

FINAL REPORT

**INTERNATIONAL LEGAL
RESEARCH GROUP**

**FREEDOM OF EXPRESSION AND
PROTECTION OF JOURNALISTIC SOURCES**



elsa

The European Law Students' Association



INTERNATIONAL LEGAL RESEARCH GROUP ON FREEDOM OF EXPRESSION – PROTECTION OF JOURNALISTIC SOURCES

*Protection of journalistic sources as one of the basic conditions for freedom of expression without which sources may
be deterred from assisting the media in informing the public on matters of public interest*

The European Law Students' Association

International Coordinator

Antonia Markoviti

International Academic Coordinator

Bruno Filipe Monteiro

International Research Assistants

Håkon Sverdstad Bjørvik & Mariagiulia Cecchini

International Human Resources Coordinator

Jakub Čája

International Linguistics Editor

Mark O'Reilly

International Technical Editor

Lala Darchinova

International Academic Supervisor

Ms. Silvia Grundmann

*Head of the Media Division in the Information Society Department of the Directorate General Human Rights
and Rule of Law, Council of Europe*

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FOREWORD

Dear Reader,

The Final Report of the International Legal Research Group on Freedom of Expression - Protection of Journalistic Sources is the outcome of a year of effort and devotion. Approximately 300 people are the 'owners' of this work. It was indeed a highly demanding procedure for all the participants, since our wish to reach a satisfactory level of academic quality, made the whole process challenging – out of the initial 35 registered countries, 28 reach the academic requirements that were set this year. However, real effort is always rewarded and we believe that this international publication will constitute a strong asset in the CV of the participants, but - most importantly - we really hope that all this acquired knowledge has essentially helped the participants to understand thoroughly one of the biggest focuses of the Council of Europe and encouraged them to pay more attention on this topic and act concretely in the future to address – at least legally – these challenges.

Of course, the achievements of the International Legal Research Group would not have been reached without the valuable support and help from many individuals.

First and foremost, as the International Coordination Team, we would like to congratulate the National Research Groups for their extraordinary work. The result is based on the will and effort of the 28 participating countries, involving approximately 300 students and academics participating as Researchers, Coordinators, Linguistics Editors and Academic Supervisors. We would like to thank all of you, because this enormous achievement is now available to act as a valuable source of information for all of our fellow students abroad and of course for anyone interested in the topic.

Indeed, the professional and academic contribution is very important for such kind of student activities. Therefore, we would like to wholeheartedly thank Ms. Barbara Orkwiszewska and the Directorate of Communications of the Council of Europe. We are very grateful for your assistance. Furthermore, we would like to acknowledge the academic support provided by the Media Division in the Information Society Department of the Directorate General Human Rights and Rule of Law, and especially the Head and International Academic Supervisor, Ms. Silvia Grundmann. Specifically, we would like to express our huge gratitude to Ms. Christina Lamprou from the aforementioned department of the Council of Europe, without whom the project would not have been realised. Thank you very much for everything. Last but not least, we are also grateful to Dagne Sabockyte, Vice President for Marketing of ELSA International 2015/16 who contributed to the project in many ways during the year and especially technically.

We wish you a pleasant reading!

Thankfully yours,

Antonia, Bruno, Håkon, Mariagiulia, Jakub, Lala and Mark

International Coordination Team of the International Legal Research Group on Freedom of Expression - Protection of Journalistic Sources

1. WHAT IS ELSA?

ELSA is a non-political, non-governmental, non-profit making, independent organisation which is run by and for students. ELSA has 43 Member and Observer countries with more than 300 Local Groups and 42,000 students. It was founded in 1981 by 5 law students from Poland, Austria, West Germany and Hungary. Since then, ELSA has aimed to unite students from all around Europe, provide a channel for the exchange of ideas and opportunities for law students and young lawyers to become internationally minded and professionally skilled. Our focus is to encourage individuals to act for the good of society in order to realise our vision: "*A just world in which there is respect for human dignity and cultural diversity*". You can find more information on WWW.ELSA.ORG.

2. LEGAL RESEARCH GROUPS IN ELSA

A Legal Research Group (LRG) is one of the flagship projects of ELSA. It is a group of law students and young lawyers carrying out research on a specified topic of law with the aim to make their conclusions publicly accessible. Legal research was one of the main aims of ELSA during our early years. When ELSA was created as a platform for European cooperation between law students in the 1980s, sharing experience and knowledge was the main purpose of our organisation. In the 1990s, our predecessors made huge strides and built a strong association with a special focus on international exchange. In the 2000s, young students from Western to Eastern Europe were facing immense changes in their legal systems. Our members were part of such giant legal developments such as the EU expansion and the implementation of EU Law. To illustrate, the outcome of the ELSA PINIL (Project on International Criminal Court National Implementation Legislation) has been the largest international criminal law research in Europe. In fact, the final country reports have been used as a basis for establishing new legislation in many European countries.

The results of our more recent LRGs are available electronically. ELSA FOR CHILDREN (2012) was published on COUNCIL OF EUROPE'S WEB PAGES and resulted in a FOLLOW UP LRG (2014)

together with, among others, Missing Children Europe. In 2013, ELSA was involved in Council of Europe's 'No Hate Speech Movement'. THE FINAL REPORT resulted in a concluding conference in Oslo that same year and has received a lot of interest from academics and activists in the field of discrimination and freedom of speech. The RESULTS OF THE LRG CONFERENCE, a guideline, have even been translated into Japanese and were presented in the Council of Europe and UNESCO! Last year, we organized Legal Research Group on Social Rights in cooperation with Department of European Social Charter in Council of Europe. 28 National Groups contributed to [Final Report](#) and the results are going were presented on a concluding conference in Strasbourg, where the [Concluding Report](#) of the whole research was finalised. In the same year with the current LRG a new big cooperation began with the International Labour Organisation (ILO) and a new LRG with the purpose of expanding the ILO LEGOSH Database. The concrete results will be published by ILO and will be available soon.

3. WHAT IS THE LEGAL RESEARCH GROUP ON FREEDOM OF EXPRESSION – PROTECTION OF JOURNALISTIC SOURCES

The topic of new LRG is Protection of Journalistic Sources. There have been a large number of cases in which public authorities in Europe have forced, or attempted to force, journalists to disclose their sources. The European Court of Human Rights has reiterated that Article 10 of the European Convention on Human Rights safeguards not only the substance and contents of information and ideas, but also the means of transmitting it. The press has been accorded the broadest scope of protection in the Court's case law, including with regard to confidentiality of journalistic sources.

“Protection of journalistic sources is one of the basic conditions for press freedom. ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined, and the ability of the press to provide accurate and reliable information be

adversely affected. ... [A]n order of source disclosure ... cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.”

(Goodwin v. the United Kingdom, judgment of 27 March 1996, § 39).

The Council of Europe has found that violations are more frequent in member states without clear legislation. Moreover, in cases of investigative journalism, the protection of sources is of even greater importance. To shed light on this issue, ELSA has partnered with the Media and Internet Division of the Directorate General of Human Rights and Rule of Law in the Council of Europe to understand how journalistic sources are being protected in each Member-States.

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ELSA ALBANIA

Contributors

National Coordinator and National Academic Coordinator

Sajmira Kopani

National Researchers

Gezim Spahiu

Migena Kore

Paola Ibraj

National Linguistic Editor

Armando Bode

National Academic Supervisor

Prof. Dr. Enkeleda Olldashi

1. Introduction

The freedom of expression constitutes one of the essential foundations of a democratic society.¹ In this framework, with a particular importance is the protection of journalistic sources, as one of the basic conditions for press freedom. Therefore, the legal protection of this right, as it is affirmed in several international instruments on journalistic freedoms, deserves considerable attention within the domestic legislation of a country.

It is generally accepted that without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press, as it is defined by the European Court of Human Rights,² could be undermined, and the ability of the press to provide accurate and reliable information be adversely affected.

Journalists in general, whether working for local, national or international media, routinely depend on non-journalists for the supply of information on issues of public interest. Some individuals serving as sources come forward with secret or sensitive information, relying upon the reporter to convey it to a broader audience. In many instances, anonymity is the precondition upon which the information is conveyed from the source to the journalist. This may be motivated by fear of repercussions which might adversely affect their physical safety or job security.³

In these circumstances, it is essential for journalists to be entitled to refuse the disclosure of both the names of their sources and the nature of the information provided in confidence. The protection of sources and their confidentiality is essential to journalistic practice, as it is very difficult for journalists to operate unless they can give a strong and genuine promise of confidentiality to their sources.⁴

Despite the clear advantages of the protection of journalistic sources, complicated situations may arise when the interests of journalists face the public interests and rights, mainly where this information is relevant to criminal or civil proceedings. In this meaning, differently from other professions such as the case of a lawyer, the protection of journalistic sources against disclosure does not constitute an absolute right which cannot be derogated from in light of specific situations. Therefore, guidelines and provisions in the domestic legislation must provide the extent to which journalists have this kind of 'privilege' to refuse divulging the identity of confidential sources.

¹ *Jersild v. Denmark* [1994] European Court of Human Rights Series A no. 298, p. 23, para. 31

² *Goodwin v. the United Kingdom* [1996] European Court of Human Rights. Series A no. 28957, para 39

³ Article 19 and Interights, '*Briefing Paper on Protection of Journalists' Sources - Freedom of Expression Litigation Project*' [May 1998], <https://www.article19.org/data/files/pdfs/publications/right-to-protect-sources.pdf> accessed 05 May 2016

⁴ Centre for Media Pluralism and Media Freedom "*Protection of Sources – EU Member States Laws*" <http://journalism.cmpf.eui.eu/maps/protection-of-sources/> accessed 05 May 2016

The journalist is an important actor of media and therefore its position develops with the same progress as media itself. One can learn a lot about the journalist and the regulation found in the legislation with regard to the rights attributed to him, only by getting to know closer the situation and legal regulation of media.⁵

In this context, this research examines the legal situation regarding the protection of journalistic sources in the Republic of Albania, as one of the contracting states to the Council of Europe, with the obligation to guarantee the freedom of expression as stipulated by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and other international legal acts.

2. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

The national media legislation in Albania has gone through considerable changes during the transition from a totalitarian regime to a democracy and still, nowadays, the media legal system is being approximated with national and international requirements and standards.

The legal reform of the media system started with the introduction of the Press Law in 1993, which was one of the first initiatives of the Government at the time, but this is still not sufficient. This legislative intervention was modelled after a western example (i.e. the German state of Westphalia), but failed to adjust to the Albanian context. As a result, the law on Public and Private Radio and Television, No. 8410, in 1998, was approved with a later Law on Audiovisual Media adopted in 2013.⁶ In 2007, Albania signed an Action Plan for media legal reform with European Union (EU) and the Council of Europe, which together with the Organization for Security and Co-operation in Europe (OSCE) have participated in the media legislation reform through legal expertise and consultancy.⁷

Journalists benefit of the protection from several national sources in Albania. Apart from the above-mentioned laws, the Constitution also assures protection of speech and the freedom of expression.

⁵Artan Fuga, 'The Four Challenges Faced by Albanian Media', 15 February 2013, <http://en.ejo.ch/media-economics/challenges-albanian-media> accessed 06 May 2016

⁶ Swedish Helsinki Committee for Human Rights, 'European regulation and Albanian media legislation: A comparative analysis of the main standards' <http://www.institutemedia.org/Documents/PDF/European-Albanian%20comparative%20analysis.pdf> accessed 01 May 2016

⁷ *ibid.*

The Constitution of the Republic of Albania states that the freedom of the press, radio and television is guaranteed.⁸ Article 17 of the Constitution provides that the fundamental rights (including the freedom of expression, freedom of the media and freedom of information) can be restricted by law, in the public interest or for the protection of the rights of others, while adding that such restrictions must be “...in proportion to the situation that has dictated it...” and “...in no case may exceed the limitations provided for in the European Convention of Human Rights.” In addition, the Law on Radio and Television also states that editorial independence is guaranteed by law.⁹

Article 10 of the European Convention on Human Rights (ECHR) does not explicitly mention the freedom of the press, but the ECHR has developed extensive case-law providing the press a special status in the enjoyment of the freedoms contained in Article 10.¹⁰ A component of this article is the protection of journalists’ sources, which is considered very important for a democratic society.

The status of the European Convention on Human Rights in the Albanian legal system is reinforced by the fact that the Albanian Parliament has ratified the convention and its successive protocols. As such, these international instruments “constitute part of the internal legal system” and even prevail, in case of conflict, over ordinary Albanian laws.¹¹

According to article 159 (1) of Criminal Procedural Code, journalists or any other professionals are not obligated to testify on what they are aware of, if that is part of the professional secret, except in specific cases for procedural authorities. Additionally, no specific provision concerning journalists or their right to protect sources is found for information classified as State Secret Acts.¹²

The Code of Ethics of the Albanian Media (the material source of law) also offers a special protection for the sources of information possessed by journalists.¹³ This Code of Ethics was drafted in 1996 and revised in 2006 with the initiative of the Albanian Media Institute, the main NGO in the country dealing with media training and policy, and the two main journalist associations: the Union of Albanian Journalists and the League of Professional Journalists. Nevertheless, even 20 years after its creation and the wide support of different organizations and

⁸ Constitution Law of the Republic of Albania, article 22

⁹ Law No. 8410 [On Public and Private Radio and Television], article 5

¹⁰ Monica Macovei ‘A guide to the implementation of Article 10 of the European Convention on Human Rights’, Council of Europe, January 2014 [http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-02\(2004\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-02(2004).pdf) accessed 01 May 2016

¹¹ Constitution, article 122: “1. Any ratified international agreement constitutes part of the internal legal system after it is published in the Official Journal of the Republic of Albania. It is directly applicable, except when it is not self-executing and its application requires the adoption of law. 2. An international agreement ratified by law has priority over the laws of the country that are incompatible with it.”

¹² Law n. 8391 (For the National Informative Service) 1999 [Per SherbiminInformativKometar]

¹³ Term used for the classification of sources of law

institutions, this Code **is not a binding** act and its implementation relies on the willingness of journalists themselves.¹⁴

Although these national law provisions provide an implicit right for journalists not to disclose their sources of information, these provisions fail to give an implicit or explicit definition of a “source” and “information identifying a source”, as set out in the Council of Europe Recommendation Nr. R(2000)7.¹⁵

3. Is there, in domestic law, a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

Journalist all over the world find it difficult to gain access to places and situations where they can report on matters of public interest and fulfil their role as reporters of truth and wrongdoings, if they cannot guarantee confidentiality of their sources. This is a common problem in Albania, because, if a source is not ensured anonymity, then journalists will not be able to report.

In the national legal system, there are provisions protecting professional secrecy.

As previously stated, Article 159 of the Criminal Procedural Code provides that journalists are not obligated to disclose the source of information they possess. However, if the information regarding the sources is essential to evidence the criminal offense, provided that this is the only way, the court can order the journalists to disclose their sources.

Additionally, according to the “Code of Ethics of Albanian Media”, journalists should not divulge the name of a person who has provided information on a confidential, unless the person has explicitly consented.¹⁶ The right of anonymity can be infringed in special cases where:

- a) There are doubts that the source has intentionally distorted the truth;
- b) There are references that the source is the only way to avoid serious and unavoidable damages;
- c) The information is related with the planning of a criminal act.¹⁷

¹⁴Ilda Londo ‘Self-regulation and defamation’ *Albanian Media Institute*, pg 5:

<http://www.institutemedia.org/Documents/PDF/Self%20regulation%20and%20defamation.pdf> accessed 01 May 2016

¹⁵ Council of Europe, "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", appendix, definitions c. and d.

¹⁶ Ethical Code of Albanian Media, Albanian Media Institute 1996 [KodiEtikiGazetareve]

¹⁷ Para. 5, point 3, Ethical Code of Albanian Media, Albanian Media Institute 1996 [KodiEtikiGazetareve]

According to the Article 17 of Law “On Right of Information”,¹⁸ the right of information can be restricted in cases when it is necessary, proportional and if the information impairs the below-mentioned interests:

- a) The right of a private life;
- b) Commercial secret;
- c) Copyright;
- d) Patents.

It does not explicitly refer to journalists, but this can be interpreted as a way for journalists to disclose their sources for necessary cases, as mentioned in the above-stated article.

Different provisions provide cases when the breach of confidentiality may arise, but on the other hand there are no specific articles in the national framework establishing sanctions for the breach of confidentiality. The Statute of the Albanian Media Institute stipulates that a member of this association may be excluded if his/her activity is in contradiction with the obligations and the ethics of the Statute and his/her moral figure and activity seriously damages the reputation of the association.¹⁹ Therefore, sanctions imposed by this association are made only in certain cases where the board of the association considers as an infringement of the principles imposed in its Statute. These sanctions can only affect membership of the association, by penalizing in a moral and ethical way, without any legal sanctions.

According to the law “for the Protection of Personal Information”²⁰, journalists have to respect the integrity of the person and the provisions envisaged in this law, since in case of infringement, Article 39 of this law provides the administrative sanctions for the misuse of the personal information.

Albanian lawmakers should adopt legislation that specifically establish that principle and bar judges from drawing negative inferences from journalist defendant’s refusal to disclose the identity of their sources.²¹

4. Who is a “journalist” according to the national legislation? Is it, in your view, a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media

¹⁸Article 17. Law n. 119 (On the Right to Information) 2014 [Per t drejten e Informimit ne RepublikensëShqipërisë]

¹⁹Article 13

²⁰Law N. 9887, 2008, changed with the law n. 48/2012

²¹The Cost of Speech, Violations of Media Freedom in Albania, Human Rights Watch, Vol. 14, No.5 (D), June 2002 pg 26

actors? Is the protection of journalists' sources extended to anyone else?

Defining a journalist and journalism is both elusive and problematic. As journalism undergoes a profound shift toward the electronic, it is difficult to figure out who is covered by the term and crafting the definition too narrowly excludes certain speakers from the benefits afforded to journalists.²²

In Albania, the term 'journalist' has a wide meaning, not explicitly defined in national legislation. Generally, a journalist is considered a person who has graduated in "Journalism" from the relevant faculty of any University in Albania.²³ However, the media community considers a journalist as anyone engaged in the process of newsgathering and reporting for written or broadcasting media. This is also evidenced by research that shows that only 53% of journalists have a degree in journalism.²⁴

Additionally, self-regulation mechanisms like several journalists' associations do not necessarily put any criteria related to the education as regards to the membership. For example, the Statute of Albanian Media Institute provides the criteria for who "will be accepted as a member of the association: every journalist older than 18 years who has been working for three consecutive years in any media entity..."²⁵

The role and tasks of a 'journalist' are provided by the Code of Ethics of the Albanian Media Institute. According to this Code, "journalists have the right to obtain information, to publish and to criticize. Information should be truthful, balanced and verified."²⁶

Journalism is a function shared by a wide range of actors, 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.²⁷ With regard to the other media actors, Albanian legislation does not provide any definition.

The protection of journalistic sources is guaranteed by Article 44 of the Law No. 8410 "On Public and Private Radio and Television", which states that "confidentiality of sources of information (including material gathered by journalists) is guaranteed. They are disclosed only in special cases provided by law."

²² Greg Leslie, "Who is a journalist and why does it matter?", [2009] pg.4

²³ See: The Internal Regulation of "Faculty of History and Philology", University of Tirana

²⁴ Ramadan Cipuri, "Albanian journalist between the Professional Standards and external pressures"

²⁵ Statute of Albanian Media Institute, Article 9

²⁶ Para 3. Ethical Code of Albanian Media, Albanian Media Institute 2006 [Kodi Etik i Gazetareve]

²⁷ UN Human Rights Committee 2011, 102nd session, General comment no.34, ICCPR, para 44 <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> accessed 28 April 2016.

Although Albanian Legislation does not provide an explicit provision with regard to protection of other media actors, in our view, the above article, used to imply a wide protection of sources of information not only to the journalist themselves but leaving it open for other media actors as well.

The right of journalists not to disclose their sources of information is included as a principle by the Law for Audiovisual Media in Republic of Albania, which provides that the audiovisual operators, are ruled by the principle of confidentiality of the sources of information.²⁸

On the other hand, an implicit protection of the sources of information is provided by Law No. 119/2014 on “Freedom of Information” which states that the “freedom of information is restricted, if necessary, proportionate and if that information would violate professional secrecy guaranteed by law.”

From the above, it can be concluded that sources of information of journalists are generally protected, even though not clearly nor in a detailed manner.

5. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

The protection of journalistic sources undermines the protection of information and journalists' independence, serving as a direct contribution and a guarantee to the quality of the information. In most countries where a law protecting journalistic sources is adopted, the number of cases incriminating journalists on this matter has decreased or can be more easily fought back at a legal level. In countries where no such law is adopted, journalistic sources are more often threatened.²⁹

Regarding the legal safeguards on this issue, it can be concluded that there is no national law dealing with the issue of the disclosure of journalistic sources.³⁰ However, as it was laid down above, pursuant to article 159 of the Criminal Procedural Code - professional journalists cannot reveal information regarded as professional secrets, hence their sources. However, if the data is essential in proving the criminal offence and the source is the only way to prove this, the court can order the journalists to reveal their sources. In light of this provision, given the fact that the

²⁸ Article 4. Law n. 97 (For Audiovisual Media in Republic of Albania) 2013, [Ligji per Median Audiovizive ne Republiken e Shqiperise)

²⁹ Anthony Bellanger from Jason N. Parkinson ‘*Journalism in the Age of Mass Surveillance*’ [2014]
<https://www.nuj.org.uk/campaigns/safeguarding-journalists-and-their-sources/> accessed 27 April 2016.

³⁰ Ilda Londo ‘*Self-regulation and defamation*’ Albanian Media Institute, pg5:
<http://www.institutemedia.org/Documents/PDF/Self%20regulation%20and%20defamation.pdf>. accessed 01 May 2016

disclosure of the source happens only during a testimony in criminal court proceedings, the information can be accessed only by the parties involved therein. The general rule provided in the Criminal Procedure Code is that the proceedings are open to the public, emphasizing the publicity of the hearing.³¹ Nevertheless, according to Article 340/1/c, which provides the cases of closed hearings, the court decides to hold the court examination or some of its actions in camera when it is necessary to protect the witnesses or the defendant.³²

On the other hand, the Criminal Code provides some sanctions and penalties in case of refusal, as laid out in the article 307 which states that: “the offender can be fined or imprisoned up to one year and if proven that the reason for refusing to testify is personal gain, the sentence of imprisonment can be up to three years.” In this framework, since the disclosure of the source is in light of an obligatory testimony, which is essential in proving a criminal offense, the witness (in this case the journalist) has no possibility to avoid this obligation.

From another perspective, there are no legal provisions regulating the relation between journalists and their sources in these cases. Journalists can only appeal to the Code of Ethics or their consciousness in finding out whether to reveal their source or not. The revised Code of Ethics contains a provision stipulating that journalists should not reveal their sources, unless they have obtained explicit consent.³³

Albania does not have a unified piece of legislation regarding the regulation of media in general. There are totally different regulation regimes for print and electronic media. The print media operates in an almost total lack of legal regulation on press. Instead, it is subject only to regulation by competition and commercial laws. After the law on Print Media was repealed in 1997, as it was considered too restrictive and entirely inadequate to the Albanian context, the Law on Press was passed. However, it contains only two provisions that guarantee the freedom of press in a general and vague manner.³⁴

On the other hand, the legal framework on the broadcasting activity in Albania is laid down firstly by the Law on Public and Private Radio and Television, adopted in 1997, and then by the Law on Audio-visual Media, adopted in 2013. According to the law in force, the main body responsible for the implementation of the law is the regulatory authority: Audio-visual Media Authority (AMA), which replaced the National Council of Radio and Television (KKRT). AMA is a public independent legal body which operates pursuant to the provisions of the mentioned law and the effective legislation in the Republic of Albania.

³¹ Article 339/1 of the Criminal Procedure Code: "The hearing shall be public otherwise it shall be null and void".

³² Article 340, Cases of closed hearings:

1. The court decides to hold the court examination or some of its actions in camera: c) when it is necessary to protect the witnesses or the defendant.

³³ *ibid.*

³⁴ *ibid.*

In discharging its functions, the AMA must assure, among others, the preservation and support of democratic values regulated in the Constitution, especially those related to the freedom of speech.³⁵

The AMA must also encourage the public service broadcasters to meet objectives in accordance with the provisions of this law. In doing so, the AMA has the competence to draft and adopt codes and rules of audio-visual broadcasts and other bylaws in implementation of the Law on Audio-visual Media. In the same time, the AMA has the right to monitor the implementation of the law by entities exercising their activity in this field and, in case of infringements, it may impose sanctions.³⁶ Nevertheless, as a matter of fact this authority has never ventured into any efforts to guarantee the implementation of these particular provisions so far.³⁷

The recent huge technological developments in the area of media have increasingly complicated its supervision in the legal perspective. In that context, it is admitted that media self-regulation appears to be a solution to increase media accountability while offering more flexibility than state media regulation.³⁸ In this framework, a self-regulation mechanism can be prescribed as a joint endeavor by media professionals to set up voluntary editorial guidelines and abide by them in a process open to the public. By doing so, the independent media accept common responsibility for the quality of the public discourse, while fully preserving their editorial autonomy in shaping it.³⁹

Even though there will always be a need for legal guarantees on the freedom of the media, just as legal definitions of the necessary restrictions are needed, however, to ensure that media is fulfilling its role as watchdog of governments (and not only), it needs as little state interference as possible. Self-regulation can help prevent unnecessary media legislation and provide an alternative to courts for resolving media content complaints.⁴⁰ In contrast to formal and bureaucratic regulation mainly by state and government, self-regulation refers to responsibilities assigned to media operators to implement by themselves or that are voluntarily chosen by them. Such rules often have the character of desirable goals, guidelines or principles, rather than fixed

³⁵ Article 18 "Objectives of AMA's activity" of the Law n. 97 (On Audio-visual Media in Republic of Albania) 2013 [Për mediat audiovizive në Republikën e Shqipërisë]

³⁶ Article 19 "AMA's Functions" Law n. 97 (On Audio-visual Media in Republic of Albania) 2013 [Për mediat audiovizive në Republikën e Shqipërisë]

³⁷ Ilda Londo 'Self-regulation and defamation' Albanian Media Institute, pg5:

<http://www.institutemedia.org/Documents/PDF/Self%20regulation%20and%20defamation.pdf>. accessed 01 May 2016

³⁸ Adeline Hulin and Mike Stone 'The Online Media Self-Regulation Guidebook', [2013]

<http://www.osce.org/fom/99560?download=true> accessed 01 May 2016.

³⁹ Miklós Haraszti 'The Media Self-Regulation Guidebook' Office of the OSCE Representative on Freedom of the Media, [2008] <http://www.osce.org/fom/31497?download=true>: accessed 06 May 2016.

⁴⁰ *ibid.*

or compulsory standards to be achieved. They are 'policed' either within and by the media organization itself or by some intermediate body representing public and industry interests.⁴¹

In this meaning, in Albania there are no specific media self-regulation mechanisms which address concretely the issue of protection of journalistic sources. There is a negative correlation between a lack of a Journalistic Code of Ethics and a possible self-regulation prospect in professional terms, producing flaws in institutional and democratic standards expected.⁴²

The last attempt to change the situation was the draft law on Freedom of the Press which tried to provide provisions for the establishment of an Order of Journalists that would serve as a regulator of the media community. This was strongly rejected as it was considered a structure that must be established upon the free will of journalists and not initiated by Parliament, or legally bound to report to the Parliament. According to this bill, all journalists would be obliged to become members of this Order and to adhere to its regulation, a system modeled after the Italian system in this area.⁴³ It was considered an excessive legal regulation, by the media community at the time, which was keen to adopt a more self-regulatory approach instead of this kind of intervention by the state.

But, in fact, self-regulation so far in Albania has been almost inexistent.⁴⁴ The two main associations, the League of Albanian Journalists and the Union of Albanian Journalists, which remain extremely weak, have not made any notable attempts to raise awareness among journalists and organize them for their common good.⁴⁵

The main code of ethics recognized by the media community in general, since the moment of its signing in 1996 and its revision in 2006, is the Code drafted with the initiative of the Albanian Media Institute to which we have referred above.⁴⁶ It covers the usual areas intended to promote responsibility in the daily work of journalists, such as the confidentiality of sources among others. The first Code was adopted in 1996 and although it was well-written by providing provisions which covers most of the problems faced by journalists, had as the main flow of this attempt to self-regulation the lack of an implementing mechanism that would supervise journalists' conduct in relation to the Code. In this framework, the main challenge of the new

⁴¹ Belina Budini 'Ways to Establish Self-Regulation on the Part of the Albanian Electronic Media in Coherence with European Union Prospects?' <http://dSPACE.epoka.edu.al/bitstream/handle/1/1323/Ways%20to%20Establish%20Self-Regulation%20on%20the%20Part%20of%20the%20Albanian%20Electronic%20Media%20in%20Coherence%20with%20European%20Union%20Prospects.pdf?sequence=1> accessed 07 May 2016

⁴² *ibid*

⁴³ Ilda Londo 'Self-regulation and defamation' Albanian Media Institute: <http://www.institutemedia.org/Documents/PDF/Self%20regulation%20and%20defamation.pdf> accessed 07 May 2016.

⁴⁴ *ibid*

⁴⁵ *ibid*

⁴⁶ Albanian Media Institute: <http://www.institutemedia.org>

Code of Ethics in 2006 was the establishment of a self-implementing mechanism. After long discussions, the work group drafted a statute which provided a body referred as the Council of Ethics, in a form of a registered association, since in the legal point of view, it guarantees the broadest representation. According to its statute, members of the Council can be natural or legal persons, media outlets, civil society organizations working on freedom of expression, journalists, freelancers, columnists, etc. Hence, the general principle is that membership is voluntary and unlimited, but a broad range of membership is clearly preferred in order to provide the greatest legitimacy possible.

In addition, two permanent commissions would be established within the Council of Ethics, one for print media and the other for electronic media. These would be the bodies that will examine the complaints regarding possible ethical violations. The public can also lodge complaints to the commissions of ethics, as long as the media they complain against are members of the Council of Ethics.⁴⁷ Unfortunately, efforts to establish such a council of ethics, as a media self-regulation in Albania, seemed to be merely an attempt, as far as this body is totally inexistent in the country. Beside the Council of Ethics as it was designed in its draft-statute, in July 2015 was formally established, by a number of journalists and with the support of the Council of Europe, a body named as the Council of Media. The purpose of this self-regulation mechanism is to guarantee the respect of the Code of Ethics by the actors in the entire media area, and to contribute to the freedom of media in Albania.⁴⁸ The concrete results of this initiative are not yet evident and notable, due to the short time of its establishment.

Besides the Code of Ethics, there have been some other sporadic initiatives to establish internal codes of ethics in some private media, such as "Spekter Group". As an illustration, the code of ethics of this company outlines how journalists should deal with their sources, cases when anonymity is allowed and other professional issues. The code is implemented by an ethics bureau, composed by one representative employed by the company.⁴⁹

Nevertheless, the lack of the interest of the media owners to be involved in self-regulation development is evident. The professional media bodies in Albania do not adhere to syndicates or any other efficient professional organization and the competition between the media outlets is more important than their agreement upon the professional standards.⁵⁰ Overall, there is a lack of awareness so as to self-regulation principles and benefits.

Another eventual mechanism successfully proved as a means of achieving self-regulation in the media is the institution of the "news ombudsman". This media actor is considered as the conscience of the news reporting. In light of this development in the Western Europe, there is

⁴⁷ Article 12. Draft Statute of the Association "Council of Journalism Ethics," February [2006]

⁴⁸ <http://www.javanews.al/fomohet-keshilli-i-medias/> accessed 01 May 2016

⁴⁹ <http://www.shekulli.com.al/> accessed 01 May 2016

⁵⁰ Zlatev O. "Media accountability systems (MAS) and their applications in South East Europe and Turkey" in Professional Journalism Self-Regulation. Paris, United Nations Educational, Scientific and Cultural Organization [2011]

no tradition of an institutionalized news ombudsman in Albania, but the role of the ombudsman is occasionally taken by academic personalities and senior journalists related to specific events when they chose to have their say.⁵¹

On the other side, although there is no specific News Ombudsman, there is a general self-regulatory instrument such as the People's Advocate (Ombudsman) in Albania accessible by every person, without restrictions related to the profession. It is an institution designed, following the legislation of other countries of Europe, which have previously created such a mechanism. The main task is to defend the rights, freedoms and lawful interests of individuals from unlawful and incorrect acts or omissions of public administration bodies as well as third parties acting on its behalf. Its mission is the prevention of potential conflicts between public administration and individuals. The Ombudsman in Albania acts on the basis of the complaint or request submitted to his office. He also operates on his own initiative, for special occasions made public, but further must take the consent of the person concerned.⁵² It is not the Ombudsman who decides directly himself to retribute the rights of petitioners, but he makes recommendations to remedy the violation of the right by a public administration body which has caused the violation. In cases where the relevant body does not respond to the recommendations of the Ombudsman, the latter may address gradually to higher bodies in a hierarchy up to the Assembly (Parliament) with a report proposing concrete measures for restitution of the violated right.⁵³ The Ombudsman may not start or, if started, can terminate the investigation if the same case has been decided or is being examined by the prosecution office or the court. In these cases the Ombudsman has the right to request information from those authorities. He has the right to request information or documents related to the matter under consideration, even if they are classified as state secrets.

⁵¹ Belina Budini 'Ways to Establish Self-Regulation on the Part of the Albanian Electronic Media in Coherence with European Union Prospects' <http://dspace.epoka.edu.al/bitstream/handle/1/1323/Ways%20to%20Establish%20Self-Regulation%20on%20the%20Part%20of%20the%20Albanian%20Electronic%20Media%20in%20Coherence%20with%20European%20Union%20Prospects.pdf?sequence=1> accessed 07 May 2016

⁵² Law n.8454 (Law on the People's Advocate in the Republic of Albania) 1999 [Per Avokatin e Popullit ne Republiken e Shqiperise]

⁵³ Albanian People's Advocate oficial page: <http://www.avokatipopullit.gov.al/en/>

6. In the respective national legislation, are the limits of non-disclosure of the information in line with the principles of the Recommendation No R (2000) 7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

As a member State to the Council of Europe, the Republic of Albania has undertaken the commitment to the fundamental right to freedom of expression as guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Due to the importance of the protection of the confidentiality of journalists' sources for the media in a democratic society, national legislation should provide accessible, precise and foreseeable protection. It is in the interest of states, invoking the need for democratic societies, to secure adequate means of promoting the development of free, independent and pluralist media.

The domestic law and practice in Albania should and needs to provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention and the principles established therein, which are to be considered as minimum standards for the respect of this right.⁵⁴

In this framework, the protection of journalists' sources of information constitutes a basic condition for their work and freedom as well as for the freedom of the media in general.

In this perspective, in line with the principles of the Recommendation No R (2000) 7 of CoE, Albania has the obligation to bring them to the attention of public authorities and the judiciary as well as to make them available to journalists, the media and their professional organizations.⁵⁵

As it is noted above, Albania does not have specific law (*lex specialis*) on protecting the right of journalists not to disclose their sources of information.

The Law on Audio-visual Media in the Republic of Albania provides only one subparagraph concerning this topic. Article 4.2.c, as a general provision elaborating fundamental principles of 'audio-visual broadcasts', mentions among others the principle of maintaining the secrecy of information sources.

⁵⁴ Principle 1 of the 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

⁵⁵ Principle 5 of the 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

Pursuant to the provisions of this law, the AMA which is the regulatory institution in the field of audio-visual broadcasts and their support services in Albania, has drafted and adopted the Broadcasting Code as a sublegal act regulating principles, rules and practices of broadcasting. The issue of journalists' information sources is addressed in only one line of this Code, in the Section 4 "Broadcasting of the Information Programs", where it is provided within a sentence that: "Journalists have the right not to disclose their sources of information".

In the framework of domestic acts providing the right of maintaining the secrecy of information sources, as it is mentioned above, the Code of Ethics adopted by the Albanian Media Institute, has no legal consequences meaning that it is not binding to journalists and other subjects from the legal perspective. Nevertheless, it sets out minimum standards and criteria for the activity of journalists in Albania. In the third section of this Code is regulated the issue of relations with sources, suggesting that journalists should not divulge the name of a person who has provided information on a confidential basis, unless consent has been explicitly given by the person concerned. According to this provision, the right to the anonymity may be breached only if the information in question relates to the planning of a criminal act.

On the other side, the only national law providing in the same provision the right of journalists to maintain professional secrecy and the respective limitation of this right, is the Criminal Procedure Code of the Republic of Albania. In Section I of Chapter II, named "Types of Evidence", of this Code is provided in the Article 159.3 the right of journalists to save the professional secretly.⁵⁶

According to this provision, certain professionals, including journalists, may not be compelled to testify on what they know due to their profession, except in cases where they have the obligation to report to proceeding authorities (in light of Article 300 of Criminal Code "Failure to report a crime"). This is particularly applied to the names of persons whom professional journalists have obtained information from during the course of their profession.

Paragraph 2, which is also applicable to journalists, provides that when the court has reasons to believe that the claim made by these persons in order to avoid the testimony has no grounds, it orders the necessary verification. When such claims result unjustified, the court orders the witness to testify.

In this line, it is also provided specifically in the paragraph 3 that when the information is indispensable to prove the criminal offence and the truthfulness of the information may **only** be proved through identification of the source, the court orders the journalist to disclose the source of his information. In regard with this paragraph, for the limitation to be applied must co-exist two cumulative conditions. First, is the fact that the information taken by the source must be indispensable to prove a criminal act, and second, that there is no other way to prove the

⁵⁶ Law No. 7895(Criminal Code of the Republic of Albania) 1995 [Kodi Penal i Republikës së Shqipërisë]

truthfulness of this information, except through revealing the source.⁵⁷ The legitimate interest in the disclosure of the source sanctioned in this provision is the prevention of criminal acts, similar with the second paragraph of Article 10 of the Convention. **In this provision, no distinction is made between offences or minor crimes and “major” or serious crimes.**

According to the Explanatory Memorandum of the Recommendation, only the prevention of the latter category can possibly justify the disclosure of a journalist's source.

With due regard to this provision, it is a positive step the fact that **professional** journalists, in line with principles set out in the Recommendation, are protected from the obligation to testify in a trial, in order to maintain their sources of information. **What is important to notice is that the court is the sole authority which has the exclusive competence to decide whether this right shall be derogated or not.** In our opinion, by giving this competence only to the court, it is guaranteed the essence of the right and provided the appropriate legal security for journalists. Furthermore, it is accomplished in the *ratio* of Principle 5.a of the Recommendation, which states that the motion or request for initiating any action aimed at the disclosure of information identifying a source should only be introduced by persons or public authorities that have a direct legitimate interest in the disclosure.

What might be problematic is the fact that in this provision is not provided any specific alternative measure with the intention of protecting journalists right not to disclose source of information, in order to be less intrusive to this right. **It is completely at the discretion of the court to decide on the issue of protecting the journalist's professional secrecy, search for and apply proportionate, alternative measures.**

It is also not specified in the so-called procedure of verification, stated in paragraph 2, in case the court suspects that the journalist's claim to apply this protection has no grounds. In the light of this limitation, there is not a clear statement in which grounds would be a hypothetical suspect by the court. Nevertheless, it is widely acceptable that the presumption that the court is the most effective authority to protect and guarantee the right of journalists provided in the national legislation.

In addition, another guarantee provided by the Criminal Procedure Code, is the fact that the eventual disclosure of sources of information shall be made in a form of a trial testimony, which is generally given during the court proceedings, in the presence of the parties, both prosecutor and defendant. The interrogation of journalists as witnesses in the court proceedings cannot be made by prosecutor or police agents, in a different venue except the court.⁵⁸

⁵⁷ Artan Hoxha, Halim Islami and Ilir Panda: "*Criminal Procedure*", 2012

⁵⁸ Article 157/1 "The duties of the witness": The witness is obliged to appear before the **court**, to observe its orders and to say the truth for the questions brought before him.

Another problematic area of the Albanian procedural law might be the fact that in Article 159, it has not implemented Principle 5.e of the Recommendation, which states that where journalists respond to a request or order to disclose information identifying a source, the competent authorities should consider applying measures to limit the extent of a disclosure, for example by excluding the public from the disclosure with due respect to Article 6 of the Convention, where relevant, and by themselves respecting the confidentiality of such a disclosure. Nevertheless, as in general court proceedings, even in this case the court has the discretion to decide whether it should exclude the public from the disclosure or not.⁵⁹

It is encouraging the fact that Article 159 provides that the reveal of the source of information is the very last remedy applied by the court. It comes as a necessity only if there is no other way to prove an eventual criminal offence. In light of the other alternative investigative measures available in the Albanian national law, according to the Criminal Procedure Code, beside the testimony, the types of proofs include interrogation of the defendant,⁶⁰ the confrontation,⁶¹ the identification and recognition,⁶² experiments,⁶³ expertise,⁶⁴ material evidence and documents.⁶⁵

These proofs are available only if they are taken by the legal means of searching evidence such as the examination, inspections, seizure and surveillance.⁶⁶

On the other side, Albanian national legislation does not provide, in its legal system, the same protection for other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial process or dissemination of this information, as it is stated in Principle 2 of the Recommendation.⁶⁷ Even they should equally be protected under the principles established therein, there are no provisions securing this principle. The knowledge of the source has to be acquired by these other persons in the framework of their 'professional relations with journalists'. Secretarial staff, journalistic colleagues, printing staff, the editor or the employer of a journalist might have access to information identifying a source. It is therefore necessary to extend the protection to these persons in order to maintain the secrecy of a source towards third persons or the public, if they are not already covered by the definition of journalist under national systems of protection.⁶⁸

⁵⁹ Article 340, Cases of closed hearings:

1. The court decides to hold the court examination or some of its actions in camera: c) when it is necessary to protect the witnesses or the defendant.

⁶⁰ Articles 166-168 of the Criminal Procedure Code

⁶¹ Articles 169-179 of the Criminal Procedure Code

⁶² Articles 171-175

⁶³ Articles 176-177

⁶⁴ Articles 178-186

⁶⁵ Articles 187-197

⁶⁶ Chapter III of the Criminal Procedure Code

⁶⁷ Principle 2 of the 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

⁶⁸ [http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec\(2000\)007&expmem_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(2000)007&expmem_EN.asp)

Within the scope of Article 159, falls only the one named as "professional journalist", without explaining what this term means. In order to exclude any misinterpretation or ambiguity, it would be relevant to modify and reword this provision by defining clearly the terminology used therein. Nevertheless, we consider that in this situation the term "professional journalist" should be interpreted by the court having regard to the case-law of the European Court of Human Rights.⁶⁹ In the judgment of *De Haes and Gijssels v. Belgium* (27 February 1997, para. 55), for example, the European Court of Human Rights extended the right not to disclose information identifying a source to an editor and a journalist alike.

7. In the Recommendation No R (2000) 7 the following principles should be respected when the necessity of disclosure is stated: absence of reasonable alternative measures, outweighing legitimate interest (protection of human life, prevention of major crime, defence of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the disclosure outweigh the interest in the non-disclosure?

The right of journalists not to disclose their sources of information is part of their right to freedom of expression under Article 10 of the Convention which, according to the ECHR's interpretation, is binding on all Contracting States.

It is widely accepted that the right to freedom of expression and information constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and the development of every individual, as expressed in the Declaration on the Freedom of Expression and Information of 1982.

The "public interest" is an amorphous concept, which is typically not defined in access to information legislation. This flexibility is intentional. Legislators and policy makers recognise that the public interest may change over time and according to the circumstances of each situation. In the same way, neither does the law try to define categorically what is "reasonable."⁷⁰

Courts need to balance the two public interests that stand in tension in journalist's sources protection cases. A miscalculation of the public interest in these cases would cause the risk of moving away from the main intention. The assessment of the public interest should rely on a case-by-case basis. Whether the disclosure of a journalistic source will be deemed to be in the interest of the public outweighing the interest of the non-disclosure, this usually depends upon

⁶⁹ *Goodwin v the United Kingdom* [1996] European Court of Human Rights, para 34

⁷⁰ Megan Carter and Andrew Bouris, "Freedom of Information, Balancing the Public Interest" [2006] pg 3-14

the facts of the particular case. Anyway, there are some objective criteria which need to guide courts on deciding whether the disclosure is relevant or not.

The aim of the invoked Recommendation is also to set out the requirements for an adequate protection of the right of journalists not to disclose their sources of information, in order to safeguard freedom of journalism and the public's right of information from the media. The protection of the professional relationship between journalists and their sources is in this respect of higher importance than the actual value of the information for the public, as the ECHR has held.⁷¹ In this line, any disclosure of a source may have a chilling effect on the readiness of future sources to provide journalists with information, irrespective of the kind of information provided by the source. The guidelines appended to this Recommendation therefore establish common principles for the right of journalists not to disclose their sources of information in the light of Article 10 of the European Convention on Human Rights.

In evaluating a violation of the Article 10 of the Convention, in accordance with paragraph 2, the Court needs to examine whether there has been an “interference” under this provision; whether this interference was “prescribed by law”, whether it pursued a “legitimate aim” and is “necessary in a democratic society”.

Any restriction of the right of journalists not to disclose information identifying their source and of the public interest in the non-disclosure must be prescribed by law and based on a legitimate interest among the grounds provided for in the second paragraph of Article 10. It must be a legitimate intention to restrict the right to freedom of expression. Any limitation of this right must be truly necessary, in response to a pressing social need.

When evaluating whether a particular legitimate interest under this provision justifies the restriction of the right to freedom of expression, the Court applies a balancing test which determines whether a restriction is “*necessary in a democratic society*”.⁷² Moreover, the disclosure must accomplish its intention based on the public interest; otherwise it would lose the essence of this measure.

In the view of ECHR, there must exist a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure and the means deployed to achieve that aim.

The concrete interest of the person or public authority in the disclosure of the source must be “sufficient to outweigh the vital public interest in the protection of the (...) journalist's source”.⁷³

Only exceptional cases where a vital personal or public interest is at stake might justify or be proportional to the disclosure of a source.

⁷¹ *Goodwin v the United Kingdom* [1996] European Court of Human Rights para. 37

⁷² *Sunday Times v the United Kingdom* [1991], European Court of Human Rights para. 50

⁷³ *ibid* para 45

According to the ECHR, there must be a careful balance between the disclosure and the non-disclosure of journalists sources, in order to protect the free press and hence the fundamental democratic right to right to freedom of expression.

In estimating the importance to be given in favor of disclosure there is a wide spectrum within which a particular case must be located. If the party seeking disclosure shows, for example, that his very livelihood depends upon it, this will put the case near one end of the spectrum. If he shows no more than that what he seeks to protect is a minor interest in property, this will put the case at or near the other end.

On the other side the importance of protecting a source from disclosure in pursuance of the policy underlying the statute will also vary within a spectrum. One important factor will be the nature of the information obtained from the source. The greater the legitimate interest in the information which the source has given to the publisher or intended publisher, the greater will be the importance of protecting the source. But another and perhaps more significant factor which will very much affect the importance of protecting the source will be the manner in which the information was itself obtained by the source. If it appears to the court that the information was obtained legitimately this will enhance the importance of protecting the source. Conversely, if it appears that the information was obtained illegally, this will diminish the importance of protecting the source unless, of course, this factor is counterbalanced by a clear public interest in publication of the information.⁷⁴

In that context, the Albanian domestic legislation, and more concretely the Code of Criminal Procedure, as it is noted above, provides in the Article 159 that the disclosure of the sources of information is the very last remedy applied by the court. *It comes as a necessity only if there is no other way to prove an eventual criminal offence.* Thus, for the limitation to be applied the information taken by the source must be indispensable to prove a criminal act, and there must be no other way to prove the truthfulness of this information, except through revealing the source.

The legitimate interest in the disclosure of the source sanctioned in this provision is the prevention of criminal acts, similar with the second paragraph of Article 10 of the Convention, being in line with the criteria explained above. Nevertheless, as it is noted above, there is no distinction between offences or minor crimes and “major” or serious crimes, as it is set out in the Recommendation. There are also no specifications regarding the interest for certain crimes, except the fact that the court is the sole authority which has the exclusive competence to decide whether the disclosure shall be made or not.

In this perspective, it can be assumed that the disclosure of journalistic sources in Albania is only partially in line with the Recommendations and standards explained above.

⁷⁴ The House of Lords decision in the Goowin case (Lord Bridge' opinion)

8. In the light of the case-law of the European Court of Human Rights, how do national courts apply the respective laws with regard to the right to protect sources? In particular, how do they balance the different interests at stake?

Freedom of expression constitutes one of the main foundations of a democratic society, one of the basic conditions for its progress and for the development of every human.⁷⁵ The European Court of Human Rights has emphasized and set out the standards for different aspects related to the Freedom of Expression and particularly for the right to protect the sources of information. The courts in Albania, when interpreting and applying the law, bring to their attention the consolidated jurisprudence of the European Court of Human Rights and often base their judicial reasoning according to the case-law of the Court.

With regard to the right to protect sources, to the best of our knowledge, national courts during their judicial reviews have not had cases referring the right to protect sources of information. **In Albania there is no case-law** considering the right of non-disclosure of sources but different claims have been brought before the court with regard to Freedom of Expression and the national Courts of Albania have given various judicial decisions where you can see how national courts consider the case law of the European Court of Human Rights and its standards.

Courts frequently make the erroneous assumption that journalists who refuse to disclose their sources have acted in bad faith and are therefore guilty of malicious defamation. For example, the District Court of Tirana, in its decision (Case Kryemadhi v. Patozi), failed to acknowledge that the journalist's right to protection of their confidential sources is an essential part of press freedom.

9. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

Pursuant to Albanian Criminal Code, terrorism includes acts with the purpose of creating panic in the population or to oblige national institutions, Albanian or foreign, to do or not to do a specific crime, or to destroy or destabilise, in a serious manner, political, constitutional,

⁷⁵ *Handyside v the United Kingdom* [1979], European Court of Human Rights, para 41

economic or socially important structures of the Albanian state, another state, institution or international organization.⁷⁶

In the fight against terrorism, the general provisions of the national legal framework are established to prevent and punish all kinds of crime, including terrorism. In accordance with the national legislation, the legal provisions for the fight against terrorism are incorporated in national law. Article 28/2 of the Criminal Code states that: “a terrorist organisation is a special form of criminal organisation, composed of two or more persons who have a sustainable collaboration in time with the aim of committing terrorist acts with a purpose”.⁷⁷ Chapter VII of this Code contains more than 17 articles after the amendment. They express all the forms of terrorism, including: offences with terrorist purposes, terrorist organisations, financing of terrorism, collecting funds for the financing of terrorism, recruitment of one or more persons for committing acts for terrorist purposes or terrorism financing, training for committing purposed terrorist acts, promotion, public and calling propaganda for the execution of activities and threats for the purposes of conducting terrorist acts, etc.⁷⁸

The procedural law provides for the use of different technical means for gathering evidence such as: house searches, seizure of persons, search and seizure of documents, seizure and opening of letters and other items to be delivered, telephone tapping, and other means of intercepting communications (fax, e-mail), electronic surveillance and observation.⁷⁹ The prosecution may search persons when it considers that they may be concealing material evidence or items related to a criminal offence. Furthermore, the court may order the seizure of bank documents, negotiable instruments, sums deposited in current accounts etc., even if they are in safety vaults, where there are reasonable grounds to suspect that they are connected to a criminal offence, even if they do not belong to the defendant or are not in his name. Interception of communication, according to the national Criminal Procedure Code, can be ordered, besides all, for the person who is suspected that receives or transmit communications from the suspected person and for the person, whom surveillance can lead to the discovery of the location or the identity of the suspect.⁸⁰ The surveillance may be allowed for:

- Crimes done voluntarily, which have a maximum conviction of jail time of no less than seven years;
- Criminal offenses of insults and threats done with telecommunication devices.

In view of the present article, even if it is not referred explicitly to journalists, journalists can be part of this surveillance to lead the investigations on the revelation of location or identity of the person of interest. The surveillance can only be made with a warrant from the court, upon the

⁷⁶ Albanian Criminal Code, Article 230, para.1.

⁷⁷ https://www.coe.int/t/dlapil/codexter/Country%20Profiles/Profiles%202014%20Albania_EN.pdf accessed on 2nd May 2016.

⁷⁸ Chapter VII of the Albanian Criminal Code

⁷⁹ Articles 204, 205, 206, 221/1/2/3 and 221/c of the Code of Criminal Procedure

⁸⁰ Law n. 7905 (Criminal Procedural Code of the Republic of Albania) 1995 [Kodii Procedures PenaletëRepublikëssëShqipërisë] Article 221/3

request of the prosecutor or the injured party, when there is enough evidence to pursue the investigations.⁸¹ When there are reasonable grounds to think that a delay might seriously damage an investigation, the prosecutor may authorise interception by a reasoned decision and informs the court immediately within twenty-four hours.

In the Code of Ethics of the Albanian Media Institute, it is envisaged that journalists can reveal their sources only in three cases: when the source has intentionally changed the story without saying the whole truth; when the reference to reveal the name of the source is the only way to avoid serious unavoidable damages and when the information is related to the planning of a criminal act.

Moreover, pursuant to the Code of Criminal Procedure journalists are not obliged to testify because of their professional secret, except in certain cases, when they are obliged to refer to the authorities. The court has the authority to compel the journalist to reveal the identity of their source.⁸²

Improvements of investigation techniques are necessary in view of the increase of mass communications through the Internet and communication software. According to Article 191/a, in case of proceedings on criminal acts in the field of information technology, at the request of a party, the Court orders the controller or the holder to deliver memorized computer data. Under Article 208/a of the Code of Criminal Procedure, the court decides upon the sequestration of these data and computer systems.⁸³

Furthermore the National Informative Service in Albania (SHISH),⁸⁴ has the duty to collect information about terrorism, for the production and trafficking of narcotics, for the production of mass destruction weapons and for crimes against the environment. The National Informative Service also has the obligation to protect its methods and sources of information from unauthorised interventions. When this institution has a strong conviction for an infringement of the law, the National Informative Service informs the relevant institutions while protecting the informative sources and the methods.⁸⁵

There is not any national case-law, either concerning journalists' or their sources of information's right to confidential communication and anonymity online, neither concerning any attempts by a public authority to interfere in journalist's right to encryption and anonymity online. Therefore it

⁸¹ Law n. 7905 (Criminal Procedural Code of the Republic of Albania) 1995 [Kodii Procedures PenaletëRepublikës së Shqipërisë] Article 222/1

⁸² Law n. 7905 (Criminal Procedural Code of the Republic of Albania) 1995 [Kodi i Procedures Penale të Republikës së Shqipërisë] Article 159/3

⁸³ p.5, https://www.coe.int/t/dlapil/codexter/Country%20Profiles/Profiles%202014%20Albania_EN.pdf

⁸⁴ Law n. 8391 (For the National Informative Service) 1999 [Per Sherbimin Informativ Shteteror] Article 3

⁸⁵ Law n. 8391 (For the National Informative Service) 1999 [Per Sherbimin Informativ Shteteror] Article 9

cannot be said that journalist's right to anonymity and encryption online has not been violated in Albania.

In conclusion, there are no explicit articles concerning journalists and the identification of their sources, but under the previous articles mentioned before, journalists can be intercepted if they have relevant information about terrorism. Such information may be delivered to the competent authorities, if the National Informative Service considers this information as a threat to any possible infringement of the law.

10. Can journalists rely on encryption and anonymity online to protect themselves and their sources against surveillance?

The right to privacy emblemizes the substance of the process of democratisation in this country.⁸⁶ The Constitution of Albania has affirmed, and also guarantees, this complex and fundamental right. The right to private life, affirmed in the constitution, includes the guarantee given to the individual not to self-incriminate, the right for the protection of individual data, the right to privacy from unauthorised intervention of the police and the confidentiality of the correspondence.

Article 36 of the constitution of Albania inscribes the confidentiality of the correspondent: *"Freedom and secrecy of correspondence or any other means of communication are guaranteed."*

This is a provision addressed to citizens in general, while, as per the anonymity for journalists, it is actually questionable whether the domestic legislation is clear, considering that the only provisions found in light of anonymity is the Ethical Code of Albanian Media Institute.

The Code of Ethics emphasises the right to anonymity of the journalist, not anonymity online, but anonymity in general as a liability of the journalist not to divulge the name of the person who provided the confidential information, unless the person has clearly consented, as it is mentioned above, the *right to anonymity can be exceeded only in exceptional cases:*

- a) *There is suspicion that the source has consciously distorted the truth;*
- b) *The reference to the name of the source is the only way to avoid serious damage and is inevitable;*
- c) *The information in question relates to the planning of a criminal act...'*⁸⁷

Regarding to anonymity online, Law on "Audiovisual Media in Republic of Albania" No. 97/2013, does not provide any provision to protect themselves and their sources of information

⁸⁶ Igli Totozani, "The Right to Privacy and Albania", March 2013, Newspaper "The Day"

⁸⁷ Para 3 Ethical Code of Albanian Media, Albanian Media Institute 2006 [Kodi Etik i Gazetareve]

against surveillance. This right can neither be drawn in context of other laws, nor through Albanian jurisprudence, since there is no cases regarding this matter.

11. Are whistle-blowers explicitly protected under laws protecting journalistic sources? Is there another practice protecting whistle-blowers? Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

“Whistle-blower” means any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector.⁸⁸

Whistleblowing is known as an instrument to prevent and detect corruption. Since whistleblowing is aimed at the reporting of corruption, as fraud, misuse of public funds, bribery for a favor in the private or public sector, in places and circumstances, that only few people can know about these events, only individuals engaged in these events or that work closely with the people engaged in these events. Therefore, these people should enjoy a certain level of protection, because in most cases, they are subject of retaliation and legal issues.

In the case *Guja v Moldova*,⁸⁹ the Grand Chamber of the European Court of Human Rights considered the dismissal of a civil servant who had leaked information, a letter to the press, revealing political pressure on the judiciary in a corruption case to be an illegitimate restriction of the right to the freedom of expression, guaranteed under Article 10 of the Convention.⁹⁰ The sanction imposed on Guja was considered disproportionate and it could have a negative effect in the future on civil servants' willingness to denounce malpractices. This case is a very important reference for every country in order to guarantee a protection to whistle-blowers and harmonize the legislation protecting them.

In the Albanian legislation, the protection of whistle-blowers is not yet compromised in a single legal act and is not explicitly found with this term. Moreover, legal disposition on whistleblowing can be found in several laws, but there is not a provision that can be found under the law protecting journalistic sources for whistle blowing.

In order to comply with the requirements of the Council of Europe to protect people who report corruption, the Albanian parliament adopted, in 2006, the law “On co-operation of the

⁸⁸ Recommendation CM/Rec (2014) 7 of the Committee of Ministers to member States on the protection of whistle-blowers

⁸⁹ *Guja v Moldova* [2008] European Court of Human Rights, para 73

⁹⁰ Dirk Voorhoof, ‘Whistle-blowing and the Right to Freedom of Expression and information under the European Human Right System’ (30 September 2013) <<http://cmpf.eui.eu/seminars/whistle-blowing.aspx>>, accessed 9 March 2016.

public in the fight against corruption”.⁹¹ This law aims to protect the persons involved in the reporting of corruption. The law on public co-operation is considered to comply with international standards, but it does not cover any forms of sanctions, as unfair dismissal or protection of the whistle-blower working status, which is usually what the whistle-blower fears most and the cause of hesitation in ‘blowing the whistle’. Nevertheless, even if the law is praised as a step forward in the fight against corruption and in the protection of whistle-blowers, it has several weaknesses. One of the main weaknesses of this law is that it has not clearly stated the responsible authority to conduct the preliminary investigation. A hypothesis in this regard may be that the law is silent, because the denunciation is made within the institution where the corruption has occurred. That being said, the law on public co-operation makes the protection of whistle-blowers difficult and hard to put into practice.⁹²

In May 2014, the Council of Ministers of Albania has adopted the Recommendation of Council of Europe in 2013, in scope of fighting corruption in Albania as a key priority.⁹³

Corruption cases from the employee are also envisaged within the Albanian Labour Code, where it is stated that any unjustified measure or administrative sanction taken against employees that have reasons to suspect cases of corruption and that highlight these cases to the responsible people or authorities is invalid.⁹⁴ Moreover, it is stated that the reports of these facts, which have a connection with corruption, do not constitute an infringement of the professional secret. In any unjustified measures or administrative sanctions taken against employees that have reason to suspect cases of corruption and that denounce these cases to the responsible people or authorities is invalid and the employees can resort to the courts to claim their right.

The Code of Administrative Procedure is aimed to protect the fundamental rights of the individual or personal interests. There is not any explicit provision referring to whistleblowing in this code, but it states that any individual may complain against any administrative act, or against the refusal to enact the act, to the responsible body or his/her superior.⁹⁵ Although, the protection of whistle-blowers is not mentioned in any article, this code requires that the public administration bodies, during the course of their activity, shall protect public interest and also should not infringe the legitimate rights of private people.⁹⁶

⁹¹ Law n. 9508 (Public cooperation in combatting corruption) 2006 [Për bashkëpunimin e publikut në luftën kundër korrupsionit]

⁹² Arjan Dymishi, Elira Hroni, Egert Gjokutaj, *Whistle-blowers protection in Albania: An assessment of the Legislation and Practice* (Institute for Democracy and Mediation, 2013)

⁹³ Decision of the Council of Ministers n.330, dated on 28.5.2014

⁹⁴ Article 10, para 1.Law n. 10053, (The Labour Code of the Republic of Albania) 2009 [Kodi i Punes i Republikës së Shqipërisë]

⁹⁵ Law n. 8485 (The Code of Administrative Procedures of the Republic of Albania) 1999 [Kodi i Procedurave Administrative të Republikës së Shqipërisë] Article 137 and 139

⁹⁶ Ibid. Article 10

The law on protection of collaborators of justice and witnesses is applied for criminal proceedings that are sentenced to no less than 4 years' imprisonment.⁹⁷ This law does not refer explicitly to whistleblowing protection, nevertheless this law precludes any whistleblowing activity in relation to proceeding on criminal offence pursuant to article 260 of the Criminal Code on passive corruption of high state officials or local elected representatives.⁹⁸

In cases of whistleblowing, the law on protection of collaborators of justice and witnesses often fails to offer practical protection.

The law of 2006 "On Co-operation of the public in the fight against corruption" did not give whistle-blowers a sufficient level of protection and it so far it is not successfully implemented. Also, the laws mentioned above do not explicitly protect whistle-blowers. So, it is crucial to implement a specific law for the protection of whistle-blowers in Albania and under this scope the Parliament of Albania has prepared a draft law for the Protection of Whistle-blowers.⁹⁹

Another aspect of interest to mention is that the draft law does not only involve public administration, but also the private sector. This will require a well-studied mechanism to avoid abuse and a proper harmonisation with the legislation in Albania.¹⁰⁰ It is a known fact that companies that have clear internal complaint mechanisms tend to respect the rights of their employees and human rights in general. The position of whistle-blowers is more delicate, since this action can damage their reputation, trust, position and function within the company, so he needs sufficient protection to not fear any retaliation and financial damages.

The draft law creates a new mechanism to remove the suspicious practices and actions in the workplace, by an employee in the public or in the private sector in the Republic of Albania.

Within the report by the whistle-blower, the High Inspectorate of Declaration and Audit of Assets and Conflict of Interests (HIDAACI), will be responsible to gather all the necessary information and to investigate the case, while preserving the anonymity of the whistle-blower.¹⁰¹

The new mechanism for whistle-blowers in the new draft law is built on two main points: the first one is the forecast of a new legal procedure to investigate the allegations of the whistle-blowers for a suspicious corruption act and the second point is to sanction any action against the

⁹⁷ Law n. 10173 (On the Protection of Collaborators of Justice and Witnesses) 2009 [Për mbrojtjen e dëshmitarëve dhe bashkëpunëtorëve të Drejtësisë]law N. 10173 (On the Protection of Collaborators of Justice and Witnesses) 2009

⁹⁸ Arjan Dymishi, Elira Hroni, Egest Gjokutaj, "Whistle-blowers protection in Albania: An assessment of the Legislation and Practice", Institute for Democracy and Mediation [2013] pg.9

⁹⁹ Draft law (Protection of Whistle-blowers) 2015 [Projekt ligj për Mbrojtjen e Sinjalizuesve]

⁸²Netherlands Embassy in Albania, 'Presentation of the Whistleblowing Draft',

<<http://albania.nlembassy.org/news/2016/02/whistleblowing-draft-law-presentation.html>> accessed on 9 March 2016

¹⁰¹ Article 9. Draft law (Protection of Whistle-blowers)2015 [Projekt ligj për Mbrojtjen e Sinjalizuesve]

whistle-blowers in any retaliation directly or indirectly by the company.¹⁰²

The existing provisions are ambiguous and this draft law for the protection of whistle-blowers will guarantee the efficient functioning when denouncing a malpractice and will encourage whistle-blowers to come forward and report malpractices.

12. Conclusions

In conclusion of this research, it can be assumed that, in accordance with Article 10 of the European Convention on Human Rights, and the principles established therein, the domestic law and practice in Albania should, and need to, provide further explicit and clear protection of the right of journalists not to disclose their sources of information. In light of this commitment, the Legal Reform of media in Albania, imposed by the fundamental political changes, from the totalitarian regime to democracy, started with the Press Law on 1993, the first democratic law, as the initial step towards a media system similar to the Western European countries. Since then, several measures on national level have been taken to establish and adjust the media legislation system. Nevertheless, as it is noted in this research, existing Albanian legislation does not provide a specific law (*lex specialis*) on protecting this right.

There is not a unified piece of legislation regarding the regulation of media in general. There are totally different regulation regimes for print and electronic media. Print media operates in an almost total lack of legal regulation on press. Instead, it is subject only to regulation by competition and commercial laws. On the other hand, the legal framework on the broadcasting activity in the country is laid down firstly by the Law on Public and Private Radio and Television in the Republic of Albania, adopted in 1997, and then by the Law on Audiovisual Media, adopted in 2013. This law provides only a general provision elaborating fundamental principles of 'audiovisual broadcasts', mentioning among others the principle of maintaining the secrecy of information sources.

On the other side, the only national law providing in the same provision (article 159) the right of journalists to maintain professional secrecy and the respective limitation of this right, is the Code of Criminal Procedure in the Republic of Albania.

With due regard to this provision, it is a positive step the fact that **professional** journalists, in line with principles set out in the Recommendation No R (2000) 7, are protected from the obligation to testify in a trial, in order to maintain their sources of information. What is important to notice is that the court is the sole authority which has the exclusive competence to decide whether this right shall be derogated or not. In our opinion, by giving this competence only to the court, it is guaranteed the essence of the right and provided the appropriate legal security for journalists.

¹⁰² Report on the draft law for the "Protection of Whistle-blowers", para 3

What might be problematic is the fact that in this provision is not provided any specific alternative measure with the intention of protecting journalists right not to disclose source of information, in order to be less intrusive to this right. It is completely at the discretion of the court to decide on the issue of protecting the journalist's professional secrecy, search for and apply proportionate alternative measures. It is also not specified the so-called procedure of verification, stated in paragraph 2 of this provision, in case the court suspects that the journalist's claim to apply this protection has no grounds. In the light of this limitation, there is no a clear statement in which grounds would be a hypothetical suspect by the court. Nevertheless, it is widely acceptable the presumption that the court is the most effective authority to protect and guarantee the right of journalists provided in the national legislation.

It is encouraging that Article 159 of Criminal Procedural Code provides that the revelation of the source of information is the very last remedy applied by the court. It comes as a necessity only if there is no other way to prove a criminal offence.

Another issue, is the fact that within the scope of Article 159, falls only the one named as "professional journalist", without explaining what this term does mean. In this framework, there is no legal definition of the term "journalist" in Albania beyond the description of the role and tasks of 'journalist' provided by the Code of Ethics. In order to exclude any misinterpretation or ambiguity, it would be relevant to modify and reword this provision by defining clearly the terminology used therein. Nevertheless, we consider that in this situation the term "professional journalist" should be interpreted by the court having regard to the case-law of the European Court of Human Rights.¹⁰³

From the above, in our view, we can conclude that sources of information of journalists are protected, even though not clearly and in detail, but indirectly through the provisions of Criminal Procedure Code and the Law of "Freedom of Information".

With regard to the right to protect sources, national courts of Albania, during their judicial reviews have not had cases referring the right to protect sources of information. In Albania there is no any case law considering the right of non-disclosure of sources but different claims have been brought before the court with regard to Freedom of Expression and the national Courts of Albania have given various judicial decisions where you can see how national courts consider the case law of the European Court of Human Rights and its standards.

Another important issue is the lack of efficient self-regulations mechanisms, which in a normal situation could help media to keep its role as watchdog of governments in general.

In that context, although it is admitted that media self-regulation appears to be a solution to

¹⁰³ *Goodwin v the United Kingdom* [1996] European Court of Human Rights

increase media accountability while offering more flexibility than state media regulation,¹⁰⁴ in this meaning, in Albania there are no specific media self-regulation mechanisms which address concretely the issue of protection of journalistic sources. There is a negative correlation between a lack of a Journalistic Code of Ethics and a possible self-regulation prospect in professional terms, producing flaws in institutional and democratic standards expected.¹⁰⁵ Self-regulation so far in Albania has been almost inexistent.¹⁰⁶

The main code of ethics recognized by the media community in general, since the moment of its signing in 1996 and its revision in 2006, it is the Code drafted with the initiative of the Albanian Media Institute, as the main NGO dealing with media training and policy.¹⁰⁷ Although well-written by providing provisions which cover almost the entire problematic of journalists, it has as the main flow of this attempt to self-regulation the lack of an implementing mechanism that would supervise journalists' conduct in relation to the Code.

Concerning the problem whether journalists can rely on encryption and anonymity online to protect themselves and their sources against surveillance, it is actually questionable whether our legislation is clear considering that the only implications found with regard to the anonymity to protect the journalists and their sources of information is the Code of Ethics, which is not legally binding, and as consequence it cannot be considered as a 'protective measure'.

Finally, as per the protection of whistle-blowers, in the Albanian legislation, their protection is not yet compromised in a single legal act and is not explicitly found with this terminology. Moreover, legal disposition on whistleblowing can be found in several laws, but there is not a provision that can be found under the law protecting journalistic sources for whistleblowing.

¹⁰⁴ The Online Media Self-Regulation Guidebook / Ed. by A. Hulin and M. Stone

¹⁰⁵ Belina Budini 'Ways to Establish Self-Regulation on the Part of the Albanian Electronic Media in Coherence with European Union Prospects' <http://dspace.epoka.edu.al/bitstream/handle/1/1323/Ways%20to%20Establish%20Self-Regulation%20on%20the%20Part%20of%20the%20Albanian%20Electronic%20Media%20in%20Coherence%20with%20European%20Union%20Prospects.pdf?sequence=1> accessed on 07 May 2016

¹⁰⁶ Ibid

¹⁰⁷ Albanian Media Institute official page <http://www.institutemedia.org>

13. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

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14. Table of provisions

Provisions in native language	Corresponding translation
<p>Kushtetuta e Republikës së Shqipërisë, neni 22</p> <p>1. Liria e shprehjes është e garantuar.</p> <p>2. Liria e shtypit, e radios dhe e televizionit është e garantuar.</p> <p>3. Censura paraprake e mjeteve të komunikimit ndalohet.</p> <p>4. Ligji mund të kërkojë dhënien e autorizimit për funksionimin e stacioneve të radios ose të televizionit.</p>	<p>Constitution of the Republic of Albania, article 22</p> <p>1. Freedom of expression is guaranteed.</p> <p>2. Freedom of the press, radio and television is guaranteed.</p> <p>3. Prior censorship of means of communication is prohibited.</p> <p>4. The law may require authorization to be granted for the operation of radio or television stations.</p>
<p>Kushtetuta e Republikës së Shqipërisë, neni 17</p> <p>1. Kufizime të të drejtave dhe lirive të parashikuara në këtë Kushtetutë mund të vendosen vetëm me ligj për një interes publik ose për mbrojtjen e të drejtave të të tjerëve. Kufizimi duhet të jetë në përpjesëtim me gjendjen që e ka diktuar atë.</p> <p>2. Këto kufizime nuk mund të cenojnë thelbin e lirive dhe të të drejtave dhe në asnjë rast nuk mund të tejkalojnë kufizimet e parashikuara në Konventën Europiane</p>	<p>Constitution of the Republic of Albania, article 17</p> <p>1. Limitations of the rights and freedoms provided for in this Constitution may be established only by law, in the public interest or for the protection of the rights of others. A limitation shall be in proportion to the situation that has dictated it.</p> <p>2. These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention</p>

<p>për të Drejtat e Njeriut.</p>	<p>on Human Rights.</p>
<p>Kushtetuta e Republikës së Shqipërisë, neni 122</p> <p>1. Çdo marrëveshje ndërkombëtare e ratifikuar përbën pjesë të sistemit të brendshëm juridik pasi botohet në Fletoren Zyrtare të Republikës së Shqipërisë. Ajo zbatohet në mënyrë të drejtpërdrejtë, përveç rasteve kur nuk është e vetëzbatueshme dhe zbatimi i saj kërkon nxjerrjen e një ligji. Ndryshimi, plotësimi dhe shfuqizimi i ligjeve të miratuara me shumicën e të gjithë anëtarëve të Kuvendit për efekt të ratifikimit të marrëveshjeve ndërkombëtare bëhet me të njëjtën shumicë.</p> <p>2. Një marrëveshje ndërkombëtare e ratifikuar me ligj ka epërsi mbi ligjet e vendit që nuk pajtohen me të.</p>	<p>Constitution of the Republic of Albania, article 122</p> <p>1. Any ratified international agreement constitutes part of the internal legal system after it is published in the Official Journal of the Republic of Albania. It is directly applicable, except when it is not self-executing and its application requires the adoption of a law. The amendment and repeal of laws approved by a majority of all members of the Assembly is done by the same majority for the purposes of the ratification of an international agreement.</p> <p>2. An international agreement ratified by law has priority over the laws of the country that are incompatible with it.</p>
<p>Kodi i Procedurës Administrative të Republikës së Shqipërisë, neni 137:</p> <p>1. Çdo palë e interesuar ka të drejtë të ankohet kundër një akti administrativ ose kundër një refuzimi për nxjerrjen e aktit administrativ.</p> <p>2. Organi administrativ, të cilit i drejtohet ankimi, shqyrton ligjshmërinë dhe rregullsinë e aktit të kontestuar.</p>	<p>The Code of Administrative Procedures of the Republic of Albania, article 137:</p> <p>1. Any interested party is entitled to submit an appeal against an administrative act or against a denial for the issuance of the administrative act.</p> <p>2. The administrative act, to which the appeal is addressed, reviews the legitimacy and regularity of contested act.</p>

<p>3. Në parim, palët e interesuara mund t'i drejtohen gjykatës vetëm pasi të kenë ezauruar rekursin administrativ.</p>	<p>3. In principle, the interested parties may address the court only after using the administrative recourse.</p>
<p>Kodi i Procedurës Administrative të Republikës së Shqipërisë, neni 139:</p> <p>1. Ankimi administrativ mund të bëhet përpara:</p> <p>a) organit që ka nxjerrë aktin administrativ të ankimuar ose që ka refuzuar të nxjerrë aktin administrativ;</p> <p>b) organit epror të organit të përmendur në nënparagrafin (a) të paragrafit 1 të këtij neni.</p> <p>2. Në rastet kur ankimi i drejtohet organit epror, ky i fundit ia transferon dosjen përkatëse organit që ka nxjerrë/refuzuar të nxjerrë aktin së bashku me orientimet e tij për zgjidhjen e çështjes.</p>	<p>The Code of Administrative Procedures of the Republic of Albania, article 139:</p> <p>1. The administrative appeal may be submitted before:</p> <p>a) the body which issued the appealed administrative act or denied the issuance of an administrative act.</p> <p>b) the superior body mentioned in point a of paragraph 1 of this Article.</p> <p>2. In cases where the appeal is addressed to the superior body, the latter transfers the respective file to the body which has issued/refused to issue the act attached with its instruction concerning the resolution of this case.</p>
<p>Kodi i Procedurës Penale i Republikës së Shqipërisë, neni 159:</p> <p>1. Nuk mund të detyrohen të dëshmojnë për sa dinë për shkak të profesionit, me përjashtim të rasteve kur kanë detyrimin që t'ua referojnë autoriteteve proceduese:</p>	<p>Criminal Procedure Code of the Republic of Albania, article 159:</p> <p>1. May not be compelled to testify on what they know due to their profession, except in cases where they have the obligation to report to proceeding authorities:</p>

<p>a) përfaqësuesit e besimeve fetare, statutet e të cilëve nuk janë në kundërshtim me rendin juridik shqiptar;</p> <p>b) avokatët, përfaqësuesit ligjorë dhe noterët;</p> <p>c) mjekët, kirurgët, farmacistët, obstetrët dhe kushdo që ushtron një profesion shëndetësor;</p> <p>ç) ata që ushtrojnë profesione të tjera, të cilëve ligji u njeh të drejtën të mos dëshmojnë për ato që lidhen me sekretin profesional.</p> <p>2. Gjykata, kur ka arsye të dyshojë se pretendimi i bërë nga këta persona për t'iu shmangur dëshmisë nuk ka baza, urdhëron verifikimet e nevojshme. Kur ai rezulton pa baza, gjykata urdhëron që dëshmitari të deponojë.</p> <p>3. Dispozitat e parashikuara nga paragrafi 1 dhe 2 zbatohen edhe për gazetarët profesionistë lidhur me emrat e personave nga të cilët ata kanë marrë të dhëna gjatë ushtrimit të profesionit të tyre. Por, kur të dhënat janë të domosdoshme për të provuar veprën penale dhe vërtetësia e këtyre të dhënave mund të dalë vetëm nëpërmjet identifikimit të burimit, gjykata urdhëron gazetarin që të tregojë burimin e informacionit të tij.</p>	<p>a) religious representatives, whose statutes are not in contravention of the Albanian legal order;</p> <p>b) attorneys at law, legal representatives and notaries;</p> <p>c) physicians, surgeons, pharmacists, obstetricians and anyone who exercises a medical profession,</p> <p>d) those who exercise other professions, which the law recognizes them the right not to testify on what is related to professional secrecy.</p> <p>2. When the court has reasons to suspect that the claim made by these persons in order to avoid the testimony has no grounds, orders the necessary verification. Where it (claim) results baseless, the court orders the witness to testify.</p> <p>3. Provisions provided under paragraph 1 and 2 shall also apply to professional journalists pertaining to the names of persons whom they have got information from during the course of their profession. But, when the information is indispensable to prove the criminal offence and the truthfulness of the information may only be proved through identification of the source, the court orders the journalist to reveal the source of his information.</p>
<p>Kodi i Procedurës Penale i Republikës së Shqipërisë, neni 204:</p> <p>1. Para se të bëhet kontrolli i personit, atij</p>	<p>Criminal Procedure Code of the Republic of Albania, article 204:</p> <p>1. Prior to conducting a body search, the</p>

<p>që do të kontrollohet i dorëzohet një kopje e vendimit të kontrollit, duke i bërë të ditur të drejtën për të kërkuar praninë e një personi të besuar, me kusht që ai të gjendet shpejt dhe të jetë i përshtatshëm.</p> <p>2. Kontrolli bëhet duke respektuar dinjitetin dhe mbrojtjen e atij që kontrollohet.</p>	<p>one who will be searched, is handed over a copy of the search order, informing him of his right to request the presence of a reliable person, provided that can be found immediately and is suitable.</p> <p>2. The search is conducted in compliance with the dignity and safety of the one being searched.</p>
<p>Kodi i Procedurës Penale i Republikës së Shqipërisë, neni 205:</p> <p>1. Të pandehurit, kur është i pranishëm, dhe atij që ka në dispozicion vendin u dorëzohet kopja e vendimit të kontrollit, duke i sqaruar të drejtën për të kërkuar praninë e një personi të besuar.</p> <p>2. Kur mungojnë personat e treguar në paragrafin 1, kopja e vendimit i dorëzohet një të afërm, një fqinji ose një personi që punon bashkë me të.</p> <p>3. Organi procedues mund të kontrollojë personat e pranishëm, kur çmon se këta mund të fshehin provën materiale ose sendet që i përkasin veprës penale. Ai mund të urdhërojë që të pranishmit të mos largohen para se të mbarojë kontrolli dhe të kthehen forcërisht ata që largohen.</p>	<p>Criminal Procedure Code of the Republic of Albania, article 205:</p> <p>1. Defendant, when present and the one who is in charge of the place, is handed over a copy of the search order, informing them of the right to request the presence of a reliable person.</p> <p>2. When the persons stipulated in paragraph 1 are absent, a copy of the order is handed over to a relative, neighbour or to a person who works with him.</p> <p>3. The proceeding authority may search the persons present when it judges that they may conceal material evidence or items belonging to the criminal offence. It may order that persons present may not leave prior to conclusion of the search and may use force to get back those who leave.</p>
<p>Kodi i Procedurës Penale i Republikës</p>	<p>Criminal Procedure Code of the</p>

<p>së Shqipërisë, neni 206:</p> <p>1. Kontrolli në një banesë ose në një vend të mbyllur ngjitur me të nuk mund të fillojë para orës shtatë dhe pas orës njëzet. Në raste të ngutshme organi procedues mund të urdhërojë me shkrim që kontrolli të bëhet tej këtyre caqeve.</p>	<p>Republic of Albania, article 206:</p> <p>1. A house search or a search of a closed place attached to it may not commence before seven o'clock and after twenty o'clock. In urgent cases, the proceeding authority may order in writing that the search be conducted beyond these restrictions.</p>
<p>Kodi i Procedurës Penale i Republikës së Shqipërisë, neni 221:</p> <p>1. Përgjimi i komunikimeve të një personi ose të një numri telefoni me telefon, faks, kompjuter ose me mjete të tjera të çdo lloji, përgjimi i fshehtë me mjete teknike i bisedave në vende private, përgjimi me audio dhe video në vende private dhe regjistrimi i numrave të telefonit, hyrës dhe dalës, lejohen vetëm kur procedohet:</p> <p>a) për krimet e kryera me dashje, për të cilat parashikohet dënim me burgim jo më pak, në maksimum, se shtatë vjet;</p> <p>b) për kundërvajtjet penale të fyerjes e të kanosjes, të kryera me mjete të telekomunikimit.</p> <p>2. Përgjimi i fshehtë fotografik, filmik ose me video i personave në vende publike dhe përdorimi i pajisjeve gjurmuese të</p>	<p>Criminal Procedure Code of the Republic of Albania, article 221:</p> <p>1. Interception of communications of a person or a telephone number, by telephone, fax, computer or other means of any kind, the secret interception by technical means of conversation in private place, the interception by audio and video in private places and the recording of incoming and outgoing telephone numbers, is permitted only where there is a proceeding:</p> <p>a) for intentionally committed crimes for which a punishment of imprisonment of no less than seven years is provided;</p> <p>b) for the criminal contravention of insult and threat committed through the means of telecommunications.</p> <p>2. Secret photographic, filmed or video surveillance of persons in public places and use of tracking devices of whereabouts are</p>

<p>vendndodhjes lejohen vetëm kur procedohet për krime të kryera me dashje, për të cilat parashikohet dënim me burgim jo më pak, në maksimum, se dy vjet.</p> <p>3. Përgjimi mund të urdhërohet kundër:</p> <p>a) të dyshuarit për kryerjen e një vepre penale;</p> <p>b) personit që dyshohet se merr ose transmeton komunikime nga i dyshuari;</p> <p>c) personit që merr pjesë në transaksione me të dyshuarin;</p> <p>ç) personit, vëzhgimi i të cilit mund të çojë në zbulimin e vendndodhjes ose të identitetit të të dyshuarit.</p> <p>4. Rezultati i përgjimit është i vlefshëm për të gjithë komunikuesit.</p> <p>5. Përgjimi parandalues rregullohet me ligj të veçantë. Rezultatet e tij nuk mund të përdoren si provë.</p>	<p>permitted only when there is a proceeding for intentionally committed crimes for which a punishment of imprisonment of no less than two years, in maximum, is provided.</p> <p>3. Interception/Surveillance may be ordered against:</p> <p>a) a person suspected of committing a criminal offence;</p> <p>b) a person who is suspected of receiving or transmitting communications from the suspect;</p> <p>c) a person who takes part in transaction with the suspect;</p> <p>d) a person whose surveillance may lead to the discovery of the crime scene or the identity of the suspect.</p> <p>4. The results of interception/surveillance are valid for all the communicators.</p> <p>5. Preventive interception/surveillance is governed by a separate law. Its results may not be used as evidence.</p>
<p>Kodi i Procedurës Penale i Republikës së Shqipërisë, neni 339, pika 1:</p> <p>1. Seanca gjyqësore është publike,</p>	<p>Criminal Procedure Code of the Republic of Albania, article 339, p. 1:</p> <p>1. The hearing shall be public otherwise it</p>

<p>përndryshe quhet e pavlefshme.</p>	<p>shall be null and void.</p>
<p>Kodi i Procedurës Penale i Republikës së Shqipërisë, neni 340:</p> <p>1. Gjykata vendos që shqyrtimi gjyqësor ose disa veprime të tij të zhvillohen me dyer të mbyllura:</p> <p>a) kur publiciteti mund të dëmtojë moralin shoqëror ose mund të sjellë përhapjen e të dhënave që duhet të mbahen sekret në interes të shtetit, në qoftë se një gjë e tillë kërkohet nga organi kompetent;</p> <p>b) kur nga ana e publikut ka shfaqje që prishin zhvillimin e rregullt të seancës;</p> <p>c) kur është e nevojshme të mbrohet siguria e dëshmitarëve ose e të pandehurve;</p> <p>ç) kur gjykohet e nevojshme në pyetjen e të miturve.</p> <p>2. Vendimi i gjykatës për zhvillimin e seancës me dyer të mbyllura revokohet kur pushojnë shkaqet që e sollën atë.</p>	<p>Criminal Procedure Code of the Republic of Albania, article 340:</p> <p>1. The court decides to hold the court examination or some of its actions in camera:</p> <p>a) when the publicity may damage the social morality or may divulge data to be kept secret for the interest of the state, if this is requested by the competent authority.</p> <p>b) in case of behaviors which impair the normal performance of the hearing</p> <p>c) when it is necessary to protect the witnesses or the defendant</p> <p>d) when necessary during the questioning of juveniles</p> <p>2. The decision of the court holding the hearing in camera is revoked once the causes which required it no longer exist.</p>

<p>Ligji nr. 8391 për Shërbimin Informativ Shtetëror, neni 3</p> <p>Shërbimi Informativ Shtetëror ka këto detyra kryesore:</p> <p>.....</p> <p>- Mbledh informacion për terrorizmin, për prodhimin dhe trafikun e narkotikëve, për prodhimin e armëve të dëmtimit në masë, për krimet kundër mjedisit</p> <p>.....</p>	<p>Law n. 8391 For the National Informative Service, article 3</p> <p>National Informative Service has these duties:</p> <p>.....</p> <p>-to collect information about terrorism, for the production and trafficking of narcotics, for the production of mass destruction weapons, for crimes against the environment.</p> <p>.....</p>
<p>Ligji nr. 8391 për Shërbimin Informativ Shtetëror, neni 9</p> <p>Shërbimi Informativ Shtetëror nuk kryen veprimtari të karakterit ushtarak ose policor.</p> <p>Kur SHISH krijon bindjen për një shkelje të ligjit, informon në institucionin përkatës, duke mbrojtur burimet dhe metodat informative.</p> <p>Shërbimi Informativ Shtetëror në funksion të realizimit të detyrave të tij mund të bashkëpunojë me shërbimet informative të vendeve të tjera.</p>	<p>Law no 8391 For the National Information Service, article 9</p> <p>The National Information Service does not perform military or police activities.</p> <p>When NIS has a strong conviction for an infringement of the law, inform the relevant institution while protecting methods and sources of information.</p> <p>National Information Service in order to carry out its tasks can cooperate with information services of other countries.</p>
<p>Projekt ligj për Mbrojtjen e Sinjalizuesve neni 9</p> <p>Në zbatim të parimit të ruajtjes së konfidencialitetit, sekretit shtetëror dhe</p>	<p>Draft law Protection of Whistle-blowers, article 9</p> <p>Pursuant to the principle of confidentiality, state secrecy and protection of personal</p>

<p>mbrojtjes të të dhënave personale, njësitë përgjegjëse bashkëpunojnë me njëratjetrën dhe me ILDKPKI-në për shkëmbim të dhënash, të plota dhe pa asnjë rezervë, me qëllim shqyrtimin dhe zgjidhjen e një rasti të sinjalizuar kur pavarësisht nga organizata e sinjalizuesit, të sinjalizuarit i përkasin organizatave të ndryshme.</p>	<p>data, the responsible units cooperate with each other and with HIDAA (High Inspectorate for the Declaration and Audit of Assets) for exchanging of data, full and without reservation, in order hearing and for the resolution of a case of whistleblowing when despite of whistleblowing organizations, whistleblowers belong to different organizations.</p>
<p>Ligji nr 8410 Për radion dhe televizionin publik privat, neni 5</p> <p>Pavarësia editorial sigurohet me ligj.</p> <p>Punësimi, ngritja në detyrë si dhe të drejtat dhe detyrat e punonjësve të radio dhe televizioneve publike dhe private nuk përcaktohen nga seksi, origjina, pikëpamjet politike, besimi fetar apo anëtarësia në sindikata</p>	<p>Law n. 8410 On Public Private Radio and television, article 5</p> <p>Editorial independence is guaranteed by law.</p> <p>Employment, promotion and the rights and duties of employees of radio and television public and private are not determined by sex, origin, political views, religious beliefs or trade union membership</p>
<p>Ligji Nr. 8452 për Avokatin e Popullit në Republikën e Shqipërisë, Neni 2 "Detyrat e Avokatit të Popullit":</p> <p>Avokati i Popullit mbron të drejtat, liritë dhe interesat e ligjshëm të individit nga veprimet ose mosveprimet e paligjshme e të parregullta të organeve të administratës publike, si dhe të të tretëve që veprojnë për llogari të saj.</p> <p>Avokati i Popullit i udhëhequr nga parimet</p>	<p>Law Nr. 8454, on the People's Advocate in the Republic of Albania, Article 2 "Duties of the People's Advocate":</p> <p>The People's Advocate safeguards the rights, freedoms and lawful interests of individuals from unlawful and improper actions or failures to act of the organs of public administration as well as third parties acting on their behalf.</p> <p>The People's Advocate guided by the</p>

<p>e paanësisë, konfidencialitetit, profesionalizmit dhe pavarësisë ushtron veprimtarinë në mbrojtje të të drejtave dhe të lirive të njeriut, të parashikuara në dispozita kushtetuese dhe në ligje. Dispozitat e këtij ligji zbatohen edhe për mbrojtjen e të drejtave të të huajve, të cilët janë ose jo rezidentë të rregullt në Shqipëri, të refugjatëve, si dhe të personave pa shtetësi që ndodhen në territorin e Republikës së Shqipërisë, sipas kushteve të parashikuara në ligj.</p>	<p>principles of impartiality, confidentiality, professionalism and independence exercises his activity for the protection of human right and freedoms as defined by the constitutional provisions and by the laws. The provisions of this law shall also apply to protect the rights of foreigners, whether they are residing lawfully, in Albania or not, refugees as well as stateless persons within the territory of the Republic of Albania, pursuant to the terms set forth by law.</p>
<p>Ligji Nr. 8452 për Avokatin e Popullit në Republikën e Shqipërisë, Neni 12 "E drejta për t'u ankuar":</p> <p>Çdo individ, grup individësh ose organizata joqeveritare, që pretendojnë se u janë shkelur të drejtat dhe liritë dhe interesat e tyre të ligjshme nga veprimet ose mosveprimet e paligjshme e të parregullta të organeve të administratës publike, kanë të drejtë të ankohen ose të njoftojnë Avokatin e Popullit dhe të kërkojnë ndërhyrjen e tij për vënien në vend të së drejtës ose lirisë së shkelur.</p> <p>Avokati i Popullit duhet të ruajë fshehtësinë nëse e sheh të arsyeshme, si dhe nëse kjo kërkohet nga personi që bën ankesën, kërkesën apo njoftimin.</p>	<p>Law Nr. 8454, on the People's Advocate in the Republic of Albania, Article 12 "Right to complain":</p> <p>Every individual, group of individuals or non-government organization, claiming that his/their rights, freedoms or lawful interests have been violated by the unlawful or improper actions or failures to act of the organs of the public administration shall have the right to complain or notify the People's Advocate and to request his intervention to remedy the violation of the right or freedom.</p> <p>The People's Advocate shall maintain confidentiality if he deems it reasonable as well as when the person submitting the complaint, request or notification so requests.</p>
<p>Ligji Nr. 8452 për Avokatin e Popullit në Republikën e Shqipërisë, Neni 13 "Fillimi i shqyrtimit të çështjes":</p>	<p>Law Nr. 8454, on the People's Advocate in the Republic of Albania, Article 13 "Initiation of the proceedings":</p>

<p>Avokati i Popullit fillon procedurën e shqyrtimit të çështjes kur vëren ose dyshon se ka ndodhur një shkelje e së drejtës, në bazë të ankesës apo të kërkesës së personit të interesuar ose të dëmtuar, si dhe me nismën e vet, për raste të veçanta të bëra publike, por me pëlqimin e të interesuarit ose të dëmtuarit.</p>	<p>The People's Advocate, upon finding or suspecting that a right has been violated, shall initiate an investigation of the case, upon the complaint or request of the interested or affected person, or on his own motion if the particular case is in the public domain and provided the interested or injured party consents.</p>
<p>Vendim i Këshillit të Ministrave nr 330 datë 28.05.2014</p> <p>Këshilli i Ministrave vendosi për:</p> <p>Miratimin e udhërrëfyesit për 5 prioritetet e rekomanduara nga Komisioni European</p>	<p>Decision of the Council of the Ministers n. 330 dated 28.05.2014</p> <p>The Council of Ministers decided for the:</p> <p>Adoption of guidelines for the 5 priorities recommended by European Commission.</p>
<p>Për mediat audiovizive në Republikën e Shqipërisë (neni 5)</p> <p>“Autoritet i komunikimeve elektronike dhe postare ose AKEP” është autoriteti përgjegjës rregullator për komunikimet elektronike, sipas përcaktimeve të ligjit nr. 9918 datë 19.5.2008 “Për komunikimet elektronike në Republikën e Shqipërisë”.</p>	<p>On Audiovisual Media in Republic of Albania (article 5)</p> <p>“Postal and Electronic Communications Authority” or PECA is the regulatory authority responsible for electronic communications pursuant to the provisions of Law No. 9918, dated 19.5.2008 “On Electronic Communications in the Republic of Albania”</p>

<p>Per te drejten e Informimit ne Republikën së Shqipërisë, neni 17</p> <p>2. E drejta e informimit kufizohet në rast se është e domosdoshme, proporcionale dhe nëse dhënia e informacionit shkakton një dëm të qartë dhe të rëndë ndaj interesave të mëposhtëm: a) sigurinë kombëtare, sipas përkufizimit të bërë nga legjislacioni për informacionin e klasifikuar; b) parandalimin, hetimin dhe ndjekjen e veprave penale; c) mbarëvajtjen e hetimit administrativ në kuadër të një procedimi disiplinor; ç) mbarëvajtjen e procedurave të inspektimit dhe auditimit të autoriteteve publike; d) formulimin e politikave monetare dhe fiskale të shtetit; dh) barazinë e palëve në një proces gjyqësor dhe mbarëvajtjen e procesit gjyqësor; e) këshillimin dhe diskutimin paraprak brenda ose midis autoriteteve publike për zhvillimin e politikave publike; ë) mbarëvajtjen e marrëdhënieve ndërkombe-tare ose ndërqeveritare. Pavarësisht nga sa paras hikohe-t në paragrafin e parë, të pikës 2, të këtij neni, informacioni i kërkuar nuk refuzohet në rast se ekziston një interes publik më i lartë për dhënien e tij. Kufizimi mbi të drejtën e informimit, për shkak të interesit të parashikuar në pikën 2, shkronjat "c" dhe "ç", të këtij neni, nuk zbatohet kur hetimi administrativ, në kuadër të një procedimi disiplinor, dhe procedurat e inspektimit e të auditimit të autoriteteve publike kanë përfunduar. Kufizimi mbi të drejtën e informimit, për shkak të interesit të parashikuar në pikën 2, shkronjat "d" dhe "dh", të këtij neni, nuk zbatohet kur të dhënat përkatëse janë fakte, analiza të fakteve, të dhëna teknike ose të dhëna statistikore. Kufizimi mbi të drejtën e informimit, për shkak të interesit të</p>	<p>On the Right to Information, article 17 (2)</p> <p>2. The right to information may be restricted, if giving the information causes a clear and serious harm to the following interests: (a) national security, as defined by the legislation for classified information; (b) prevention, investigation and prosecution of offences; (c) conduct of an administrative investigation within a disciplinary proceeding; (d) conduct of inspection and auditing procedures of public authorities; (e) formulation of state monetary and fiscal policies; (f) equality of parties in court proceedings and the conduct of litigation; (g) preliminary consultations and discussions within or between public authorities on public policy development; (h) progres of international or intergovernmental relations. Notwithstanding the provisions of paragraph 1 of point 2 of this Article, the information requested is not rejected if there is a higher public interest to grant it. Restrictions on the right to information, due to the interests foreseen in point 2, letter "c" and "d" of this Article, shall not apply when the administrative investigation, in the context of a disciplinary proceeding, and audit inspection procedures of the public authority have been completed. Restriction on the right to information, due to the interests foreseen in point 2, letter "e" and "f" of this Article, shall not apply where the relevant data are facts, analyses of facts, technical data or statistics. Restriction on the right to information, due to the interests foreseen in point 2, letter "g" of this Article, shall not apply once the</p>
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<p>parashikuar në pikën 2, shkronja "e", të këtij neni, nuk zbatohet pasi politikat janë bërë publike.</p>	<p>policies are published.</p>
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ELSA AUSTRIA

Contributors

National Coordinator

Anica Karlic

National Academic Coordinator

Anica Karlic

National Researchers

Sandra Gallistl

Susanne Herta

Franziska Jäger

Verena Kirchmair

Mariella Rieder

National Linguistic Editor

Aleksander Makal

National Academic Supervisor

Univ. Prof. Dr. Walter Berka

1. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this construed in national law?

1.1. Constitutional legislation

Austrian legislation affords protection of the journalists right not to disclose sources by means of Article 10, para 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), § 157 Abs 1 Z 4 Code of Criminal Procedure [Strafprozessordnung, StPO] and § 31 Media Act [Mediengesetz, Medien].

The right of the journalists not to disclose their sources falls within the scope of freedom of expression under Article 10, para 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); in Austria, the ECHR enjoys the rank of federal constitutional law and is directly applicable.¹

Article 10, ECHR prohibits state action which aims at forcing journalists to disclose their sources. In a 2010 case, the Austrian *Oberster Gerichtshof* (Supreme Court of Justice, “OGH”) followed the decision of the European Court of Human Rights (“ECtHR”) in *Sanoma Uitgevers B.V. v. the Netherlands*, and ruled that an order for disclosure of sources (which can only be complied with by, for instance, surrendering a storage medium with materials researched by a journalist) is contrary to the provisions of art 10 para 1 ECHR.²

1.2. Criminal legislation

Furthermore, § 157 Abs 1 Z 4 Code of Criminal Procedure [Strafprozessordnung, StPO] and § 31 Media Act [Mediengesetz, MedienG] afford explicit protection of the journalist’s right not to disclose his sources.

In the Austrian law of criminal procedure, § 157 Abs 1 Z 4 StPO 1975 allows a journalist *expressis verbis* to refuse to testify as a witness in order to protect the identity of his source:³

§157 (1) Entitled to refuse testimony are:

...

4. Media owners, editors, journalistic staff, and [other] employees of a media undertaking or a media service in respect of questions concerning the person of the author, sender,

¹ See Question 4.

² *Sanoma Uitgevers B.V. v. The Netherlands* [2010] ECtHR App no 38224/03; Os 130/10g [2010] Austrian Supreme Court of Justice EvBl Vol. 20 [2011] 134 [German]; Ernst Fabrizy, *Strafprozessordnung* (12th edn, Manz 2014) 1052 [German];

³ Ernst Fabrizy, *'Strafprozessordnung'* (12th edn, Manz 2014) 403, 407 [German].

or source of articles and documents, or any information which has reached them in their professional capacity.

As already noted, this provision applies only if the journalist concerned is called to testify **as a witness**. However, even when a criminal action is brought against a journalist, he can protect his sources by exercising a general right to refuse testimony anchored in several provisions⁴ of the StPO 1975 which aim to provide the defendant with protection against self-incrimination and exist independently of the right granted under § 157 Abs 1 Z 4 StPO 1975. The court must instruct the journalist-defendant of this right on its own motion;⁵ should it fail to do so, the judgement may be declared void.⁶ As a result, even as a defendant in criminal proceedings, the journalist can refuse to disclose his source.⁷ This system may be said to achieve the goal set by Principle 7 of Recommendation No. R (2000) 7.⁸

All materials a journalist has received from a source when carrying out his professional activities are protected under § 157 Abs 1 Z 4 StPO 1975; hence any person who furnishes the journalist with information will be a source within the meaning of this provision.⁹

In this context, it is necessary to note that material researched by the journalist himself is not protected. However, if the material concerned has only been partly researched by the journalist and otherwise contains information which the journalist has received from a source, such material will be protected in so far as its disclosure would reveal the identity of the source.¹⁰

1.3. Other legislation

Apart from the provisions of the StPO 1975, the right of journalists not to disclose their sources is also guaranteed under § 31 MedienG. The significance of this provision lies in the fact that, in contrast to the provisions of the StPO 1975 discussed above, it may be invoked in all judicial proceedings (criminal, civil and administrative).¹¹

⁴ § 7 Abs 2, § 49 Abs 4, and §164 Abs 1 StPO 1975.

⁵ §159 Abs 1-2 StPO 1975

⁶ § 281 Abs 1 Z 3 StPO; § 159 Abs 3 StPO.

⁷Walter Berka, Lucie Heindl, Thomas Höhne, Alfred Noll, '*Mediengesetz Praxiskommentar*' (LexisNexis 2012) 351f [German].

⁸ Recommendation No. R (2000) 7, Appendix Principle 7.

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ Walter Berka, Lucie Heindl, Thomas Höhne, Alfred Noll, '*Mediengesetz Praxiskommentar*' (LexisNexis 2012) 351 [German].

MedienG 1981 is a successor to the Press Act 1922 [Pressegesetz] and has been amended several times, most recently in 2011, in order to adjust the law to the conditions of new media technologies, and particularly of online media.¹²

The MedienG 1981 protects general rights of privacy, contains procedural provisions for the protection of journalistic sources, and orders disclosure of financial contributions to media undertakings.

§ 31 MedienG 1981 is a procedural provision. It confers a testimonial privilege on defined categories of people working in the media industry:¹³

§31 Protection of editorial confidentiality

- (1) Media owners, editors, journalistic staff, and [other] employees of a media undertaking or a media service, appearing as witnesses in criminal proceedings or other proceedings before a court or an administrative authority, have the right to refuse to answer questions concerning the person of the author, sender, or source of articles and documents, or any information which has reached them in their professional capacity.

As the media can perform their ‘public watchdog’ role only if they receive secret and confidential information, § 31 MedienG 1981 aims to give journalists a possibility to preserve the anonymity of their informants.¹⁴ However, while journalists may refuse to answer questions about their identity, they are not obliged to keep it secret.¹⁵

1.3.1. Personal Scope: Privileged Persons

As may be seen in the text of § 31 MedienG 1981, there are four occupational groups which can invoke the right of non-disclosure. These are: media owners, editors, journalistic staff (*Medienmitarbeiter*), and employees (*Arbeitnehmer*) of a media undertaking or a media service. This is a considerably broader spectrum of people than the label “journalist” would normally accommodate. Since the privileged groups include, but are not limited to, journalists, it may be convincingly argued that this national provision achieves the goals set in Principle 2 of Recommendation No R (2000) 7. Not caught by the provision are, for example, guest commentators, authors of letters to the editor, or authors of books.¹⁶

¹² Werner Röggl, Heinz Wittmann, Peter Zöchbauer, *Medienrecht* (Verlag Medien und Recht 2012) 13ff [German].

¹³ Franz Höpfel, Eckart Ratz, *Wiener Kommentar zum Strafgesetzbuch, MedienG* (2nd edn, Manz 2011) 18ff [German].

¹⁴ Walter Berka, Lucie Heindl, Thomas Höhne, Alfred Noll, *Mediengesetz Praxiskommentar* (LexisNexis 2012) 350 [German]; RS0126501 [2007] (official interpretation of the Austrian justice of *Voskuil v. The Netherlands* [2007] ECtHR App no 64752/01).

¹⁵ Walter Berka, Lucie Heindl, Thomas Höhne, Alfred Noll, *Mediengesetz Praxiskommentar* (LexisNexis 2012) 350 [German];

¹⁶ *ibid.*

The statute does not determine when a person will be deemed to belong to one of the four categories listed in § 31 MedienG 1981. Thus, for instance, a question may arise as to whether a person must be employed by a media company when called to testify before the court in order to take advantage of this privilege. According to the prevailing legal opinion, it is the status of the witness at the time when he received the information that is material. Accordingly, if a witness is no longer employed in one of the positions listed in § 31, he may still refuse to disclose his source's identity provided that he was so employed when he received the information concerned.¹⁷

As mentioned above, this testimonial privilege may be claimed in any court proceedings, whether criminal or civil, as well as before administrative authorities.¹⁸

A defendant in criminal proceedings may not claim the right of non-disclosure under § 31 MedienG 1981.¹⁹ He has, however, a general right to refuse to testify under § 7 Abs 2, § 49 Abs 4, and §164 Abs 1 StPO 1975 (discussed above). As a defendant in civil proceedings, the journalist cannot be forced to testify; his refusal will, however, be interpreted by the trial judge in accordance with the principle of unfettered consideration of evidence (*Grundsatz freier Beweiswürdigung*).²⁰ Notwithstanding, a journalist can never be forced to disclose a source before the court.

1.3.2. Material scope:

Any person who passes information onto a journalist is a 'source' within the meaning of § 31 MedienG 1981.²¹

In addition to protecting the identity of the source, § 31 MedienG 1981 also protects the content of information received by persons caught by its scope.²² It is immaterial whether the information received is confidential or not.²³

¹⁷Walter Berka, Lucie Heindl, Thomas Höhne, Alfred Noll, *Mediengesetz Praxiskommentar* (LexisNexis 2012) 351 [German].

¹⁸ibid, 351f; Franz Höpfel, Eckart Ratz, *Wiener Kommentar zum Strafgesetzbuch, MedienG (2nd edn, Manz 2011)* 18 [German].

¹⁹Franz Höpfel, Eckart Ratz, *Wiener Kommentar zum Strafgesetzbuch, MedienG (2nd edn, Manz 2011)* 21 [German].

²⁰§ 281 Code of Civil Procedure 1985 [*Zivilprozessordnung, ZPO*]; Walter Berka, Lucie Heindl, Thomas Höhne, Alfred Noll, *Mediengesetz Praxiskommentar* (LexisNexis 2012) 352 [German].

²¹ Franz Höpfel, Eckart Ratz, *Wiener Kommentar zum Strafgesetzbuch, MedienG (2nd edn, Manz 2011)* 18 [German].

²²Walter Berka, Lucie Heindl, Thomas Höhne, Alfred Noll, *Mediengesetz Praxiskommentar* (LexisNexis 2012) 352 [German].

²³ Franz Höpfel, Eckart Ratz, *Wiener Kommentar zum Strafgesetzbuch, MedienG (2nd edn, Manz 2011)* 21 [German]; Fritz Zeder, *Hygiene um das Redaktionsgeheimnis*' (2011) Österreichische Juristen-Zeitung 5 [German].

As is the case under § 157 Abs 1 Z 4 StPO 1975, material researched by the journalist does not fall within the scope of § 31 MedienG 1981. But, again, if the material concerned has only partly been researched by the journalist and otherwise contains information which the journalist has received from a source, such material will be protected in so far as its disclosure would reveal the identity of the source.²⁴

Protecting the anonymity of, as well as the content of information received from, a source, the provisions of MedienG 1981 and StPO 1975 discussed above comply with the guidelines relating to the right of non disclosure as laid down in Recommendation No R (2000) 7.

1.3.3. No balance of interests

§ 31 MedienG 1981 applies strictly, irrespective of the balance of the parties' interests. A person caught by this provision can refuse to testify even if the information about the source is likely to be crucial to the success of an investigation of a serious crime. Currently, such strict application of the provision is a subject of legal and political debates.²⁵

Absent the balance of interests, § 31 MedienG 1981 gives journalists instruments to protect their sources which are superior to both those offered by the ECHR and those called for in Recommendation No R (2000) 7 and Recommendation 1950 (2011).²⁶

2. Is there, in domestic law, a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

A provision that prohibits journalists from disclosing confidential sources does not exist in Austrian law. Whilst a journalist has the right not to disclose his source, he is not obliged to keep that source's identity secret.²⁷

According to § 157 Abs 1 Z 4 StPO 1975, a journalist has the right to refuse to testify as a witness in order to keep his source secret. However, the journalist-witness may only invoke this testimonial privilege on his own volition; thus, the journalist-witness will not breach the provisions of the StPO 1975 or the Criminal Code 1975 [Strafgesetzbuch, StGB] if he decides to

²⁴ *ibid.*

²⁵ Walter Berka, Lucie Heindl, Thomas Höhne, Alfred Noll, *Mediengesetz Praxiskommentar* (LexisNexis 2012) 352 [German]; Fritz Zeder, *Hype um das Redaktionsgeheimnis* (2011) Österreichische Juristen-Zeitung 5 [German].

²⁶ Recommendation No R (2000) 7; Recommendation 1950 (2011).

²⁷ Walter Berka, Lucie Heindl, Thomas Höhne, Alfred Noll, *Mediengesetz Praxiskommentar* (LexisNexis 2012) 350 [German]; ; Franz Höpfel, Eckart Ratz, *Wiener Kommentar zum Strafgesetzbuch, MedienG* (2nd edn, Manz 2011) 21 [German].

reveal his source.²⁸ Similarly, the MedienG 1981 contains no sanction for disclosing a source. A journalistic source has no right to confidentiality against the journalist's will.²⁹ This said, it will be generally in the journalist's interest to keep the identity of his sources secret. Otherwise, he would be unlikely to obtain crucial information from his future sources. Accordingly, the relevant provisions of the StPO 1975 and the MedienG discussed above aim to give journalists instruments to keep the confidentiality of their sources.³⁰

It goes without saying that a journalist may be prohibited from revealing his sources under his employment contract or the ethical code of his profession. A breach of either may lead to sanctions from the employer.

3. Who is a “journalist” according to the national legislation? Is it, in your view, a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media actors? Is the protection of journalists' sources extended to anyone else?

In Austria, the profession of journalism is regulated in a separate statute – the Journalists Act 1920 [Journalistengesetz, JournalistenG].

According to § 1 Abs 1 JournalistenG 1920, the provisions of the act shall apply to:

all employees of a newspaper enterprise who are charged with the composition of texts or the drawing of pictures, and who are employed with a fixed salary and not merely as a matter of secondary occupation (editors, general editors).

Furthermore, § 1 Abs 2 JournalistenG provides that the act shall apply *mutatis mutandis* to persons who perform the tasks listed in § 1 Abs 1, but are employed by a press agency, a broadcasting enterprise, or a film production enterprise.

3.1. Holders of the Journalistic Privilege

While the JournalistenG, 1920, addresses issues of labour and company law specific to media companies, the protection of journalistic sources is dealt with primarily in § 31 MedienG 1981.

²⁸ Ernst Fabrizy, *Strafprozessordnung* (12th edn, Manz 2014) 403 [German].

²⁹ Walter Berka, Lucie Heindl, Thomas Höhne, Alfred Noll, *Mediengesetz Praxiskommentar* (LexisNexis 2012) 350 [German].

³⁰ *Ibid.*

Curiously, the MedienG 1981 does not use the term 'journalist'; rather, it provides protection to a broader spectrum of privilege holders:

§ 31. (1) Media owners, editors, journalistic staff, and [other] employees of a media undertaking or a media service, appearing as witnesses in criminal proceedings or other proceedings before a court or an administrative authority, have the right to refuse to answer questions concerning the person of the author, sender, or source of articles and documents, or any information which has reached them in their professional capacity.

Moreover, §1 MedienG 1981 provides some definitions of the terms used in §31 MedienG 1981. Accordingly, a **media owner** is a person who operates a media undertaking, managing the content, production or distribution.³¹ This role is not defined more precisely by the law, but due to the fact that this term was legally introduced by the amendment of the MedienG in 2005,³² the explanatory materials make clear the intention to extend protection to owners of homepages or of online discussion forums.³³ This is the most significant difference between the term 'journalist' as used in the JournalistenG, which requires a form of employment by a company, and the 'journalistic' privilege granted by § 31 MedienG. Consequently, also private persons, and especially bloggers, are protected and may refuse to disclose their sources.

An **editor** is defined as the person who makes decisions about the line which the medium represents.³⁴

Journalistic staff (*Medienmitarbeiter*) and employees (*Arbeitnehmer*) are all the other persons working in the media company. Tasks performed by the journalistic staff consist in shaping the medium's content. This category of persons can therefore be equated with 'journalists' within the meaning of the JournalistenG 1920.³⁵

Employees are employees of a media undertaking who perform non-journalistic tasks.³⁶ This means that § 31 MedienG 1981 guarantees protection to practically all persons employed by a media company.³⁷ Clearly, the legislature's intention was to protect media undertakings against attempts to bypass the law by means of court orders directing a member of the non-journalistic

³¹ §1 (1) Z8 MedienG 1981

³² Bundesgesetzblatt I Nr. 49/2005; Bundesgesetzblatt 151/2005

³³ Explanatory Notes and Considerations of the parliament, accessed on March 20 2016 <http://www.bka.gv.at/Docs/2005/2/9/erl%C3%A4uterungenmg.pdf>

³⁴ §1 (1) Z9 MedienG 1981

³⁵ §1 (1) Z11 *ibid*

³⁶ Employees of another company that are, for instance, charged with the print of the newspaper obviously are not included in the meaning of this legal term as they do not belong to the main company, but are employed in another business.

³⁷ Berka, Höhne, Noll, Polley, *Mediengesetz Praxiskommentar*, (2nd edn, LexisNexis ARD Orac, 2005) § 31 Rn 4 [German]

staff (eg. a secretary) to surrender documents or other materials with reference to the 'fact' that they are not protected by the 'journalistic' privilege.³⁸

Looking at the spectrum of privilege holders, it becomes apparent that the Austrian legislative viewed the term 'journalist' within its conventional meaning as too restrictive; it was thought necessary to provide a more nuanced wording if the freedom of expression should be secured. Nevertheless, the law still does not recognise some of the important channels of distribution, such as YouTube and freelance book authors (who do not happen to be holders of the § 31 privilege by virtue of their acting as media owners, editors, or members of staff of a media company).³⁹

3.2. Circumstances of Protection

§ 31 MedienG 1981 guarantees the right to refuse to disclose journalistic sources if two additional conditions are fulfilled: the person appears before the court as a **witness** and has received the information concerned **in his professional capacity**.⁴⁰

3.2.1. Witness

§ 31 Abs 1 MedienG 1981 explicitly 'limits' the right to keep sources secret to persons appearing in a trial as witnesses.

In addition to the right to refuse to disclose sources, § 31 Abs 2 MedienG provides that '[t]he right as stated in Abs 1 must not be circumvented by an order made to a person enjoying this right to surrender documents, printed matter, image, sound, or data carriers, illustrations, or other representations of such content, or by confiscating these.'

As already mentioned in the answer to Question 1, there are several procedural laws guaranteeing a defendant the right to remain silent during a trial. Therefore, it is possible to say that the right to refuse to answer questions concerning journalistic sources is warranted to the same extent to defendants as it is to witnesses.

However, in Austrian law, there is no regulation, which would extend the protection guaranteed by § 31 Abs 2 MedienG 1981 to defendants. This means that if a journalist is a defendant, search and seizure orders may be used to confiscate documents within the limits of the applicable procedural law.

³⁸ This does not mean that employees of cooperating companies (eg a separate printery) are protected as well.

³⁹ Berka, Höhne, Noll, Polley, *Mediengesetz Praxiskommentar*, (2nd edn, LexisNexis ARD Orac, 2005) § 31 Rn 5 [German]

⁴⁰ § 31 (1) MedienG 1981

Consequently, it may often seem expedient to try to obtain the desired information by commencing a legal action against a privilege holder in order to change his position to that of a defendant. This issue was raised in a case brought before the OGH in 2010.⁴¹ A reporter accompanied two men who were later accused of re-engaging in National Socialist activities by performing a Nazi salute. In the ensuing trial, the reporter, too, was accused of incitement; the prosecution used this circumstance to try to obtain the unpublished film materials by means of confiscation. When the media company appealed, the OGH decided a judgement which is now the leading Austrian case (*Präjudiz*) recognising the need to protect journalistic sources. The decision highlights the importance of the right of non-disclosure, emphasizes the role of the media in a democratic state, and clarifies the legal 'status' of the MedienG (discussed in point 3.2.). The Court also ruled on the issue of bypassing § 31 MedienG by bringing a charge against a privilege holder, which indicates that the courts are going to scrutinise the trial roles as well as grounds for putting someone in the position of a defendant. Accordingly, the OGH refused the prosecutor's demand to confiscate the unpublished film materials and closed the proceedings against the reporter.

3.2.2. The Receipt of Information

The holders of the journalistic privilege are only entitled to refuse to disclose their sources if they have obtained the information concerned in their professional capacity (as employees of a media undertaking).⁴² This does not mean that the information itself has to be confidential or available to only a limited number of people. Quite to the contrary: the protection is also guaranteed if the information is distributed in public.

It is necessary that the privilege holder have obtained the information while **carrying out his professional duties**; however, he need not be employed by a media company when appearing as a witness.

4. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

4.1. Safeguards

⁴¹ 13 Os130/10g (13 Os136/10i),

https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20101216_OGH0002_01300S00130_10G0000_000 accessed on 20 March 2016

⁴² The terms „journalistic/media-related“ are meant in the light of § 31 (1) MedienG 1981 and therefore include the positions described in 3.2.

§ 31 MedienG 1981 merely provides a right to remain silent, if the judge, the prosecutor, or the counsel for the other party requests information in any form.⁴³ In contrast to other evidentiary privileges, the court is not obliged to advise the privilege holder of his right to remain silent about the sources.⁴⁴ This means that the trial may not become a subject of a nullity appeal merely because the witness had not been informed about this right.⁴⁵ Equally, a trial does not become invalid because the witness has disclosed the sources; he is, naturally, allowed to do so if he is asked about it.⁴⁶

Some legal commentators view this legal situation as justifiable, pointing out that the occupational groups concerned should, in any case, be aware of their professional privileges and thus need not be additionally advised of their right to remain silent. Nonetheless, this remains controversial, especially if one considers that such obligation exists under § 152 (2) StPO 1975 in respect of attorneys and notaries, that is, professionals who would normally be expected to be aware of their rights more than members of any other profession.⁴⁷

All things considered, there are no safeguards to protect the holders of the journalistic privilege from the consequences of their unfamiliarity with the law. Absent any self-regulatory mechanism, it is for media undertakings to ensure that their employees are cognisant of their right to remain silent.

4.2. Implementation of the Laws

Austrian law guarantees a wide range of fundamental rights. Not all of them, however, are anchored in constitutional statutes (as may be the case in other countries). Some provisions gained importance over time and were therefore elevated to rank of constitutional law, despite being regulated in 'ordinary' statutes (*einfachgesetzliche Regelungen*). Additionally, some fundamental rights have their origin in public international law and regulations issued by international institutions and supranational organisations.

A particularly prominent source of fundamental rights is the ECHR, which Austria joined in 1958. The ECHR has been transposed into national law in a general way, which means that its

⁴³ In contrast to the situation in 13 Os130/10g (13 Os136/10i), where the journalist was a defendant, a journalist-witness does not have any right to object to such a request; he may only refuse to answer questions.

⁴⁴ Hubert Hinterhofer, *Zeugenschutz und Zeugnisverweigerungsrechte im österreichischen Strafprozess*, (Facultas 2004) 421 [German]

⁴⁵ Brandstetter, Schmid, *Kommentar zum Mediengesetz*, (Manz Verlag) §31 Rz 14 [German]

⁴⁶ A journalist has no right to be heard, but may just respond to questions he/she is asked in the witness stand. As a result, this also means that an informant is not protected by any law and basically has no rights against a disclosing journalist.

⁴⁷ Hubert Hinterhofer, *Zeugenschutz und Zeugnisverweigerungsrechte im österreichischen Strafprozess*, (Facultas 2004) 421 [German]. This could be against the principle of equality [*Gleichheitssatz*] and thus unconstitutional.

provisions are directly applicable in Austria. As a result, the freedom of expression guaranteed by Article 10 ECHR enjoys the rank of a constitutional right.⁴⁸

As regards the protection of journalistic sources, which is mainly regulated by the MedienG 1981 (an ordinary statute), it was controversial whether it belonged with the freedom of expression and thus had to be regarded as an aspect of that constitutional right.⁴⁹ This controversy was resolved by the OGH in 2010,⁵⁰ when the Court took a strong position on the legal status of § 31 MedienG 1981 and ruled that the protection of journalistic sources provided for thereunder is an aspect of the freedom of expression and is therefore to be recognised as a constitutional right.⁵¹

Furthermore, the 2010 decision shed some more light on the question of the **balance of interests** (as between the interest in protecting the source, on the one hand, and the interest in obtaining the information, on the other). The Court held that no balance of interest was required in the context of the right to protect journalistic sources; in other words, no matter how essential the information could be (eg for the success of investigations of a serious crime), a breach of the right guaranteed by § 31 MedienG 1981 is not justifiable.

This must be seen as a special case, since most of the fundamental rights in Austria are subject to restrictions which are justifiable by reference to the exigencies of public interest or a specific purpose which they are to pursue. Only the most significant rights, such as the ones resulting from the prohibition of torture or slavery, are regarded as 'absolute' and are therefore free from restrictions of any kind. It is thus clear that Austrian legislation in this area goes far beyond the law laid down in the decisions of the European Court of Human Rights (ECtHR) concerning the balance of interests under Article 10, ECHR.⁵²

5. In the respective national legislation, are the limits of non-disclosure of the information in line with the principles of the Recommendation No R (2000) 7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search

⁴⁸ Walter Berka, *Verfassungsrecht*, (4th edn, Springer Verlag 2012) 482-484 [German]. See also, Fritz Zeder, *Hype um das Redaktionsgeheimnis* (Österreichische Juristen Zeitung, 2011/2) 5-9 [German]

⁴⁹ Peter Zöchbauer, *Was Journalisten (nicht) dürfen* (Der österreichische Journalist, 02+03 edn, 2011) 100-101 [German] accessed on 20 March 2016

<http://www.journalist.at/archiv/2011-2/ausgabe-02032011/was-journalisten-nicht-durfen/>

⁵⁰ 13 Os130/10g (13 Os136/10i), accessed on 20 March 2016

https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20101216_OGH0002_01300_S00130_10G0000_000

⁵¹ Fritz Zeder, *Hype um das Redaktionsgeheimnis* (Österreichische Juristen Zeitung, 2011/2) 5-9 [German]

⁵² Fritz Zeder, *Hype um das Redaktionsgeheimnis* (Österreichische Juristen Zeitung, 2011/2) 5-9 [German]

for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

According to the Recommendation No. R (2000) 7 of the Council of Europe, in order 'to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage', certain principles concerning the right of journalists not to disclose their sources of information should be followed. Whether Austrian national legislation is in line with the principles of the Recommendation No. R (2000) 7 in regard to the limits of the right of non-disclosure shall be discussed in the following.

As already mentioned, the protection of journalistic sources is guaranteed by law, in particular by § 31 MedienG 1981 and § 157 Abs 1 Z4 StPO 1975. According to the ECtHR,⁵³ the protection of journalistic sources is one of the aspects of the freedom of expression. This was confirmed in the 2010 judgement of the OGH discussed above.⁵⁴ The right of journalists not to disclose information identifying a source thus falls within the scope of Article 10.

However, the right to freedom of expression is not unlimited. 'Restrictions on restrictions' on this fundamental right are stated in Article 10, paragraph 2, ECHR. According to this Article, limits to freedom of expression have to be

prescribed by law and ... 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.

Thus, there are three conditions set out in Article 10, paragraph 2, ECHR and re-affirmed by the ECtHR which have to be met in order to justify restrictions on the freedom of expression. First, **prescription by law** is required; limits to the freedom of expression must be expressly provided for in law. This is of great importance in preventing public authorities from arbitrarily interfering with the exercise of fundamental rights. Moreover, a number of goals agreeing with **legitimate public interest** in restrictions of this right are mentioned in the paragraph. In addition to this, in order to be permissible, any interference or restriction must be **necessary in a democratic society** and pursue the goals defined as legitimate.⁵⁵ Article 10 applies for any interference with the right of non-disclosure of journalistic sources and all three conditions have to be met cumulatively.⁵⁶ The right must not be subject to restrictions other than those stated expressly.

⁵³ *Goodwin v United Kingdom* App no 17488/90 (ECtHR, 27 March 1996).

⁵⁴ 13 Os 130/10g (OGH, 16 December 2010).

⁵⁵ *The Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979).

⁵⁶ Michael Holoubek, Klaus Kassai and Matthias Traimer, *Grundzüge des Rechts der Massenmedien* (4th edn, Springer Wien New York 2010) 42 [German].

In contrast to the first and second conditions, the meaning of the third condition, namely, the interference being necessary in a democratic society, requires further explanation. Whether an interference is necessary in a democratic society, is a question of proportionality.⁵⁷ Any interference disproportionate to the legitimate aim pursued will not be deemed 'necessary in a democratic society' and will thus violate Article 10. According to the case-law of the ECtHR, considering 'the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom', restricting measures can only be compatible with Article 10, ECHR when 'justified by an overriding requirement in the public interest'.⁵⁸

These considerations need to be taken into account when determining whether public interest in disclosure as mentioned in Article 10 outweighs the interest in protecting journalistic sources. Following the view of the ECtHR stated in its judgements, the Austrian *Verfassungsgerichtshof* (Constitutional Court, "VfGH") held that an interference with the freedom of expression will be deemed compatible with the constitution only if the interference is prescribed by law, pursues at least one of the legitimate aims mentioned in paragraph 2 of Article 10 and is necessary in a democratic society.⁵⁹ In order to assess the necessity of the measure in a democratic society, the VfGH developed a "principle of proportionality" (*Grundsatz der Verhältnismäßigkeit*) which serves to determine the appropriate means-end relationship between the legitimate aim pursued and the interference with the fundamental right.⁶⁰ In Austria, the test of the principle of proportionality is applied to every interference with fundamental rights which are not guaranteed unlimitedly. In order to be considered proportional, an interference needs to meet the following criteria:

The measures used to pursue the legitimate public goals have to be **suitable** to actually achieve these goals. Secondly, the measures need to be **necessary**; this means that the measure applied has to be the least severe measure necessary to achieve the goal. The authorities have to first look into and, if possible, apply alternative measures, which adequately protect their respective rights and interests, and at the same time are less intrusive with regard to the right of journalists not to disclose information. Personal liberty may not be subject to any further restrictions than those which are necessary to secure legitimate public interest. Eventually, restrictions of the exercise of fundamental rights are only in line with the constitution when justified by an overriding requirement in the public interest. For that reason, the assessment of overruling interests is based on a **proportionality test** in order to determine whether public interests outweigh the protection of personal freedom.⁶¹

It is primarily the legislator who has to ensure that a law which interferes with fundamental rights meets all these criteria. If the law has a margin of appreciation, the executive authorities too are

⁵⁷ *ibid* 43.

⁵⁸ *Goodwin v United Kingdom* App no 17488/90 (ECtHR, 27 March 1996)

⁵⁹ B847/87 (VfGH 3 March 1989).

⁶⁰ Walter Berka, *Lehrbuch Grundrechte* (Springer Wien New York 2000) 60 [German].

⁶¹ *ibid* 60.

obliged to take notice of the principle of proportionality when implementing the law.⁶² The reasonability of the authorities' actions, especially the balancing of competing interests, is supervised by the ECtHR.⁶³

Since the protection of journalistic sources is one of the aspects of the freedom of expression,⁶⁴ the curb placed on interferences with this right also applies to the right of journalists not to disclose information identifying a source. However, as noted above, in § 31 MedienG 1981 and § 157 Abs 1 Z4 StPO 1975, the Austrian legislative has gone even further in protecting journalistic sources: the balancing of interests, as prescribed by art 10 ECHR, is not required.⁶⁵ Thus, an order to disclose journalistic sources falling under these provision will always be deemed to infringe on the right to freedom of expression. This applies irrespective of whether the sources, if disclosed, would be likely to provide important information about serious crimes.⁶⁶ The OGH affirmed that this goes far beyond the average European-level of protection.⁶⁷ However, the right of journalists not to disclose their sources only applies when they act as witnesses⁶⁸. In other cases, an interference has to pass the proportionality test in order to comply with the case-law of both the ECtHR and the VfGH. According to § 5 StPO 1975, it is necessary to balance the interests where the actions of criminal investigation do not fall within the protections of sources. This provision makes it possible for criminal execution authorities to act in line with the constitution.

The principles concerning the limits to the right of non-disclosure mentioned in the Recommendation No R (2000) 7 refer to Article 10, paragraph 2, ECHR. The Committee of Ministers effectively sums up the ECtHR case-law on the importance of the right of non-disclosure which needs to be taken into account when balancing interests. As the principle of proportionality developed by the VfGH requires the absence of reasonable alternative measures and a compelling legitimate interest, it complies with Principle 3 of the Recommendation No R (2000) 7. In fact, the provisions of § 31 MedienG 1981 and § 157 Abs 1 Z4 StPO 1975 offer protective instruments which go beyond the goals set in the Recommendation.

6. In the Recommendation No R (2000) 7 the following principles should be respected when the necessity of disclosure is stated: absence of reasonable alternative measures, outweighing legitimate interest (protection of human life, prevention of major crime, defence of a

⁶² *ibid* 127.

⁶³ *ibid* 127.

⁶⁴ Michael Holoubek, Klaus Kassai and Matthias Traimer, *Grundzüge des Rechts der Massenmedien* (4th edn, Springer Wien New York 2010) 46 [German].

⁶⁵ Fritz Zeder, 'Hype um das Redaktionsgeheimnis' [2011] *Österreichische Juristen-Zeitung* 6 [German].

⁶⁶ Susanne Reindl-Krauskopf, 'Meinungsäußerungsfreiheit und Redaktionsgeheimnis' [2011] *Juristische Blätter* 667 [German].

⁶⁷ 13 Os 130/10g (OGH, 16 December 2010).

⁶⁸ For a more detailed discussion see Question 1.

**person accused or convicted of having committed a major crime).
Under which criteria can the interest in the disclosure outweigh the
interest in the nondisclosure?**

As already mentioned, § 31 MedienG 1981 and § 157 Abs 1 Z4 StPO 1975 do not require balancing the interests. As a result, there are no circumstances under which the interest in disclosure could outweigh the interest in non-disclosure. Outside the scope of these provisions, an interference in the right not to disclose sources will only be deemed justifiable if it passes the proportionality test. Both the test and the circumstances under which the interest in disclosure will outweigh the interest in non-disclosure have been discussed in the answer to Question 5.⁶⁹

**7. In the light of the case-law of the European Court of Human Rights,
how do national courts apply the respective laws with regard to the
right to protect sources? In particular, how do they balance the
different interests at stake?**

7.1. Introduction

Between 1991 and 2016, the OGH decided six cases (both criminal and civil) which concerned the right to protect journalistic sources. The OGH case-law can be roughly divided into two categories. The first category addresses the problem of limiting the right to protect sources under § 31 MedienG 1981 to witnesses, and has already been discussed in Question 3. The second category also involves discussions of the scope of § 31 MedienG, but is more focused on the question of interpretation of the source and the protected information itself.

7.2. Information covered by § 31 MedienG 1981

7.2.1. OGH Case 15 Os 69/03 [2003]70

During a demonstration in the assembly hall of the University of Vienna a group of masked demonstrators inflicted damage to property. The events were filmed by a reporter team of the Austrian Broadcasting Corporation (“ORF”). When the court ordered that the footage be surrendered, the ORF refused to comply invoking the right to professional secrecy and filed a complaint against this claim.

⁶⁹ Walter Berka, *Lehrbuch Grundrechte* (Springer Wien New York 2000) 60 [German].

⁷⁰ 15 Os 69/03 [2003] Austrian Supreme Court of Justice EvBl Vol. 42 [2004] 190 [German].

The OGH held that the right to professional secrecy under § 31 MedienG 1981 did not apply as the footage had been taken in public, during a publicly accessible event, and by a reporter team identified as such. Thus, the team was not creating any impression of secrecy or confidentiality, and the court order could not be seen as an attempt to circumvent the right to protect sources.

The OGH pointed out that § 31 MedienG 1981 will not normally apply for public events as in those cases there is no need to keep information secret. In the light of ECtHR case-law, this blanket statement seems problematic. Thus, for instance, Zöchbauer⁷¹ suggests that the OGH decision is not in line with the case-law of the ECtHR, which in *Nordisk Film & TV A/S v. Denmark* states:

Article 10 of the Convention may be applicable in such a situation and that a compulsory hand over of research material may have a chilling effect on the exercise of journalistic freedom of expression ... However, this matter can only be properly addressed in the circumstances of a given case.⁷²

According to Zöchbauer, in the 2010 case discussed above,⁷³ the OGH refined its initial position on the scope of the right to protect sources under § 31 MedienG 1981 and Article 10 ECHR.⁷⁴ The Court held that information received at public events is not automatically deprived of protection, and that the right to protect sources is not limited to information given in confidence. As a result, any information given to a journalist in his professional capacity will fall under § 31 MedienG 1981.

The latest case where a party claimed the right to protect sources involved an alleged obligation of telecommunication service providers to disclose information. This civil case involved an order issued against a media owner (who provided an online discussion platform) directing him to disclose email addresses of users who had posted defamatory materials allegedly falling under the scope of § 1330 General Civil Code 1811 (*Allgemeines Bürgerliches Gesetzbuch, ABGB*).⁷⁵ The media owner refused to disclose this information invoking his right to protect sources under § 31 MedienG 1981.

The OGH held that postings on an online discussion platform do not qualify as information within the meaning of § 31 MedienG 1981. The Court stated that § 31 MedienG 1981 does not include any explicit restrictions on the form of information provided to journalists but excludes postings published strictly of the user's own accord without any connection to journalistic work or activity.

⁷¹ Peter Zöchbauer, *Neues zum Redaktionsgeheimnis? Eine Anmerkung zur OGH-Entscheidung 13 Os 130/10g, 13 Os 136/10i* [2011] *Medien und Recht* Vol. 1, 4.

⁷² *Nordisk Film & TV A/S v. Denmark* [2005]; *Sanoma Uitgevers B.V. v. the Netherlands* [2010] ECHR 1284, 22.

⁷³ 13 Os 130/10g [2010] Austrian Supreme Court of Justice EvBl Vol. 20 [2011] 134 [German].

⁷⁴ Zöchbauer, *Neues zum Redaktionsgeheimnis?* 4.

⁷⁵ 6 Ob 133/13x [2014] Austrian Supreme Court of Justice EvBl Vol. 105 [2014] 733 [German].

The Court saw this as agreeing with the rationale of § 31 MedienG 1981, since neither it, the vital public-watchdog role of the press, nor its ability to provide accurate and reliable information were adversely affected. The OGH stated that its decision was in line with the case-law of the ECtHR (e.g. in *Nordisk Film & TV A/S v. Denmark*⁷⁶), pointing out that the information was obtained from a source that was not acting with any awareness of journalistic activity; moreover, it was held that persons which do 'not freely assist the press in informing the public of matters of public interest or matters concerning others' should not enjoy the right to protect sources.⁷⁷

In 2015, the ECtHR decided a similar case regarding postings on a news website. In *Delfi AS v. Estonia*, the Court was asked to examine a complaint concerning the liability of a company running a news website for comments posted on it by users. The portal provided a platform, run on commercial terms, for user-generated comments on previously published content.⁷⁸ In this case users – whether identified or anonymous – posted unambiguously unlawful comments which infringed on the personality rights of others.

The Grand Chamber held that while

the publisher [of a printed media publication] is, through editing, the initiator of the publication of a comment, on the Internet portal the initiator of publication is the writer of the comment, who makes it accessible to the general public through the portal. Therefore, the portal operator is not the person to whom information is disclosed.⁷⁹

The decision taken by the OGH is in line with this ECtHR judgement, since the purpose of the right to protect journalistic sources is not objected to in this case and the application of the right not to disclose sources cannot be extended to postings on media owned websites that have no connection with any journalistic activity whatsoever where the media owner functions solely as a host provider. This again finds reflection in *Delfi AS v. Estonia* as

the recognition of differences between a portal operator and a traditional publisher, is in line with the international instruments in this field, which manifest a certain development in favour of distinguishing between the legal principles regulating the activities of the traditional print and audiovisual media on the one hand and Internet-based media operations on the other. In the recent Recommendation of the Committee of Ministers to the member States of the Council of Europe on a new notion of media, this is termed a 'differentiated and graduated approach [that] requires that each actor whose services are identified as media or as an intermediary or auxiliary activity benefit from both the appropriate form (differentiated) and the appropriate level (graduated) of protection and that responsibility also be delimited in conformity with Article 10 of the European

⁷⁶ *Nordisk Film & TV A/S v. Denmark* [2005].

⁷⁷ Werner Röggl, Peter Zöchbauer, *Redaktionsgeheimnis - beleidigende Postings - Auskunft über die E-Mail-Adresse des Posters* [2014] *Medien und Recht* Vol. 2, 60.

⁷⁸ Council of Europe Research Division, *Internet: case-law of the European Court of Human Rights* <http://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf> accessed 25 April 2016.

⁷⁹ *Delfi As. v. Estonia* [2015].

Convention on Human Rights and other relevant standards developed by the Council of Europe.’ Therefore, the Court considers that because of the particular nature of the Internet, the ‘duties and responsibilities’ that are to be conferred on an Internet news portal for the purposes of Article 10 may differ to some degree from those of a traditional publisher, as regards third-party content.⁸⁰

7.3. The restriction to the witness

A main point of discussion regarding Austrian legislation in the field of the protection of journalistic sources is the restriction of the right to refuse to testify under § 31 MedienG 1981 to witnesses. This is once again reflected in the following case-law.

7.3.1.1 OGH Case Ob 15/91 [1991]81

This civil case involved a newspaper publishing inculpatory evidence against a group of people supposedly involved in corruption and illegal party financing. The defendants in the criminal case claimed that the newspaper had presented false evidence. The newspaper sued them for discredit under § 1330 ABGB. In the proceedings, the newspaper was asked to disclose the informants who had furnished the disputed evidence. The newspaper refused, invoking § 31 MedienG 1981.

The OGH held that the right under § 31 MedienG 1981 to refuse to testify in court was limited exclusively to testimony. Since a party to the proceedings is not obliged to provide any information and non-compliance cannot be sanctioned, the result in respect of the right to protect sources only differs in the way the judge can appraise the evidence as well as the refusal to provide evidence. This statement was repeated in 11 Os 5/03⁸² and 6 Ob 130/06 w;⁸³ in the latter, the court established rules on the appraisal of evidence in civil-law proceedings in the light of the right to protect sources when a defendant remains silent.

7.3.2. OGH Case 6 Ob 130/06 w84

This civil case was commenced by an Estonian company which sued a journalist and the ORF (as co-defendant) for damages for defamation and discredit (§ 1330 ABGB); the damage was allegedly caused by a TV report whose final version was cut in a way which had altered the meaning of the initial report. The journalist responsible for the report stated that, after the TV report was sold to another TV station, the final editing and the controversial change of the

⁸⁰ Delfi As. v. Estonia [2015], para 113.

⁸¹ 1 Ob 15/91 [1991] Austrian Supreme Court of Justice EvBl Vol. 158 [1991] 702 [German].

⁸² 11 Os 5/03 [2003] Austrian Supreme Court of Justice, Medien und Recht Vol. 4 [2005] 231[German].

⁸³ 6 Ob 130/06 w [2006] Austrian Supreme Court of Justice

<https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_20060629_OGH0002_0060OB00130_06W0000_000/JJT_20060629_OGH0002_0060OB00130_06W0000_000.pdf> [German].

⁸⁴ *ibid.*

report's meaning were already beyond his control. When asked to name the responsible person, he invoked his right to protect the source. The OGH held that the right to refuse to give evidence in accordance with § 31 MedienG 1981 is, in principle, only granted to witnesses in criminal and civil proceedings. As, in this case, the journalist had been summoned before the court as a defendant, he would have had to provide a specific reason which would justify respecting his right to professional secrecy. As the defendant failed to do so, his refusal to disclose the person responsible was eventually taken into account in the judgement according to the principle of unfettered consideration of evidence (*Grundsatz freier Beweiswürdigung*).

Considering the legal rationale of § 31 MedienG 1981, it is doubtful whether these OGH decisions are in conformity with ECtHR case-law. The fact that the right to protect sources is granted to witnesses or – by *argumentum e contrario* – that the privilege is not available to the litigating parties has to pass a strict proportionality test and must be reviewed in light of the balance of interests as required by the ECtHR.⁸⁵

It is sometimes argued that the protection of journalistic sources and the concomitant regulations should be extended to cases where the journalist is a defendant in criminal proceedings.⁸⁶ Hinterhofer states that this claim goes too far and would lead to criminal immunity not only in cases related to professional but also private lives of privilege holders. This would go well beyond the initial idea of protecting the sources.⁸⁷

The rights granted under § 31 MedienG 1981 should not too easily be circumvented when a journalist appears before the court as a criminal defendant. Therefore, it is important to point out that in each case the court must interpret the applicable law in the light of the constitution, including Article 10 of the ECHR, and this has to be reflected in the court's decision.⁸⁸

⁸⁵ Zeder, *Hype um das Redaktionsgeheimnis*, 6.

⁸⁶ See Draft legislation submitted by members of the Austrian National Council (Nationalrat) in 2006 <https://www.parlament.gv.at/PAKT/VHG/XXII/A/A_00823/imfname_062006.pdf> accessed 26 April 2016 [German].

⁸⁷ Hinterhofer, *Das Redaktionsgeheimnis im österreichischen Strafprozess* 142.

⁸⁸ Zöchbauer, *Neues zum Redaktionsgeheimnis?* 4.

8. What are the criteria for using electronic surveillance and anti-terror laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

8.1. National Provisions for Investigative Measures

As discussed in Question 8, § 31 MedienG 1981 guarantees the protection of sources in the context of criminal, civil, or administrative proceedings. A journalist has the right to remain silent when asked about circumstances covered by the right to protect sources. The wording of § 31 MedienG is very similar to that of § 157 Abs 1 (4) StPO 1975, the crucial difference being that the latter is only applicable in criminal cases. Both provisions prohibit circumventing the journalist's right to protect his sources. § 31 MedienG 1981 provides a non-exhaustive list of prohibited actions, which include forced surrender of printed matter, image carriers, sound and data storage mediums as well as seizure of documents.⁸⁹

§ 144 Abs 2 StPO 1975 has a similar effect when it states that any investigative measures under Chapter 8 (*Hauptstück*) of the StPO that aim to circumvent this right are illegitimate.

The measures under Chapter 8 StPO are comprehensive and cover all types of investigative techniques aimed at identifying, clarifying and confiscating including the search of premises (§§ 119 et seqq.), the interception of telecommunication (§§ 134 et seqq.), and electronic eavesdropping operations (§§ 134, 136).

According to § 5 Abs 1 StPO 1975,⁹⁰ read in light of the principles of legality and proportionality, the criminal police and public prosecutors are strictly bound by restrictions on their powers as prescribed by this law. In the event of an infringement of these legal restrictions the actions and the findings of the investigative bodies are not null and void *per se*. That means that if such evidence is brought before the court in criminal proceedings, a defendant seeking to prevent it being used against him has to resort to a nullity appeal (see § 281 Abs 1 (2 or 3) StPO 1975).

⁸⁹ Hubert Hinterhofer, *Das Redaktionsgeheimnis im österreichischen Strafprozess: Bestandsaufnahme und aktuelle Entwicklungen*, in Helmut Koziol et al. (Ed.), *Medienpolitik und Recht II*, 133 [German].

⁹⁰ § 5 Abs 1 StPO 1975: Criminal police, the prosecutor and the court, in the exercise of powers and in the acquisition of evidence, may only intervene in the right of a person to the extent required and expressly prescribed by law and necessary for the performance of work. Each, thus, caused the infringement of legally protected rights must be proportionate to the severity of the offense, to the degree of suspicion and the desired success.

8.1.2. Legal Protection and Safeguards

8.1.2.1. *Seizure Actions*

The seizure of evidence, as provided for in § 109 et seqq. StPO 1975, has to be ordered by the public prosecutor. In case of imminent danger or particular urgency, the criminal police are entitled to undertake seizure but have to request authorisation from the public prosecutor within 14 days after the measure was undertaken.

When this seizure action effectively bypasses the right not to disclose journalists' sources under § 157 Abs 1 (4)⁹¹, 144 Abs 2 StPO 1975⁹² and § 31 MedienG 1981, the journalist may object to it. In such case, all material seized has to be brought before the judge and the journalist has to be given an adequate amount of time to go through the material and mark those parts which are protected by professional secrecy. Then, the judge reviews the material and decides on what to take on file. The material that falls under professional secrecy has to be given back to the journalist and is to be treated as unknown to the judge. If the judge decides to take on material that falls under professional secrecy the journalist can appeal against the decision to the OGH which has a suspensive effect.⁹³

8.1.2.2 *Search of Premises*

Search orders as provided for in §§ 119 et seqq. StPO 1975 are legitimate if a suspicion exists (based on certain facts) that materials which would help clarify or identify a criminal offence are kept in a particular place. However, a search action is legitimate only if it is ordered by the public prosecutor and authorized by the judge. As this measure may not be used to circumvent professional secrecy, a search order will not be issued if the journalist is only suspected of being in possession of evidence (the situation is different if the journalist himself is suspect of a crime, see 3.3.1) The journalist does not have to deliver any evidence referring to the right to protect journalists' sources.⁹⁴ § 121 Abs 2 StPO 1975 includes a special provision for the search of premises which are used exclusively for professional activities, such as a publishing house; in such cases a representative of the professional body, the media owner or his designated representative has to be present during the search. However, there is no legal protection against a possible violation of this provision.⁹⁵

⁹¹ § 157 Abs 1 Z 4 StPO 1975: The right to refuse to testify is granted to the:

Media owner (publisher), media employees and workers of a media house or media service on questions relating to the person of the author, sender or informant of articles and documents or on information that has been given to them regarding their professional activity.

⁹² § 144 (2) StPO 1975: The order or implementation of investigative measures comprised by this main chapter is illegitimate as it is bypassing the right of a person in accordance with § 157 Abs. 1 Z 2 - 4 to remain silent.

⁹³ Christian Bertel/ Andreas Vernier, *Strafprozessrecht* 97.

⁹⁴ Bertel/Venier, *Strafprozessrecht* 98.

⁹⁵ Ernst Eugen Fabrizy, *Die österreichische Strafprozessordnung. Kurzkommentar* 317.

8.1.2.3. *Surveillance Actions and the Interception of Communication*

The aim of surveillance actions or observation (§ 129 et seqq. StPO 1975) is to obtain information about the whereabouts of a suspect or to verify a well-founded suspicion of a crime. The investigative powers differ depending on the seriousness of the crime committed (in respect of the severity of the potential legal sanction).

Depending on the gravity of intrusion into the private sphere of a suspect or a person that may lead to information on the suspect, these measures can be taken with or without an order or approval of the public prosecutor. The StPO 1975 provides clear norms when it comes to the powers of the criminal police, including the requirements when, how long, and with what means surveillance actions may be implemented.

The interception of communication as regulated in § 134 et seqq. StPO 1975 has to be authorized by the judge and is to be limited to the time strictly necessary to pursue the goal declared.⁹⁶

Yet, again, it is prohibited to implement such measures merely in order to bypass professional secrecy such as the right not to disclose journalists' sources. In the event of these legal restrictions being violated, the infringing actions and findings are not null and void, but rather constitute grounds for annulment through a nullity appeal - see § 281 Abs 1 (2 or 3) StPO 1975.⁹⁷

8.1.3. Officer for Legal Protection

As these measures may constitute a serious infringement of fundamental rights and are secretly conducted, there is a special legal institute implemented to supervise the order and to authorise the operative implementation of investigative measures.

The Officer for Legal Protection (*Rechtsschutzbeauftragter*) is nominated by the Minister of Justice on the suggestion of the President of the VfGH, the chairman of the Ombudsman Board (*Volksanwaltschaft*) and the President of the Austrian Bar (*Österreichischer Rechtsanwaltskammertag*).

The Officer for Legal Protection, according to § 47a StPO 1975, performs his duties independently and is not bound by any instructions. He is required to maintain official secrecy.

§ 147 Abs 1 (5) StPO 1975 explicitly requires the authorisation of this supervisory body in cases where measures such as requests for information on surveillance data or telecommunication

⁹⁶ Bertel/Venier, *Strafprozessrecht* 104.

⁹⁷ Ingeborg Zerbes, *Spitzel, Spähen, Spionieren. Sprengung strafprozessualer Grenzen durch Zugriff auf Kommunikation*. 199.

data, interception of communication, optical and acoustic observation, are targeted on journalists.

8.2. Undercover Investigation under the Security Police Act 1991 (SPG)⁹⁸

Besides the StPO 1975, the authorisation for the use of investigative measures similar to those granted for crime investigation is found in the Security Police Act 1991 [Sicherheitspolizeigesetz, SPG]. The dividing line between the tasks and competencies of the criminal police, on one hand, and the security police on the other is not always clear and often quite difficult to draw.

Whilst the security police aims at prevention of dangers and addressing general risks, the criminal police focus on investigation of criminal offences. The scope of application of the measures under the SPG 1991 are broad as a general risk may consist of a dangerous attack (a threat to any legally protected interest) or as soon as three or more people with the intent to connect, proceed to commit offenses (criminal connection).⁹⁹ Generally security police undertakes all measures independent of measures and tasks that fall under the StPO 1975 just applies from the time on a suspect of a criminal offence is identified. This is important as, for example, the observation of a person and all other (undercover) investigations do not underlie the same control mechanisms as for a criminal investigation.

The security police report to the Minister of the Interior (*Bundesminister für Inneres*). The only independent supervision is constituted by the Legal Protection Commissioner (*Rechtsschutzbeauftragter*). The effectiveness of this legal protection is questionable¹⁰⁰ and often criticized for lacking independence due to it being part of the political the Ministry of the Interior.

A safeguard regarding the protection of sources is implemented in § 56 Abs 4 SPG 1991;¹⁰¹ accordingly, the transfer of personal data to other authorities as security agencies is illegitimate if there are indications that such action may circumvent the provisions of § 31 MedienG 1981.

8.3. State Protection Law of 2016 - a New Threat to the Protection of Sources?

⁹⁸State Police Act 2016 (Polizeiliches Staatsschutzgesetz PStSG)
<<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10005792>>
accessed 31 March 2016 [German].

⁹⁹ § 16 SPG 1991: A general risk exists in case of 1. an dangerous attack or 2. as soon as three or more people work together with the intent of committing offenses (criminal organisation).

A dangerous attack consists of a threat of a legally protected good by an unlawful and judicially punishable act that is committed intentionally and not merely pursued at the request of an interested party as it constitutes a criminal offense.

¹⁰⁰ See Rudolf Keplinger/ Lisa Pühringer, *Sicherheitspolizeigesetz*. Polizeiausgabe, 2014, p. 287.

¹⁰¹ § 56 Abs 4 SPG 1991: The transfer of personal data to other authorities as security agencies is not permitted if there are indications for the supplying agency, that in this way the protection of editorial secrecy (§ 31 para. 1 Media Act) would be circumvented.

Very recently, the Austrian National Council (*Nationalrat*) passed the State Protection Act 2016 [Polizeiliches Staatsschutzgesetz, PStSG],¹⁰² which will enter into force in July 2016. This act aims at, among others, strengthening measures to counter terrorism, extremism, espionage or any threat to the state. Therefore powers of the police have been expanded. This led to vehement criticism of the new law by the Austrian Journalists Club,¹⁰³ which pointed out the fact that no provisions were made to guarantee professional secrecy.¹⁰⁴

It is noteworthy that, parallel to the expansion of powers, the criteria for using them have become less precise and less rigid. In comparison with the SPG 1991 which requires a direct connection to a dangerous attack or risk of such, the PStSG 2016 legitimises actions in case of a probable danger or when such danger is to be identified.¹⁰⁵

8.4. Compliance of National Legislation with ECtHR Case-Law

As any restriction on the freedom of expression guaranteed under Article 10 ECHR has to be 'prescribed by law' and appear 'necessary in a democratic society,' national legislation for investigative measures has to be reviewed for possible non-compliance with the ECHR. Any authorisation or justification of an interference with individual rights must be compatible with the rule of law and meet the criteria of being accessible, sufficiently clear and precise and therefore foreseeable in its application.

8.4.1. Investigative Measures under the StPO 1975

The StPO 1975 is publicly accessible and provides precise and clear norms about the investigative tasks and powers of the executive authorities in criminal cases. The individual is able to foresee in which cases and under what circumstances the police is capable of taking measures. The StPO 1975 contains legal safeguards against arbitrary interferences by the authorities as police actions that conflict with individual rights have to be approved by the prosecutor office or a judge. In addition it provides the individual with legally enforceable rights

¹⁰² Announced in the Austrian Federal Law Gazette, BGBl. I Nr. 5/2016, 26 February 2016, <https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2016_I_5/BGBLA_2016_I_5.pdf> accessed 15 March 2016 [German].

¹⁰³ Austria's largest independent organisation for journalist, <<http://www.oejc.at>> accessed 15 March 2016 [German].

¹⁰⁴ See the Austrian Journalists Club's Opinion on the draft law of the State Protection Law 2016, <https://www.parlament.gv.at/PAKT/VHG/XXV/SNME/SNME_04166/imfname_423521.pdf> accessed 15 March 2016 [German].

¹⁰⁵ § 6 Abs 1 SPG 1991: The Federal Office (Bundesamt) and the national offices (Landesämter) are responsible for 1. enhanced risk exploration; this is the observation of a grouping, when with regard to its existing structures and to recent developments in its surrounding it is to be expected that it will commit criminal acts connected to severe danger for public security especially connected to ideologically or religiously motivated violence
See § 6, 11 State Protection Law, <http://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00110/fname_395434.pdf> accessed 1 April 2016 [German].

to appeal against the specific measure. The StPO 1975 also refers to the journalists' right to protect sources and explicitly prohibits interferences within its scope of protection (see above).

8.4.2. Investigative Measures under the SPG 1991

The SPG 1991 are similarly accessible to the public and any individual can learn about its content, including precise and clear norms when and why investigative measures can be undertaken by the security police.¹⁰⁶ Search and seizure measures do not have to be ordered by a judicial authority, but the law provides a clear and precise legal basis for their admissibility as they are only legitimate under exigent circumstances.¹⁰⁷ Regarding undercover measures, especially the interception of communication, national legislation has to take a strict approach in order to prevent potential misuse of powers. According to the ECtHR case-law, legislation must explicitly state whose communication may be intercepted and on what grounds.¹⁰⁸ The law must provide for the procedure of protocolling and subsequently making written reports about the interception available for the judge and the suspect as well as for the duration of an interception.¹⁰⁹ In addition, the law must include effective means of control.¹¹⁰ All the criteria which are required to establish clear and foreseeable legislation are assumed to be incorporated in the SPG 1991.

8.4.3. Investigative Measures under the PStSG 2016

The PStSG 2016 may be easily accessed by the public, but raises concerns as far as the criteria of clarity, precision and foreseeability are concerned. It contains vague legal terms, dynamic references as well as a list of offences that leaves a wide investigation scope and might leave the individual puzzled because of its lack of comprehensibility and transparency. The compliance of the PStSG with the ECHR is questionable, since it lacks legal protection and clear norms about

¹⁰⁶ Franz Matscher, *Sicherheitspolizeigesetz und Grundrechtsschutz*, in Franz Matscher (Ed.), *Grundrechtsschutz und polizeiliche Effizienz – Das österreichische Sicherheitspolizeigesetz*, 35-36 [German].

¹⁰⁷ Ibid. 25.

¹⁰⁸ In *Malone v the United Kingdom* (App no 8691/79 (ECtHR, 2 August 1984) para 79) the ECtHR held that the legislation must „indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities“.

¹⁰⁹ In *Kruslin v France* (App no 11801/85 (ECtHR 24 April 1990) para 35) the ECtHR stressed the shortcomings of French legislation: „For example, the categories of people liable to have their telephones tapped by judicial order and the nature of the offences which may give rise to such an order are nowhere defined. Nothing obliges a judge to set a limit on the duration of telephone tapping. Similarly unspecified are the procedure for drawing up the summary reports containing intercepted conversations; the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge (who can hardly verify the number and length of the original tapes on the spot) and by the defence; and the circumstances in which recordings may or must be erased or the tapes be destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court.“

¹¹⁰ Daniel Einöckl, *Die Zulässigkeit von Informationseingriffen in der Rechtsprechung des EGMR*, in Armin Bammer et al., *Rechtsschutz gestern – heute – morgen*, 99 [German].

the maximum period of the storage of data and information and the absence of any obligation to inform an affected individual.¹¹¹ However, regarding the use of personal data, § 9 Abs 1 PStSG 2016 – in contrast to the initial draft – refers to the journalist right to protect sources as determined in the StPO 1975 and prohibits any interference with this right.

9. Can journalists rely on encryption and anonymity online to protect themselves and their sources against surveillance?

In accordance with the understanding of freedom of expression constituting a fundamental right, Austria took an active role in achieving the EU Guidelines on Freedom of Expression online and offline. Those guidelines, adopted by the Council of the European Union in May 2014, comprise goals and measures for the member states to promote ‘the right to privacy in the digital age’ as well as the ‘security of journalists’.¹¹²

Austria’s constitutional provisions do not provide for one comprehensive basic right to privacy. Instead, various constitutional laws proffer selective protection against certain acts of interference. As far as data monitoring is concerned, the following constitutional provisions should be mentioned:

- Art 10a Basic Law on the General Rights of Nationals 1867 [Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger, StGG]¹¹³ in conjunction with Art 8 ECHR encompass the protection against confidentiality of telecommunications and
- § 1 Data Protection Act 2000 [Datenschutzgesetz, DSG 2000] governs the fundamental right to data protection.

Art 10a StGG 1867 stipulates the confidentiality of content data, which is disseminated by means of telecommunication networks. Infringement of this constitutional right (e.g. phone tapping, eavesdropping operation) is only considered justified with a court order.¹¹⁴ Article 8 of the ECHR additionally grants protection against encroachment on master, traffic and location data § 92 Telecommunication Act 2003 [Telekommunikationsgesetz, TKG],¹¹⁵ e.g. name, phone

¹¹¹ See the statement of the Arbeitskreis Vorratsdaten Österreich, <<https://akvorrat.at/sites/default/files/PStSG-4.pdf>> accessed 20 May 2016 [German].

¹¹² See ‘EU Human Rights Guidelines on Freedom of Expression Online and Offline’ at: <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/142549.pdf/> accessed 20 April 2016 [German].

¹¹³ See the full legal text of Austria’s Basic Law at: <https://www.vfgh.gv.at/cms/vfgh-site/english/downloads/englishverfassung.pdf>.

¹¹⁴ See, Mayer, Kucsko-Stadlmayer, Stöger, *Bundesverfassungsrecht* (11th edn, Manz 2015), 758 [German].

¹¹⁵ See full legal text of the Telecommunication Act 2003 at: https://www.ris.bka.gv.at/Dokumente/ErV/ERV_2003_1_70/ERV_2003_1_70.pdf.

number, IP-address. In those cases, infringement is permitted merely within the realm of substantive reservation of statutory powers. See for instance § 53 Abs 3a SPG.¹¹⁶

On a simple legal level, § 93 TKG 2003 governs the obligation for electronic communication operators to secrecy of communications, including not only content data but also traffic data. § 93 Abs 5 points out that confidentiality of communication must comply with § 31 MedienG 1981.

The DSG 2000 regulates the obligation of secrecy and protection of users' personal data in so far as there is a legitimate interest in doing so.¹¹⁷ 'Personal data' refers to any detail relating to an identified or identifiable individual. Any usage of personal data constitutes an infringement of the fundamental right to non-disclosure thereof.¹¹⁸ Moreover, any use of such data must be based on statutory provisions and pass the proportionality test.

§ 48 DSG 2000 encompasses the so-called 'media privilege', which ensures the protection of journalistic sources.¹¹⁹ This clause exempts media undertakings (especially newspapers, periodicals, broadcasting companies, including online-coverage), media services (news agencies) and media actors (editors, reporters, freelance journalists) from the application of most DSG 2000 provisions.

The privilege includes the following aspects:

- Those media entities may not be impeded when conducting journalistic research and media coverage.
- They cannot be prompted to correct or delete articles or other media coverage.
- Furthermore, media outlets may not be requested to provide information about gathering and processing of personal data in connection with journalistic purposes (for instance about a certain source).¹²⁰

With regard to specific legislation dealing with the usage of encryption services and the granting of online anonymity, the Austrian approach is similar to the protection of whistle-blowers. Both matters pose relatively new legal challenges, which have not yet been tackled with a specific legislative act. At the same time there are other measures that seek for adequate protection.

¹¹⁶Walter Berka, *Verfassungsrecht*, (5th edn, Verlag Österreich 2014) 490 [German].

¹¹⁷Cf. § 4 Z 3 defines 'affected person' as individual whose data is utilized.

¹¹⁸'Data usage' in § 4 DSG 2000 is a general term pertaining inquiry, processing, transfer, storage, deletion etc..

¹¹⁹For a detailed analysis of § 48 DSG 2000 see Arnaud Berthou, *Das Medienprivileg im Datenschutzrecht – Verfassungs- und unionsrechtliche Problemstellungen* (diploma thesis), 2012 at: <<http://www.it-law.at/wp-content/uploads/2014/09/Diplomarbeit-Arnaud-Berthou2.pdf/>> accessed 25 April 2016 [German].

¹²⁰See website of the Austrian Data Protection Authority at <<https://www.dsb.gv.at/site/8143/default.aspx/>> accessed 25 April 2016.

Neither the E-Commerce Act 2001 [E-Commerce Gesetz, ECG]¹²¹ nor the Telecommunication Act frame rules on secure online communication, particularly regarding the restriction of the use of encryption or anonymity tools.

The Order on Private Mobile Radio 2004 [Betriebsfunkverordnung, BFV] had governed that encryption systems were allowed within the wireless network of organizational units of the Federal Ministry of the Interior. In its 2004 version, this norm was not incorporated anymore.

On the contrary, the Austrian Government pursues a policy that builds on establishing public awareness about online and digital security respectively. Thus, the overall strategy is to educate the public about secure and private communication, rather than undermining the use of anonymity and privacy enhancing tools through legislation.

In the June 2015 report to the Human Rights Council of the Special Rapporteur on Encryption, Anonymity and the Freedom of Expression, the Permanent Mission of Austria to the United Nations in Geneva laid out a compilation of the governments' campaigns and online platforms mainly offering information and consultation concerning internet safety and responsible use thereof.¹²²

Due to the fact that there is no regulation by law on that very subject matter, there are no specific legal definitions to mention.

§18 Abs 1 ECG deals with liability issues of service providers and violations will lead to administrative sanctions. It regulates that service providers 'shall not be obligated to monitor in a general fashion the information stored, transmitted or made available by them or to actively research circumstances indicating illegal activity'. In other words, §18 Abs 1 does not impose a general statutory monitoring duty but establishes disclosure- and notification obligations (e.g. for courts). Subsections two to four state that if certain prerequisites are satisfied, service providers must facilitate the identification of their users. Considering that the legal norm is subject to a threefold test, its application is of restrictive nature. It is a balancing act between public interests, preserving constitutional rights to privacy as well as data protection and proportionality.

Additionally, in regard to criminal cases, service providers are deemed to be non-suspect third parties, thus the rules of testimony do not apply. Therefore, the courts cannot take any coercive action.

¹²¹ See full legal text of the E-Commerce Act 2001 at:

https://www.ris.bka.gv.at/Dokumente/ErV/ERV_2001_1_152/ERV_2001_1_152.html.

¹²² [This report](#) (A/HRC/29/32) may be found at

<<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/CallForSubmission.aspx/>> accessed 21 April 2016 [German].

However, the growing concerns about national security threats, especially in the face of recent terror attacks, have placed the Austrian legislation deliberations regarding surveillance measures and cryptography in a state of transformation.¹²³

Despite continuous security issues we are facing in the digital age, Austria's position still remains the same in its core: privacy is a key pillar of democracy and, consequently, a general ban of anonymisation services is negated. Nonetheless, only one week after the passing of the new State Protection Law (see question 8), the Justice Minister, Dr. Wolfgang Brandstetter announced a legislative initiative to deepen and expand surveillance of internet communication via telephone, e-mail and short messaging services. In an interview with 'Die Presse'¹²⁴ he confirms the plan to implement the possibility of monitoring encrypted online communication services such as Skype and Whatsapp. Dr. Susanne Reindl-Krauskopf, head of the Austrian Center for Law Enforcement Sciences (ALES) agrees stating in an interview¹²⁵ that, in order to carry out law enforcement effectively, it will be necessary to improve regulations on telephone surveillance with a focus on access to encoded data.

Whether there will be exceptions especially for lawyers and journalists is unclear at the moment, but the trend obviously is towards more extensive surveillance by state authorities. The challenge will consist in finding a common ground and a well-balanced legal framework which would be sufficient to enable state authorities to fulfil their duties especially in regard to national security issues, while at the same time acknowledging the need to protect journalistic sources.

10. Are whistle-blowers explicitly protected under law protecting journalistic sources? Is there another practice protecting whistle-blowers? Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

In Austria, "whistleblowing" is a relatively new phenomenon. However, following the implementation of the Sarbanes-Oxley Act (SOX) in the USA in 2002, it became a hotly debated

¹²³ Report from February 2016 on cyber security:

<<https://www.cert.at/static/downloads/reports/cert.at-jahresbericht-2015.pdf/>> accessed 21 April 2016 [German].

¹²⁴ Press article including the interview with Austria's Justice Minister Dr. Brandstetter may be found under:

<http://diepresse.com/home/panorama/oesterreich/4915917/Trotz-Verschluslung_Brandstetter-will-Skypen-abhoren?parentid=5962984&showMask=1/> accessed 21 April 2016 [German].

¹²⁵ Press article including the interview with Dr. Susanne Reindl-Krauskopf is available at:

<http://diepresse.com/home/recht/rechtallgemein/4877068/Terrorabwehr_Bei-schwersten-Taten-Computer-infiltrieren/> accessed 21 April 2016 [German].

topic.¹²⁶ The SOX regulations obliged Austrian subsidiaries of US based corporations to establish whistleblowing systems within the framework of their corporate governance.

Although the subject-matter of whistleblowing involves a wide spectrum of legal problems (for instance white-collar crimes, corruption, data protection and labour laws), so far no comprehensive general legislation has been passed to regulate these issues for the public and the private sectors. In other words, the legislative efforts to change the legal situation have not yet resulted in the adoption of new legislation explicitly protecting whistle-blowers.

Even though the term “whistleblowing” is now all but commonplace in the German language, so far, no legal definition of the term has been developed.¹²⁷ Whistle-blower protection law (except from the protection law for public servants – see below) can only be derived from many different statutory regulations.

However, the common understanding of whistleblowing is that it consists in exposing malfeasance, for instance white-collar crime, corruption, social fraud, breaches of financial reporting regulations, balance sheet violations, or money laundering. Typically, whistle-blowers detect problems on their own, as they have direct access to information at their place of work.¹²⁸ Thanks to the efforts made by Austria to implement measures to protect whistle blowers, its level of achievement compared to other EU member states was rated ‘partial’ in the 2014 Transparency International report on “Legal Protection for Whistle-blowers in the EU”.¹²⁹

§ 53a of the Federal Civil Service Act 1979 [Beamten-Dienstrechtsgesetz, BDG] is the first provision that provides protection for public servants, who come forward and report an instance of malfeasance. Since according to § 53 BDG public servants are obliged to disclose crimes related to their office, statutory protection was paramount and, as a result, detrimental actions against government employees are now prohibited. As laid out in the annotations to the ministerial draft,¹³⁰ the aim was to protect employees who act as informants from sanctions or other forms of discrimination by their employer in order to effectively fight corruption.

It is crucial to distinguish between internal and external whistleblowing.

¹²⁶ The Sarbanes- Oxley Act of 2002 is available at: <https://www.sec.gov/about/laws/soa2002.pdf>.

¹²⁷ Shahanaz Müller, ‘*Providing an Alternative to Silence*’ – Country Report Austria (2013): <<http://www.asktheeu.org/de/request/994/response/5855/attach/2/Country%20report%20Austria%20Redacted.pdf> /> accessed 25 April 2016.

¹²⁸ Silvia Traunwieser, ‘*Whistleblowing – Segen oder Fluch?*’, in Gruber/N. Raschauer (Hrsg), *Whistleblowing* (Manz 2015) [German].

¹²⁹ Mark Worth, ‘*Whistleblowing in Europe, Legal Protection for whistle-blowers in the EU*’, Transparency International, 2013: <http://www.stt.lt/documents/soc_tyrimai/2013_WhistleblowingInEurope_EN.pdf /> accessed 23 April 2016.

¹³⁰ 326/ME XXIV. KP – Annotations to the Ministerial Draft (Ministerialentwurf – Erläuterungen) [German] <http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00326/fname_233998.pdf (16.08.2012), p. 10. /> accessed 25 April 2016.

Internal whistleblowing involves identification of problems within an entity, whereas external whistleblowing refers to sharing information about grievances and crimes with the media or other third party supervisory authorities.

External whistleblowing is particularly well protected by a secure whistleblowing system.¹³¹ After a trial period of two years, the so-called 'Whistle-blower' website¹³² was launched officially in January 2016. Following the package of new federal laws (*Transparenzpaket*) passed in 2012, this communication platform was established by the Public Prosecutor's Office for Combatting Economic Crimes and Corruption [Wirtschafts- und Korruptionsstaatsanwaltschaft, WKStA].¹³³ It serves as a prosecuting body combating large-scale white collar crimes and corruption.¹³⁴ The platform provides whistle-blowers a secure way to convey information via a non-traceable virtual mailbox. It allows for anonymous communication with the whistle-blower. Absolute protection of identity is guaranteed. However, if a whistle-blower wishes to be identified, he may disclose his identity using a special virtual key. In such a case that individual will be able to invoke the rule of lenity in order to receive protection. The relevant provision can be found in § 209a StPO.

The lenity rule only applies to an individual who has not participated in the crime disclosed by the whistle-blower. Voluntary cooperation with the prosecuting authority may free the whistle-blower of criminal charges.

As far as **internal** whistleblowing is concerned, it is important to stress that private entities are eager to implement their own whistle-blower hotlines as part of their internal control and compliance systems, but there is no general statutory obligation to do so. Their purpose is to give employees an opportunity to disclose wrongdoing internally. Consequently, responsible individuals are able to act on the reported acts of malfeasance in a timely fashion and implement measures necessary to eradicate them. § 37 of the Austrian Labour Constitutional Act 1974 [Arbeitsverfassungsgesetz – ArbVG] grants employees some basic protection against bad consequences of disclosures. In other words, whistle blowers are protected from termination of their employment contract.

In general, internal hotlines are permitted, subject to certain limitations set by data protection and labour law provisions. Setting up anonymous whistleblowing hotlines in private entities requires a previous permission of the data protection authority (*Datenschutzbehörde*, DSB). The employer has to prove an overriding legitimate interest in using such a hotline. Since

¹³¹ [The web-based reporting system is called Business Keeper Monitoring System \(BKMS\).](#)

¹³² Whistle-blower Homepage is available at:

<https://www.bkms-system.net/bkwebanon/report/clientInfo?cin=1at21&language=ger>.

¹³³ For more details, see Austria to the EU 'Anti-Corruption Report', COM(2014) 38 final, Annex 20, page 4 at: <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_austria_chapter_en.pdf> accessed 23 April 2016.

¹³⁴ See:

https://www.justiz.gv.at/web2013/file/8ab4ac8322985dd501229ce2e2d80091.de.0/broschuere_englisch_downloadversion.pdf.

implementation of a whistleblowing hotline is a measure, which affects human dignity, the DSB requires a works council agreement (*Betriebsvereinbarung*); it is binding written agreement between the owner of the company and the worker's council. Either statutes or collective agreements determine the specific matters that have to be regulated by such works council agreements. Particularly measures affecting human dignity require works council's consent (§ 96 Abs 1 Z 3 ArbVG). In its ruling from 2012, the DSK (at that time the DSB was named DSK) held that implementation of whistleblowing-systems is subsumed under that norm requiring a works council agreement.¹³⁵

To sum up, it can be stated that Austria is making efforts to ensure protection of whistle-blowers. On the international level, in April 2014, the Committee of Ministers of the Council of Europe adopted a Recommendation on the protection of whistle-blowers.¹³⁶ It provides the first European definition of whistleblowing¹³⁷ and, in the Appendix, includes guidelines and principals for member states to review and amend their laws. When these principles are compared with the existing legal framework, it becomes clear that Austria falls short of providing a legal definition of whistleblowing and a clear standalone legislation, especially in the private sector. But it should be noted that there have been some positive developments as well. The explicit implementation of the Whistle-blower-Homepage in § 2a Abs 6 of the Public Prosecutor's Act [Staatsanwaltschaftsgesetz, StAG], which came into force on January 1st 2016, was a significant step towards granting whistle-blowers more protection. One of the key points in the Recommendation highlights the importance of member states in facilitating reporting, encouraging disclosures, and maintaining a high level of confidentiality of the whistle-blower's identity.

11. Conclusion

The right of the journalists not to disclose their sources of information is expressly provided for in Austrian law by § 157 Abs 1 Z 4 StOP 1975 and § 31 MedienG 1981. Moreover, in a number of important OGH decisions, this right has been declared to be an aspect of the freedom of

¹³⁵ The decision DSK 14.12.2012 K600.320- 005/0003- DVR/2012 is available at:

<https://www.ris.bka.gv.at/Dokumente/Dsk/DSKTE_20121214_K600320_005_0003_DVR_2012_00/DSKTE_20121214_K600320_005_0003_DVR_2012_00.html/> accessed 25 April 2016 [German].

For a more in depth analysis of this ruling see: Rainer Knyrim, Renate Riedl, 'Erfordernis einer Betriebsvereinbarung bei Genehmigung eines Hinweisgebersystems bei der Datenschutzkommission' (DRdA 4/2013 August) at:

<http://www.preslmayr.at/tl_files/Publikationen/2013/Erfordernis%20einer%20Betriebsvereinbarung%20bei%20Genehmigung%20eines%20Hinweisgebersystems%20bei%20der%20DSK_Knyrim_Riedl_DrdA_42013.pdf/> accessed 25 April 2016 [German].

¹³⁶ Recommendation CM/Rec (2014)7 of the Committee of Ministers to member states on the protection of whistle-blowers

<[http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2014\)7E.pdf/](http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2014)7E.pdf/)> accessed 25 April 2016.

¹³⁷ "Whistle-blower" means any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector'.

expression as guaranteed under art 10 para 1 ECHR. The latter is directly applicable in Austria and has the effect of a ban on state action aimed at forcing journalists to disclose their sources. As regards criminal legislation, the Austrian criminal procedure law allows a journalist to refuse to testify as a witness in order to protect the identity of his source (§157 Abs 1 Z 4 StPO). However, this provision applies only if the journalist concerned is called to testify as a witness.

All the material a journalist has received from a source when carrying out his professional activities is protected under §157 Abs 1 Z 4 StPO. This said, it must be stressed that material researched by the journalist himself is not protected. The right of journalists not to disclose their sources is also guaranteed under the procedural provisions of §31 MedienG. In contrast to the provisions of the StPO (which is applicable only to criminal cases), it may be invoked in all judicial proceedings. It contains a testimonial privilege and guarantees to a distinctive group of people working in the media industry the right to refuse to disclose confidential sources. Any person who passes information onto a journalist is a source within the meaning of §31 MedienG.

§31 MedienG does not distinguish between confidential and non-confidential information; it is applicable to both kinds equally. Furthermore, it does not require balancing the interests and applies strictly under all circumstances.

There is no provision in Austrian law which would prohibit journalists from disclosing confidential sources. A journalist has the right not to disclose his source, but he is not obliged to keep their identity secret.

The profession of journalism is regulated in a separate statute, the JournalistenG 1920. §1 Abs 1 JournalistenG specifies to whom its provision shall apply. §31 MedienG offers protection to media owners, editors, journalistic staff, and other, non-journalistic employees of a media undertaking or a media service. While the groups of persons caught by §1 Abs 1 JournalistenG and §1 MedienG respectively partly overlap, the MedienG grants a testimonial privilege to further media actors.

Concerning safeguards for the protection of journalistic sources, Austrian law provides merely a right to remain silent (§31 MedienG). This means the trial does not become subject of a nullity appeal. Moreover there is no process or institution to guarantee or supervise the exercise of this right. All in all, there are neither safeguards to assist the protection of journalistic sources, nor is there a self-regulatory system.

The OGH has taken a strong position and declared that the protection of journalistic sources is an aspect of the freedom of expression and, for this reason, a right with constitutional status. This means that no matter how pressing the disclosure of source of information may appear, a breach of §31 MedienG 1981 will not be justifiable.

As to the question of conformity of Austrian national legislation on non-disclosure with the principles laid down in Recommendation No R (2007), it may be said that the provisions of §31 MedienG and §157 Abs 1 Z 4 StPO not only achieve the goals set in the Recommendation, but also go beyond them in offering media actors even more extensive privileges.

Recently, Austria passed the PStSG 2016, which aims at strengthening measures to counter terrorism, extremism, espionage or any threat against the state. The Austrian Journalists Club has, however, voiced criticism of the new law, pointing out that no provisions to guarantee professional secrecy have been included.

Austria took an active role in achieving the EU Guidelines on Freedom of Expression online and offline. Those guidelines comprise goals and suggested measures for the member states to promote 'the right to privacy in the digital age' as well as the 'security of journalists'. Since there is no legal regulation on this subject-matter, there are no specific legal definitions to discuss.

In Austria, the phenomenon of "whistleblowing" is relatively new; nonetheless, it has become a hot topic in recent years. It can be said that Austria is making efforts to grant protection to whistle-blowers and it should be noted that there have been some positive developments. An important step towards granting whistle blowers more protection was the explicit anchoring of the Whistle-blower-Homepage in §2a Abs 6 StAG 1986.

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12. Table of Provisions

Provisions in native language	Corresponding translations
Strafprozessordnung 1975	Code of Criminal Procedure 1975
<p>§ 5 (1) Kriminalpolizei, Staatsanwaltschaft und Gericht dürfen bei der Ausübung von Befugnissen und bei der Aufnahme von Beweisen nur soweit in Rechte von Personen eingreifen, als dies gesetzlich ausdrücklich vorgesehen und zur Aufgabenerfüllung erforderlich ist. Jede dadurch bewirkte Rechtsgutbeeinträchtigung muss in einem angemessenen Verhältnis zum Gewicht der Straftat, zum Grad des Verdachts und zum angestrebten Erfolg stehen.</p>	<p>§ 5 (1) Criminal police, the prosecutor and the court, in the exercise of powers and in the acquisition of evidence, may only intervene in the right of a person to the extent required and expressly prescribed by law and necessary for the performance of work. Each thus caused infringement of legally protected rights must be proportionate to the severity of the offense, to the degree of suspicion and the desired success.</p>
<p>§ 47a Rechtsschutzbeauftragter</p> <p>(1) Der Bundesminister für Justiz hat zur Wahrnehmung besonderen Rechtsschutzes nach diesem Bundesgesetz nach Einholung eines gemeinsamen Vorschlages des Präsidenten des Verfassungsgerichtshofes, des Vorsitzenden der Volksanwaltschaft und des Präsidenten des Österreichischen Rechtsanwaltskammertages einen Rechtsschutzbeauftragten sowie die erforderliche Anzahl von Stellvertretern mit deren Zustimmung für die Dauer von drei Jahren zu bestellen; Wiederbestellungen sind zulässig. Der Vorschlag hat zumindest doppelt so viele Namen zu enthalten wie</p>	<p>§ 47a The Officer for Legal Protection</p> <p>(1) The Federal Minister of Justice shall appoint an officer for legal protection as well as the required number of deputy officers nominated jointly by the President of the Constitutional Court, the Chairman of the Ombudsman Board, and the President of the Austrian Bar Association for a period of three years; reappointment is permissible. There have to be at least twice as many nominees as there are positions to be filled.</p>

<p>Personen zu bestellen sind.</p> <p>(2) Der Rechtsschutzbeauftragte und seine Stellvertreter müssen besondere Kenntnisse und Erfahrungen auf dem Gebiet der Grund- und Freiheitsrechte aufweisen und mindestens fünf Jahre in einem Beruf tätig gewesen sein, in dem der Abschluss des Studiums der Rechtswissenschaften Berufsvoraussetzung ist und dessen Ausübung Erfahrungen im Straf- und Strafverfahrensrecht mit sich brachte</p> <p>(4) Der Rechtsschutzbeauftragte ist in Ausübung seines Amtes unabhängig und an keine Weisungen gebunden. Er unterliegt der Amtsverschwiegenheit. Seine Stellvertreter haben gleiche Rechte und Pflichten.</p>	<p>(2) The Officer for Legal Protection and his deputies must have special knowledge and experience in the field of fundamental and civil rights and must have at least five years' professional experience in a position in the field of criminal law or criminal procedure law where a qualifying law degree is one of the professional requirements.</p> <p>...</p> <p>(4) In the exercise of his office, the Officer for Legal Protection is independent and not bound by any instructions. He is under obligation to maintain official secrecy. His deputies have the same rights and obligations.</p>
<p>§121 (2) ... Einer Durchsuchung in ausschließlich der Berufsausübung gewidmeten Räumen einer der in § 157 Abs. 1 Z 2 bis 4 erwähnten Personen ist von Amts wegen ein Vertreter der jeweiligen gesetzlichen Interessenvertretung beziehungsweise der Medieninhaber oder ein von ihm namhaft gemachter Vertreter beizuziehen.</p>	<p>§ 121 (2) ... Without prompting from the interested party, a search of areas used by persons mentioned in § 157 Abs 1 Z 2 – 4 exclusively for their professional activities has to be carried out in presence of a representative of the relevant legal interest representation, or a representative of the media owners or a representative designated by him.</p>

<p>§ 144</p> <p>(2) Die Anordnung oder Durchführung der in diesem Hauptstück enthaltenen Ermittlungsmaßnahmen ist auch unzulässig, soweit dadurch das Recht einer Person, gemäß § 157 Abs. 1 Z 2 bis 4 die Aussage zu verweigern, umgangen wird.</p> <p>(3) Ein Umgehungsverbot nach Abs. 1 erster Satz oder Abs. 2 besteht insoweit nicht, als die betreffende Person selbst der Tat dringend verdächtig ist. In einem solchen Fall ist für die Anordnung und Durchführung einer Ermittlungsmaßnahme in den Fällen des §§ 135 Abs. 2 bis 3 sowie 136 Abs. 1 Z 2 und 3 eine Ermächtigung des Rechtsschutzbeauftragten (§ 147 Abs. 2) Voraussetzung.</p>	<p>§ 144</p> <p>(2) The order or implementation of investigative measures contained in this chapter are impermissible in so far as the right of a person to remain silent in accordance with § 157 Abs. 1 Z 2 - 4 would thus be circumvented.</p> <p>(3) The prohibition of circumvention under to Abs 1 first sentence or Abs 2 does not apply when the person concerned is under compelling suspicion. In such a case, for the order and implementation of an investigative measure under § 135 Abs 2 to 3 and § 136 Abs 1 Z 2 and 3, an authorisation of the Officer for Legal Protection (§ 147 Abs 2) is required.</p>
<p>§ 147 (1)</p> <p>...</p> <p>5. Dem Rechtsschutzbeauftragten obliegt die Prüfung und Kontrolle der Anordnung, Genehmigung, Bewilligung und Durchführung einer Auskunft über Daten einer Nachrichtenübermittlung, einer Überwachung von Nachrichten und einer optischen und akustischen Überwachung von Personen nach den §§ 135 Abs. 2 und 3, 136 Abs. 1 Z 2, die gegen eine Person gerichtet ist, die gemäß § 157 Abs. 1 Z 2 bis 4 berechtigt ist, die Aussage zu verweigern (§ 144 Abs. 3).</p>	<p>§147 (1)</p> <p>...</p> <p>5. The Officer for Legal Protection's task is to monitor the order or authorisation of the obtaining of information about data of a communication, an observation of a person in accordance with §§ 135 Abs 2 and 3, 136 Abs 1 Z 2 which is directed against an individual that has the right to refuse to give information according to § 157 Abs 1 Z 2 - 4 (§ 144 Abs. 3)</p>

<p>§ 157 (1) Zur Verweigerung der Aussage sind berechtigt:</p> <p>4. Medieninhaber (Herausgeber), Medienmitarbeiter und Arbeitnehmer eines Medienunternehmens oder Mediendienstes über Fragen, welche die Person des Verfassers, Einsenders oder Gewährsmannes von Beiträgen und Unterlagen betreffen oder die sich auf Mitteilungen beziehen, die ihnen im Hinblick auf ihre Tätigkeit gemacht wurden</p>	<p>§ 157 (1) Entitled to refuse to testify are:</p> <p>4. Media owners, editors, copy editors and employees of a media undertaking or media service in respect of questions concerning the person of the author, sender, or source of articles and documentation, or any information which has reached them in their professional capacity.</p>
<p>§ 209a (1) Die Staatsanwaltschaft kann nach den §§ 200 bis 203 und 205 bis 209 vorgehen, wenn ihr der Beschuldigte freiwillig sein Wissen über Tatsachen offenbart, die noch nicht Gegenstand eines gegen ihn geführten Ermittlungsverfahrens sind und deren Kenntnis wesentlich dazu beiträgt,</p> <p>1. die Aufklärung einer der Zuständigkeit des Landesgerichts als Schöffengericht oder Geschworenengericht oder der WKStA (§§ 20a und 20b) unterliegenden Straftat entscheidend zu fördern, oder</p> <p>2. eine Person auszuforschen, die in einer kriminellen Vereinigung, kriminellen Organisation oder terroristischen Organisation führend tätig ist oder war.</p>	<p>§209a (1) The public prosecutor may proceed in accordance to §§ 200 to 203 und 205 to 209, if the accused voluntarily reveals his knowledge about facts which are not yet the subject of the investigative proceedings against him and the knowledge of which substantially contributes to</p> <p>1. solving a crime that falls in the competence of a regional court acting as a lay assessor or jury court or in the competence of the WKStA (§§ 20a und 20b), or</p> <p>2. finding a person who is or was an active and leading member of a criminal association, a criminal organisation, or a terrorist organisation.</p>

Journalistengesetz 1920	Journalists Act 1920
<p>§ 1 (1) Die Vorschriften dieses Gesetzes gelten für alle mit der Verfassung des Textes oder mit der Zeichnung von Bildern betrauten Mitarbeiter einer Zeitungsunternehmung, die mit festen Bezügen angestellt sind und diese Tätigkeit nicht bloß als Nebenbeschäftigung ausüben (Redakteure, Schriftleiter).</p> <p>(2) Die Vorschriften dieses Gesetzes gelten sinngemäß für die Mitarbeiter einer Nachrichtenagentur, einer Rundfunkunternehmung (Ton- oder Bildfunk) oder einer Filmunternehmung, die mit der Gestaltung des Textes oder mit der Herstellung von Bildern (Laufbildern) über aktuelles Tagesgeschehen betraut und mit festen Bezügen angestellt sind und diese Tätigkeit nicht bloß als Nebenbeschäftigung ausüben</p>	<p>§1 (1) The provisions of this statute shall apply to all employees of a newspaper enterprise who are charged with the composition of texts or the drawing of pictures, and who are employed with a fixed salary and not merely as a matter of secondary occupation (general editors, editors).</p> <p>(2) The provisions of this statute apply by analogy to employees of a press agency, a broadcasting company (sound or image transmission) or a film production company, who are charged with the composition of texts or the production of images about everyday events, and who are employed with a fixed salary and not merely as a matter of secondary occupation.</p>

Mediengesetz 1980	Media Act 1980
<p>§ 1 (1) Im Sinn der Bestimmungen dieses Bundesgesetzes ist</p> <p>1. „Medium“: jedes Mittel zur Verbreitung von Mitteilungen oder Darbietungen mit gedanklichem Inhalt in Wort, Schrift, Ton oder Bild an einen größeren Personenkreis im Wege der Massenherstellung oder der Massenverbreitung;</p>	<p>§ 1 (1) In terms of this federal act, terms listed hereunder shall mean:</p> <p>1. “medium”: any means [used] to disseminate information or representations with intellectual content in word, writing, in form of sound or image, to a major audience by way of mass production or mass dissemination;</p>

<p>1a. „Medieninhalte“: Mitteilungen oder Darbietungen mit gedanklichem Inhalt in Wort, Schrift, Ton oder Bild, die in einem Medium enthalten sind;</p> <p>...</p> <p>6. „Medienunternehmen“: ein Unternehmen, in dem die inhaltliche Gestaltung des Mediums besorgt wird sowie</p> <p>a) seine Herstellung und Verbreitung oder</p> <p>b) seine Ausstrahlung oder Abrufbarkeit entweder besorgt oder veranlasst werden;</p> <p>7. „Mediendienst“: ein Unternehmen, das Medienunternehmen wiederkehrend mit Beiträgen in Wort, Schrift, Ton oder Bild versorgt;</p> <p>8. „Medieninhaber“: wer</p> <p>a) ein Medienunternehmen oder einen Mediendienst betreibt oder</p> <p>b) sonst die inhaltliche Gestaltung eines Medienwerks besorgt und dessen Herstellung und Verbreitung entweder besorgt oder veranlasst oder</p> <p>c) sonst im Fall eines elektronischen Mediums dessen inhaltliche Gestaltung besorgt und</p>	<p>1a. “media content”: information or representations with intellectual content, in word, writing, in form of sound or image contained in a medium;</p> <p>...</p> <p>6. “media undertaking”: an undertaking engaging in or causing a third party to engage in shaping the medium’s content and</p> <p>a) its production and distribution or</p> <p>b) its broadcast or availability for download.</p> <p>7. “media service”: an undertaking procuring features in word, writing, sound or image for media companies on a recurrent basis;</p> <p>8. “media owner”: one who</p> <p>a) engages in the operation of a media company or a media service or</p> <p>b) otherwise engages in or causes third parties to engage in the creation of a medium’s content and its production and dissemination, or</p> <p>c) otherwise in case of an electronic medium</p>
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<p>dessen Ausstrahlung, Abrufbarkeit oder Verbreitung entweder besorgt oder veranlasst oder</p> <p>d) sonst die inhaltliche Gestaltung eines Mediums zum Zweck der nachfolgenden Ausstrahlung, Abrufbarkeit oder Verbreitung besorgt;</p> <p>9. „Herausgeber“: wer die grundlegende Richtung des periodischen Mediums bestimmt;</p> <p>10. „Hersteller“: wer die Massenherstellung von Medienwerken besorgt;</p> <p>11. „Medienmitarbeiter“: wer in einem Medienunternehmen oder Mediendienst an der inhaltlichen Gestaltung eines Mediums oder der Mitteilungen des Mediendienstes journalistisch mitwirkt, sofern er als Angestellter des Medienunternehmens oder Mediendienstes oder als freier Mitarbeiter diese journalistische Tätigkeit ständig und nicht bloß als wirtschaftlich unbedeutende Nebenbeschäftigung ausübt;</p>	<p>engages in or causes third parties to engage in the creation of its content and its production and dissemination, or</p> <p>d) otherwise engages in the creation of the content of a medium for the purpose of subsequently broadcasting it, making it available for download or disseminating it;</p> <p>9. “editor”: one who decides on the basic line represented in a periodically published medium;</p> <p>10. “producer”: one who engages in the mass production of media products;</p> <p>11. “copy editor”: one who is engaged as a journalist in editing the contents of a medium in a media undertaking or media service or who engages in such journalistic activity as a free professional on a permanent basis and not as a matter of insignificant secondary occupation;</p>
<p>§ 31 (1) Medieninhaber, Herausgeber, Medienmitarbeiter und Arbeitnehmer eines Medienunternehmens oder Mediendienstes haben das Recht, in einem Strafverfahren oder sonst in einem Verfahren vor Gericht oder einer Verwaltungsbehörde als Zeugen die Beantwortung von Fragen zu verweigern, die die Person des Verfassers, Einsenders oder Gewährsmannes von Beiträgen und Unterlagen oder die ihnen im Hinblick auf ihre Tätigkeit gemachten Mitteilungen betreffen.</p> <p>(2) Das im Abs. 1 angeführte Recht darf nicht umgangen werden, insbesondere dadurch, daß dem Berechtigten die Herausgabe von Schriftstücken, Druckwerken, Bild- oder Tonträgern oder Datenträgern, Abbildungen und</p>	<p>§ 31 (1) Media owners, editors, copy editors and employees of a media undertaking or media service, appearing as witnesses in criminal proceedings or other proceedings before court or an administrative authority, have the right to refuse to answer questions concerning the person of the author, sender, or source of articles and documentation, or any information which has reached them in their professional capacity.</p> <p>(2) The right as stated in Abs 1 must not be circumvented by an order made to the person enjoying this right to surrender documents, printed matter, image, sound or data carriers,</p>

<p>anderen Darstellungen mit solchem Inhalt aufgetragen wird oder diese beschlagnahmt werden.</p> <p>(3) Inwieweit die Überwachung von Nachrichten von Teilnehmeranschlüssen eines Medienunternehmens und eine optische oder akustische Überwachung von Personen unter Verwendung technischer Mittel in Räumlichkeiten eines Medienunternehmens zulässig sind, bestimmt die Strafprozeßordnung.</p>	<p>illustrations or other representations of such content or by confiscating them.</p> <p>(3) The extent to which the monitoring of messages send through subscriber lines of a media undertaking, or optical and acoustical surveillance of persons which is carried out using technical devices on the premises of a media undertaking, is permissible, is determined by the Code of Criminal Procedure.</p>
<p>Sicherheitspolizeigesetz 1991</p>	<p>Security Police Act 1991</p>
<p>§ 16 (1) Eine allgemeine Gefahr besteht</p> <p>1. bei einem gefährlichen Angriff (Abs. 2 und 3) oder</p> <p>2. sobald sich drei oder mehr Menschen mit dem Vorsatz verbinden, fortgesetzt gerichtlich strafbare Handlungen zu begehen (kriminelle Verbindung).</p>	<p>§ 16 (1) A general risk exists</p> <p>1. in case of a dangerous attack (Abs 2 and 3) or</p> <p>2. as soon as three or more people join together with the intention to commit offences (criminal association).</p>
<p>§ 56 (4) Die Übermittlung personenbezogener Daten an andere Behörden als Sicherheitsbehörden ist unzulässig, wenn für die übermittelnde Stelle Hinweise bestehen, dass hierdurch der Schutz des Redaktionsgeheimnisses (§ 31 Abs. 1 Mediengesetz) umgangen würde.</p>	<p>§ 56 (4) The transfer of personal data to authorities other than security authorities is not permitted if the transferring authority has received indications that the protection of editorial secrecy (§ 31 para. 1 Media Act) would be thus circumvented.</p>

<p>Polizeiliches Staatsschutzgesetz 2016</p>	<p>State Protection Act 2016</p>
<p>§ 6 (1) Dem Bundesamt und den Landesämtern obliegen</p> <p>1. die erweiterte Gefahrenforschung; das ist die Beobachtung einer Gruppierung, wenn im Hinblick auf deren bestehende Strukturen und auf zu gewärtigende Entwicklungen in deren Umfeld damit zu rechnen ist, dass es zu mit schwerer Gefahr für die öffentliche Sicherheit verbundener Kriminalität, insbesondere zu weltanschaulich oder religiös motivierter Gewalt kommt;</p> <p>2. der vorbeugende Schutz vor verfassungsgefährdenden Angriffen durch eine Person, sofern ein begründeter Gefahrenverdacht für einen solchen Angriff besteht;</p>	<p>§ 6 (1) The Federal Office and the State Offices are responsible for</p> <p>1. extensive investigation of risks, ie observation of a group, when, considering its existing structures and the anticipated developments in its environment, it is to be expected that criminal acts posing severe danger for public security, and especially acts of ideologically or religiously motivated violence, will occur.</p> <p>2. preventive protection against attacks which may pose a danger for the constitutional order in so far as there is a well-founded suspicion that such an attack may occur</p>
<p>§ 9 (1) (...) Bei Ermittlungen von personenbezogenen Daten nach diesem Bundesgesetz ist ein Eingriff in das von § 157 Abs. 1 Z 2 bis 4 Strafprozessordnung – StPO, BGBl. Nr. 631/1975, geschützte Recht nicht zulässig. § 157 Abs. 2 StPO gilt sinngemäß.</p>	<p>§ 9 (...)For the investigation of personal data under this federal state law an interference with the right guaranteed by § 157 Abs 1 Z 2 – 4 StPO 1975 is prohibited.</p>

Allgemeines Bürgerliches Gesetzbuch	General Civil Code
<p>§ 1330 (1) Wenn jemandem durch Ehrenbeleidigung ein wirklicher Schade oder Entgang des Gewinnes verursacht worden ist, so ist er berechtigt, den Ersatz zu fordern.</p> <p>(2) Dies gilt auch, wenn jemand Tatsachen verbreitet, die den Kredit, den Erwerb oder das Fortkommen eines anderen gefährden und deren Unwahrheit er kannte oder kennen mußte. In diesem Falle kann auch der Widerruf und die Veröffentlichung desselben verlangt werden. Für eine nicht öffentlich vorgebrachte Mitteilung, deren Unwahrheit der Mitteilende nicht kennt, haftet er nicht, wenn er oder der Empfänger der Mitteilung an ihr ein berechtigtes Interesse hatte.</p>	<p>§ 1330 (1) If a real damage or loss of profit has been caused to someone by libel, he is entitled to claim compensation.</p> <p>(2) This applies also when someone circulates facts that jeopardize the credit, the income, or the advancement of another person, and he knew or must have known about their falsity. In this event also the revocation and its publication can be demanded. When someone makes an announcement whose untruth he is not aware of, and does so non-publically, and he or the recipient of the announcement had a legitimate interest in it, he is not liable for any such announcement.</p>
Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger 1867	Basic Law on the General Rights of Nationals 1867
<p>Art 10a. Das Fernmeldegeheimnis darf nicht verletzt werden.</p> <p>Ausnahmen von der Bestimmung des vorstehenden Absatzes sind nur auf Grund eines richterlichen Befehles in Gemäßheit bestehender Gesetze zulässig.</p>	<p>Art 10a. The confidentiality of telecommunications may not be infringed.</p> <p>Exceptions from the provisions of the preceding paragraph are admissible only by virtue of a judicial warrant in conformity with the existing laws.</p>

Datenschutzgesetz 2000	Data Protection Act 2000
<p>§ 1 (1) Jedermann hat, insbesondere auch im Hinblick auf die Achtung seines Privat- und Familienlebens, Anspruch auf Geheimhaltung der ihn betreffenden personenbezogenen Daten, soweit ein schutzwürdiges Interesse daran besteht. Das Bestehen eines solchen Interesses ist ausgeschlossen, wenn Daten infolge ihrer allgemeinen Verfügbarkeit oder wegen ihrer mangelnden Rückführbarkeit auf den Betroffenen einem Geheimhaltungsanspruch nicht zugänglich sind.</p> <p>(2) Soweit die Verwendung von personenbezogenen Daten nicht im lebenswichtigen Interesse des Betroffenen oder mit seiner Zustimmung erfolgt, sind Beschränkungen des Anspruchs auf Geheimhaltung nur zur Wahrung überwiegender berechtigter Interessen eines anderen zulässig, und zwar bei Eingriffen einer staatlichen Behörde nur auf Grund von Gesetzen, die aus den in Art. 8 Abs. 2 der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten (EMRK), BGBl. Nr. 210/1958, genannten Gründen notwendig sind. Derartige Gesetze dürfen die Verwendung von Daten, die ihrer Art nach besonders schutzwürdig sind, nur zur Wahrung wichtiger öffentlicher Interessen vorsehen und müssen gleichzeitig angemessene Garantien für den Schutz der Geheimhaltungsinteressen der Betroffenen festlegen. Auch im Falle zulässiger Beschränkungen darf der Eingriff in das Grundrecht jeweils nur in der gelindesten, zum Ziel führenden Art vorgenommen werden.</p> <p>(3) Jedermann hat, soweit ihn betreffende</p>	<p>(1) Everybody shall have the right to secrecy for the personal data concerning him, especially with regard to his private and family life, in so far as he has an interest deserving such protection. Such an interest is precluded when data cannot be subject to the right to secrecy due to their general availability or because they cannot be traced back to the data subject.</p> <p>(2) Insofar personal data is not used in the vital interest of the data subject or with his consent, restrictions to the right to secrecy are only permitted to safeguard overriding legitimate interests of another, namely in case of an intervention by a public authority the restriction shall only be permitted based on laws necessary for the reasons stated in art 8, para 2 of the European Convention on Human Rights (Federal Law Gazette No. 210/1958). Such laws may provide for the use of data that deserve special protection only in order to safeguard substantial public interests and shall provide suitable safeguards for the protection of the data subjects' interest in secrecy. Even in the case of permitted restrictions the intervention with the fundamental right shall be carried out using only the least intrusive of all effective methods.</p> <p>(3) Everybody shall have, insofar as personal data concerning him are destined for</p>

<p>personenbezogene Daten zur automatisierten Verarbeitung oder zur Verarbeitung in manuell, dh. ohne Automationsunterstützung geführten Dateien bestimmt sind, nach Maßgabe gesetzlicher Bestimmungen</p> <p>1. das Recht auf Auskunft darüber, wer welche Daten über ihn verarbeitet, woher die Daten stammen, und wozu sie verwendet werden, insbesondere auch, an wen sie übermittelt werden;</p> <p>2. das Recht auf Richtigstellung unrichtiger Daten und das Recht auf Löschung unzulässigerweise verarbeiteter Daten.</p> <p>(4) Beschränkungen der Rechte nach Abs. 3 sind nur unter den in Abs. 2 genannten Voraussetzungen zulässig.</p>	<p>automated processing or manual processing, i.e. in filing systems without automated processing, as provided for by law,</p> <p>1. the right to obtain information as to who processes what data concerning him, where the data originated, for which purpose they are used, as well as to whom the data are transmitted;</p> <p>2. the right to rectification of incorrect data and the right to erasure of illegally processed data.</p> <p>(4) Restrictions of the rights according to Abs 3 are only permitted under the conditions laid out in Abs. 2.</p>
<p>§ 4 Im Sinne der folgenden Bestimmungen dieses Bundesgesetzes bedeuten die Begriffe:</p> <p>1. „Daten“ („personenbezogene Daten“): Angaben über Betroffene (Z 3), deren Identität bestimmt oder bestimmbar ist; „nur indirekt personenbezogen“ sind Daten für einen Auftraggeber (Z 4), Dienstleister (Z 5) oder Empfänger einer Übermittlung (Z 12) dann, wenn der Personenbezug der Daten derart ist, daß dieser Auftraggeber, Dienstleister oder Übermittlungsempfänger die Identität des Betroffenen mit rechtlich zulässigen Mitteln nicht bestimmen kann;</p> <p>2. „sensible Daten“ („besonders</p>	<p>§ 4 For the subsequent provisions of this Federal Act the terms listed below shall mean:</p> <p>1. "Data" ("Personal Data"): Information relating to data subjects (Z 3) who are identified or identifiable; Data are "only indirectly personal" for a controller (Z 4), a processor (Z5) or recipient of a transmission (Z 12) when the Data relate to the subject in such a manner that the controller, processor or recipient of a transmission cannot establish the identity of the data subject by legal means;</p> <p>2. "Sensitive Data" ("Data deserving special</p>

<p>schutzwürdige Daten“): Daten natürlicher Personen über ihre rassische und ethnische Herkunft, politische Meinung, Gewerkschaftszugehörigkeit, religiöse oder philosophische Überzeugung, Gesundheit oder ihr Sexualleben;</p> <p>3. „Betroffener“: jede vom Auftraggeber (Z 4) verschiedene natürliche oder juristische Person oder Personengemeinschaft, deren Daten verwendet (Z 8) werden;</p> <p>8. Verwenden von Daten: jede Art der Handhabung von Daten, also sowohl das Verarbeiten (Z 9) als auch das Übermitteln (Z 12) von Daten;</p>	<p>protection”): Data relating to natural persons concerning their racial or ethnic origin, political opinion, trade-union membership, religious or philosophical beliefs, and data concerning health or sex life;</p> <p>3. ”Data Subject”: any natural or legal person or group of natural persons not identical with the controller, whose data are processed (Z 8);</p> <p>8. ”Use of Data”: all kinds of operations with Data, meaning both processing of data (Z 9) and transmission of Data (Z 12);</p>
<p>§48 (1) Soweit Medienunternehmen, Mediendienste oder ihre Mitarbeiter Daten unmittelbar für ihre publizistische Tätigkeit im Sinne des Mediengesetzes verwenden, sind von den einfachgesetzlichen Bestimmungen des vorliegenden Bundesgesetzes nur die §§ 4 bis 6, 10, 11, 14 und 15 anzuwenden.</p> <p>(2) Die Verwendung von Daten für Tätigkeiten nach Abs. 1 ist insoweit zulässig, als dies zur Erfüllung der Informationsaufgabe der Medienunternehmer, Mediendienste und ihrer Mitarbeiter in Ausübung des Grundrechtes auf freie Meinungsäußerung gemäß Art. 10 Abs. 1 EMRK erforderlich ist.</p>	<p>§48 (1) Insofar as media companies, media services and their operatives use data directly for journalistic purposes according to the Media Act, only §§ 4 to 6, 10, 11, 14 and 15 of the non-constitutional provisions of this Federal Act shall apply.</p> <p>(2) The use of data for activities pursuant to Abs 1 shall be legal insofar as this is required to fulfil the information requirements of the media companies, media services and their operatives in exercise of the right to free speech pursuant to art 10 para 1 of the European Convention on Human Rights.</p>

<p>(3) Im übrigen gelten die Bestimmungen des Mediengesetzes, insbesondere seines dritten Abschnitts über den Persönlichkeitsschutz.</p>	<p>(3) In all other respects the Media Act shall apply, especially the third part about the protection of personality rights.</p>
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<p>Telekommunikationsgesetz 2003</p>	<p>Telecommunication Act 2003</p>
<p>§ 92 (1) Die Bestimmungen dieses Abschnitts gelten für die Verarbeitung und Übermittlung von personenbezogenen Daten in Verbindung mit der Bereitstellung öffentlicher Kommunikationsdienste in öffentlichen Kommunikationsnetzen einschließlich öffentlicher Kommunikationsnetze, die Datenerfassungs- und Identifizierungsgeräte unterstützen. Soweit dieses Bundesgesetz nicht anderes bestimmt, sind auf die in diesem Bundesgesetz geregelten Sachverhalte die Bestimmungen des Datenschutzgesetzes 2000, BGBl. I Nr. 165/1999, anzuwenden.</p> <p>(2) Die Bestimmungen der Strafprozessordnung bleiben durch die Bestimmungen dieses Abschnittes unberührt.</p> <p>(3) In diesem Abschnitt bezeichnet</p>	<p>§ 92 (1) The provisions of this section apply to the processing and transmission of personal data in connection with the provision of public communications services in public communications networks, including those public communications networks which support data collection and identification equipment. Unless otherwise provided by this Federal Act, the provisions of the Data Protection Act 2000, Federal Law Gazette I No.165/1999, shall apply to the facts regulated in this Federal Act.</p> <p>(</p> <p>2) The provisions stipulated in this section are without prejudice to the Code of Criminal Procedure.</p> <p>(3) Irrespective of § 3, in this section the term:</p>

<p>unbeschadet des § 3 der Begriff:</p> <p>4. „Verkehrsdaten“ Daten, die zum Zwecke der Weiterleitung einer Nachricht an ein Kommunikationsnetz oder zum Zwecke der Fakturierung dieses Vorgangs verarbeitet werden;</p> <p>4a. „Zugangsdaten“ jene Verkehrsdaten, die beim Zugang eines Teilnehmers zu einem öffentlichen Kommunikationsnetz beim Betreiber entstehen und für die Zuordnung der zu einem bestimmten Zeitpunkt für eine Kommunikation verwendeten Netzwerkadressierungen zum Teilnehmer notwendig sind;</p> <p>5. „Inhaltsdaten“ die Inhalte übertragener Nachrichten (Z 7);</p> <p>6. „Standortdaten“ Daten, die in einem Kommunikationsnetz oder von einem Kommunikationsdienst verarbeitet werden und die den geografischen Standort der Telekommunikationsendeinrichtung eines Nutzers eines öffentlichen Kommunikationsdienstes angeben, im Fall von festen Telekommunikationsendeinrichtungen sind Standortdaten die Adresse der Einrichtung;</p>	<p>4. “traffic data” means any data processed for the purpose of the conveyance of a communication on a communications network or for the billing thereof;</p> <p>4a. “access data” means the traffic data created at the operator during access by a subscriber to a public communications network and required for assignment to the subscriber of the network addresses used for a communication at a specific point of time;</p> <p>5. “content data” means the contents of conveyed communications (Z 7);</p> <p>6. “location data” means any data processed in a communications network or by a communications service, indicating the geographic position of the telecommunications terminal equipment of a user of a publicly available communications service; in the case of fixed-link telecommunications terminal equipment, location data refer to the address of the equipment</p>
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E-Commerce-Gesetz 2001	E-Commerce Act 2001
<p>§ 18 Die in den §§ 13 bis 17 genannten Diensteanbieter sind nicht verpflichtet, die von ihnen gespeicherten, übermittelten oder zugänglich gemachten Informationen allgemein zu überwachen oder von sich aus nach Umständen zu forschen, die auf rechtswidrige Tätigkeiten hinweisen.</p>	<p>§ 18 The service providers mentioned in §§ 13 to 17 shall not be obligated to monitor in a general fashion the information stored, transmitted or made available by them or to actively research circumstances indicating illegal activity.</p>
Beamten-Dienstrechtsgesetz 1979	Federal Civil Service Act 1979
<p>§ 53a Die Beamtin oder der Beamte, die oder der gemäß § 53 Abs. 1 im guten Glauben den begründeten Verdacht einer in § 4 Abs. 1 des Bundesgesetzes über die Einrichtung und Organisation des Bundesamts zur Korruptionsprävention und Korruptionsbekämpfung, BGBl. I Nr. 72/2009, genannten strafbaren Handlung meldet, darf durch die Vertreterin oder den Vertreter des Dienstgebers als Reaktion auf eine solche Meldung nicht benachteiligt werden. Dasselbe gilt, wenn die Beamtin oder der Beamte von ihrem oder seinem Melderecht gemäß § 5 des Bundesgesetzes über die Einrichtung und Organisation des Bundesamts zur Korruptionsprävention und Korruptionsbekämpfung Gebrauch macht.</p>	<p>§ 53a The civil servant who acts in good faith and has reasonable suspicion about a criminal offence subject to § 4 Abs 1 of the Federal Law on the Establishment of the Federal Bureau of Anti-Corruption, and gives notification in accordance to § 53 Abs 1, shall not be disadvantaged by the employer. The same applies when the civil servant exercises his right according to § 5 of the Federal Law on the Establishment of the Federal Bureau of Anti-Corruption.</p>
Staatsanwaltschaftsgesetz 1986	Public Prosecution Act 1986
<p>§ 2 (6) Bei der WKStA besteht ein</p>	<p>§ 2 (6) WKStA operates an internet-based</p>

internetbasiertes Hinweisgebersystem, über welches Hinweise insbesondere wegen der in § 20a Abs. 1 StPO genannten Vergehen oder Verbrechen auch anonym gemeldet werden können. § 80 StPO bleibt unberührt.

whistle-blower system, which enables a whistle-blower to make an anonymous notification particularly regarding crimes or offences mentioned in § 20a Abs 1 StPO. § 80 StPO shall remain unaffected.

ELSA AZERBAIJAN

Contributors

National Coordinator

Aliyeva Sevil

National Academic Coordinator

Amina Kalantarova

National Researchers

Arzu Shukurova

Nurlana Dunyamaliyeva

Shahla Aslanova

Ayisha Afandiyeva

Mahammad Ismayilov

National Linguistic Editors

Qurban Qurbanzade

National Academic Supervisor

Amir Aliyev

Gulnaz Alasgarova

1. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

Being the core of the democratic society, the freedom to express one's thoughts and ideas and the freedom of information are one of the main conditions for the progress of the society as a whole and the development of each of its individual in particular. The protection of journalists' right not to disclose their source of information is one of the basic rights providing the freedom of people to get information on the matters of public interest.

In accordance with the article 7 of The Law of the Republic of Azerbaijan on Freedom of Information¹ under the sources of information, which contain the essence of the question, are understood the documents and other carriers reflecting information, in order provided for in the legislation, mass media information and public speeches. A number of cases concerning the right of protection of journalists and their sources of information, provision of this right are reflected in a majority of the domestic legislation of the Republic of Azerbaijan. Our state has held numerous events and has adopted a number of legislative acts in the field of the protection of confidentiality of journalists' sources of information, which is deemed to be one of the generally accepted ethic norms of journalism around the world.

According to article 47 of the Constitution of the Republic of Azerbaijan,² everyone has the right to freedom of thought and speech. Nobody can be enforced to express his thoughts and convictions or to deny them. In addition, in article 50 of the Constitution,³ the freedom of information expressed. Everyone is free to look for, obtain, transfer, develop and distribute any information in a legal way. Freedom of mass media is guaranteed. State censorship in mass media, including press is prohibited. However, the Constitution does not provide a separate article concerning journalists' freedom of expression, right to obtain, use and disseminate information, right for protection of sources of information. Simply, according to the discretion of those articles, journalists, like everyone else, are entitled to the freedom of expression, right to obtain, use and disseminate information.

According to article 11 of the Law of the Republic of Azerbaijan on Mass Media,⁴ a journalist cannot be enforced to disclose the source of information published or broadcasted via mass media in connection with the case under investigation or at the court proceedings, except in

¹ The Law of the Republic of Azerbaijan on Freedom of Information, article 7.

² The Constitution of the Republic of Azerbaijan, article 47.

³ The Constitution of the Republic of Azerbaijan, article 50.

⁴ The Law of the Republic of Azerbaijan on Mass Media, article 11.

cases specified by law. In this case, the responsibility for the author's non-disclosed description, article, picture or caricature lies on the shoulders of a contributing editor responsible for release or a journalist. The disclosure of the source of information in our law does not only comprise in itself the disclosure of the name of a person who provided a journalist with information, but also any other information allowing to identify the person, including any personal information about the person who gave information (age, work place, place of residence, etc.); his appearance, voice, information about getting the information by a journalist (where, when, how it was received, etc.); the non-spread part of the provided information; personal information in connection with the journalist's professional activities (his previous work, previous investigations, etc.) In accordance with the article 13 of The Law of the Republic of Azerbaijan on Freedom of Information,⁵ documented information source about an identity of a person are the documents on his name, signed by him and information about a person, gathered by the authorities within their competence. Thus, for the confidentiality of a person privacy terms concerning these documents and information sources must be fulfilled.

The legislation has determined when the abuse by a journalist of his right will result in a violation of law. Thus, according to the article 189 Code of Administrative Offences of the Republic of Azerbaijan⁶ promulgation of information, prohibited to disclosure by legislation; non-fulfilment of control on preparation of materials, published in printing edition in accordance with requirements of legislation; promulgation of information without indication of its source, except occasions envisaged by legislation production or distribution of production of mass media without reference data or deliberate distortion of reference data by abuse of freedom of mass media and journalist rights on behalf a journalist entails imposition of penalty in amount of 20-25 manats.

In all cases, a journalist can be demanded to provide the information about the source of his information only if there exists a reasoned and grounded court decision. The court, in its decision, has to substantiate that the identity of the source of the information is required by the purposes specified in the law and the necessary information was impossible to get in any other ways. A journalist, who does not agree with the court's decision, may appeal to the respective higher court. The journalist must be provided with an opportunity to appeal. When there is disseminated official information of journalists' organizations, parties, societies, associations or any other interested groups the indication of the sources of such information is necessary. However, if an individual, not representing these kind of organisations will have a condition not to disclose his name, when providing information, journalist and media entity must comply with this condition, the sources of information should be secured. For sure, this will be protected in case if the information does not violate other people's rights.

The anonymity of a person giving information to the mass media editorial is guaranteed. This means that the journalist does not have a right to disclose the name of the person who provided

⁵ The Law of the Republic of Azerbaijan on Freedom of Information, article 13.

⁶ Code of Administrative Offences of the Republic of Azerbaijan, article 189.

him with information. The government authorities or other public institutions, in their row, are banned from looking for the source or to disclose the information acquired by the journalist. A journalist may bear a legal responsibility for disclosing the source, however, in our time, yet no journalist has been sentenced for this type of crime. It should be noted that only the offices and organisations are prohibited to search for and identify the sources, but not enterprises and civilians. The owner of a private firm can search for the source of information, while an editorial journalist might ask his colleague about the sources the latter uses. The results of such searches mostly depend on a journalist. Thus, he takes on himself not only the legal responsibility, but also the moral responsibility. Therefore, by following his moral obligation the journalist must try to keep the source in a secret even when there are requirements of the government and judicial authorities.

No one, other than the court, be it the state authorities, officials, can force a journalist to disclose his source of information. The determination of the principle of impossibility to enforce a journalist to disclose the source is of a great importance. It expands the freedom of journalists to obtain information. Protection of information sources plays a major role in strengthening the freedom of information. The right of journalists to keep information sources confidential is a key element in the preparation of reports. The lack of protection of sources of information limits the possibilities for carrying out journalist investigations. If the journalist discloses his source, others may lose their faith to that journalist and persons possessing information vital for journalist would avoid giving this information to the journalist. Therefore, a journalist must try not to disclose the source, for sure, following the requirements of the law.

2. Is there, in domestic law, a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

According to the first article of The Code of Professional Ethics of a journalist of the Republic of Azerbaijan,⁷ all professional activities of a journalist are fully compatible with the Constitution and laws of the Republic of Azerbaijan. He is fully responsible for his published (broadcasted) material before the readers, viewers, listeners and society as a whole. In accordance with article 11 of the Law of the Azerbaijan Republic on Mass Media,⁸ media editorship and journalist are not allowed to disseminate information:

- 1) about person giving latent information, if person doesn't want his name to be unfold;
- 2) about person who has given information with condition his name not to be declared;
- 3) about preliminary investigation and interrogation without permission of investigator, interrogator, prosecutor or court;
- 4) about personality of minors who have committed felony without their permission or without their legal representatives' permission.

⁷ The Code of Professional Ethics of a journalist of the Republic of Azerbaijan, article 1.

⁸ The Law of the Republic of Azerbaijan on Mass Media, article 11.

An editor and journalist, who is responsible for publication of information, cannot be forced to unfold his source of information, with an exception if it is in trial proceedings and stated by law. In this case, the editor or journalist is responsible for the anonymous description, article, image or caricature. The Law of the Republic of Azerbaijan on Mass Media establishes the general rules of seeking, getting, preparing, transmission, production and dissemination of the mass information in the Azerbaijan Republic, and also organizational, legal and economical fundamentals of activity of press, news agencies, television and radio organisations, directional on a realisation of the rights of the citizens on getting of the full, authentic and quick information. Editor or journalist in the following cases shall be forced by the court to open their sources of information: for the protection of human life; with the purpose to prevent heavy crime; to protect the person accused or suspected in conducting heavy crime. If a journalist possesses the information on cases endangering human life (i.e. the person will be deprived of his life) in order to eliminate danger to the life of that person if other information is not sufficient and a journalist needs to know the identity of a person who informed, the court may require the journalist to disclose the identity of that person. If any other information is not enough for prevention of preparing grave (Article 15.4 of the Criminal Code⁹) and especially grave crimes (Article 15.5 of the Criminal Code¹⁰) the court may require the journalist to disclose the necessary information for revealing the person who gave information. If a journalist refuses to provide the court with information, he may bare criminal liability under the article 307.1 of the Criminal Code¹¹.

In further proceedings, a journalist may also carry the criminal responsibility in accordance with article 298 of the Criminal Code¹² and may be held liable for refusing to testify.

Article 186 of the Code of Administrative Offences of the Republic of Azerbaijan,¹³ establishes that, not responding to a journalist request at periods established by legislation entails the imposition of penalty on natural persons in the amount of 40-70 manats, while restriction of presentation or refusal in presentation of information to journalist, except information protected by legislation entails imposition of penalty in the amount of 60-90 manats. This article directs the administrative liability on officials and the representatives of state bodies, municipalities, institutions, enterprises and organisations, public associations, political parties, who were expected to directly provide the information.

Such individuals and state agencies, in accordance with article 21 of the Civil Code of the Republic of Azerbaijan¹⁴ as a result of violations of the right of journalists to obtain information are also obliged to pay the damage caused to them.

⁹ Criminal Code of the Republic of Azerbaijan, article 15.4.

¹⁰ Criminal Code of the Republic of Azerbaijan, article 15.5.

¹¹ Criminal Code of the Republic of Azerbaijan, article 307.1.

¹² Criminal Code of the Republic of Azerbaijan, article 298.

¹³ Code of Administrative Offences of the Republic of Azerbaijan, article 186.

¹⁴ Civil Code of the Republic of Azerbaijan, article 21.

According to article 189 of Code of Administrative Offences of the Republic of Azerbaijan,¹⁵ abuse of freedom of mass media and journalist rights on behalf of editorial staff (responsible editor) of mass media and journalists (authors) i.e.: promulgation of information, prohibited to disclosure by legislation; non-fulfilment of control on preparation of materials, published in printing edition in accordance with requirements of legislation; promulgation of information without indication of its source, except occasions envisaged by legislation; production or distribution of production of mass media without reference data or deliberate distortion of reference data entails imposition of penalty on natural persons in amount of 20-25, official persons - 60-80, legal persons - 200-250 manats.

3. Who is a journalist according to national legislation? Is it, in your view, a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media actors? Is the protection of journalists sources extended to anyone else?

Article 49 of the the Law of the Republic of Azerbaijan on Mass Media¹⁶ provides us with such a definition of a journalist: a regular correspondent of mass media, who is engaged in gathering, preparing, editing and producing information; a correspondent of mass media, regularly fulfilling the assignments concerning gathering, preparing and editing information are considered to be journalists. As it can be seen the definitions given by our legislation to a journalist lacks the expression of the journalists' right to protect their sources of information. However, the protection of information sources is an essential condition for journalist's independent activities, for obtaining more information by winning the trust of the person providing information and for carrying out the investigation, as well as the integral part of the notion of journalist and journalist activities.

At this point, article 61 of the Law of the Republic of Azerbaijan on Mass Media must be analysed.¹⁷ According to it at failure of positions of this law in certain cases the publisher, distributor and editorial office (editor, editor-in-chief) bear civil, administrative, criminal and other responsibility pursuant to the legislation of the Republic of Azerbaijan. These cases are following: unfounded waiving of the disproof, correction and answer, non-observance of the solutions, which have entered valid force, and resolutions of court - editorial office (accountable editor); failure to meet requirements of Articles 9, 11, 13, 21 and 28 of the present Law - the founder, editorial office, publisher and distributor; precluding to distribution on valid foundations of product of publication, introducing of pirate limitations on retail sale of circulation of periodic print publication - the officials; for an assumption of pirate financing of

¹⁵ Code of Administrative Offences of the Republic of Azerbaijan, article 189.

¹⁶ The Law of the Republic of Azerbaijan on Mass Media, article 49.

¹⁷ The Law of the Republic of Azerbaijan on Mass Media, article 61.

mass media manufactured (distributed) on the territory of the Azerbaijan Republic, by state organs, legal and physical persons of foreign countries - the founder and editor-in-chief (editor); at pirate preparing both distribution by editorial office and publishing house of product of mass media after a resolution of court on suspension or phase-out the distribution – the publisher, distributor and editorial office (editor, editor-in-chief) bear civil, administrative, criminal and other responsibility pursuant to the legislation of the Azerbaijan Republic. According to the Code of Administrative Offences abuse and misuse by an editor of his rights makes the application of respective penalties to an editor inevitable.

The legislation has established such defined cases, when a media actor is obliged, unconditionally, to give up the source of information, in any other case they are entitled to the right to keep their source undisclosed. Thus, when personal information is entered in to information systems used by everyone via open sources, the operator of that information system has to inform the subject about the sources of entered-information. This is connected to the right of subjects to get information about the sources of acquisition of personal data, which is collected and processed in the information system. As a general rule, when obtaining verbal information in every office, enterprise, organisation where people are involved, who help the reporter in seeking information. Some are engaged in helping because of their service debts, while others do it employing their constitutional right on the guarantee of maintaining the confidentiality of the source of information and the free distribution of information. Many provide media actors with information disinterestedly; however, the maintenance of their anonymity is very important to them. After all, the issue may be regarding the workplace of the person providing the information. For example, a civil servant is willing to provide information about the illegal actions occurring at one of the departments of his work office. If the principal will make inquiries on who leaked the information, then that person's job may be at risk. Thus, many sources have the grounds to act as an anonymous source. This is an obvious proof of the fact, that keeping the source of information confidential plays an important role for other persons to give information freely and confidently and for determining the problems and events taking place in society and in the political arena. In our legislation, there does not exist a single systemised normative act which would regulate the right of media actors to keep their information sources confidential. Thus, for the formation of free media, our state is in need of developing legislation in this area.

4. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

The Constitution of the Republic of Azerbaijan, as well as the European Convention on Human Rights, recognises everyone's right to legally search for, acquire, transmit, prepare and spread any information or idea.

The right of a person to seek and acquire the information also covers his right of free movement to the places, where a person assumes the information exists, the right to be able to meet any person, the right to enter any places, as well as the right to look for the information via the suitable technical means, including the internet, all of it for sure can be carried out only in

appropriate legal ways. This right, moreover, includes the possibility to make notes on what a person had seen or heard, as well as to record what a person had seen or heard by technical means, such as sound recording, video recording devices, still cameras.

Article 50 of the Constitution of the Republic of Azerbaijan recognizes everyone's right to look for, obtain, transfer, develop and distribute any information in a legal way.¹⁸ According to the Law of the Republic of Azerbaijan on Getting Information, anyone, himself or through a representative, can apply to the owner of the information, and acquire the desired information by selecting the method of obtaining and type of the information. Anyone is understood as being citizens, foreign citizens, as well as stateless persons. In accordance with the law on Getting Information, everyone has equal rights for obtaining information. Information owners, by this law, regardless of who is requiring from them the information, which information owners consider to be of public importance and open to public, should provide them with what they demand. For this, no kind of limitation exists, be it professional, age or any other restrictions.

The guarantee of the confidentiality of journalists' sources of information: Can journalists be required to disclose their source of information?

As it was previously mentioned, being at the core of a democratic society, the freedom to express one's thoughts and ideas, and freedom of information are one of the main conditions for the progress of the society as a whole and the development of each of its individual in particular. The protection of journalists' right not to disclose their source of information is one of the basic rights providing the freedom of people to get information on the matters of public interest.

Media editors and journalists who are responsible for the publication of information cannot be forced to disclose his source of information, with an exception if it is in trial proceedings and stated by law. To disclose the source of information, in our law, does not only comprise in itself the disclosure of the name of a person who provided a journalist with information, but also any other information allowing to identify the person, including any personal information about the person who gave information (age, work place, place of residence, etc.), his appearance, voice, information about getting the information by a journalist (where, when, how it was received, etc.), the non-spread part of the provided information, personal information in connection with the journalist's professional activities (his previous work, previous investigations, etc.)

The source must always be indicated while disseminating official information from organisations, parties, societies, unions and other interest groups. However, if the person who provides the information prefers to remain anonymous, journalists or media entities must adhere to his/her privacy conditions. The confidentiality of the source of information shall be protected. The information provided by unofficial sources shall be checked for its authenticity and informative value before being disseminated. The content of the information shall not be distorted while being prepared for print. When quoting from another article or speech, journalists should note

¹⁸ The Constitution of the Republic of Azerbaijan, article 50.

precise starting and ending points of the quotation. When printing photo-symbols (illustration, photo editing) together with texts, it should be noted that such images do not have documentary importance. Titles of articles should correspond to their content. A journalist should try to have his/her interview signed by interviewees or their authorised agents. If this is not possible, interviewees should be notified of the way in which the interview will be published and whether the questions asked by the journalist will be modified. If there are no other methods available, journalists may use special equipment (hidden cameras, hidden microphones or other hidden tools) or methods (“fake” IDs and etc.) as an exception for obtaining information that has public importance. Journalists shall not resort to intimidation, application of force or threats in order to obtain information or images.¹⁹

According to article 52 of The Law of the Republic of Azerbaijan on Mass Media,²⁰ the citizens of the Azerbaijan Republic have the right to direct information from foreign sources, including mass media. The limitation of direct acceptance of the television programmes is enabled in cases, foreseen by the intergovernmental agreements, contracted by the Azerbaijan Republic. In case the order of distribution of foreign periodic print publications, founder or constant place of editorial office of which one are outside boundaries of the Azerbaijan Republic, is not established by the intergovernmental agreement contracted by the Azerbaijan Republic, its distribution needs a resolution from the appropriate organ of the executive authority.

Journalists shall not condemn people for their nationality, race, sex, language, profession, religion, and place of birth or residence and shall not highlight such data. Journalists shall respect the honour, dignity, and inviolability of personal life of the person he/she meets with and writes about. Journalists may not disseminate facts about citizens’ personal lives without their consent, unless dissemination of such information does not violate the rights of the society, is lawful and does not contradict social interest. Journalists and mass media entities must correct their errors wholly and as soon as possible, regardless of the person who identified the error. The correction should indicate whether the related article was erroneous in whole or in part. When publishing personal letters, the author, the person to whom the letter is addressed to, or their heirs, should be asked for permission. Names or images of victims who suffered from accidents or crime must not be disclosed without their consent. This is possible under special conditions and if the victim is a public figure. If the crime was committed by teenagers or children (persons below 18 years of age), journalists should refrain from disseminating the names or pictures of the criminals. Journalists should respect the right to presumption of innocence of persons who are suspected of committing crimes and should introduce such persons not as criminals, but as persons who have been detained for being suspected of committing crimes. If a mass media entity has provided information on detention or indictment of a citizen as a suspect and if his/her innocence was later proven, the media entity must inform the public in this regard. Journalists shall not take advantage of childrens’ innocence and trust; they shall respect their rights and demonstrate a special responsibility in communicating their views; and shall seek to avoid

¹⁹ Professional Code of Conduct of Azerbaijani Journalists, principle 2.

²⁰ The Law of the Republic of Azerbaijan on Mass Media, article 52.

interviewing children without the consent of their parents or lawful guardians. Journalists shall not publish information or photographs about private life of a child unless there is an overriding public interest. Journalists shall protect the identity of children involved in, or affected by tragedy or criminal activity. If a person is charged with committing of a crime, journalists shall not prepare reports which could undermine the objectiveness of the court in this issue and opinions from all involved parties should be reflected in such reports. If victims of a crime have not given their consent to be identified, journalists shall treat the identities of such individuals with sensitivity. This rule is especially important in cases involving sexual assault. If witnesses have not consented to being identified and if their identification does not have any public importance, journalists shall treat their identity with sensitivity. Journalists shall refrain from glorifying or unnecessarily sensationalising reporting about crime, violence, brutality and suicide. Journalists shall be careful not to be used as a means by those who promote, incite or use violence; instead, journalists shall report on their activities with due constraint and only if there is a clear public interest. Journalists or editorials should not prepare reports that exaggerate terror acts; reports that serve the interests of terrorists; reports that create fear or those which promote or justify terror acts.²¹ Journalists shall not pay sources for information, but where payment is considered necessary in order to obtain information that the public has a right to know, it shall be made clear in the relevant report that payments have been made.²²

Information resources by categories of access may be open and with limited access. Pursuant to the legislation of the Azerbaijan Republic and decisions of relevant bodies of the executive power, information resources, except documented information with limited access, shall be open for access. Documented information with limited access pursuant to the terms of its legal framework shall be divided into information considered state secret and confidential. The classification of information as state secret, procedure for its use and protection shall be established by the Law of Azerbaijan Republic "On State Secret". Information, not being regarded as state secret but needed to be kept in secrecy in order to protect legal interests of citizens, institutions, enterprises and organizations, shall be confidential. Gathering, processing, using and disseminating of confidential information shall only be allowed in cases established by the legislation of Azerbaijan Republic.²³ The Law of the Republic of Azerbaijan on Information, Informatization and Protection of Information, dated April 3 1998, regulates the relations arising from the formation of information resources based on creation, collection, processing, accumulation, keeping, search, dissemination of information, establishment and use of information systems, technology and means for their insurance and at protection of information. The Law shall establish rights of subjects involving in information processes. Moreover, it shall not concern relations that are regulated by the Laws of Azerbaijan Republic on Mass Media and on Copyright and Related Rights.

²¹ Professional Code of Conduct of Azerbaijani Journalists, principle 3.

²² Professional Code of Conduct of Azerbaijani Journalists, principle 4.8.

²³ The Law of the Republic of Azerbaijan on Information, Informatization and Protection of Information, article 10.

5. In the respective national legislation, are the limits of non-disclosure of the information in line with the principles of the Recommendation No R (2000) 7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

The limits of non-disclosure of information is considered in Principle 3 of the Appendix to 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. This principle refers to Article 10, paragraph 2 of the ECHR in its disposition. So, the Convention for the Protection of Human Rights and Fundamental Freedoms and European Court of Human Rights have stressed the main outlines in which the limits to the disclosure are concerned.. The main problem is that the journalistic sources should be protected and confidentiality is granted and at the same time the personal, state and business secrets should be respected. Therefore, there is a need of developing a balanced system.

Recommendation No. R (2000) 7, principle 3²⁴ - Limits to the right of non-disclosure is consisting of three clauses:

a. The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10, paragraph 2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of Article 10, paragraph 2 of the Convention outweighs the public interest in not disclosing information identifying a source, competent authorities of member States shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law of the European Court of Human Rights, and may only order a disclosure if, subject to paragraph b, there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.

b. The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:

i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and

ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:

- an overriding requirement of the need for disclosure is proved,
- the circumstances are of a sufficiently vital and serious nature,
- the necessity of the disclosure is identified as responding to a pressing social need, and

²⁴ Recommendation No. R (2000) 7, Principle 3 (Limits to the right of non-disclosure)

- member States enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.

c. The above requirements should be applied at all stages of any proceedings where the right of non-disclosure might be invoked.

The definitions for the purpose of the Recommendation in regard of the "information identifying a source" mentions that:

The term "information identifying a source" means, as far as this is likely to lead to the identification of a source:

- the name and personal data as well as voice and image of a source;
- the factual circumstances of acquiring information from a source by a journalist;
- the unpublished content of the information provided by a source to a journalist; and
- personal data of journalists and their employers related to their professional work.²⁵

So, the journalist cannot be compelled to disclose information identifying a source, as it violates certain rights. As the internet is developing with a inevitable speed, the measures for protection should be restricted more than it has been done before. The officials try to make adequate steps for striking a balance.

In the Constitution of the Republic of Azerbaijan, adopted on November 12 1995, Article 50 states that: freedom of mass information is ensured. State censorship in mass media as well as in print media is prohibited.²⁶

As Azerbaijan is a post-soviet country, the law was concrete on state censorship during the Soviet period. On August 6 1998, the state censorship over mass media was prohibited by the Order of the President Heydar Aliyev. From this period, the free environment is observed in the media sphere.

As the Constitution of Azerbaijan Republic is the supreme document in the land, the national laws also indicated the principle then. The legislation considers only vital public or individual interests at stake when there is a necessity for disclosure.

So, the authorities, namely, investigative bodies and courts, firstly clarify the balance, for that the investigation deeply analyses the matters and then, as in the case of ECHR the balance test should be applied. The Law of the Republic of Azerbaijan on Mass Media in the section consisting basis of freedom of mass media, namely in article 11, enumerates the special circumstances in which the editor or journalist can be obliged by the court to disclose the source. The circumstances are limited, shortly speaking, they are as follows:

- for the protection of human life;

²⁵ Recommendation No. R (2000) 7 , Definitions; Principle 3 (Limits to the right of non-disclosure)

²⁶ The Constitution of the Republic of Azerbaijan, article 50.

–for the purpose of preventing grave crime;
–for the protection of the person that is suspected or accused for committing grave crime.²⁷

As seen from these, the bases are in connection with outweighing interests coming from the principles of the Recommendation. The main body implementing the process of disclosure is the court, as stated by article 11 of the Law on Mass Media of the Republic of Azerbaijan.

In Azerbaijani legislation, another legislative act named as 'The Law of the Republic of Azerbaijan on Freedom of Information adopted on June 19 1998, speaks about the information that is with limited access in the Article 10.²⁸

Analysing some cases of the ECtHR, it can be concluded that mainly article 10 of the Convention is deemed to have been violated, but further article 5 (right to liberty and security)²⁹ and article 8 (right to respect private life)³⁰ have also been violated when journalists have been denied their right of not disclosing their source of information.³¹

Azerbaijan became a member of the European Council from January 25 2001, the Convention has been ratified by the Milli Majlis of Azerbaijan Republic on December 25 2005. Azerbaijani citizens have been entitled to apply to the European Court of Human Rights since April 15 2002.³² Azerbaijan considers the importance of co-operation with the European Court of Human Rights and implementing cases in practice. As a country developing to democracy, the fundamental principles should be regarded, as stated in the Explanatory Memorandum of the Recommendation too; the chilling effect of the disclosure of a source by a journalist will impede this role of the media. Hence, national courts and authorities shall pay particular regard to the importance of the right of journalists not to disclose their sources.

The practice helps to make reforms in this sphere and gives rise to the application in the national level, so the approach of the Court in relation to ensuring the right of journalists not to disclose their sources is respected. In absence of any vital interests for individual or state interests, this right should be highly protected by the officials and other citizens under Azerbaijani laws; otherwise, it will be a threat to the protection of democratic values and internal policy of the state. So the authority is expected to be in line with the legal requirements, which mainly indicates the compliance with principles. Similar to the alike processes, the need of disclosure requires the court to define the matter through the application of proportionality principle. Whether the interest is more important and less intrusive to apply in comparison to the non-

²⁷ The Law of the Republic of Azerbaijan on Mass Media, article 11.

²⁸ The Law of the Republic of Azerbaijan on Freedom of Information, article 7.

²⁹ ECHR, article 5.

³⁰ ECHR, article 7.

³¹ http://www.echr.coe.int/Documents/FS_Journalistic_sources_ENG.pdf

³² <http://www.judicialcouncil.gov.az/Meqaleler/5.pdf>

disclosure of the journalistic sources. There are provisions applicable here concerned in the Law on Mass Media of the Republic of Azerbaijan about responsibility. Article 59 of the above-mentioned law is named as responsibility for violating the freedom of mass media and journalistic rights. Here, the provision together with other grounds tells that; any interference of the citizens, state bodies, municipalities, administrations, entities and organizations, political parties, and also public associations or officials to the legal activity of the founders, publishers, editorial offices (accountable editors), distributors and journalists of mass media, including: enforcing the journalist to disseminate information or refusing printing the information (broadcasting), can cause civil, administrative, criminal or other responsibility in compliance with the legislation of the Republic of Azerbaijan.³³

The Criminal Code of the Republic of Azerbaijan considers obstructing legal professional activity of journalists as a criminal act, in Article 163:

–obstructing legal professional activity of journalists, i.e. compelling them to disseminate any information or refusing from disseminating any information with using violence or threat of violence- is punished by fine in the amount of one hundred to five hundred manats or reclamation work for one year;

–if the same deeds are committed by authorized person using official position – it is punished with depriving to hold certain position or engage in certain activities up to three years, or reclamation work up to two years or imprisonment up to one year without deprivation.³⁴

Procedural regulations of the alternative measures and application stages are not strictly guided by the procedural code, but the following articles of the code let us form some description on this issue. Criminal Procedural Code of the Republic of Azerbaijan among the reasons for initiating criminal case, mentions the information of the mass media about the committed or planned crimes in Article 206,³⁵ information held by the mass media concerning a crime committed or planned, which is deemed to constitute grounds for initiating criminal proceedings, shall be sent to the prosecuting authorities after its disclosure in the press or on radio or television. In the second part, there is a reference to Article 205³⁶ on the issue of order of sending the information to the criminal persecution bodies so; the documents confirming the commitment of the offence shall be attached to the information sent, the details about the source also should be mentioned. The next part of the article³⁷ states that, media officials who have published or sent to the authorities information about a crime committed or planned and authors of such information shall submit the documents in their possession confirming the information to the inquirer, the investigator, the prosecutor in charge of the procedural aspects of the investigation or the court.

³³ The Law of the Republic of Azerbaijan on Mass Media, article 59.

³⁴ The Criminal Code of the Republic of Azerbaijan, article 163.

³⁵ The Criminal Procedure Code of the Republic of Azerbaijan, article 206.1.

³⁶ The Criminal Procedure Code of the Republic of Azerbaijan, article 205.

³⁷ Criminal Procedure Code of the Republic of Azerbaijan, article 206.3.

Criminal Procedure Code of the Republic of Azerbaijan in relation to the disclosure of the information further states in Article 222.3³⁸ that, information about the investigation may be disseminated by participants in the criminal proceedings and journalists only with the permission of the preliminary investigator, the investigator, the prosecutor in charge of the procedural aspects of the investigation or the court, where the disclosure is not counter to the interests of the investigation and does not violate the rights and legal interests of other participants in the criminal proceedings.

The attitude of the legislation is in line with the relation of international acts about the discussed problem. National authorities, together with principle 3 of the Recommendation, should respect the conditions of principle 5 concerning disclosures, as these provisions refer to the matters about the implementation on disclosing information identifying source.

Limits of non-disclosure is a necessary ground for the correct functioning of the principle. However, the process of applying is the most difficult stage, because of meeting before the political, state and legal thinking or interests. National legislation considers the issue in general and stands for the least intrusive measures. Provisions in relation to protection of journalistic sources and at the same time for limits of non-disclosure are concrete and demands being guided by the principal features of the law. Azerbaijani legislation, respecting the principles, states the issue and ensures the procedural stage to be guided by a balanced control.

6. In the Recommendation No R (2000) 7, the following principles should be respected when the necessity of disclosure is stated: absence of reasonable alternative measures, outweighing legitimate interest (protection of human life, prevention of major crime, defence of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the disclosure outweigh the interest in the non-disclosure?

Resembling the principles of Recommendation No R (2000) 7 and the conditions mentioned there, it is clear that journalists can be denied their right of not to disclose their source of information in certain cases. If the right is of a fundamental basis, then restrictions for them should be well-based too. The allowance considers special cases, namely clause b of Principle 3 of the Recommendation No R(2000) 7,³⁹ which states:

b. The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:

i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and

³⁸ Criminal Procedure Code of the Republic of Azerbaijan, article 222.3.

³⁹ Recommendation No R(2000) 7, Principle 3 b.

- ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:
- an overriding requirement of the need for disclosure is proved,
 - the circumstances are of a sufficiently vital and serious nature,
 - the necessity of the disclosure is identified as responding to a pressing social need, and
 - member States enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.

Briefly, the grounds arising from here are: absence of alternative measures, including their exhausting and the outweighing legitimate interest.

Firstly, if there is a necessity for disclosure, it could not be appropriate immediately asking or compelling journalist to disclose the source because of the mentioned principle. There is reference to both persons and authorities, as they are separately discussed as subjects in legislations.

A disclosure should only be justified if and after other means or sources have been unsuccessfully exhausted by the parties to a disclosure proceeding. Such measures may, for example, include an internal investigation in a case where secret internal information about an enterprise or administration was disseminated, the reinforcing of restrictions on access to certain secret information, general police investigations or the dissemination of contrasting information as a countermeasure. The parties to a disclosure proceeding should also exhaust other non-journalistic sources at first before demanding the disclosure of the source by the journalist.⁴⁰

Alternative sources who could be subject to an alternative investigation and enquiry may include, for example, employees, colleagues, contracting partners or business partners of the person requesting the disclosure. In States, which protect the confidentiality of sources as such, it might not be possible to demand information from alternative persons under domestic law. Other persons, however, who are linked to the work of a journalist and thereby acquire knowledge of the journalist's source, are protected by Principle 2 of this Recommendation. Therefore, the persons or public authorities seeking a disclosure should primarily search for and apply proportionate alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the protection of the right of journalists not to disclose their source. The existence of reasonable alternative measures for the protection of a legitimate interest excludes the necessity of disclosing the source by the journalist and the parties seeking the disclosure have to exhaust these alternatives at first.

It is worth mentioning the following part from Recommendation 1950 (2011)⁴¹ as it concerns the modern situation and other persons' participation:

⁴⁰ Explanatory memorandum to the Recommendation No R(2000) 7

⁴¹ Parliamentary Assembly Recommendation 1950 (2011)

In the same manner as the media landscape has changed through technological convergence, the professional profile of journalists has changed over the last decade. Modern media rely increasingly on mobile and Internet-based communication services. They use information and images originating from non-journalists to a larger extent. Non-journalists also publish their own or third party information and images on their own or third-party Internet media, accessible to a wide and often undefined audience. Under these circumstances, it is necessary to clarify the application of the right of journalists not to disclose their sources of information.⁴²

The second ground considering legitimate interest requires a broader explanation. The principle states that, the legitimate interest in disclosure should clearly outweigh the public interest in the non-disclosure. What are the further cases? The right of non-disclosure sometimes pursues illegal purposes containing threats to the life or other legitimate interests of the individual, state etc. These circumstances clearly mean that, for providing legitimate interest in the disclosure the right of non-disclosure can be restricted.

Furthermore, the European Court of Human Rights has stressed that any restriction to the freedoms protected by Article 10, paragraph 1 of the European Convention on Human Rights must pursue a legitimate aim under Article 10, paragraph 2 of the Convention. Article 10, paragraph 2 of the Convention enumerates grounds for the restriction of freedom of expression, without establishing a hierarchy among them. Any restriction of the right of journalists not to disclose information identifying their source and of the public interest in the non-disclosure must be based on a legitimate interest from among these grounds. In this respect, Article 10, paragraph 2 has to be interpreted narrowly, in accordance with the established jurisprudence of the European Court of Human Rights. Therefore, the legitimacy of an interest has to be established by reference to those grounds which can possibly override the rights and interests in the protection of the confidentiality of journalists' sources of information.

The Recommendation affirms the use of a balancing test by the ECHR, because without perceiving the interests and comparing their importance for the sake of society it will be difficult, or impossible, to determine a just decision about disclosure or non-disclosure.

Given the importance of freedom of expression and freedom of the media for any democratic society and every individual, and taking into account the potentially chilling effect a source disclosure may have on the readiness of future sources to provide information to journalists, only exceptional cases where a vital personal or public interest is at stake might justify or be proportional to the disclosure of a source. Paragraph c, sub-paragraph ii refers to this proper use of discretion by the competent authorities and requires that (1) a legitimate interest should outweigh or override the public interest in the non-disclosure and be proven, (2) the vital and serious nature of the circumstances warrants such disclosure and (3) be identified as responding to a pressing social need by the competent authorities; (4) the assessment of the necessity of the

⁴² <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17943&lang=en>

disclosure under Article 10 of the European Convention on Human Rights is subject to supervision and review by the European Court of Human Rights.

Consequently, the protection of human life, prevention of major crime, defence of a person accused or convicted of having committed a major crime are the exact circumstances making legitimate interest in disclosure outweighing. It is also mentioned in national legislation, as stated in Article 11 of the Law on Mass Media of Azerbaijan Republic in the same way;⁴³

In the following circumstances the editor or journalist can be obliged by the court to disclose the source by the court.

- 1) for protection of human life;
- 2) for the purpose of preventing grave crime
- 3) for the protection of the person that is suspected or accused for committing grave crime.

Protection of human life is of the paramount importance for a state that has accepted fundamental principles, thus if the non-disclosure is carrying a threat to a human life, then it should be denied to be kept so.

Grave crimes are distributed in the national legislations and as they are violating the legal interests more, it would not be justified not to disclose any information containing this kind of details.

A grave crime shall be deliberate and careless actions for committing of which maximal punishment provided by the present Code shall not exceed twelve years of imprisonment, as provided by the Article 15.4 of the Criminal Code of the Republic of Azerbaijan.⁴⁴ So, the public danger is considered to be enough for the limitation. The Law on Mass Media speaks about grave crimes in different ways: for preventing their commitment and for protecting the person suspected or accused to commit those crimes, which means the category, will be applicable in two different situations.

So that, the necessity can make disclosure required in spite of the journalistic rights in certain reasonable cases discussed above. The application used is always expected to be just in the middle of the contradictory sides. Measures chosen for particular case must be analysed considering a balance between interests. That is what should be done in case of problems that makes interest of disclosure more necessary than the interest of non-disclosure. The conditions included to the principles are corresponded in Azerbaijani legislation and their justification process stands on the shoulders of the authorities. More proper application by the national law enforcement bodies would be the one stepping to the deep level of the issue and taking the outweighing interest over the other one.

⁴³ Law on Mass Media of the Republic of Azerbaijan, Article 11

⁴⁴ Criminal Code of the Republic of Azerbaijan, article 15.4.

7. In the light of the case law of the European Court of Human Rights, how do national courts apply the respective laws with regard to the right to protect sources?

In particular, how do they balance the different interests at stake? Unfortunately, there has been no cases relating to the protection of journalistic sources in the judicial practice of the Republic of Azerbaijan at this point in time.

8. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

As we have identified under the extent of above questions, journalists have the right to get, disseminate information and not to disclose to anyone the source of that information. This provision has been highlighted in respective laws of the Republic of Azerbaijan. In accordance with Article 50 of the Constitution of the Republic of Azerbaijan,⁴⁵ everyone is entitled to look for, obtain, transmit, develop and distribute any information by any legal way. However, there are some exceptional cases when identifying the source of information is of a paramount importance. The legislation of the Republic of Azerbaijan strictly, and precisely, defines these exceptional cases in order not to give a raise to particular problems. Under the respective laws of AR, there have been enshrined certain criteria of using surveillance and anti-terrorism laws, precisely some investigative actions in order to obtain the source of journalist information.

Article 1 of the Law of the Republic of Azerbaijan on Mass Media provides us with certain definitions. The freedom of mass information is based on granting to citizens by the state of the right on seeking, getting, preparing, transmission, production and dissemination of information in a reliable way. Establishing of mass media means, possession, use and control over them, seeking, getting, preparing, transmission, production and dissemination of the mass information cannot be restricted, except for cases, determined by the legislation of the Republic of Azerbaijan on mass media.⁴⁶

Article 8 of the same law defines that the mass media have the right to gain the quick and authentic items of information about economical, political, public and social situation in society, activity of state organs, municipalities, enterprises, plants and organisations, public associations,

⁴⁵ The Constitution of the Republic of Azerbaijan, article 50.

⁴⁶ The Law of the Republic of Azerbaijan on Mass Media, article 1.

political parties and officials. This right can not be restricted, except for cases indicated in the legislation of the Azerbaijan Republic.⁴⁷ Article 10 establishes in itself the inadmissibility of abuse by mass media as using mass information with the purposes of distribution of secrets guarded by the legislation of the Azerbaijan Republic, violent overthrow of an existing constitutional state formation, attempt on the integrity of the state, propagation of war, violence and cruelty, national, racial, social hate or intolerance, humiliating honour and a dignity of the citizens, pornographic materials, slander or undertaking of other unlawful operating is not enabled.⁴⁸

Article 11⁴⁹ of the same law establishes some circumstances in which the journalist can be forced by the courts to disclose the source of obtained information to them. These circumstances are following:

- for the protection of human life;
- with the purpose to prevent heavy crime;
- to protect the person accused or suspected in conducting heavy crime.

Main provisions have been defined in The Law of the Republic of Azerbaijan on the Struggle against Terrorism and The Law of the Republic of Azerbaijan on Operational Search Activities.

Article 1 of the Law of the Republic of Azerbaijan on Operational Search Activities enshrines the definition of this kind of activity.⁵⁰ According to that article, operational-search activity shall be implemented for the purpose of protection of life, health, rights and freedoms of human, interests of legal persons, state and military secrets, as well as the national security from criminal encroachments.

Investigative actions made against journalists in order to get the source of their information are in the scope of operational search activities. In the above-mentioned law, there have been indicated criteria and purposes of using these investigative actions.

Operational search activity in order to be implemented against journalists to get the source of their information has to pursue following objectives:

- 1) Prevention of crimes committed and crimes pending preparation;
- 2) Detection of committed crimes;
- 3) Identification of persons, who prepared, committed or are pending commission of crimes;
- 4) Search of persons concealing themselves from court, investigation and inquiry authority, and evading from execution of punishment, as well as missing persons;
- 5) Identification of unknown human bodies.⁵¹

It is prohibited to violate human and civic rights and freedoms envisaged in the Constitution of the Republic of Azerbaijan and interests of legal entities. The temporary restriction of human

⁴⁷ The Law of the Republic of Azerbaijan on Mass Media, article 8.

⁴⁸ The Law of the Republic of Azerbaijan on Mass Media, article 10.

⁴⁹ The Law of the Republic of Azerbaijan on Mass Media, article 11.

⁵⁰ The Law of the Republic of Azerbaijan on Operational Search Activities, article 1.

⁵¹ The Law of the Republic of Azerbaijan on Operational Search Activities, article 2.

and civic rights and freedoms in the course of implementation of operational-search activity is allowed only in accordance with the provision of this ACT in case of prevention and disclosure of crimes, search of those secreting from court, investigation and investigating authorities, escaping sentencing and missing.⁵²

Agents of the operational-search activity shall have the following responsibilities during the course of investigative activities against journalists to obtain the source of their information:

1) to implement all the actions within the scope of own authorities to ensure the protection of human and civil rights and responsibilities, legitimate interests of private and legal persons, public and state security

2) to execute decisions of judicial and investigation authorities pertaining to the implementation of the operational search measures or written instructions within the framework of the criminal case, as well as, to carry out decisions of the authorised Agents of the Operational-Search Activity;

3) to provide information obtained as a result of the operational-search activity, without disclosure of its source and modes of obtaining it, to the person conducting inquiry or investigation or to the court;

4) to respond to the requests by the foreign law-enforcement and appropriate international organisations within the framework of the international treaties, to which the Republic of Azerbaijan is party to;

5) to undertake all necessary measures in order to bring the information about the fact which is relevant to the territorial jurisdiction of another Agent of the Operational-Search Activity on the territory of the Republic of Azerbaijan and render the necessary assistance;

6) to undertake appropriate actions to ensure conspiracy in the course of implementation of operational-search activity;

7) to check the persons who have access to confidential information or matters requiring special permission due to the position that s/he occupies;

8) to protect own staff and their close relatives, persons facilitating the operational-search activity and their close relatives, as well as the participants of the criminal process and their close relatives and their property from illegal encroachments;

9) to ensure the confidentiality and anonymity of cooperation with any person;

10) to maintain the register of events, facts, objects and information sources.⁵³

Operational search activities have to be grounded and based on the specified rules in legislation. The grounds for implementing operational-search measures precisely some investigative actions against journalists are as follows:

1) decisions of a court (judge);

2) decisions of investigation authorities;

3) decisions of the authorised Agents of Operational-Search Activity.

The decisions of courts (judges), investigation authorities or authorised Agents of Operational-Search Activity shall be accepted only in following cases:

⁵² The Law of the Republic of Azerbaijan on Operational Search Activities, article 4, part II.

⁵³ The Law of the Republic of Azerbaijan on Operational Search Activities, article 6.

- 1) within the framework of existing of criminal case;
- 2) repealed by the ACT of the Republic of Azerbaijan;
- 3) in case of obtaining reliable information , which is received from unbiased and known source, to the effect that a particular person is preparing, committing or have committed a crime even without the framework of the existing criminal case;
- 4) in case of event infringing the national security and its defense capacity or prevention of this event;
- 5) in case of a person concealing himself from court, investigation or inquiry, evading execution of punishment or missing person;
- 6) in case of identification of unknown human body.⁵⁴

Conditions in order to implement these investigative actions have been defined in article 13⁵⁵ as follows:

I. Operational-search measures in respect of confidentiality of information protected by legislation and transmitted by correspondence, telephone, post-telegraph and other means of communication and privacy of premises shall be allowed if there are sufficient grounds to believe that the measures carried out with a purpose of collecting information on the persons preparing for crime, attempting the commission of crime, committing crime, hiding themselves from court, investigation and inquiry bodies, evading punishment, as well as, of tracing stolen goods, of preventing concealment and destruction of evidence will produce information to serve as evidence in criminal proceedings and location of people at large.

II. Persons commissioned by the agents of the Operational Search Activity to carry out operational-search measures in respect of tapping and recording of telephone and other communication, extracting information from channels of technical communication and other technical means, screening of correspondence and searching of premises, shall possess warrant authorizing the measures and the identification documents.

III. The technical means, psychotropic, chemical and other substances capable of damaging human health and environment shall be banned from usage in the course of implementation of operational-search measures with the purpose of obtaining information about the person who is believed to have committed a crime or to be preparing a crime, as well as his/her connections.

IV. In the course of implementation of the operational-search measures, persons commissioned by the Agents of the Operational Search Activity shall be bound to adhere to the principle of proportionality of these measures to the degree of the danger posed by the targeted criminal encroachments to the interests of the state and public in terms of potential damage to be caused.

Chiefs of the Agents of the Operational-Search Activity shall supervise of compliance with legislation in the course of organising and implementing of the Operational-Search Activity and shall be held personally for defaults.⁵⁶

⁵⁴ The Law of the Republic of Azerbaijan on Operational Search Activities, article 11, part IV.

⁵⁵ The Law of the Republic of Azerbaijan on Operational Search Activities, article 13.

⁵⁶ The Law of the Republic of Azerbaijan on Operational Search Activities, article 19.

The Law of the Republic of Azerbaijan on the Struggle against Terrorism defines main rules of using anti-terrorism laws in order to get the source of journalistic source.

First of all, we would like to introduce the concept of terrorism used in this law. In accordance with the Article 1⁵⁷ of this Law, terrorism is defined as committing of explosions, fires and other actions threatening the lives of people, damaging their health, causing significant property damage or occurrence of other hazardous consequences to public, with the purpose of destruction of public security, spread of panic among population or influencing the decisions of state authorities or international entities, as well as threat of committing of such actions for the same purposes.

The struggle against terrorism in the Azerbaijan Republic is based on following principles: 1) provision of legality; 2) inevitability of punishment stipulated under the legislation of the Azerbaijan Republic for commitment of terrorist activity; 3) coordination of public and concealed methods of struggle against terrorist; 4) combined use of legal, political, socio-economic and organisational-preventive measures; 5) prioritised protection of rights of persons endangered by terrorist activity; 6) independence in control of resources attracted to operations against terrorism; 7) minimum disclosure of staff involved in operations against terrorism, including methods and tactics used for these purposes.⁵⁸

The law of Azerbaijan on the freedom of information defines the main conceptions about the information, its source and restricted information. In accordance with this law, documents and other carriers reflecting information in order provided for in the legislation, mass media information and public speeches shall be considered as information sources.⁵⁹

Information with limited access includes state, professional (lawyer, notary, and doctor), service, bank, commercial, investigation and court secrets, information on personal and family life of persons and terrorist acts. Information with limited access includes information on environment in cases determined with the relevant legislation. Relations concerning state, professional (lawyer, notary, doctor), service, bank, commercial, investigation and court secrets, information on personal and family life of persons, terrorist acts are regulated by the relevant legislation.

Finally, as we have provided in the first part of the question, the Republic of Azerbaijan has enacted numerous laws in the area of anti-terrorism, mass media and operational-search activities which are enough accessible to the public. All of the aspects including principles, objectives, grounds, basis have been clearly enshrined in these laws to prevent any particular problems including legal uncertainty in this respect.

⁵⁷ The Law of the Republic of Azerbaijan on the Struggle against Terrorism, article 1.

⁵⁸ The Law of the Republic of Azerbaijan on the Struggle against Terrorism, article 4.

⁵⁹ The Law of the Republic of Azerbaijan on Freedom of Information, article 7.

9. Can journalists rely on encryption and anonymity online to protect themselves and their sources against surveillance?

Before discussing the main issue, we may run over the basis legislative acts concerning the freedom of expression. One of the most important provisions on this right is article 10 of European Convention on Human Rights,⁶⁰ which declares that 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.

Another international instrument regulating this fundamental freedom is the Universal Declaration of Human Rights (UDHR). Article 19⁶¹ is similar to article 10 of European Convention on Human Rights, and it claims that 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.

As to the national level, article 47 of the Constitution of the Republic of Azerbaijan under the title of freedom of thought and speech, establishes that.⁶²

- I. Everyone has the right to freedom of thought and speech.
- II. Nobody shall be forced to express his thoughts and convictions or to deny them.
- III. Agitation and propaganda provoking racial, national, religious, social discord and hostility are prohibited.

Freedom of expression maintains democracy in society. In other words, the freedom of the press affords the public one of the best means of discovering and forming an opinion of ideas and attitudes. In particular, it gives politicians the opportunity to reflect and comment on the pre-occupations of public opinion; it thus enables everyone to participate in the free political debate, which is at the very core of the concept of a democratic society, as to the *Castells v. Spain* case, European Court of Human Rights.⁶³

As to whether journalists can rely on encryption and anonymity online to protect themselves and their sources against surveillance, the definitions must first be provided. Merriam Webster Dictionary⁶⁴ says that, a journalist is a person engaged in journalism especially: a writer or editor for a news and medium, a writer who aims at a mass audience. Anonymity is merely the fact of not being identified and, in this sense, it is part of the ordinary experience of most people on a daily basis, e.g. walking in a crowd or standing in a queue of strangers. In this way, an activity can be anonymous even though it is also public. Anonymity is fundamental for the full exercise of

⁶⁰ European Convention on Human Rights, article 10.

⁶¹ The Universal Declaration of Human Rights (UDHR), article 19.

⁶² The Constitution of the Republic of Azerbaijan, article 47.

⁶³ *Castells v. Spain* case, European Court of Human Rights.

⁶⁴ Merriam Webster Dictionary.

the right to freedom of expression, as enshrined in Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The spread of the internet and new technologies has created new possibilities for communication and free expression and opinion, including enabling anonymity. Encryption has been identified as the process of encoding or ‘scrambling’ the content of any data or voice communication with an algorithm and a randomly selected variable associated with the algorithm, known as a ‘key’. Encryption is required to preserve confidentiality in online communications. APC’s Internet Rights Charter⁶⁵ established in 2001 the right to use encryption: “People communicating on the internet must have the right to use tools which encode messages to ensure secure, private and anonymous communication.” It also states that, people should be able to communicate free of the threat of surveillance and interception. The LEAP Encryption Access Project⁶⁶ coined the phrase “right to whisper”. They say, "Like free speech, the right to whisper is a necessary precondition for a free society. Without it, civil society languishes and political freedoms are curtailed. As the importance of digital communication for civic participation increases, so too does the importance of the ability to digitally whisper.”

Anonymity and encryption also can be used as tools of hate speech and sexual violence. For example,⁶⁷ Berenice, a woman from Mexico,⁶⁸ had her private photos and videos non-consensually uploaded on pornography websites. She had no idea who the culprit was, but suspected that someone had hacked her email. Afraid that people might say demeaning things about her, Berenice contacted the cyber crime police through Facebook. However, when she did not get a favorable response, she took the matter into her own hands. She capitalised on the anonymity offered by the internet as a means to safely and publicly denounce the situation. She also researched to find out how such a violation could have taken place, and what she could do to protect herself. She related, “once I found out about the video, I changed my passwords and I changed the names of my accounts. I don’t use last names any more either.” She also learned how to do reverse-image searches and tried to monitor where her pictures and the video were being uploaded, and then ask for them to be taken down.

As for surveillance, a Dictionary of Law⁶⁹ establishes it as keeping watch on a suspect. Merriam Webster⁷⁰ claims: surveillance is the act of carefully watching someone or something especially in order to prevent or detect a crime. These are more criminal definitions, but in real life journalists may be surveyed not for criminal cases, but also ‘democratic’ cases.

Now that the definitions are clarified, we must determine the appropriate regulation in domestic law. Azerbaijani legislation prohibits for journalists to unfold a name of source if the person does

⁶⁵ APC Internet Rights Charter, Theme 5.

⁶⁶ <https://leap.se/en/about-us/vision>

⁶⁷ <http://www.ohchr.org/Documents/Issues/Opinion/Communications/AssociationForProgressiveCommunication.pdf>

⁶⁸ http://www.genderit.org/sites/default/upload/case_studies_mex3_0.pdf

⁶⁹ A Dictionary of Law (7 ed.). Jonathan Law and Elizabeth A. Martin. Oxford University Press

⁷⁰ Merriam Webster Dictionary.

not want to. Regarding to it, article 11 of the Law of the Republic of Azerbaijan on Mass Media⁷¹ states that Media editorship and journalist are not allowed to unfold a person giving information with the condition of his identity not to be revealed. Media editorship and journalist who is responsible for publication of information can't be enforced to unfold his source of information, with an exception if it is in a trial proceedings and stated by law. In this case media editor or journalist is responsible for the anonym description, article, image or caricature.

Editors or journalists in the following cases shall be forced by the court to disclose their source of information:

- 1) for the protection of human life;
- 2) with the purpose to prevent the commission of a grave crime;
- 3) for the protection of the person accused or suspected in committing a grave crime.

This statement shows that, in some circumstances journalists can hide themselves, as if they got information from the person that does not want himself to be unfold. Anyway, if this information involves any felony, then journalist will be responsible as an owner of the information. There is also the similar provision in the Law of the Republic of Azerbaijan on Copyright and Related Rights, which confirms this statement. So, article 8.3⁷² of it states that in the case of publication of works anonymous or with encryption (with exception of encryption confirming the personality of the author) the publisher, if there is no other prove, is legally considered as an author's representative and legally represents author's rights and can realize his authorities.

In our legislation, no concrete provisions regarding journalists' anonymity and encryption exist. However, an article from the Law of the Republic of Azerbaijan on Telecommunication⁷³ would be useful to refer to in our case. Article 38 named Provision of the Telecommunication Anonymity states that, the limitation of the information transmitted by the telecommunication means can be allowed only in the circumstances determined by law. These circumstances mainly are connected to criminal offences, territorial integrity, state secret etc.

Thus, journalists in Azerbaijan can rely on anonymity and encryption, but in a certain frame. They can use their positive rights and freedoms without harming others' rights. This regulation in general can be found in different laws of the Republic of Azerbaijan, however, the universal regulation still to be developed by the Milli Majlis of the Republic of Azerbaijan – legislative branch of government. For sure in the first place, the development has to concern the respective reforms in mass media law.

⁷¹ The Law of the Republic of Azerbaijan on Mass Media, article 11.

⁷² The Law of the Republic of Azerbaijan on Copyright and Related Rights, Art 8.3.

⁷³ The Law of the Republic of Azerbaijan on Telecommunication, article 38.

10. Are Whistle-Blowers Explicitly Protected under Law Protecting Journalistic Sources? Is There Another Practice Protecting Whistle-Blowers? Is the Legislation Prohibiting Authorities and Companies from Identifying Whistle-blowers?

The freedom of expression, which can be defined as the freedom to hold opinions, freedom to impart information, freedom to receive information and ideas. (Case Case of TASZ v. Hungary,⁷⁴ Nilgün Halloran Case, 2012/1184⁷⁵) allows people to express their opinion, creates the respect for fundamental human rights, improves national security by making the political system more democratic and the government more efficient, which leads to a better decision-making.

The State has both positive and negative obligations in the scope of freedom of expression and freedom of media. Public authorities should not ban individuals from expressing and disseminating their thoughts unless they have to in the scope of negative obligations; they should take necessary measures for real and effective protection of freedom of expression in the scope of positive obligations.

For providing the necessary answer, all the terms given for discussion must be defined. As to the Cambridge Dictionary,⁷⁶ a whistle-blower is a person who tells someone in authority about something illegal that is happening, especially in a government department or a company. Merriam-Webster⁷⁷ provides that a whistle-blower is one who reveals something covert or who informs against another.

Surely, however, the most clear definitions regarding the term were given in the Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistle-blowers⁷⁸, where:

- a. “whistle-blower” means any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector;
- b. “public interest report or disclosure” means the reporting or disclosing of information on acts and omissions that represent a threat or harm to the public interest;
- c. “report” means reporting, either internally within an organisation or enterprise, or to an outside authority;
- d. “disclosure” means making information public.

⁷⁴ Társaság a Szabadságjogokért v. Hungary.

⁷⁵ Nilgün Halloran Case, 2012/1184.

⁷⁶ Cambridge Dictionary.

⁷⁷ Merriam-Webster Dictionary.

⁷⁸ Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistle-blowers.

As far as we can see, similar terms are regulated by the Article 50 of the Constitution of the Republic of Azerbaijan,⁷⁹ titled as the Freedom of Information:

I. Everyone is free to legally look for, acquire, transfer, prepare and distribute any information in a legal way.

II. Freedom of mass media is guaranteed. State censorship in mass media, including press is prohibited.

III. Everyone's right to refute or react to the information published in the media and violating his or her rights or damaging his or her reputation is guaranteed.

Article 2 on the Law of the Republic of Azerbaijan on Getting Information declares that the acquisition of information in the Republic of Azerbaijan is free.⁸⁰

Article 8 on the Law of the Republic of Azerbaijan on Mass Media⁸¹ determines that the media has the right to get operative and honest information about the action of state organisations, municipals, institution, enterprise and organisations, public unions, political parties, officials, and that this right cannot be restricted in any case other than prescribed by the legislation of the Republic of Azerbaijan.

Article 5 of The Law of the Republic of Azerbaijan on Trade Secret⁸² determines several rights for the trade secret owner, which include the right to determine, change and cancel the regime of trade secret; the right to use, give to other persons if it is based on contract and apply the other methods of involving to civil circulation of trade secret; the right to have a defend from the action offended or may offend the regime of trade secret; the right to demand a compensation of the harm from the persons, who used the trade secret for their interests, under judiciary.

However, in Azerbaijani legislation, there is no concrete provision about whistle-blowers, and the most appropriate definition determined in our law is the "source of information". As a temporary alternate regarding to whistle-blowers, we refer to the provisions of our law protecting the "source of information". We can safely assume that, in Azerbaijani legislation this issue is regulated by these norms. As it was determined by the discussions to the previous questions, legislation prohibits authorities and companies from identifying the source of information. Furthermore, it determines liability for perpetrator motions against the source of information. However, surely, there exists a limit. If a whistle-blower's action includes criminal motive, then the punished side will be the whistle-blower. This means that in certain cases, the source of information is liable for spreading the confidential information and may be considered as a perpetrator. Authorities and companies can identify them if they commit a misdemeanor or a felony, as in the Criminal Code of the Republic of Azerbaijan⁸³ there are some provisions which demand so. As an example, we may refer to defamation and humiliation, which are determined as the criminal offences under the Criminal Code of the Republic of Azerbaijan in the articles 147 and 148 respectively.

⁷⁹ The Constitution of the Republic of Azerbaijan, article 50.

⁸⁰ The Law of the Republic of Azerbaijan on Getting Information, article 2.

⁸¹ The Law of the Republic of Azerbaijan on Mass Media, article 8.

⁸² The Law of the Republic of Azerbaijan on Trade Secret, article 5.

⁸³ The Criminal Code of the Republic of Azerbaijan, articles 147, 148.

Under the Country Report of Azerbaijan under European Neighbourhood Policy we can partly get answers to the main questions of the issue.⁸⁴ To what extent are there legal provisions in place to protect whistle-blowers in the public sector? Protection of whistle-blowers is envisioned in the draft law on Conflict of Interest, the adoption of which has been delayed, while existing legislation is rather inconsistent on the issue. Although a public official shall be subject to criminal liability for failure to report serious or especially grave crimes, and few corruption related offences fall under this category, there is no legal protection for those who do. In other words, if officials do not report grave incidents they may be punished, and in case of lighter offences they will get away with it, except for police officers who are required to report all kinds of law violations. But if they do, the law will not protect them unless a criminal case is opened, and then the Law on State Protection of Participants of the Criminal Process steps in. Hence, as of now there is really no motivation for officials to do so. Ordinary citizens do not have any reporting obligations and receive some protection under the Criminal Code – i.e. they are freed from criminal responsibility for paying a bribe if they reported it before the information became known to law enforcement bodies, or if they have been exposed to a threat on the part of an official. To what extent are whistle-blowers in the public sector protected in practice? Protection of whistle-blowers in practice is non-existent, which is supported by other external evaluations.⁸⁵ Statistics are not available on the reporting of corruption-related offences. There are no specific systems to receive signals of suspicions of corruption with most public agencies (exceptions being the Ministries of Tax and Education). However, many government bodies have online facilities and hotlines through which people, including officials, can report anything, including corruption suspicions. At any rate, the efficiency of these tools is minimal, as the law prohibits reviewing anonymous reports and few people, least of all civil servants, would dare to reveal their identity when reporting corruption suspicions. The gap in the official whistle-blower mechanisms has partly been filled by civil society organizations such as TI Azerbaijan's Corruption Hotline. However, it should be noted that even civil society does not receive many reports other than complaints from victims of corruption themselves, as the reporting of somebody else's misdoings is contrary to national culture.

Monitoring Report of Azerbaijan on Third Round Monitoring under the Organisation for Economic Co-Operation and Development also shows that,⁸⁶ no steps were taken to introduce a legal obligation to report corruption or regulation on protection of whistle-blowers. A number of significant anti-corruption laws have not been adopted for a long time, for example, legislation on conflict of interest prevention or whistle-blowers protection.

Summing these all up, we come to a certain conclusion, which is that despite the fact, that many foreign countries regulate the definition of whistle-blowers under their legislation, in domestic legislation this issue remains open because of lack of concrete provisions in national law. Our

⁸⁴European Neighborhood Policy, Country Report Azerbaijan, March 2005

⁸⁵ Source: Public Anti-corruption Initiatives available at <http://www.business-anti-corruption.com/country-profiles/europe-central-asia/azerbaijan/initiatives/public-anti-corruption-initiatives/>

⁸⁶ www.oecd.org/corruption/acn/AZERBAIJANThirdRoundMonitoringReportENG.pdf

legislation system still uses analogy with regards to the situations concerning by their nature whistle-blowers and we need some theoretical improvement on this exact part of information and media law.

11. Conclusion

According to the article 11 of the Law of the Republic of Azerbaijan on Mass Media a journalist cannot be forced to disclose the source of information published or broadcasted via mass media in connection with the case under investigation or at the court proceedings, except in cases specified by law. In this case, the responsibility for the author's non-disclosed description, article, picture or caricature lies on the shoulders of a contributing editor responsible for release or a journalist. To disclose the source of information in our law does not only comprises in itself the disclosure of the name of a person who provided a journalist with information, but also any other information allowing to identify the person, including any personal information about the person who gave information (age, work place, place of residence, etc.), his appearance, voice, information about getting the information by a journalist (where, when, how it was received, etc.), the non spread part of the provided information, personal information in connection with the journalist's professional activities (his previous work, previous investigations, etc.). According to article 189 of Code of Administrative Offences of the Republic of Azerbaijan, abuse of freedom of mass media and journalist rights on behalf of editorial staff (responsible editor) of mass media and journalists (authors) i.e.: promulgation of information, prohibited to disclosure by legislation; non-fulfilment of control on preparation of materials, published in printing edition in accordance with requirements of legislation; promulgation of information without indication of its source, except occasions envisaged by legislation; production or distribution of production of mass media without reference data or deliberate distortion of reference data entails imposition of penalty on natural persons in amount of 20-25, official persons - 60-80, legal persons - 200-250 manats. This is an obvious proof of the fact, that keeping the source of information in confidentiality plays an important role for other persons to give information freely and confidently and for determining the problems and events taking place in society and in the political arena. In our legislation, there does not exist a single systemized normative act which would regulate the right of media actors to keep their information sources confidential. Thus, for the formation of free media our state is in the need of development of legislation in this exact field. Information not being state secret but needed to be kept in secrecy in order to protect legal interests of citizens, institutions, enterprises and organisations shall be confidential one. Gathering, processing, use and dissemination of the confidential information shall only be allowed in cases established by legislation of Azerbaijan Republic. As Azerbaijan is a post-soviet country, the law was concrete on state censorship in Soviet period. In August 6 1998, the state censorship over mass media was prohibited by the Order of the President Heydar Aliyev. From this period the free environment is observed in the media sphere. As the Constitution of Azerbaijan Republic is the supreme document in hierarchy, the national laws also indicated the principle then. The legislation considers only vital public or individual interests at stake when the necessity is allowed for disclosure. Law of Azerbaijan on the freedom of information defines main conceptions about the information, its source and restricted information. In accordance with this law, documents and other carriers reflecting information in order provided for in the legislation, mass media information and public speeches shall be considered as information sources.

Information with limited access includes state, professional (lawyer, notary, and doctor), service, bank, commercial, investigation and court secrets, information on personal and family life of persons and terrorist acts. Information with limited access includes information on environment in cases determined with the relevant legislation. Relations arisen concerning state, professional (lawyer, notary, doctor), service, bank, commercial, investigation and court secrets, information on personal and family life of persons, terrorist acts are regulated by the relevant legislation. Azerbaijan Republic has enacted plenty of laws in anti-terrorism laws, mass media and operational-search activities which are enough accessible to the public. All of the aspects including principles, objectives, grounds, basis have been clearly enshrined in these laws to prevent any particular problems including legal uncertainty in this respect. In our legislation there do not exist concrete provisions regarding journalists' anonymity and encryption. However, an article from the Law of the Republic of Azerbaijan on Telecommunication would be useful to refer to in our case. Article 38 named Provision of the Telecommunication Anonymity states that, the limitation of the information transmitted by the telecommunication means can be allowed only in the circumstances determined by law. These circumstances mainly are connected to criminal offences, territorial integrity, state secret etc.

Thus, journalists in Azerbaijan can rely on anonymity and encryption, but in a certain frame. They can use their positive rights and freedoms without harming others' rights. This regulation in general can be found in different laws of the Republic of Azerbaijan, however, the universal regulation still to be developed by the Milli Majlis of the Republic of Azerbaijan – legislative branch of government. For sure in the first place, the development has to concern the respective reforms in mass media law. Foreign countries regulate the definition of whistle-blowers under their legislation, in domestic legislation this issue remains open because of lack of concrete provisions in national law. Our legislation system still uses analogy with regards to the situations concerning by their nature whistle-blowers and we need some theoretical improvement on this exact part of information and media law.

12. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

12.1. Legislation

- The Constitution of the Republic of Azerbaijan
- The Law of the Republic of Azerbaijan on Mass Media
- The Law of the Republic of Azerbaijan on Freedom of Information
- European Convention on Human Rights
- The Law of the Republic of Azerbaijan on Information, Informatization and Protection of Information
- The Code of Professional Ethics of a journalist of the Republic of Azerbaijan
- Criminal Code of the Republic of Azerbaijan
- Code of Administrative Offences of the Republic of Azerbaijan
- Civil Code of the Republic of Azerbaijan
- Professional Code of Conduct of Azerbaijani Journalists
- The Law of the Republic of Azerbaijan on Operational Search Activities
- The Law of the Republic of Azerbaijan on the Struggle against Terrorism
- The Universal Declaration of Human Rights (UDHR)
- Parliamentary Assembly Recommendation 1950 (2011)
- The Law of the Republic of Azerbaijan on Copyright and Related Rights
- The Law of the Republic of Azerbaijan on Telecommunication
- The Law of the Republic of Azerbaijan on Trade Secret

12.2. Books and articles

- APC Internet Rights Charter
- Merriam Webster Dictionary
- A Dictionary of Law (7 ed.). Jonathan Law and Elizabeth A. Martin. Oxford University Press
- Társaság a Szabadságjogokért v. Hungary.
- Nilgün Halloran Case, 2012/1184.
- Cambridge Dictionary.
- Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistle-blowers.
- Castells v. Spain case, European Court of Human Rights.
- Explanatory memorandum to the Recommendation No R(2000) 7
- European Neighborhood Policy, Country Report Azerbaijan, March 2005

12.3. Internet sources

- http://www.echr.coe.int/Documents/FS_Journalistic_sources_ENG.pdf
- <http://www.judicialcouncil.gov.az/Meqaleler/5.pdf>
- <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML>
- <https://leap.se/en/about-us/vision>
- <http://www.ohchr.org/Documents/Issues/Opinion/Communications/AssociationForProgressiveCommunication.pdf>
- http://www.genderit.org/sites/default/upload/case_studies_mex3_0.pdf
- www.oecd.org/corruption/acn/AZERBAIJANThirdRoundMonitoringReportENG.pdf
- Public Anti-corruption Initiatives available at <http://www.business-anti-corruption.com/country-profiles/europe-central-asia/azerbaijan/initiatives/public-anti-corruption-initiative>

13. Table of Provisions

Provisions in native language	Corresponding translation
<p>1) Məlumat azadlığı haqqında Azərbaycan Respublikasının Qanunu</p> <p>Maddə 7. Məlumat mənbələri</p> <p>Qanunvericilikdə nəzərdə tutulmuş qaydada məlumatları əks etdirən sənədlər və başqa daşıyıcılar, kütləvi informasiya vasitələrinin məlumatları, açıq çıxışlar məlumat mənbələri hesab edirlər.</p>	<p>1) The Law of the Republic of Azerbaijan on Freedom of Information</p> <p>Article 7. The sources of information</p> <p>Documents and other carriers reflecting information in order provided for in the legislation, mass media information and public speeches are considered to be the sources of information.</p>
<p>2) Kütləvi informasiya vasitələri haqqında Azərbaycan Respublikasının qanunu</p> <p>Maddə 11. İnformasiyanın yayılmasına, informasiya mənbəyinin açıqlanmasına yol verilməyən xüsusi hallar</p> <p>Kütləvi informasiya vasitəsi redaksiyasının və ya jurnalistin:</p> <p>1) şəxsin gizli saxlanmaq şərt ilə verdiyi məlumatı yayılan xəbər və materiallarda açıqlamasına;</p> <p>2) adının bildirilməməsi şərt ilə məlumat vermiş şəxsin kimliyini göstərməsinə;</p> <p>3) təhqiqatçının, müstəntiqin, ibtidai araşdırmaya prosessual rəhbərliyi həyata</p>	<p>2) The Law of the Republic of Azerbaijan on Mass Media</p> <p>Article 11. Special cases, prohibiting the dissemination of information and the disclosure of the source of information</p> <p>Media editorship and journalist are not allowed to disseminate information:</p> <p>1) about person giving latent information, if person doesn't want his name to be unfold;</p> <p>2) about person who has given information with condition his name not to be declared;</p> <p>3) about preliminary investigation and interrogation without permission of</p>

<p>keçirən prokurorun və ya məhkəmənin icazəsi olmadan ibtidai istintaq və təhqiqat məlumatlarını yaymasına;</p> <p>4) cinayət etməkdə təqsirləndirilən yetkinlik yaşına çatmayanların və ya qanuni nümayəndələrinin razılığı olmadan onların şəxsiyyəti barədə hər hansı məlumatı yaymasına yol verilmir.</p> <p>Kütləvi informasiya vasitəsinin məlumatın dərc olunmasına (efirə verilməsinə) məsul redaktoru və (və ya) jurnalist istintaqda yaxud məhkəmə icraatında olan işlə əlaqədar qanunla müəyyən edilmiş hallardan başqa, informasiya mənbəyini açıqlamağa məcbur edilə bilməz. Bu halda müəllif açıqlanmayan təsvirə, məqaləyə, şəkilə və ya karikaturaya görə məsuliyyət buraxılışa məsul redaktorun yaxud jurnalistin üzərinə düşür.</p> <p>Redaktor və ya jurnalist aşağıdakı hallarda məhkəmə tərəfindən öz mənbəyini açıqlamağa məcbur edilə bilər:</p> <ol style="list-style-type: none">1) insan həyatının müdafiəsi üçün;2) ağır cinayətin qarşısını almaq məqsədi ilə;3) ağır cinayət törətməkdə ittiham olunan yaxud təqsirli bilinən şəxsin müdafiəsi üçün. <p>Bu maddənin birinci hissəsinin 3-cü bəndinin tələbləri jurnalistin müstəqil təhqiqat aparmaq hüququnu məhdudlaşdırmır.</p>	<p>investigator, interrogator, prosecutor or court;</p> <p>4) about personality of minors who have committed felony without their permission or without their legal representatives' permission.</p> <p>Media editorship and journalist who is responsible for publication of information cannot be enforced to unfold his source of information, with an exception if it is in a trial proceedings and stated by law. In this case media editor or journalist is responsible for the anonym description, article, image or caricature.</p> <p>Editor or journalist in the following cases shall be forced by the court to disclose their source of information:</p> <ol style="list-style-type: none">1)for the protection of human life;2) with the purpose to prevent the commission of a grave crime;3) for the protection of the person accused or suspected in committing a grave crime. <p>The requirements of the third part of the first provision of this article does not however limit the right of a journalist to conduct an independent investigation.</p>
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<p>3) Məlumat azadlığı haqqında Azərbaycan Respublikasının Qanunu</p> <p>Maddə 13. Şəxsiyyət haqqında məlumat (fərdi məlumat)</p> <p>Şəxsiyyət haqqında sənədləşdirilmiş və ya açıq elan edilmiş xəbər şəxsiyyət barədə məlumata aiddir. Şəxsiyyət haqqında sənədləşdirilmiş məlumat mənbəyi onun adına verilmiş, onun tərəfindən imzalanmış sənədlər və öz səlahiyyətləriçərçivəsində orqanlar tərəfindən şəxsiyyət haqqında toplanmış məlumatlardır. Şəxsiyyətin dini mənsubiyyəti və əqidəsi barədə məlumat yalnız onun tərəfindən könüllü təqdim edildikdə dövlət orqanları tərəfindən toplana bilər. Şəxsiyyətin siyasi partiyaya üzvlüyü və ya bitərəf olması barədə məlumat yalnız qanunla nəzərdə tutulmuş hallarda dövlət orqanlarına təqdim edilməlidir.</p> <p>4) Azərbaycan Respublikası Jurnalistin Peşə Etikası Kodeksi</p> <p>I Maddə. Jurnalistin sosial məsuliyyəti</p> <p>Jurnalistin bütün peşə fəaliyyəti Azərbaycan Respublikasının Konstitusiyası və qanunlarına tam uyğun gəlir. O, dərc olunmuş (efirə verilmiş) materialı üçün oxucu, tamaşaçı, dinləyici, ümumiyyətlə ictimaiyyət qarşısında tam məsuliyyət daşıyır.</p> <p>5) Azərbaycan Respublikasının Cinayət Məcəlləsi</p>	<p>3) The Law of the Republic of Azerbaijan on Freedom of Information</p> <p>Article 13. Information about a person</p> <p>Documentary or open news about a person is considered as information about a person. Source of documentary information about a person are documents addressed to his/her name, signed by him/her and information collected about a person by bodies within their authorities. Information about religion and confession of a person may be collected by state bodies only in case of his/her voluntary submission of this information. Information on political party membership or neutrality of a person shall be submitted to state bodies only in cases provided for by the legislation.</p> <p>4) The Code of Professional Ethics of a journalist of the Republic of Azerbaijan</p> <p>I Article. The social responsibility of a journalist</p> <p>All professional activities of a journalist are fully compatible with the Constitution and laws of the Republic of Azerbaijan. He is fully responsible for his published (broadcasted) material before the readers, viewers, listeners and society in whole.</p> <p>5) Criminal Code of the Republic of Azerbaijan</p>
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<p>Maddə15. Cinayətlərin təsnifatı</p> <p>15.4. Bu Məcəllə ilə qəsdən və ya ehtiyatsızlıqdan törədilməsinə görə nəzərdə tutulmuş azadlıqdan məhrum etmə cəzasının yuxarı həddi on iki ildən artıq olmayan əməllər ağır cinayətlər hesab olunur.</p> <p>15.5. Bu Məcəllə ilə qəsdən törədilməsinə görə on iki ildən artıq azadlıqdan məhrum etmə cəzası və ya daha ağır cəza nəzərdə tutulmuş əməllər xüsusilə ağır cinayətlər hesab olunur.</p> <p>6) Azərbaycan Respublikasının Cinayət Məcəlləsi</p> <p>Maddə 298. Şahidin və ya zərərçəkmiş şəxsin ifadə verməkdən imtina etməsi</p> <p>Şahidin və ya zərərçəkmiş şəxsin ifadə verməkdən imtina etməsi—</p> <p>üç yüz manatdan beş yüz manatadək miqdarda cərimə və ya yüz iyirmi saatdan yüz səksən saatadək ictimai işlər və ya bir ildən iki ilədək müddətə islah işləri və ya altı ayadək müddətə azadlıqdan məhrum etmə ilə cəzalandırılır.</p> <p>Qeyd: Şəxs özü, arvadı (əri), övladları, valideynləri və qanunvericiliklə dairəsi müəyyən edilmiş digər yaxın qohumlarına qarşı ifadə verməkdən imtina etdikdə cinayət məsuliyyətinə cəlb oluna bilməz.</p> <p>7) Azərbaycan Respublikasının Cinayət Məcəlləsi</p> <p>Maddə 307. Cinayət barəsində xəbər verməmə</p>	<p>Article 15. Classification of crimes</p> <p>15.4 Grave crime shall be deliberate and careless actions for committing of which maximal punishment provided by the present Code shall not exceed twelve years of imprisonment.</p> <p>15.5 Especially grave crime shall be deliberate actions for committing of which punishment provided by the present Code, shall be imprisonment for the term of twelve years or more strict punishment.</p> <p>6) Criminal Code of the Republic of Azerbaijan</p> <p>Article 298. Refusal of witness or victim from testifying</p> <p>Refusal of witness or victim from testifying –</p> <p>is punished by the penalty at a rate from three hundred up to five hundred of nominal financial unit, or public works for the term from hundred twenty up to hundred eighty hours, or corrective works for the term from one year up to two years, or imprisonment for the term about six months.</p> <p>NOTE: The person cannot be instituted criminal proceedings for refusal from testifying against himself, wife (husband), children, parents and other close relatives which circle is determined by the legislation.</p> <p>7) Criminal Code of the Republic of Azerbaijan</p> <p>Article 307. Not informing about crimes and</p>
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<p>və ya qabaqcadan vəd etmədən cinayəti gizlətmə</p> <p>307.1. Ağır və ya xüsusilə ağır cinayətin hazırlanmasını və ya törədilməsini bilərək həmin cinayət barəsində xəbər verməmə —</p> <p>beş yüz manatdan min manatadək miqdarda cərimə və ya iki ilədək müddətə islah işləri və ya iki ilədək müddətə azadlıqdan məhrum etmə ilə cəzalandırılır.</p> <p>8) Azərbaycan Respublikasının İnzibati Xətalər Məcəlləsi</p>	<p>obviously not promised concealment of crimes</p> <p>307.1. Not informing about known preparing or committed minor serious or serious crimes —</p> <p>is punished by the penalty at a rate from five hundred up to one thousand of nominal financial unit, or corrective works for the term up to two years, or imprisonment for the term up to two years.</p> <p>307.2. Obviously not promised concealment of minor serious crimes -</p> <p>is punished by the penalty at a rate from two up to five thousand of nominal financial unit or imprisonment for the term up to three years.</p> <p>307.3. Obviously not promised concealment serious crime —</p> <p>is punished by imprisonment for the term of from two up to five years.</p> <p>NOTE: The person provided by article 307.1 of the present Code, who has not informed on a crime, prepared or committed by his wife (husband), children, parents and close relatives which circle is established by the legislation, can not be involved to a criminal liability.</p> <p>8) Code of Administrative Offences of the</p>
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<p>Maddə 186. Jurnalistlərin hüquqlarının pozulması</p> <p>186.1. Qanunvericiliklə müəyyən edilmiş müddətdə jurnalist sorğusuna cavab verməməyə görə -qırx manatdan yetmiş manatadək miqdarda cərimə edilir.</p> <p>186.2. Qanunvericiliklə qorunan informasiyalar istisna olmaqla, jurnalistə informasiyanın verilməsi üzərinə məhdudiyyətlər qoymağavə ya informasiya verilməsindən imtina etməyə görə -</p> <p>altmış manatdan doxsan manatadək miqdarda cərimə edilir.</p>	<p>Republic of Azerbaijan</p> <p>Article 186 Violation of rights of journalists</p> <p>186.1. Not responding journalist request at periods established by legislation, — entails imposition of penalty on natural persons in amount of 40-70 manats.</p> <p>186.2. Restriction of presentation or refusal in presentation of information to journalist, except information protected by legislation, — entails imposition of penalty in amount of 60-90 manats.</p>
<p>9) Azərbaycan Respublikasının İnzibati Xətalər Məcəlləsi</p> <p>Maddə 189. Kütləvi informasiya azadlığından və jurnalist hüququndan sui-istifadə etmə</p> <p>189.0. Kütləvi informasiya vasitəsinin redaksiyası (məsul redaktoru) və jurnalistlər (müəlliflər) tərəfindən kütləvi informasiya azadlığından və jurnalist hüquqlarından sui istifadə etməyə görə,yəni:</p> <p>189.0.1. açıqlanması qanunla qadağan edilənməlumatları açmağa;</p> <p>189.0.2. mətbu nəşrdə çap olunan materialların qanunvericiliyin tələblərinə uyğun</p>	<p>9) Code of Administrative Offences of the Republic of Azerbaijan</p> <p>Article 189 Abuse of freedom of mass media and journalist rights</p> <p>189.0. Abuse of freedom of mass media and journalist rights on behalf of editorial staff (responsible editor) of mass media and journalists (authors) i.e.:</p> <p>189.0.1. Promulgation of information, prohibited to disclosure by legislation;</p> <p>189.0.2. Non-fulfilment of control on preparation of materials, published in printing</p>

<p>hazırlanmasına nəzarət etməməyə;</p> <p>189.0.3. qanunvericiliklə müəyyən edilmiş hallardan başqa informasiyanı onun mənbəyini göstərmədən yaymağa;</p> <p>189.0.4. istinad məlumatları göstərilməyən kütləvi informasiya vasitələri məhsullarını istehsal etməyə və yaymağa, yaxud istinad məlumatlarını qəsdən yanlış göstərməyə görə - fiziki şəxslər iyirmi manatdan iyirmi beş manatadək miqdarda, vəzifəli şəxslər altmış manatdan səksən manatadək miqdarda, hüquqi şəxslər iki yüz manatdan iki yüz əlli manatadək miqdarda cərimə edilir.</p> <p>10) Azərbaycan Respublikasının Mülki Məcəlləsi</p> <p>Maddə 21. Zərərin əvəzinin ödənilməsi</p> <p>21.1. Zərərin əvəzinin ödənilməsini tələb etmək hüququna malik olan şəxs ona vurulmuş zərərin əvəzinin tam ödənilməsini tələb edə bilər, bu şərtlə ki, qanunda və ya müqavilədə zərərin əvəzinin daha az miqdarda ödənilməsi nəzərdə tutulmasın.</p> <p>21.2. Zərər dedikdə, hüququ pozulmuş şəxsin pozulmuş hüququnu bərpa etmək üçün çəkdiyi və ya çəkməli olduğu xərclər, əmlakından məhrum olması və ya əmlakının zədələnməsi (real zərər), habelə hüququ pozulmasaydı, həmin şəxsin adi mülki dövryyə şəraitində əldə edəcəyi gəlirlər (əldən çıxmış fayda) başa düşülür.</p> <p>21.3. Zərərin əvəzinin ödənilməsi ilə bağlı</p>	<p>edition in accordance with requirements of legislation;</p> <p>189.0.3. Promulgation of information without indication of its source, except occasions envisaged by legislation</p> <p>189.0.4. Production or distribution of production of mass media without reference data or deliberate distortion of reference data entails imposition of penalty on natural persons in amount of 20-25, official persons - 60-80, legal persons - 200-250 manats.</p> <p>10) Civil Code of the Republic of Azerbaijan</p> <p>Article 21. Recovery Compensation of Damages</p> <p>21.1. The person holding the right to claim the compensation for damage may claim full recovery compensation of damages, provided that the amount of damages recoverable is not limited to a lesser amount by law or contract.</p> <p>21.2. Damages are the expenses, incurred or to be incurred by which a person, whose right has been violated, incurred or will incur to restore the violated right or damage to his property (tangible loss) as well as profits, which the person would have earned under ordinary conditions of civil relationships, if his rights have not been breached (lost profits).</p> <p>21.3. In determination of the volume of claim</p>
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<p>tələbin həcmnin müəyyənləşdirilməsi zamanı zərərçəkənin, onun işçisinin və qanunvericiliklə nəzərdə tutulmuş hallarda üçüncü şəxslərin davranışının zərərin yaranmasına və artmasına hansı həcmdə şərait yaratması nəzərə alınmalıdır.</p> <p>11) Kütləvi informasiya vasitələri haqqında Azərbaycan Respublikasının qanunu</p> <p>Maddə 49. Jurnalist statusu</p> <p>Jurnalistin bu Qanunla müəyyən edilmiş statusu aşağıdakılara şamil edilir:</p> <ol style="list-style-type: none">1) kütləvi informasiya vasitəsinin məlumat toplamaq, hazırlamaq, redaktə və istehsal etməklə məşğul olan ştatlı müxbirlərinə;2) kütləvi informasiya vasitəsinin məlumat toplanması, hazırlanması və redaktəsi ilə bağlı tapşırıqlarını müntəzəm yerinə yetirən ştatdankənar müxbirlərinə. <p>12) Kütləvi informasiya vasitələri haqqında Azərbaycan Respublikasının qanunu</p> <p>Maddə 61. Kütləvi informasiya vasitələri haqqında qanunun digər pozulma hallarına görə məsuliyyət</p> <p>Kütləvi informasiya vasitələri haqqında Qanunun müddəaları aşağıdakı hallarda pozularsa:</p> <ol style="list-style-type: none">1) təkzib, düzəliş və cavabdan əsassız olaraq imtina edildikdə, məhkəmənin qanuni qüvvəyə minmiş qərar və qətnaməsinə əməl etmədikdə	<p>on compensation of losses, shall be taken into consideration the extent of influence of the party causing loss, his employees and any third parties, to its occurrence and increase.</p> <p>11) The Law of the Republic of Azerbaijan on Mass Media</p> <p>Article 49. The status of a journalist</p> <p>The status of a journalist determined with this Law shall be applied to the following:</p> <ol style="list-style-type: none">1)a regular correspondent of mass media, who is engaged in gathering, preparing, editing and producing information;2) a lance correspondent of mass media, regularly fulfilling the assignments concerning gathering, preparing and editing information <p>12) The Law of the Republic of Azerbaijan on Mass Media</p> <p>Article 61. Liability for other cases of violation of the law on Mass Media</p> <p>At failure of positions of the Law "On mass media" in following cases:</p> <ol style="list-style-type: none">1.Unfounded waiving of the disproof, correction and answer, non-observance of the solutions, which have entered valid force, and resolutions of court - editorial office
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<p>redaksiya (məsul redaktor);</p> <p>2) bu Qanunun 9-cu, 11-ci, 13-cü, 21-ci və 28-ci maddələrinin tələbləri yerinə yetirilmədikdə təsisçi, redaksiya, nəşir və yayıcı;</p> <p>3) çap məhsulunun qanuni əsaslarla yayılmasına mane olduqda, dövrü mətbu nəşrin tirajının pərakəndə satışına qeyri-qanuni məhdudiyətlər qoyulduqda - vəzifəli şəxslər;</p> <p>4) xarici ölkələrin dövlət orqanlarının, hüquqi və fiziki şəxslərinin Azərbaycan Respublikasının ərazisində istehsal olunan (yayımlanan) kütləvi informasiya vasitələrini qanuna zidd şəkildə maliyyələşdirmələrinə yol verdiklərinə görə - təsisçi və baş redaktor (redaktor);</p> <p>5) istehsalın və yayımın dayandırılması və ya ona xitam verilməsi barədə məhkəmə qətnaməsindən sonra redaksiya və nəşriyyat kütləvi informasiya vasitəsinin məhsulunu qeyri-qanuni hazırladıqda və yaydıqda - nəşir, yayıcı və redaksiya (redaktor, baş redaktor) Azərbaycan Respublikasının qanunvericiliyinə müvafiq surətdə mülki, inzibati, cinayət və digər məsuliyyət daşıyırlar.</p>	<p>(accountable editor);</p> <p>2.Failure to meet requirements of Articles 9, 11, 13, 21 and 28 of the present Law - the founder, editorial office, publisher and distributor;</p> <p>3.Precluding to distribution on valid foundations of product of publication, introducing of pirate limitations on retail sale of circulation of periodic print publication - the officials;</p> <p>4.For an assumption of pirate financing of mass media manufactured (distributed) on the territory of the Azerbaijan Republic, by state organs, legal and physical persons of foreign countries - the founder and editor-in-chief (editor);</p> <p>5.At pirate preparing both distribution by editorial office and publishing house of product of mass media after a resolution of court on suspension or phase-out the distribution - the publisher, distributor and editorial office (editor, editor-in-chief) bear civil, administrative, criminal and other responsibility pursuant to the legislation of the Azerbaijan Republic.</p>
<p>13) Azərbaycan Respublikasının Konstitusiyası</p> <p>Maddə 50. Məlumat azadlığı</p> <p>I. Hər kəsin qanuni yolla istədiyi məlumatı axtarmaq, əldə etmək, ötürmək, hazırlamaq və yaymaq azadlığı vardır.</p> <p>II. Kütləvi informasiyanın azadlığına təminat</p>	<p>13) The Constitution of the Republic of Azerbaijan</p> <p>Article 50. Freedom of information</p> <p>I. Everyone is free to look for, obtain, transfer, develop and distribute any information in a legal way.</p> <p>II. Freedom of mass media is guaranteed. State</p>

<p>verilir. Kütləvi informasiya vasitələrində, o cümlədən mətbuatda dövlət senzurası qadağandır.</p> <p>III. Hər kəsin kütləvi informasiya vasitələrində dərc edilən və onun hüquqlarını pozan və ya mənafeələrinə xələl gətirən məlumatı təkzib etmək və ya ona cavab vermək hüququna təminat verilir.</p> <p>14) Azərbaycan Jurnalistlərinin Peşə Davranışı Qaydaları</p> <p>Prinsip 2. İnformasiya qaynaqlarına sayğılı yanaşma</p> <p>2.1 Təşkilatların, partiyaların, cəmiyyətlərin, birliklərin və hər hansı digər maraqlı qrupların rəsmi məlumatları yayılarkən mənbə mütləq göstərməlidir. Lakin bilgi verən şəxs adının gizli saxlanması şərtini irəli sürürsə, jurnalist və informasiya orqanı bu şərtə mütləq əməl etməlidir. İnformasiya qaynağının gizliliyi qorunmalıdır.</p> <p>2.2 Qeyri-rəsmi mənbələrin məlumatları onların həqiqətə uyğunluğu və informasiya dəyəri yoxlanılmadan yayılmamalıdır. İnformasiya çapa hazırlanarkən onun mənası təhrif olunmamalıdır. Başqa mətndən və ya çıxışdan sitat gətirərkən jurnalist həmin sitatın harada başladığını və bitdiyini dəqiq bildirməlidir. Fotosimvolların (illüstrasiya, fotomontaj və sair) dərci zamanı şəklən sənədli xarakter daşmadığı qeyd olunmalıdır. Yazıların sərlövhələri onun məzmununa uyğun gəlməlidir.</p> <p>2.3. Jurnalist çalışmalıdır ki, götürdüyü müsahibəni onu verən adamın özü, yaxud da</p>	<p>ensorship in mass media, including press is prohibited.</p> <p>III. Everyone's right to refute or react to the information published in the media and violating his or her rights or damaging his or her reputation is guaranteed.</p> <p>14) Professional Code of Conduct of Azerbaijani Journalists</p> <p>Principle 2. Respectful approach towards sources of information</p> <p>2.1 The source must always be indicated while disseminating official information from organizations, parties, societies, unions and other interest groups. However, if the person who provides the information prefers to remain anonymous, journalists or media entities must adhere to his/her privacy conditions. The confidentiality of the source of information shall be protected.</p> <p>2.2 The information provided by unofficial sources shall be checked for its authenticity and informative value before being disseminated. The content of the information shall not be distorted while being prepared for print. When quoting from another article or speech, journalists should note precise starting and ending points of the quotation. When printing photo-symbols (illustration, photo-editing) together with texts, it should be noted that such images do not have documentary importance. Titles of articles should correspond to their content.</p> <p>2.3 Journalist should try to have his/her</p>
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<p>vəkil etdiyi şəxs imzalasın. Bu, mümkün olmadıqda, müsahibənin hansı şəkildə çap ediləcəyi, hətta jurnalistin özünün verdiyi sualların belə sonradan dəyişdirilib dəyişdirilməyəcəyi müsahibə öncədən bildirilməlidir.</p> <p>2.4. Jurnalistin müstəsna hal kimi digər imkanları mövcud olmadıqda, ictimai əhəmiyyət kəsb edən informasiyanın əldə edilməsi üçün xüsusi avadanlıqlardan (gizli kameralar, gizli mikrofonlar və sair gizli vasitələrdən) və ya üsullardan (“qurama” kimlik və s.) istifadə edə bilər.</p> <p>2.5. Jurnalist məlumatların və ya təsvirlərin əldə edilməsi məqsədi ilə hədələməyə, güc tətbiqinə və ya təhdidə yol verməməlidir.</p> <p>15) Kütləvi informasiya vasitələri haqqında Azərbaycan Respublikasının qanunu</p> <p>Maddə 52. Xarici mənbələrdən alınan informasiyanın yayılması</p> <p>Azərbaycan Respublikası vətəndaşlarının xarici mənbələrdən, o cümlədən kütləvi informasiya vasitələrindən birbaşa məlumat əldə etmək hüququ var.</p> <p>Bilavasitə televiziya proqramlarının qəbul olunmasının məhdudlaşdırılmasına Azərbaycan Respublikasının bağladığı dövlətlərarası müqavilələrdə nəzərdə tutulmuş hallarda yol verilir.</p> <p>Təsisçi və ya redaksiyasının daimi yeri Azərbaycan Respublikasının hüdudlarından kənar olan xarici dövrü mətbu nəşrin yayılma qaydası Azərbaycan Respublikasının bağladığı dövlətlərarası müqavilədə müəyyən</p>	<p>interview signed by interviewees or their authorized agents. If this is not possible, interviewees should be notified of the way in which the interview will be published and whether the questions asked by the journalist will be modified.</p> <p>2.4. If there are no other methods available, journalists may use special equipment (hidden cameras, hidden microphones or other hidden tools) or methods (“fake” IDs and etc) as an exception for obtaining information that has public importance.</p> <p>2.5. Journalists shall not resort to intimidation, application of force or threats in order to obtain information or images.</p> <p>15) The Law of the Republic of Azerbaijan on Mass Media</p> <p>Article 52. A dissemination of information receivable from foreign sources</p> <p>The citizens of the Azerbaijan Republic have the right to gain the direct information from foreign sources, including mass media.</p> <p>The limitation of direct acceptance of the television programs is enabled in cases, foreseen by the intergovernmental agreements, contracted by the Azerbaijan Republic.</p> <p>In case the order of distribution of foreign periodic print publications, founder or constant place of editorial office of which one are outside boundaries of the Azerbaijan Republic, is not established by the</p>
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<p>edilməmişdirsə, onun yayılması üçün müvafiq icra hakimiyyəti orqanının razılığı tələb olunur.</p> <p>16) Azərbaycan Jurnalistlərinin Peşə Davranışı Qaydaları</p> <p>Prinsip 4. Jurnalistin özünün və çalışdığı orqanının reputasiyasının qorunması</p> <p>4.8. Jurnalist zərurət olmadıqca informasiya mənbələrinə pul ödəməməlidir. Lakin ictimaiyyətin əldə etmək hüququnun olduğu informasiyanı toplayarkən ödənişlərin zəruri olduğu hallarda belə ödənişlərin həyata keçirilməsi müvafiq reportajda göstərilməlidir.</p> <p>17) İnformasiya, informasiyalaşdırma və informasiyanın mühafizəsi haqqında Azərbaycan Respublikasının qanunu</p> <p>Maddə 10. İnformasiyanın təsnifatı</p> <p>Əldə olunma növünə görə informasiya ümumi istifadə üçün açıq və alınması məhdudlaşdırılan informasiyalara bölünür. Azərbaycan Respublikasının qanunu ilə əldə olunması məhdudlaşdırılmayan informasiyalar açıq informasiyalar sayılır.</p> <p>Əldə edilməsi qanunla məhdudlaşdırılan informasiyalar hüquqi rejiminə görə məxfi və gizli (konfidensial) olur. Dövlət sirri məxfi, vətəndaşların, mülkiyyət növündən asılı olmayaraq yaradılmış idarə, müəssisə və təşkilatların, digər hüquqi şəxslərin qanuni maraqlarının qorunması məqsədilə əldə olunmasına məhdudiyət qoyulan peşə (həkim, vəkil, notariat), kommərsiya, istintaq və məhkəmə sirləri, habelə fərdi məlumatlar</p>	<p>intergovernmental agreement contracted by the Azerbaijan Republic, its distribution needs a resolution of the appropriate organ of the executive authority.</p> <p>16) Professional Code of Conduct of Azerbaijani Journalists</p> <p>Principle 4. Protection of journalists' own reputation and of the organization he/she works for</p> <p>4.8. Journalists shall not pay sources for information, but where payment is considered necessary in order to obtain information that the public has a right to know, it shall be made clear in the relevant report that payments have been made.</p> <p>17) The Law of the Republic of Azerbaijan on Information, Informatization and Protection of Information</p> <p>Article 10. Information Resources by Categories of Access</p> <p>Information resources by categories of access may be open and with limited access. Pursuant to legislation of Azerbaijan Republic and decisions of relevant bodies of the executive power, information resources, except documented information with limited access, shall be open for access.</p> <p>Documented information with limited access pursuant to the terms of its legal framework shall be divided into information considered state secret and confidential one. Classification of information as state secret, procedure for its use and protection shall be established by the Law of Azerbaijan Republic "On State Secret". Information not being state secret but needed to be kept in secrecy in order to protect legal</p>
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<p>konfidensial xarakter daşıyır. Fərdi məlumatlar daxilolma (əldə olunma) növünə görə konfidensial və açıq kateqoriyalara bölünür.</p> <p>Məlumatların dövlət sirlrinə aid edilməsi, istifadəsi qaydaları və mühafizəsi "Dövlət sirri haqqında" Azərbaycan Respublikasının Qanunu ilə müəyyən edilir. Konfidensial informasiyanın toplanmasına, işlənməsinə, istifadəsinə və yayılmasına yalnız Azərbaycan Respublikasının qanunvericiliyində müəyyən edilmiş hallarda yol verilə bilər.</p>	<p>interests of citizens, institutions, enterprises and organizations shall be confidential one. Gathering, processing, use and dissemination of the confidential information shall only be allowed in cases established by legislation of Azerbaijan Republic.</p>
<p>18) Məlumat azadlığı haqqında Azərbaycan Respublikasının qanunu</p>	<p>18) The Law of the Republic of Azerbaijan on Freedom of Information</p>
<p>Maddə 10. Alınması məhdudlaşdırılan məlumat</p>	<p>Article 10. Information with limited access</p>
<p>Alınması məhdudlaşdırılan məlumatlara — dövlət, peşə (vəkil, notariat, həkim), qulluq, bank, kommertiya, istintaq və məhkəmə sirləri, şəxslərin şəxsi və ailə həyatına, terror aksiyalarına aid olan məlumatlar aiddirlər. Ətraf mühitə dair informasiya müvafiq qanunvericiliklə müəyyən edilmiş hallarda alınması məhdudlaşdırılan məlumata aid edilir. Dövlət, peşə (vəkil, notariat, həkim), qulluq, bank, kommertiya, istintaq və məhkəmə sirləri, şəxslərin şəxsi və ailə həyatına, terror aksiyalarına, ətraf mühitə aid olan məlumatlarla bağlı yaranan münasibətlər müvafiq qanunvericiliklə tənzimlənilir.</p>	<p>Information with limited access includes state, professional (lawyer, notary, and doctor), service, bank, commercial, investigation and court secrets, information on personal and family life of persons and terrorist acts. Information with limited access includes information on environment in cases determined with the relevant legislation. Relations arisen concerning state, professional (lawyer, notary, doctor), service, bank, commercial, investigation and court secrets, information on personal and family life of persons, terrorist acts are regulated by the relevant legislation.</p>
<p>19) Azərbaycan Respublikası Cinayət Məcəlləsi</p>	<p>19) Criminal Code of the Republic of Azerbaijan</p>
<p>Maddə 163. Jurnalistlərin qanuni peşə fəaliyyətinə mane olma</p>	<p>Article 163. Impending journalists in their legal professional activities</p>
<p>163.1. Jurnalistlərin qanuni peşə fəaliyyətinə mane olma, yəni zor tətbiq etməklə və ya belə</p>	<p>163.1. Impending journalists in their legal professional activities by forcing them to disseminate or refuse to disseminate</p>

zor tətbiq etmə hədəsi ilə onları məlumat yaymağa və ya məlumat yaymaqdan imtinaya vadar etmə—yüz manatdan beş yüz manatadək miqdarda cərimə və ya bir ilədək müddətə islah işləri ilə cəzalandırılır.

163.2. Eyni əməllər vəzifəli şəxs tərəfindən öz qulluq mövqeyindən istifadə etməklə törədildikdə—üç ilədək müddətə müəyyən vəzifə tutma və ya müəyyən fəaliyyətlə məşğul olma hüququndan məhrum edilməklə və ya edilməməklə iki ilədək müddətə islah işləri ilə və ya bir ilədək müddətə azadlıqdan məhrum etmə ilə cəzalandırılır.

20) Kütləvi informasiya vasitələri haqqında Azərbaycan Respublikasının qanunu

Maddə 1. Kütləvi informasiya azadlığı

Azərbaycan Respublikasında kütləvi informasiya azaddır.

Kütləvi informasiya azadlığı vətəndaşların qanuni yolla informasiya axtarmaq, əldə etmək, hazırlamaq, ötürmək, istehsal etmək və yaymaq hüququna dövlət tərəfindən təminat verilməsinə əsaslanır.

Kütləvi informasiya vasitələrinin təsis olunması, onlara sahiblik, onlardan istifadə, onların idarə olunması, kütləvi informasiyanın axtarılması, əldə edilməsi, hazırlanması, ötürülməsi, istehsalı və yayımı Azərbaycan Respublikasının kütləvi informasiya vasitələri haqqında qanunvericiliyində nəzərdə tutulan hallardan başqa, məhdudlaşdırıla bilməz.

21) Kütləvi informasiya vasitələri haqqında Azərbaycan Respublikasının qanunu

information, with use of violence or with threat of its application –is punished by the penalty at a rate of from hundred up to five hundred of nominal financial unit or corrective works for the term up to one year.

163.2. The same act committed by official with use of the service position –is punished by corrective works for the term up to two years or with imprisonment for the term up to one year with deprivation of the right to hold the certain posts or to engage in the certain activities for the term up to three years or without it.

20) The Law of the Republic of Azerbaijan on Mass Media

Article 1. Freedom of the mass information

The mass information in the Republic of Azerbaijan is free.

Freedom of the mass information is based on granting to the citizens by the state of the right on seeking, getting, preparing, transmission, production and dissemination of information by a reliable way.

Establishing of mass media means, possession, use and control over them, seeking, getting, preparing, transmission, production and dissemination of the mass information cannot be restricted, except for cases, determined by the legislation of the Republic of Azerbaijan on mass media.

21) The Law of the Republic of Azerbaijan on Mass Media

<p>Maddə 8. Kütləvi informasiya vasitələrinin məlumat almaq hüququ</p> <p>Kütləvi informasiya vasitələri cəmiyyətdəki iqtisadi, siyasi, ictimai və sosial durum haqqında, dövlət orqanlarının, bələdiyyələrin, idarə, müəssisə və təşkilatların, ictimai birliklərin, siyasi partiyaların, vəzifəli şəxslərin fəaliyyəti barədə operativ və doğru-dürüst məlumatlar almaq hüququna malikdirlər. Bu hüquq Azərbaycan Respublikasının qanunvericiliyində göstərilən hallardan başqa, məhdudlaşdırıla bilməz.</p> <p>22) Kütləvi informasiya vasitələri haqqında Azərbaycan Respublikasının qanunu</p> <p>Maddə 10. Kütləvi informasiya azadlığından sui-istifadənin yolverilməzliyi</p> <p>Azərbaycan Respublikasının qanunvericiliyi ilə qorunan sirləri yaymaq, mövcud konstitusiyalı dövlət quruluşunu zorakılıqla çevirmək, dövlətin bütövlüyünə qəsd etmək, müharibəni, zorakılığı və qəddarlığı, milli, irqi, sosial ədaləti, yaxud dözülməzliyi təbliğ etmək, mütəbər mənbə adı altında vətəndaşların şərəf və ləyaqətini alçaldan şayiələr, yalan və qərəzli yazılar, pornoqrafik materiallar çap etdirmək, böhtan atmaq, yaxud digər qanunazidd əməllər törətmək məqsədi ilə kütləvi informasiya vasitələrindən istifadə olunmasına yol verilmir.</p> <p>23) Əməliyyat-axtarış fəaliyyəti haqqında Azərbaycan Respublikasının qanunu</p> <p>23.1.Maddə 1. Əməliyyat-axtarış fəaliyyətinin anlayışı, məqsədləri və vəzifələri</p> <p>II. Əməliyyat-axtarış fəaliyyəti insan həyatını, sağlamlığını, hüquq və azadlıqlarını, hüquqi</p>	<p>Article 8. The right of the mass media to get information</p> <p>Mass media has the right to get operative and honest information on the economical, political, public and social situation in the society, on the activity of state bodies, municipalities, institutions, enterprises and organizations, public unions, political parties, officials. This right cannot be restricted in any case other than prescribed by the legislation of the Republic of Azerbaijan.</p> <p>22) The Law of the Republic of Azerbaijan on Mass Media</p> <p>Article 10. Prohibition of abuse of freedom of mass media</p> <p>Draft on funds of the mass information with the purposes of distribution of secrets guarded by the legislation of the Azerbaijan Republic, violent overthrow of an existing constitutional state formation, attempt on integrity of the state, propagation of war, violence and cruelty, national, racial, social hate or intolerance, printing under cover of a title of an authoritative source of hearings, lie also of prejudiced publications humiliating honor and a dignity of the citizens, pornographic materials, slander or undertaking of other unlawful operating is not enabled.</p> <p>23) The Law of the Republic of Azerbaijan on Operational Search Activities</p> <p>23.1.Article 1. Concept, purposes and tasks of operational search activities</p> <p>II. Operational-search activity shall be implemented for the purpose of protection of</p>
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<p>şəxslərin qanuni mənafeələrini, dövlət sirtini, habelə milli təhlükəsizliyi cinayətkar qəsdlərdən müdafiə etmək məqsədi ilə həyata keçirilir.</p> <p>III. Əməliyyat-axtarış fəaliyyətinin vəzifələri aşağıdakılardır:</p> <ol style="list-style-type: none">1) hazırlanan və törədilən cinayətlərin qarşısının alınması;2) törədilmiş cinayətlərin aşkar edilməsi və açılması;3) cinayətləri hazırlayan, törədən və ya törətmiş şəxslərin müəyyən edilməsi;4) məhkəmə, istintaq və təhqiqat orqanlarından gizlənən, cəza çəkməkdən boyun qaçıran və ya itkin düşən şəxslərin axtarılması;5) naməlum meyitlərin şəxsiyyətinin müəyyən edilməsi. <p>23.2.Maddə 4. İnsan və vətəndaş hüquq və azadlıqlarının təminatları</p> <p>II. Əməliyyat-axtarış fəaliyyətinin həyata keçirilməsi zamanı Azərbaycan Respublikasının Konstitusiyasında nəzərdə tutulmuş insan və vətəndaş hüquq və azadlıqlarını, hüquqi şəxslərin qanuni mənafeələrini pozmaq qadağandır. Əməliyyat-axtarış tədbirlərinin tətbiqi ilə bağlı insan və vətəndaş hüquq və azadlıqlarının müvəqqəti məhdudlaşdırılmasına yalnız bu Qanunla müəyyən edilmiş qaydada</p>	<p>life, health, rights and freedoms of human, interests of legal persons, state and military secrets, as well as the national security from criminal encroachments.</p> <p>III. Operational search activity in order to be implemented against journalists to get the source of their information has to pursue following objectives:</p> <ol style="list-style-type: none">1) Prevention of crimes committed and crimes pending preparation;2) Detection of committed crimes;3) Identification of persons, who prepared, committed or are pending commission of crimes;4) Search of persons concealing themselves from court, investigation and inquiry authority, and evading from execution of punishment, as well as missing persons;5) Identification of unknown human bodies <p>23.2.Article 4. Guarantees of rights and freedoms of man and of the citizen</p> <p>II. It is prohibited to violate human and civic rights and freedoms envisaged in the Constitution of the Republic of Azerbaijan and interests of legal entities. The temporary restriction of human and civic rights and freedoms in the course of implementation of operational-search activity is allowed only in accordance with the provision of this ACT in case of prevention and disclosure of crimes, search of those secreting from court, investigation and investigating authorities,</p>
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<p>cinayətlərin qarşısının alınması, onların açılması, məhkəmə, istintaq və ya təhqiqat orqanlarından gizlənmə, cəza çəkməkdən boyun qaçıran şəxslərin, itkin düşənlərin axtarışı zamanı yol verilə bilər.</p> <p>23.3.Maddə 6. Əməliyyat-axtarış fəaliyyəti subyektlərinin vəzifələri</p> <p>Bu Qanunun 1-ci maddəsində göstərilən məqsədlərə nail olmaq üçün əməliyyat-axtarış fəaliyyəti subyektlərinin aşağıdakı vəzifələri vardır:</p> <ol style="list-style-type: none">1) insan və vətəndaş hüquq və azadlıqlarının, fiziki və hüquqi şəxslərin qanunla müdafiə olunan mənafələrinin, ictimai və dövlət təhlükəsizliyinin qorunması üçün öz səlahiyyətləri daxilində bütün qanuni tədbirləri görmək;2) əməliyyat-axtarış tədbirlərinin keçirilməsinə dair məhkəmə qərarlarını, istintaq orqanlarının qərarlarını və ya cinayət işləri üzrə yazılı tapşırıqlarını, habelə əməliyyat-axtarış fəaliyyətinin səlahiyyətli subyektlərinin qərarlarını yerinə yetirmək;3) əməliyyat-axtarış fəaliyyəti nəticəsində əldə edilmiş məlumatları, onların mənbəyini və əldə edilməsi üsullarını yaymadan, konkret cinayət işi üzrə təhqiqatı və ya istintaqı aparən şəxsə və yaxud məhkəməyə vermək;4) Azərbaycan Respublikasının tərəfdar çıxdığı beynəlxalq müqavilələrə əsasən xarici dövlətlərin hüquq-mühafizə orqanlarının və müvafiq beynəlxalq təşkilatlarının sorğularına cavab vermək;5) Azərbaycan Respublikasının ərazisində	<p>escaping sentencing and missing</p> <p>23.3.Article 6. The duties of subjects of operational search activities</p> <p>Agents of the operational-search activity shall have the following responsibilities during the course of investigative activities against journalists to obtain the source of their information:</p> <ol style="list-style-type: none">1) to implement all the actions within the scope of own authorities to ensure the protection of human and civil rights and responsibilities, legitimate interests of private and legal persons, public and state security;2) to execute decisions of judicial and investigation authorities pertaining to the implementation of the operational search measures or written instructions within the framework of the criminal case, as well as, to carry out decisions of the authorized Agents of the Operational-Search Activity;3) to provide information obtained as a result of the operational-search activity, without disclosure of its source and modes of obtaining it, to the person conducting inquiry or investigation or to the court;4) to respond to the requests by the foreign law-enforcement and appropriate international organizations within the framework of the international treaties, to which the Republic of Azerbaijan is party to;5) to undertake all necessary measures in order
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<p>əməliyyat-axtarış fəaliyyətinin digər subyektlərinin səlahiyyətinə aid olan faktların aşkar edildiyi təqdirdə təxirəsalınmaz tədbirlər keçirməklə onları xəbərdar etmək və lazımı kömək göstərmək;</p> <p>6) əməliyyat-axtarış fəaliyyətini həyata keçirərkən konspirasiya qaydalarına riayət edilməsi üçün müvafiq tədbirlər görmək;</p> <p>7) öz qulluq mövqeyinə görə məxfi məlumatlara və ya xüsusi icazə tələb edən işlərə buraxılan şəxsləri yoxlamaq;</p> <p>8) öz əməkdaşlarının, onların yaxın qohumlarının, əməliyyat-axtarış fəaliyyəti subyektlərinə kömək edən şəxslərin, onların yaxın qohumlarının, habelə cinayət prosesi iştirakçılarının, onların yaxın qohumlarının şəxsi təhlükəsizliyini və əmlakının hüquqa zidd qəsdlərdən qorunmasını təmin etmək;</p> <p>9) hər hansı şəxslə əməkdaşlığın məxfiliyini və anonimliyini təmin etmək;</p> <p>10) hadisələrin, faktların, əşyaların və digər informasiya mənbələrinin əməliyyat uçotunu aparmaq.</p>	<p>to bring the information about the fact which is relevant to the territorial jurisdiction of another Agent of the Operational-Search Activity on the territory of the Republic of Azerbaijan and render the necessary assistance;</p> <p>6) to undertake appropriate actions to ensure conspiracy in the course of implementation of operational-search activity;</p> <p>7) to check the persons who have access to confidential information or matters requiring special permission due to the position that s/he occupies;</p> <p>8) to protect own staff and their close relatives, persons facilitating the operational-search activity and their close relatives, as well as the participants of the criminal process and their close relatives and their property from illegal encroachments;</p> <p>9) to ensure the confidentiality and anonymity of cooperation with any person;</p> <p>10) to maintain the register of events, facts, objects and information sources.</p>
<p>23.4.Maddə 11. Əməliyyat-axtarış tədbirlərinin həyata keçirilməsi üçün səbəblər və əsaslar</p> <p>III. Əməliyyat-axtarış tədbirlərinin həyata</p>	<p>23.4.Article 11. Reasons and grounds for carrying out the operational search activity measures</p> <p>III. Operational search activities have to be grounded and based on the specified rules in legislation. The grounds for implementing operational-</p>

<p>keçirilməsi üçün əsaslar aşağıdakılardır:</p> <ol style="list-style-type: none">1) məhkəmənin (hakimin) qərarları;2) istintaq orqanlarının qərarları;3) əməliyyat-axtarış fəaliyyətinin səlahiyyətli subyektlərinin qərarları. <p>IV. Əməliyyat-axtarış tədbirlərinin həyata keçirilməsi barədə məhkəmənin (hakimin), istintaq orqanının və ya əməliyyat-axtarış fəaliyyətinin səlahiyyətli subyektinin qərarı yalnız aşağıdakı hallarda qəbul oluna bilər:</p> <ol style="list-style-type: none">1) başlanmış cinayət işi mövcud olduqda;2) cinayət işinin başlanmasına kifayət qədər əsaslar olmasa da, cinayəti hazırlayan, törədən və ya törətmiş şəxs barəsində etimad doğuran, məlum və qərəzsiz mənbədən məlumat daxil olduqda;3) dövlət təhlükəsizliyinə və ya müdafiə qabiliyyətinə təhlükə yaradan hadisə baş verdikdə, yaxud onun qarşısı alındıqda;4) şəxs məhkəmə, istintaq və ya təhqiqat orqanlarından gizləndikdə, cəza çəkməkdən boyun qaçırdıqda, yaxud itkin düşdükdə;5) naməlum meyit aşkar edildikdə.	<p>search measures precisely some investigative actions against journalists are as follows:</p> <ol style="list-style-type: none">1) decisions of court (judge);2) decisions of investigation authorities;3) decisions of the authorized Agents of Operational-Search Activity <p>IV. The decisions of courts (judges), investigation authorities or authorized Agents of Operational-Search Activity shall be accepted only in following cases:</p> <ol style="list-style-type: none">1) within the framework of existing of criminal case;2) repealed by the ACT of the Republic of Azerbaijan;3) in case of obtaining reliable information , which is received from unbiased and known source, to the effect that a particular person is preparing, committing or have committed a crime even without the framework of the existing criminal case;4) in case of event infringing the national security and its defense capacity or prevention of this event;5) in case of a person concealing himself from court, investigation or inquiry, evading
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<p>23.5.Maddə 13. Əməliyyat-axtarış tədbirlərinin tətbiqinin şərtləri</p> <p>I. Qanunla mühafizə edilən yazışma, telefon, poçt-teleqraf və digər rabitə üsulları ilə ötürülən məlumatların sirlinin qorunması, eləcə də mənzil toxunulmazlığı ilə əlaqədar əməliyyat-axtarış tədbirlərinin tətbiqinə ancaq cinayət hazırlayan, cinayət törətməyə sui-qəsd edən, cinayət törədən, həmçinin məhkəmə, istintaq və ya təhqiqat orqanlarından gizlənən, cəza çəkməkdən boyun qaçıran şəxslər barədə məlumat toplamaq, habelə oğurlanmış əmlakı tapmaq, gərilərin gizlədilməsinin və məhv edilməsinin qarşısını almaq məqsədi ilə tətbiq edilən tədbirlər nəticəsində əldə olunmuş məlumatların cinayət işi üzrə sübut ola biləcəyini və axtarılan şəxslərin tutula biləcəyini güman etmək üçün kifayət qədər əsas olduğu halda icazə verilir.</p> <p>II. Telefon və digər danışıqlara qulaq asılması və onların yazılması, texniki rabitə kanallarından və digər texniki vasitələrdən informasiyanın çıxarılması, poçt-teleqraf göndərişlərinin yoxlanılması və mənzillərə baxış keçirilməsi ilə əlaqədar tətbiq edilən əməliyyat-axtarış tədbirlərində əməliyyat-axtarış fəaliyyəti subyektlərinin müvəkkil edilmiş şəxslərində həmin tədbirlərin tətbiqinə dair qərar və özlərinin xidməti vəsiqələri olmalıdır.</p> <p>III. Şəxs tərəfindən cinayətin törədilməsi və ya hazırlanması barədə kifayət qədər əsas olduqda onun özü və əlaqələri haqqında məlumat almaq</p>	<p>execution of punishment or missing person;</p> <p>6) in case of identification of unknown human body</p> <p>23.5.Article 13. Conditions for implementation of the operational search activity measures</p> <p>I. Operational-search measures in respect of confidentiality of information protected by legislation and transmitted by correspondence, telephone, post-telegraph and other means of communication and privacy of premises shall be allowed if there are sufficient grounds to believe that the measures carried out with a purpose of collecting information on the persons preparing for crime, attempting the commission of crime, committing crime, hiding themselves from court, investigation and inquiry bodies, evading punishment, as well as, of tracing stolen goods, of preventing concealment and destruction of evidence will produce information to serve as evidence in criminal proceedings and location of people at large.</p> <p>II. Persons commissioned by the agents of the Operational Search Activity to carry out operational-search measures in respect of tapping and recording of telephone and other communication, extracting information from channels of technical communication and other technical means, screening of correspondence and searching of premises, shall possess warrant authorizing the measures and the identification documents.</p> <p>III. The technical means, psychotropic, chemical and other substances capable of damaging human health and environment shall be banned from usage in the course of implementation of operational-search</p>
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məqsədlə tətbiq edilən əməliyyat-axtarış tədbirində insanın səhhətinə və ətraf mühitə ziyan vuran texniki vasitə, psixotrop, kimyəvi və digər maddələrdən istifadə edilməsi qadağandır.

IV. Əməliyyat-axtarış tədbirləri tətbiq edilərkən əməliyyat-axtarış fəaliyyəti subyektinin müvəkkil edilmiş şəxsləri, həmin tədbirlərin cinayətkar qəsdlərin dövlətin və cəmiyyətin mənafeyinə vura biləcəyi ziyanın ictimai təhlükəlilik dərəcəsinə uyğunluğunu gözləməyə borcludurlar.

23.6.Maddə 19. Əməliyyat-axtarış tədbirlərinin həyata keçirilməsində qanunçuluğun təminatı

Əməliyyat-axtarış fəaliyyəti subyektlərinin rəhbərləri əməliyyat-axtarış tədbirlərinin təşkili və həyata keçirilməsi zamanı qanunçuluğa əməl olunmasına nəzarət edirlər və buna görə fərdi məsuliyyət daşıyırlar.

24) Terrorçuluğa qarşı mübarizə haqqında Azərbaycan Respublikasının qanunu

24.1.Maddə 1. Əsas anlayışlar

Terrorçuluq—ictimai təhlükəsizliyi pozmaq, əhali arasında vahimə yaratmaq, yaxud dövlət hakimiyyət orqanları və ya beynəlxalq təşkilatlar tərəfindən qərar qəbul edilməsinə təsir göstərmək məqsədlə insanların həlak olması, onların sağlamlığına zərər vurulması, əhəmiyyətli əmlak ziyanının vurulması və ya başqa ictimai təhlükəli nəticələrin baş verməsi təhlükəsi yaradan partlayış, yangın və ya digər

measures with the purpose of obtaining information about the person who is believed to have committed a crime or to be preparing a crime, as well as his/her connections.

IV. In the course of implementation of the operational-search measures, persons commissioned by the Agents of the Operational Search Activity shall be bound to adhere to the principle of proportionality of these measures to the degree of the danger posed by the targeted criminal encroachments to the interests of the state and public in terms of potential damage to be caused.

23.6.Article 19. Security of the rule of law in implementation of the operational search activity measures

Chiefs of the Agents of the Operational-Search Activity shall supervise of compliance with legislation in the course of organizing and implementing of the Operational-Search Activity and shall be held personally for defaults.

24) The Law of the Republic of Azerbaijan on the Struggle against Terrorism

24.1.Article 1. Main notions

Terrorism is defined as committing of explosions, fires and other actions threatening the lives of people, damaging their health, causing significant property damage or occurrence of other hazardous consequences to public, with the purpose of destruction of public security, spread of panic among population or influencing the decisions of state authorities or international entities, as well as threat of committing of such actions for the

<p>hərəkətlər törətmə, habelə həmin məqsədlə bu cür hərəkətlərin törədiləcəyi ilə hədələmədi</p> <p>24.2.Maddə 4. Terrorçuluğa qarşı mübarizənin əsas prinsipləri</p> <p>Azərbaycan Respublikasında terrorçuluğa qarşı mübarizə aşağıdakı prinsiplərə əsaslanır:</p> <ol style="list-style-type: none"> 1) qanunçuluğun təmin edilməsi; 2) terror fəaliyyətinin həyata keçirilməsinə görə Azərbaycan Respublikasının qanunvericiliyi ilə nəzərdə tutulmuş cəzanın labüdlüyü; 3) terrorçuluğa qarşı mübarizə zamanı açıq və gizli metodların əlaqələndirilməsi; 4) hüquqi, siyasi, sosial-iqtisadi və təşkilati profilaktik tədbirlərin kompleks istifadəsi; 5) terror fəaliyyəti nəticəsində təhlükəyə məruz qalmış şəxslərin hüquqlarının müdafiəsinin üstünlüyü; 6) terrorçuluq əleyhinə aparılan əməliyyatlara cəlb olunmuş qüvvələrin idarə edilməsində təkbaşlılıq; 7) terrorçuluq əleyhinə aparılan əməliyyatların həyata keçirilməsində iştirak edən şəxsi heyətin, o cümlədən bu məqsədlə istifadə edilən texniki üsulların və taktikanın elan edilməsində minimal aşkarlıq. <p>25) Azərbaycan Respublikasının Konstitusiyası</p>	<p>same purposes</p> <p>24.2.Article 4. The main principles the struggle against terrorism</p> <p>Struggle against terrorism in the Azerbaijan Republic is based on following principles:</p> <ol style="list-style-type: none"> 1) provision of legality; 2) inevitability of punishment stipulated under the legislation of the Azerbaijan Republic for commitment of terrorist activity; 3) coordination of public and concealed methods of struggle against terrorist; 4) combined use of legal, political, socio-economic and organizational-preventive measures; 5) prioritized protection of rights of persons endangered by terrorist activity; 6) independence in control of resources attracted to operations against terrorism; 7) minimum disclosure of staff involved in operations against terrorism, including methods and tactics used for these purposes. <p>25) The Constitution of the Republic of Azerbaijan</p>
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<p>Maddə 47. Fikir və söz azadlığı</p> <p>I. Hər kəsin fikir və söz azadlığı vardır.</p> <p>II. Heç kəs öz fikir və əqidəsini açıqlamağa və ya fikir və əqidəsindən dönməyə məcbur edilə bilməz.</p> <p>III. İrqi, milli, dini, sosial ədavət və düşmənçilik oyadan təşviqat və təbliğata yol verilmir.</p> <p>26) Müəlliflik və əlaqəli hüquqlar haqqında Azərbaycan Respublikasının Qanunu</p> <p>Maddə 8. Müəlliflik hüququnun yaranması. Müəlliflik prezumpsiyası</p> <p>3. Əsərin anonim və ya təxəllüslə dərc edildiyi hallarda (müəllifin təxəllüsünün onun şəxsiyyətini şübhə altında qoymadığı hallar istisna olmaqla) əsərdə adı göstərilən nəşir, digər sübutlar olmadıqda, bu Qanuna uyğun olaraq müəllifin nümayəndəsi sayılır və bu simada müəllifin hüquqlarını qorumaq və həyata keçirmək səlahiyyətinə malikdir. Bu müddəə müəllifin öz şəxsiyyətini açıqladığı və müəllifliyini bəyan etdiyi ana qədər qüvvədə qalır.</p> <p>27) Telekommunikasiya haqqında Azərbaycan Respublikasının qanunu</p> <p>Maddə 38. Telekommunikasiyada məxfiliyin təmin olunması</p> <p>38.2. Telekommunikasiya şəbəkələri vasitəsilə ötürülən məlumatların məxfiliyinin</p>	<p>Article 47. Freedom of thought and speech</p> <p>I. Everyone has the right to freedom of thought and speech.</p> <p>II. Nobody can be enforced to express his thoughts and convictions or to deny them.</p> <p>III. Agitation and propaganda provoking racial, national, religious, social discord and hostility are prohibited.</p> <p>26) The Law of the Republic of Azerbaijan on Copyright and Related Rights</p> <p>Article 8. Establishment of copyright. Copyright presumption</p> <p>3. In the case of publication of works anonymous or with encryption (with exception of encryption confirming the personality of the author) the publisher, if there is no other prove, is legally considered as an author's representative and legally represents author's rights and can realize his authorities.</p> <p>27) The Law of the Republic of Azerbaijan on Telecommunication</p> <p>Article 38. Provision of the Telecommunication Anonymity</p> <p>38.2. The limitation of the information transmitted by the telecommunication means can be allowed only in the circumstances</p>
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<p>məhdudlaşdırılmasına yalnız qanunvericiliklə müəyyən edilmiş hallarda yol verilir.</p> <p>28) İnformasiya əldə etmək haqqında Azərbaycan Respublikasının qanunu</p> <p>Maddə 2. İnformasiya əldə etmək azadlığı</p> <p>2.1. Azərbaycan Respublikasında informasiyanın əldə olunması azaddır.</p>	<p>determined by law.</p> <p>28) The Law of the Republic of Azerbaijan on Getting Information</p> <p>Article 2. The freedom to get the information</p> <p>2.1. The acquisition of information in the Republic of Azerbaijan is free.</p>
<p>29) Kommersiya sirri haqqında Azərbaycan Respublikasının Qanunu</p> <p>Maddə 5. Kommersiya sirri sahibinin hüquqları</p> <p>5.0. Kommersiya sirri sahibinin aşağıdakı hüquqları vardır:</p> <p>5.0.1. kommersiya sirri rejimini müəyyən etmək, dəyişmək və ləğv etmək;</p> <p>5.0.2. kommersiya sirrindən istifadə etmək, müqavilə əsasında başqa şəxslərə vermək, mülki dövriyyəyə daxil edilmənin digər üsullarını tətbiq etmək;</p> <p>5.0.3. kommersiya sirrinin rejimini pozan və ya belə rejimin pozulmasına təhlükə yaradan hərəkətlərdən qanunvericiliyə uyğun olaraq müdafiə olunmaq;</p> <p>5.0.4. kommersiya sirrindən öz maraqları üçün istifadə etmiş şəxslərdən vurulan ziyanın əvəzini məhkəmə qaydasında almaq.</p>	<p>29) The Law of the Republic of Azerbaijan on Trade Secret</p> <p>Article 5. Rights of a trade secret owner</p> <p>5.0. Trade secret owner has following rights:</p> <p>5.0.1. to determine, change and cancel the regime of trade secret;</p> <p>5.0.2. to use, give to other persons if it is based on contract and apply the other methods of involving to civil circulation of trade secret;</p> <p>5.0.3. to have a defend from the action offended or may offend the regime of trade secret;</p> <p>5.0.4. to demand compensation of the harm from the persons, who used the trade secret for their interests, under judiciary.</p>
<p>30) Azərbaycan Jurnalistlərinin Peşə Davranışı Qaydaları</p> <p>Prinsip 3. Şərəf və ləyaqətin qorunması, şəxsi</p>	<p>30) Professional Code of Conduct of Azerbaijani Journalists</p> <p>Principle 3: Protection of honour and dignity,</p>

<p>həyatın toxunulmazlığı</p> <p>3.1. Jurnalist adamları millətində, irqində, cinsində, dilində, peşəsində, dinində, yaşadığı və ya anadan olduğu yerinə görə pislənməməli, onlar haqqında bu qəbildən olan bilgiləri qabartmamalıdır</p> <p>3.2. Jurnalist görüşdüyü, haqqında yazdığı hər bir şəxsin şərəf və ləyaqətində, şəxsi həyatının toxunulmazlığı prinsipinə hörmətlə yanaşmalıdır.</p> <p>3.3. Jurnalist vətəndaşların şəxsi həyatına aid faktları, onlar cəmiyyətin maraqlarına toxunmursa, hüquqa zidd deyilsə və ya ictimai əhəmiyyət kəsb etmirsə, özlərinin razılığı olmadan yayı bilməz.</p> <p>3.4. Jurnalist və kütləvi informasiya vasitəsi buraxdığı səhvi, həmin səhvi kimin müəyyən etməsindən asılı olmayaraq, maksimum qısa müddətdə və tam həcmdə aradan qaldırılmalıdır. Düzəliş zamanı aydın olmalıdır ki, əvvəl verilən məlumat tam, yoxsa konkret hansı hissədə səhvdir.</p> <p>3.5. Şəxsi xarakter daşıyan məktublar dərc edilərkən onların müəllifindən, göndərildiyi şəxsdən və ya həmin şəxsin varislərindən icazə alınmalıdır.</p> <p>3.6. Bədbəxt hadisələr və ya cinayət nəticəsində zərər çəkmiş şəxslərin razılığı olmadan onların adları açıqlanmamalı, şəkilləri verilməməlidir. Bu, yalnız xüsusi məqamlarda və zərərçəkənin ictimai fiqur olduğu hallarda mümkündür. Əgər cinayəti yeniyetmələr və ya uşaqlar (18 yaşı tamam olmamış şəxslər) törədibsə, bu zaman da cinayətkarın adını açıqlamaqdan və şəklini yaymaqdan çəkinmək</p>	<p>inviolability of personal life</p> <p>3.1 Journalists shall not condemn people for their nationality, race, sex, language, profession, religion, and place of birth or residence and shall not highlight such data.</p> <p>3.2 Journalists shall respect the honour, dignity, and inviolability of personal life of the person he/she meets with and writes about.</p> <p>3.3 Journalists may not disseminate facts about citizens' personal lives without their consent, unless dissemination of such information does not violate the rights of the society, is lawful, does not contradict social interest and is of public unimportance.</p> <p>3.4 Journalists and mass media entities must correct their errors wholly and as soon as possible, regardless of the person who identified the error. The correction should indicate whether the related article was erroneous in whole or in part.</p> <p>3.5 When publishing personal letters, the author, the person to whom the letter is addressed to, or their heirs, should be asked for permission.</p> <p>3.6 Names or images of victims who suffered from accidents or crime must not be disclosed without their consent. This is possible under special conditions and if the victim is a public figure. If the crime was committed by teenagers or children (persons below 18 years of age), journalists should refrain from disseminating the names or pictures of the criminals.</p>
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lazımdır.

3.7. Jurnalist, cinayətdə şübhəli bilinən şəxsin təqsirsizlik prezumpsiyası hüququna hörmətlə yanaşmalı, onu təqdim edərkən onun cinayətkar kimi yox, şübhəli şəxs qismində saxlanılan şəxs kimi təqdim etməlidir.

3.8. Kütləvi informasiya vasitəsi hər hansı vətəndaşın şübhəli şəxs kimi həbs olunması, yaxud istintaqa cəlb edilməsi barədə məlumat yaymışsa və sonradan onun təqsirsizliyi sübuta yetmişə, həmin informasiya orqanı bu barədə mütləq xəbər verməlidir.

3.9. Jurnalist uşaqların məsumluğu və inamından sui-istifadə etməməli, onların hüquqlarına hörmətlə yanaşmalı və onların fikirlərinin çatdırılması ilə bağlı xüsusi məsuliyyət nümayiş etdirməli, valideynlərinin və ya qanuni himayəçilərinin icazəsi olmadan uşaqlardan müsahibə götürməməyə səy göstərməlidir. Daha vacib ictimai əhəmiyyət kəsb edən maraqların mövcud olduğu hallar istisna olmaqla, jurnalist uşaqların şəxsi həyatı barədə məlumatları və ya fotosəkilləri dərc etməməlidir. Jurnalist faciə və ya cinayət əməli nəticəsində zərər çəkmiş və ya belə hadisələrə cəlb edilmiş uşaqların kimliyini mütləq qorumalıdır.

3.10. Cinayət əməli törətməsi ilə bağlı şəxsə qarşı ittiham irəli sürülmüşsə, bu mövzuda məhkəmənin obyektivliyinə təsir göstərəcək reportajlar hazırlanmamalı, hazırlanan reportajlarda isə bütün tərəflərin fikirləri əks olunmalıdır. Cinayət əməllərinin qurbanları öz kimliklərinin açıqlanmasına razı olmadıqda jurnalist belə şəxslərin kimliyinə həssaslıqla yanaşmalıdır. Seksual təcavüzlə bağlı hallarda bu qaydaya xüsusi əhəmiyyət verilməlidir. Şahidlər öz kimliklərinin açıqlanmasına razı

3.7. Journalists should respect the right to presumption of innocence of persons who are suspected of committing crimes and should introduce such persons not as criminals, but as persons who have been detained for being suspected of committing crimes.

3.8. If a mass media entity disseminated information on detention or indictment of a citizen as a suspect and if his/her innocence was later proven, the media entity must inform the public in this regard.

3.9. Journalists shall not take advantage of children's innocence and trust; shall respect their rights and demonstrate a special responsibility in communicating their views; and shall seek to avoid interviewing children without the consent of their parents or lawful guardians. Journalist shall not publish information or photographs about private life of a child unless there is an over-riding public interest. Journalist shall protect the identity of children involved in or affected by tragedy or criminal activity.

3.10. If a person is charged with committing of a crime, journalists shall not prepare reports which could undermine the objectiveness of the court in this issue and opinions from all involved parties should be reflected in such reports. If victims of a crime have not given their consent to be identified, journalists shall treat the identities of such individuals with sensitivity. This rule is especially important in cases involving sexual assault. If witnesses have not consented to being identified and if their identification does not have any public

<p>olmadıqda jurnalist, ictimai əhəmiyyət daşıdırsa belə şəxslərin kimliyinə həssaslıqla yanaşmalıdır.</p> <p>3.11. Jurnalist cinayət əməlləri, zorakılıq, qəddarlıq və intihar halları barədə reportajlarda belə əməllərin təşviqi və ya əsassız olaraq sensasiyalı formada təqdim olunmasından çəkinməlidir. Jurnalist zorakılığı təşviq edən, təhrik etməyə səy göstərən və ya belə hallara əl atan şəxslər tərəfindən vasitə kimi istifadə olunmamalı, əksinə, öz reportajlarında belə şəxslərin fəaliyyəti barədə müvafiq məhdudyyətləri tətbiq etməli və yalnız müvafiq informasiyanın ictimai əhəmiyyət kəsb etməsi şübhə doğurmadıqda bu barədə reportajlar hazırlamalıdır.</p> <p>3.12. Jurnalist və redaksiya terror hadisəni şişirdən, terrorçuların məqsədinə xidmət edən qorxu effekti yaradan, terroru oyən və terror hərəkətinə bəraət qazandıran reportajlar verməməlidir.</p> <p>31) Kütləvi informasiya vasitələri haqqında Azərbaycan Respublikasının qanunu</p> <p>Maddə 59. Kütləvi informasiya azadlığının və jurnalist hüquqlarının pozulmasına görə məsuliyyət</p> <p>Kütləvi informasiya vasitələrinin təsisçilərinin, nəşirlərinin, redaksiyalarının (məsul redaktorlarının), yayıcılarının və jurnalistlərin qanuni fəaliyyətinə vətəndaşlar, dövlət orqanları, bələdiyyələr, idarə, müəssisə və təşkilatlar, siyasi partiyalar, habelə ictimai birliklər və ya vəzifəli şəxslər tərəfindən hər hansı müdaxilə, o cümlədən:</p>	<p>importance, journalists shall treat their identity with sensitivity.</p> <p>3.11 Journalists shall refrain from glorifying or unnecessarily sensational reporting about crime, violence, brutality and suicide. Journalists shall be careful not to be used as a means by those who promote, incite or use violence; instead, journalists shall report on their activities with due constraint and only if there is a clear public interest.</p> <p>3.12. Journalists or editorials should not prepare reports that exaggerate terror acts; reports that serve the interests of terrorists; reports that create fear or those, which promote or justify terror acts.</p> <p>31) The Law of the Republic of Azerbaijan on Mass Media</p> <p>Article 59. The responsibility for failure of freedom of the mass information and press rights</p> <p>Any interference of the citizens, state bodies, municipalities, administrations, entities and organizations, political parties, and also public associations or officials to the legal activity of the founders, publishers, editorial offices (accountable editors), distributors and journalists of mass media, including:</p> <p>applying of censorship;</p>
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<p>senzura tətbiq etmək;</p> <p>peşə müstəqilliyini pozmaq;</p> <p>tirajı və ya onun bir hissəsini qeyri-qanuni müsadirə etmək, yaxud məhv etmək; jurnalisti informasiyanı yaymağa və ya informasiyanı çap etdirməkdən (efirə verməkdən) imtinaya məcbur etmək;</p> <p>jurnalistə informasiya verilməsi üzərinə, Azərbaycan Respublikasının qanunvericiliyi ilə qorunan məlumatlar istisna olmaqla, məhdudiyətlər qoymaq və ya informasiya verməkdən imtina etmək;</p> <p>jurnalist sorğusuna Azərbaycan Respublikasının qanunvericiliyi ilə müəyyənləşdirilmiş müddətdə cavab verməmək;</p> <p>habelə jurnalistin bu Qanunla müəyyənləşdirilmiş digər hüquqlarını pozmaq Azərbaycan Respublikasının qanunvericiliyinə müvafiq surətdə mülki, inzibati, cinayət və digər məsuliyyətlə səbəb ola bilər.</p> <p>32) Azərbaycan Respublikasının Cinayət Prosesual Məcəlləsi</p> <p>Maddə 206. Tərədilmiş və ya hazırlanan cinayətlər haqqında kütləvi informasiya vasitələrinin məlumatları</p> <p>206.1. Cinayətin törədilməsi və ya onun törədilməsinə hazırlıq faktına dair müvafiq kütləvi informasiya vasitəsinə məlum olmuş, cinayət işinin başlanması üçün səbəb hesab edilən kütləvi informasiya vasitələrinin məlumatları mətbuatda, radioda, televiziya və əks etdirildikdən sonra cinayət təqibi</p>	<p>failure of professional independence;</p> <p>pirate suspension or phase-out the production and distribution of mass media;</p> <p>enforcing the journalist to disseminate information or refusing printing the information (broadcasting); introducing limitations on granting to the journalist of the information or waiving of granting of the publication (airing) of the information, except for the information guarded by the legislation of Azerbaijan Republic;</p> <p>not granting the answer on journalist request during the period established by the legislation of Azerbaijan Republic;</p> <p>and also the failure of other rights of the journalist, established by the present Law, which can cause civil, administrative, criminal and other responsibility pursuant to the legislation of the Azerbaijan Republic.</p> <p>32) Criminal Procedure Code of the Republic of Azerbaijan</p> <p>Article 206. Mass media information about committed or planned crimes</p> <p>206.1. Information held by the mass media concerning a crime committed or planned, which is deemed to constitute grounds for instituting criminal proceedings, shall be sent to the persecuting authorities after its disclosure in the press or on radio or</p>
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<p>orqanlarına göndərilməlidir.</p> <p>206.2. Törədilmiş və ya hazırlanan cinayətlərlə əlaqədar kütləvi informasiya vasitələrinə ünvanlanmış, dərc edilməmiş yazışmalar kütləvi informasiya vasitələrinin vəzifəli şəxsləri tərəfindən bu Məcəllənin 205-ci maddəsində nəzərdə tutulmuş qaydada cinayət təqibi orqanlarına göndərilə bilər.</p> <p>206.3. Törədilmiş və ya hazırlanan cinayətlər haqqında məlumatları dərc etmiş və ya aidiyyəti üzrə göndərmiş kütləvi informasiya vasitələrinin vəzifəli şəxsləri, habelə həmin məlumatların müəllifləri onlarda olan və cinayət haqqında məlumatı təsdiq edən sənədləri təhqiqatçının, müstəntiqin, ibtidai araşdırmaya prosesual rəhbərliyi həyata keçirən prokurora və ya məhkəməyə təqdim etməlidirlər.</p>	<p>television.</p> <p>206.2. Correspondence addressed to the mass media about a crime committed or planned, which has not been published, shall be sent by media officials to the persecuting authorities in accordance with Article 205 of this Code.</p> <p>206.3. Media officials who have published or sent to the authorities information about a crime committed or planned and authors of such information shall submit the documents in their possession confirming the information to the inquirer, the investigator, the prosecutor in charge of the procedural aspects of the investigation or the court.</p>
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ELSA BELGIUM

Contributors

National Coordinator

Daan Wetzels

National Academic Coordinator

Pieter-Jan Ombelet

National Researchers

Christophe Daerden

Nathalie Kimpe

Kristien Poelmans

Pauline Van Sande

National Linguistic Editors

Maxim Arrazola de Oñate

Evelien Wauters

National Academic Supervisor

Prof. Dr. Koen Lemmens

Prof. Dr. Peggy Valcke

1. Introduction

The European Court of Human Rights stated in 1996 that the protection of journalistic sources is one of the basic conditions for freedom of expression. However, even in Belgium there have still been cases where public authorities forced journalists to disclose their sources.

In 2000, the Council of Europe made recommendations about the non-disclosure of journalistic sources for the member-states to implement. Sixteen years after this recommendation this study to analyse how journalistic sources are being protected in Belgium.

The first question will research if there is legislation in Belgium that protects the right of the journalist to non-disclose their information source and even that prohibits the journalist from disclosing the sources. The third question will analyse the national legislation and answer who is protected under the legislation and to what extent.

'What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?' will be answered in question four.

Questions five and six shall analyse is the Belgian legislation is in line with the principles of the Recommendation No R (2000) 7 of the Council of Europe and to what extent.

Hereafter question seven will examine how national courts apply the legislation and balance the different interests at stake.

Questions eight will look into the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information.

Furthermore, question nine will answer the question whether journalists can rely on encryption and anonymity online to protect themselves and their sources against surveillance.

Lastly, this paper will answer if whistle-blowers are protected in anyway.

2. Does the National Legislation Provide (Explicit or Otherwise) Protection of the Right of the Journalists Not to Disclose Their Source of Information? What Type of Legislation provides this protection? How Exactly is This Protection Construed in National Law?

2.1. Does the National Legislation Provide (Explicit or Otherwise) Protection of the Right of the Journalists Not to Disclose Their Source of Information?

Before 2005, Belgium did not have any legislation that explicitly provided journalists with the right not to disclose their source of information.¹ However, professional journalists, that were members of the association of journalists, were bound by ethical codes. These ethical codes encompass the duty for a professional journalist to protect his/her sources.² The codes are however not legally binding.

In 2003, the European Court of Human Rights (hereafter 'ECtHR') convicted Belgium in the case *Ernst v. Belgium*.³ The case concerned judicial authorities exercising searches and seizures at the offices and homes of four journalists of a Belgian newspaper, as well as at the head office of public broadcasting organisation RTBF.⁴ The searches were performed in connection with the prosecution of members of police and court. The ECtHR found a violation of article 8 and 10 of the European Convention of Human Rights (hereafter 'ECHR'). It held that the wide scale of the searches and seizures by the authorities was not proportionate to the legitimate aims pursued. After this conviction, Belgium started focusing more on the legal recognition of the protection of journalistic sources. Nevertheless, as mentioned above, it took until 2005 for Belgium to recognise the protection of journalistic sources with its Belgian Protection of Journalistic Sources Act of 7 April 2005. Article 3 of the Belgian Protection of Journalistic Sources Act of April 7 2005 implicitly defines journalistic sources as sources such as the informant of their information, every information, document or recording which contain information such as the identity of their informants, the type and origin of their information, the identity of the author of a text or audio-visual production, or the content of the information.⁵

2.2. What Type of Legislation provides this protection?

¹ E. Werkers, E. Lievens and P. Valcke, 'Bronnengeheim voor Bloggers?' [2006] NjW 630 [Dutch].

² Article 19 of the Code of the Council for Journalism.

³ *Ernst et autres v. Belgium* [2003] European Court of Human Rights, <http://hudoc.echr.coe.int/eng?i=001-61214> [French].

⁴ D. Voorhoof, 'Case of Ernst and Others v. Belgium' <<http://merlin.obs.coe.int/iris/2003/9/article4.en.html>> accessed 14 February 2016 [English].

⁵ This list is not exhaustive; K. Lemmens, "Wovon Man Nicht Reden Kann, Darüber Muss Man Scheigen". *Het Journalistieke Zwijgrecht Wettelijk Beschermd* (die Keure 2008) 29 [Dutch].

The Belgian Protection of Journalistic Sources Act of April 7 2005 (hereafter 'Act'), which is a federal law.

2.3. How Exactly is This Protection Construed in National Law?

Article 3 of the Act provides journalists and editorial staff with the right not to disclose their journalistic sources. This entails that they cannot be forced to disclose their sources; nor to reveal information, documents, recordings which contain information such as the identity of their informants, the type and origin of their information, the identity of the author of a text or audio-visual production, nor the content of the information; nor to hand over the original documents if this could possibly entail identifying the informant. However, this list is not exhaustive.⁶

Considering the general phrasing of article 3, the journalist and the editorial staff also enjoy this protection during hearings in civil and criminal proceedings.⁷ In this way, they are thus protected whenever they are heard as a witness as well as a defendant.

Nevertheless, the protection of journalistic sources is not considered an absolute right. Under article 4 of the Act, a journalist or editorial staff can be forced to disclose protected information to a judicial authority when the following conditions are fulfilled. A journalist or editorial staff can only be ordered to reveal their source of information at the request of a judge, and on the condition that the information at issue is likely to prevent certain crimes which pose a serious threat to the physical integrity of one or more persons. This includes the offences referred to in article 137 of the Belgian Criminal Code which concerns deals with crimes of terrorism, on the condition that they pose a risk for the physical integrity, and if (i) the information is crucial for the prevention of these crimes, and; (ii) it cannot be obtained in another way.

In accordance with article 5, the information in question cannot be submitted to any detection or investigation measures, unless this information would be able to prevent the crimes referred to in article 4, and only in accordance with the conditions stemming from the latter. However, the Act does not provide a penalty in the event that a judicial authority would violate this legislation.

Article 6 of the Act protects journalists and editorial staff from prosecution for fencing if they exercise their right of non-disclosure of their sources. Maybe we can construe it in the following way: Article 6 protects journalists and editorial staff from prosecution for the Belgian offence of fencing which can be defined as the possession of unlawfully obtained goods, which have been acquired by another person by an offense or crime, whenever they would decide not to disclose the source of their information.

⁶ K. Lemmens, "Wovon Man Nicht Reden Kann, Darüber Muss Man Scheigen". Het Journalistieke Zwijgrecht Wettelijk Beschermd" (die Keure 2008) 29 [Dutch].

⁷ Ibid.

Lastly, article 7 provides the protection of journalists and editorial staff against the conviction of an accessory charge for the crime of breach of professional confidence committed by the source. In this way the legislator wanted to put an end to the judicial practice which convicted journalists as an accessory of the breach of professional confidence in the event that the journalist had exercised his/her right of non-disclosure.⁸ However, this article does not protect the journalist from being convicted as an accomplice, nor from being convicted as an accessory under other articles.

3. Is There, in Domestic Law, a Provision That Prohibits a Journalist from Disclosing His/Her Sources? How Exactly Is this Prohibition Construed in National Law? What Is the Sanction?

In Belgium there is no legislation that prohibits a journalist from disclosing his sources.

As mentioned above, article 3 of the Act provides journalists and editorial staff with the right to non-disclosure of information or documents, as well as the right not to be a witness provided that his testimony, or the information he would thereby reveal could be used against the interests of the source of the information in question. The Act provides merely for a right of non-disclosure, not a duty. Nonetheless, in Belgium, professional journalists are bound by an ethical code of the Press Council. The ethical code stipulates the duty of a journalist not to disclose the sources of his information. However, the definition of a 'professional journalist' is more stringent than the notion of 'journalist' as defined by the Act. The journalists who are associated with the Press Council can face disciplinary action such as a reprimand, suspension, or their title of journalist could be revoked if they breach their ethical code.⁹ However, the ethical code is not legally binding.

In Belgium, certain professions entail a professional confidentiality obligation that is sanctioned under criminal law.¹⁰ However, this is primarily the case with regard to professions in the legal and (para)medical world. Journalists, on the contrary, do not have a mandatory professional confidentiality and therefore cannot be sanctioned for the disclosure of their sources under the Criminal Code, nor under the Labour Code.¹¹

4. Who Is a “Journalist” According to the National Legislation? Is It, in Your View, a Restricted Definition for the Purpose of the Protection of Journalistic Sources? What Is the Scope of Protection of Other

⁸ Ibid, 31-32.

⁹ B. Hansez, 'Een Orde van Journalisten?' [2000-01] *Jura Falc.* 95-120 [Dutch].

¹⁰ Article 458 Belgian Criminal Code.

¹¹ K. Lemmens, *Het Journalistieke Zwijgrecht Wettelijk Beschermd* 33.

Media Actors? Is the Protection of Journalists' Sources Extended to Anyone Else?

4.1. Who Is A "Journalist" According to the National Legislation?

Traditionally, article 2 (1°) of the Act defined a 'journalist' as "*anyone who is self-employed or works as an employee, as well as any legal entity, and who regularly makes a direct contribution to the gathering, editing, production or distribution of information for the public by way of a medium*".

Firstly, this definition only protects persons who are journalists in a 'professional way'. Persons that write articles on a voluntary basis will not fall under the scope of the Act. Secondly, these persons must exercise their journalistic activities on a regularly basis.

This interpretation was, however, partly annulled by the Belgian Constitutional Court in its judgment of June 7 2006.¹² The Court examined the definition in light of the articles 19 (freedom of speech) and 25 (freedom of press) of the Belgian Constitution (hereafter 'Constitution'), article 10 of the European Convention of Human Rights, and found a violation of article 19 (2) of the International Covenant on Civil and Political Rights. It highlighted the case-law of the ECHR which described the protection of journalistic sources as "one of the keystones of freedom of press"¹³ and emphasised the function of the press as a watchdog to inform the public on matters of common interest.¹⁴ Following this case law, the Constitutional Court annulled the following words of article 2 (1°) of the Act: "*Journalist, and thus*" and "*is self-employed or works as an employee, as well as any legal entity, and who regularly*".

Following this judgement the Act was amended by the Act of May 6 2006. The amendment expanded the scope of the Act by providing for a broader notion of 'journalist'. Today, the new article 2 (1°) of the Act defines a "*journalist*" as "*anyone who directly contributes to the gathering editing, production or distribution of information for the public by way of a medium*".

4.2. Is It, in Your View, a Restricted Definition for the Purpose of the Protection of Journalistic Sources?

As mentioned under the previous question, as a result of the judgement of the Constitutional Court and the subsequent amendment to the scope of the notion 'journalist' was broadened. The new broadened definition grants the protection of sources to anyone who publishes facts or

¹² N° 91/2006 [2006] Constitutional Court of Belgium <<http://www.const-court.be/public/n/2006/2006-091n.pdf>> [Dutch].

¹³ *Goodwin v. United Kingdom* [1996] European Court of Human Rights, <http://hudoc.echr.coe.int/eng?i=001-57974> [English]; *Roemen and Schmit v. Luxembourg* [2003] European Court of Human Rights, <http://hudoc.echr.coe.int/eng?i=001-60958> [English]; *Ernst et autres v. Belgium* [2003] European Court of Human Rights, <http://hudoc.echr.coe.int/eng?i=001-61214> [French].

¹⁴ *Ibid.*

opinions on a regular basis. The notion of a “medium” in the definition requires a minimum level of regularity.¹⁵ However, the definition is less strict than the one in the previous version, as the definition is not oriented towards the professional occupation of the “journalist”, but instead looks at the type of activities that a journalist exercises.¹⁶ It follows that not only professional journalists fall within the scope of the Act, but also anyone who publishes on a purely altruistic basis, such as bloggers.

4.3. What Is the Scope of Protection of Other Media Actors?

As stated above, the Act also protects the editorial staff. Art 2 (2°) defines “*editorial staff*” in a broad way as “*anyone who, during the exercise of his functions, may be in a position to have knowledge of information that can lead to the revelation of a source through the gathering, the editorial treatment, the production or the distribution of this information*”.

This definition includes, for example, protected press photographers, documentary makers, as well as staff who help prepare the files.¹⁷ As the legislator favoured the word “functions” over “profession”, not only professional editorial staff fall under this protection, but also editorial staff that contributed to the making of a (video)blog. Such an interpretation similarly follows the constitutional protection of freedom of press under article 25 of the Constitution.¹⁸

To sum up, “editorial staff” enjoy the same protection of journalistic sources as “journalists” under the Act. The reasoning behind this is that such protection is quintessential in order to have an effective protection of journalistic sources, because otherwise the protection of the journalists would be too easily circumvented.¹⁹

4.4. Is the Protection of Journalists’ Sources Extended to Anyone Else?

The Act only protects journalists and editorial staff, and thus cannot be invoked by the source itself, or a third party. The Belgian Court of Cassation confirmed this in its case of February 7 2008.²⁰ Pursuant to a complaint alleging a breach of professional secrecy, an investigation was initiated against a police officer. The police officer allegedly had given confidential information to a journalist. The police officer invoked the protection of journalistic sources under the Act. However, the Belgian Supreme Court stated, in accordance with the parliamentary preparations,

¹⁵ Werkers, ‘Bronnengeheim voor Bloggers?’ 633; K. Lemmens, *Het Journalistieke Zwijgrecht Wettelijk Beschermd* 27.

¹⁶ E. Werkers, E. Lievens, S. Paulussen, D. Geens and K. Vandenbrande, ‘*Ethics and Rights for Online Journalists: Inseparable and Obligatory?*’ (paper submitted for “The End of Journalism?”, International Journalism Conference 2008, Centre for International Media Analysis, Luton, UK, 17 October 2008) <<http://theendofjournalism.wdfiles.com/local--files/werkeretal/Werkers%20et%20al.pdf>>.

¹⁷ E. Brewaeys, ‘Informatiebronnen van Journalisten’ [2005] NjW 542 [Dutch].

¹⁸ Ibid.

¹⁹ K. Lemmens, *Het Journalistieke Zwijgrecht Wettelijk Beschermd* 28.

²⁰ P.07.1466.F.1 [2008] Court of Cassation of Belgium <<http://www.cass.be>> [2008].

that the Act only applies to journalists and editorial staff, and that a third party who is suspected of unlawful disclosure of information cannot invoke the Act, even if it concerns the disclosure of information to a journalist.

5. What Are the Legal Safeguards for the Protection of Journalistic Sources? How Are the Laws Implemented? How Are the Legal Safeguards Combined with Self-Regulatory Mechanisms?

In Belgian domestic law there are several legal safeguards for the protection of journalistic sources. These safeguards can be found in the Constitution, in the Act on the protection of journalistic sources, in the Act on the regulation of the Intelligence and Security Service and in journalistic ethical codes.

5.1. What Are the Legal Safeguards for the Protection of Journalistic Sources? How Are the Laws Implemented?

The first source of legal safeguards to be discussed, is the Belgian Constitution. The universal right of freedom of expression for every individual is enshrined in article 19, while article 25 offers an express protection for journalists, as well as safeguards for the freedom of press. These two articles can be considered as the general sources of the protection of journalistic sources in Belgium.²¹

A more specific source of law is the Act on the protection of journalistic sources of 7 April 2005. The Act introduces that all beneficiaries of the Act have the right not to disclose their sources. The answer to the question in title 2.3 explains the scope of the journalistic protection and clarifies which persons are favoured by the Act. As mentioned above, the beneficiaries of the Act are protected against a prosecution for the crime of fencing (article 6) or as an accessory to crimes (article 7).²² This is an important legal safeguard because such situations sometimes occurred in the past. The cases of *Jespers* (1977) and *Coenen* (1985) are examples of journalists arrested for fencing and complicity because they did not want to disclose their sources.²³ Under 1.3., it was also pointed out that the right of non-disclosure can be limited under certain conditions stemming from article 4. As explained, the beneficiaries of the Act can only be forced to disclose information to prevent the commission of a crime posing a serious threat to the physical integrity of persons on the basis of a court order. As the criterion of 'serious threat' is not defined in the Act, it needs to be interpreted by the competent courts. It goes without saying

²¹ Piet Martens, *Mediarecht voor journalisten*, (Garant, 2005) 17 [Dutch]; Stéphane Hoebeke and Bernard Mouffe, *Le droit de la presse* (2nd edn, Academia Bruylant, 2005) 54 [French]; Peggy Valcke and Eva Lievens, *Media Law in Belgium*, (Kluwer Law International, 2011) 51-53; Dirk Voorhoof and Peggy Valcke, *Handboek mediarecht*, (4th edn, Larcier, 2015) 27 [Dutch].

²² Question 1.3

²³ Jan Ceuleers, "Eindelijk: het journalistiek zwijgrecht (bijna) wettelijk erkend" [2004] AM 222 [Dutch].

that the interpretation of judges will be an important factor for the protection of sources. Considering that when the judge applies a restrictive interpretation of 'serious threat' the secrecy of sources will logically be protected in a stronger way.²⁴

Likewise, it was pointed out that such an exception is only applicable if (i) the information is necessary to prevent crimes and; (ii) the information cannot be obtained in another way. On the basis of the same conditions it is also possible to take investigative measures against journalists (article 5). It follows that exceptions are not applicable if the crimes are already taking place or if they are/have already been completed. The competent authorities thus need to prove that it enables them to prevent a potential future crime.

Article 10 of the ECHR contains a similar exception, as paragraph 2 states that the freedom of expression may be limited by pursuing the legitimate aim of preventing criminality, on the condition that the exception is provided by law and is necessary in a democratic society.²⁵ Also, the possibility of making an exception to the secrecy of journalistic sources on the basis of article 10, para 2 in case of a serious ongoing crime, has been recognised in the legal doctrine. Such an exception, however, is not possible on the basis of the Belgian Act.²⁶

A weakness of the Act is the lack of a sanction in case of a violation of the provisions. Nevertheless there are some examples of journalists who claimed damages after the rights granted to them on the basis of the Act were violated. They effectively received compensation.²⁷ Remarkably, at the moment of the facts the Act was not applicable yet.²⁸

Since 2010, the Act on the regulation of the Intelligence and Security Service of 30 November 1998 (hereafter 'ISS Act') also deals with the secrecy of journalistic sources. This ISS Act will be discussed more at length in question in title 8, but a few principles will be mentioned here. The ISS Act ensures that special methods of investigation are adapted to guarantee the secrecy of journalistic sources. On the basis of article 2 (2) of the Act, the Intelligence and Security Service is not allowed to obtain, analyse or exploit data protection under the principle of secrecy of journalistic sources, unless there is a serious indication that the journalist personally or actively participates or participated in the development of a potential threat. The several possible kinds of threats are listed in the Act. Moreover, the exceptional methods need to be necessary.²⁹

²⁴ Dirk Voorhoof, *Het journalistiek bronnengeheim ontbult*, (die Keure, 2008) 32-34 [Dutch]; Dirk Voorhoof and Peggy Valcke, *Handboek mediarecht*, (4th edn, Larcier, 2015) 335-336 [Dutch].

²⁵ *Secic v Croatia* [2007] European Court of Human Rights.

²⁶ Dirk Voorhoof, *Het journalistiek bronnengeheim ontbult*, (die Keure, 2008) 32-33 [Dutch]; Tessa Gombeer, "Recente rechtspraak van het Europees Mensenrechtenhof inzake artikel 10 EVRM en impact van de journalistieke beroepsethiek" [2009] *Nullum Crimen* 79 [Dutch].

²⁷ *De Graaf v Belgium* [2007] Court of First Instance of Brussels, AM [2007], 500 [Dutch].

²⁸ Dirk Voorhoof, *Het journalistiek bronnengeheim ontbult*, (die Keure, 2008) 51-52 [Dutch]; Dirk Voorhoof and Peggy Valcke, *Handboek mediarecht*, (4th edn, Larcier, 2015) 336-337 [Dutch].

²⁹ Dirk Voorhoof and Peggy Valcke, *Handboek mediarecht*, (4th edn, Larcier, 2015) 338-339 [Dutch].

When the Intelligence and Security Service uses special methods of investigation with regard to journalists, they are obliged to notify the president of AVBB, the General Association of Professional Journalists in Belgium. As a result, the investigations will be carried out under the supervision of a special commission, which is tasked to verify whether there is a direct link between the threat and the obtained data under art 18 (2) of the ISS Act. Also, under article 18 (3) of the ISS Act, the commission has to give an advice on possible “serious indications” of the journalist’s involvement and the necessity to move on to the use of special investigation methods.³⁰

The ISS Act only applies to professional journalists, which does not mean that non-professional journalists do not enjoy any protection of sources. They will be covered by the aforementioned Act on the protection of journalistic sources and article 10 ECHR.³¹

5.2. How Are the Legal Safeguards Combined with Self-Regulatory Mechanisms

As explained above, journalists are subject to a deontological or ethical code. The International Code of the International Federation of Journalists, the Declaration of Duties and Rights of Journalists are both important international sources of journalistic deontology. Important Belgian sources of journalistic deontology are the Code of journalistic principles and the Code of the Council for Journalism.³²

As it is very important for a journalist to have the right to collect data and to publish information and opinions freely, one of the most important deontological duties of the journalist is the protection of secrecy of sources.³³

In 2002, the Belgian Council for Journalism was established, which is a self-regulatory body for journalists in the Flemish part of Belgium. It is an independent institution which treats questions and complaints about the professional practice, and consists of six journalists, six representatives of editors, media houses and news agencies, and six external members. Any individual can approach the Council with general questions or complaints. The Secretary General acts as an ‘ombudsman’ and tries to obtain a settlement between the applicant and the journalist.

Deontological rules are taken into account in the rulings of the Council. The Code of the Council for Journalism (hereafter ‘the Code’) is such an instrument. The Code explicitly states

³⁰ Dirk Voorhoof and Peggy Valcke, *Handboek mediarecht*, (4th edn, Larcier, 2015) 339 [Dutch].

³¹ Dirk Voorhoof and Peggy Valcke, *Handboek mediarecht*, (4th edn, Larcier, 2015) 340 [Dutch].

³² Stéphane Hoebeke and Bernard Mouffe, *Le droit de la presse: presse écrite presse audiovisuelle, presse électronique*, (Anthemis, 2012) 841-851 [French]; Eric Brewaeyts, Dirk Voorhoof and Filip Voets, *Wetboek media en journalistiek*, (Kluwer, 2014) 164-165 [Dutch].

³³ Piet Martens, *Mediarecht voor journalisten*, (Garant, 2005) 142 [Dutch]; Stéphane Hoebeke and Bernard Mouffe, *Le droit de la presse: presse écrite presse audiovisuelle, presse électronique*, (Anthemis, 2012) 851-853 [French]; Peggy Valcke and Eva Lievens, *Media Law in Belgium*, (Kluwer Law International, 2011) 59-60; Dirk Voorhoof and Peggy Valcke, *Handboek mediarecht*, (4th edn, Larcier, 2015) 334-335 [Dutch].

that the issue of secrecy of sources will be subject to the self-regulation system,³⁴ with a view to stimulating the autonomy of journalism.³⁵

In the French Community of Belgium there is the Council of Journalistic Deontology. The Council was established in 2009 and is composed of the same members as the Flemish equivalent. It is engaged with the functions of information, mediation and regulation.³⁶ Everybody has the possibility to file a complaint.³⁷ The Council of Journalistic Deontology also has its own Code of Journalistic Deontology and a self-regulatory system.³⁸

Article 19 of the Code of the Council for Journalism of the Flemish community provides that a journalist protects the identity of its sources to whom he has promised confidentiality, and sources of whom he knew or should have known that they gave to him the information while expecting that he would not reveal their identity. The same provision can be found in article 21 of the Code of Journalistic Deontology of the French Community. On the basis of principle 8 of the Flemish Code of journalistic principles a journalist can only reveal the source if he receives the explicit authorization of the informant.

6. In the Respective National Legislation, Are the Limits of Non-Disclosure of the Information in Line with the Principles of the *Recommendation No R (2000)* ? What Are the Procedures Applied? Is the Disclosure Limited to Exceptional Circumstances, Taking into Consideration Vital Public or Individual Interests at Stake? Do the Authorities First Search for and Apply Alternative Measures, which Adequately Protect their Respective Rights and Interests and at the Same Time Are Less Intrusive with Regard to the Right of Journalists Not to Disclose Information?

6.1. In the Respective National Legislation Are the Limits of Non-Disclosure of the Information in Line with the Principles of the Recommendation No R (2000) ?

³⁴ Guidelines article 13 Code van de Raad voor de Journalistiek 20 september 2010.

³⁵ X, *Raad voor de Journalistiek* <<http://www.rvdj.be/node/58>> accessed 13 February 2016 [Dutch].

³⁶ X, Un conseil de déontologie, pour le public et pour le medias <<http://www.deontologiejournalistique.be/index.php?presentation>> accessed 11 Mars 2016 [French]

³⁷ X, Code de déontologie journalistique <<http://www.deontologiejournalistique.be/index.php?presentation>> accessed 11 Mars 2016 [French]

³⁸ X, Introduire une plainte <<http://www.deontologiejournalistique.be/index.php?presentation>> accessed 11 Mars 2016 [French]

Recommendation No. R (2002) 7 aims to protect the right of non-disclosure of the sources of information of journalists. The recommendation sets up seven basic principles that legislation of Member States need to be in accordance with.

The first principle is the right of non-disclosure of journalists. The second principle contains the right of non-disclosure of other persons. These two principles provide a general protection of journalistic sources, without discussing the limits of non-disclosure.

The possible exceptions to the right of non-disclosure are mentioned in principle 3. This principle sets out the conditions for the exception of an “overriding requirement in the public interest”. A journalist can only be obliged to reveal his source in the following cases:

(a) The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in article 10, paragraph 2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of article 10, paragraph 2 of the Convention outweighs the public interest in not disclosing information identifying a source, competent authorities of member states shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law of the European Court of Human Rights, and may only order a disclosure if, subject to paragraph b, there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.

(b) The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:

i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and

ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that: - an overriding requirement of the need for disclosure is proved, - the circumstances are of a sufficiently vital and serious nature, - the necessity of the disclosure is identified as responding to a pressing social need, and - member states enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.

(c) The above requirements should be applied at all stages of any proceedings where the right of non-disclosure might be invoked.

As mentioned above, in Belgian Law, article 4 of the Act on the Protection of Journalistic Sources states that beneficiaries of the Act can be forced by a court order to disclose relevant information to prevent a serious threat for the physical integrity of persons or crimes in the sense of article 137 of the Belgian Criminal Code. On the basis of article 5 of the Act on the Protection of Journalistic Sources the above exception is only applicable if the information is necessary to prevent crimes and if the information cannot be obtained in another way. This article also states that on the basis of the same conditions it is possible to take investigative measures against journalists.

Prevention of crimes in the sense of article 4 of the Act can be considered as an overriding requirement in the public interest and a legitimate aim in the sense of principle 3 of the Recommendation. Similar to the Recommendation, the Act requires that there are no reasonable alternative measures to the disclosure.

The answer to the questions in title 5 and 9 gives a comprehensive explanation about the ISS Act. However, with regard to the limits to the right of non-disclosure, it might be relevant to

elaborate on article 2 of the ISS Act. On the basis of this article, it is not allowed to obtain, analyse or exploit data, protected by the secrecy of journalistic sources. Nevertheless, the relevant service put this principle aside if there are serious indications that the journalist personally or actively participates or has participated in the development of a potential threat. The several possible kinds of threats are listed in the Act. Examples are threats to the internal or external security of the state, military security, the democratic and constitutional order, international relations, scientific or economic potential or any other fundamental interest of the country, such as espionage, terrorism, extremism, proliferation or participation to harmful sectarian organisations or criminal organisations. It should be pointed out, however, that his exception is limited by the necessity-requirement.³⁹

A serious threat in the sense of the ISS Act could form an overriding requirement in the public interest and thus a legitimate aim in the sense of principle 3 of the Recommendation, as the above kind of threats are crucial for the general interest and the functioning of a state. Also, the ISS Act requirement of necessity can similarly be found in the Recommendation.

6.2. What Are the Procedures Applied?

The Act provides safeguards against judicial authorities and the police force. The conditions in which there can be an exception to the secrecy of sources are mentioned above. These are no procedural conditions. The ISS Act which covers state security or any other intelligence service, states that the intervention of the Intelligence and Security service requires some procedural requirements. These requirements are discussed in the answer to the question in title 9.

6.3. Is the Disclosure Limited to Exceptional Circumstances, Taking into Consideration Vital Public or Individual Interests at Stake?

The answer to question 2.3. and 6.1 shows that the right of non-disclosure can only be limited in exceptional circumstances. It can be limited for the prevention of crimes on the basis of article 4 of the Act on the protection of journalistic sources and when there is a serious threat in the sense of the ISS Act.

6.4. Do the Authorities First Search for and Apply Alternative Measures, which Adequately Protect their Respective Rights and Interests and at the Same Time Are Less Intrusive with Regard to the Right of Journalists Not to Disclose Information?

³⁹ Dirk Voorhoof and Peggy Valcke, *Handboek mediarecht*, (4th edn, Larcier, 2015) 338-339 [Dutch].

Article 5 of the Act on the Protection of Journalistic Sources explicitly mentions that the secrecy of sources can only be limited if the information is necessary to prevent crimes and if the information cannot be obtained in another way. Consequently, the authorities need to search for and apply reasonable alternative measures if it is possible.

A good example is the judgement of the Court of First Instance of Brussels of June 29 2007.⁴⁰ It concerned the registration of phone calls of a journalist. The Court of First Instance ruled that due to the nature of the facts, it was a disproportionate violation of the secrecy of journalistic sources, as it would have been possible to take alternative investigation measures. The state of Belgium was thus convicted for monitoring the journalist's phone activity. This case is discussed in more depth in the answer to the question in title 8.

7. In the *Recommendation No R (2000) 7* the Following Principles Should Be Respected when the Necessity of Disclosure Is Stated: Absence of Reasonable Alternative Measures, Outweighing Legitimate Interest (Protection of Human Life, Prevention of Major Crime, Defence of a Person Accused or Convicted of Having Committed a Major Crime). Under which Criteria Can the Interest in the Disclosure Outweigh the Interest in the Non-Disclosure?

Council of Europe

Recommendation 7 of the Committee of Ministers on the right of journalists not to disclose their sources of information contains three relevant principles: principles 3, 5 and 6. Principle 3 describes certain limits to the right of non-disclosure, which have been discussed above in question in title 6.

Principle 4 concerns Alternative evidence to journalists' sources. It stipulates that in legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of establishing the truth or otherwise of the allegation, all evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist. So in these kinds of procedures the right of non-disclosure is not overruled by an overriding interest to restore the honour or reputation of a person.

Finally, principle 5 establishes certain conditions for cases in which a disclosure can be justified based on an overriding interest. The first condition states that the request to disclose journalistic sources can only be made by persons or public authorities which have a direct legitimate interest in the disclosure. Secondly, journalists should be informed about their right not to disclose the

⁴⁰ De Graaf v Belgium [2007] Court of First Instance of Brussels, AM [2007], 500 [Dutch].

source as well as the limits of this right. They should be informed before the disclosure is requested. The third condition stipulates that sanctions against journalists for not disclosing their source can only be imposed by judicial authorities. This should happen during proceedings which allow for a hearing of the journalist in question in accordance with the procedural safeguards of article 6 of the European Convention on Human Rights. Fourthly, this sanction for non-disclosure after a valid request should be subject to review by another judicial authority. Lastly, if journalists disclose information which can reveal their source the competent authorities should limit the extent of the disclosure as far as possible; for example by excluding the public from the disclosure and by themselves respecting the confidentiality of the disclosure.

As such, the Recommendation does not list any specific overriding interest which can justify an exception to the principle of non-disclosure of information which can reveal the source. Instead, the Recommendation includes a series of checks and criteria which must be taken into account by the competent authorities when assessing the legitimate interest.

A Member State's law should specify the conditions in which a disclosure can be justified. This is in line with the case law of the ECHR, which stresses that limitations to Article 10 must be "prescribed by law". The Court has held that "relevant national law must be formulated with a sufficient precision to enable the persons concerned - if need be with appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail", and be formulated with sufficient clarity to provide the individual "adequate protection against arbitrary interference" by public authorities through an unlimited discretion.⁴¹

Belgian law

As mentioned above, article 4 of the Act states that the right of non-disclosure of a journalist or editorial staff member can be limited under certain conditions.⁴² A judicial authority may request the revelation of the source of information if that information is likely to prevent certain crimes that pose a serious threat for the physical integrity of one or more persons, which also includes the offences referred to in article 137 of the Belgian Criminal Code that concern crimes of terrorism. The information must only be disclosed if the crime poses a risk for the physical integrity, and to the extent that following cumulative conditions are met: (1) the information is crucial for the prevention of these crimes; (2) and the information cannot be obtained by any other means. Until now this is in line with the Recommendation, even though the field of application is more restrictive than the one envisaged by the Council of Europe.

A judge can only obligate the journalist to disclose the information in certain circumstances. Foremost, the disclosure can only be ordered for the prevention of a crime.⁴³ In other words, a judge cannot order the disclosure of information if the crime is already committed (for example

⁴¹ ECHR, *Goodwin v. the United Kingdom*, 27 March 1996, para. 31

⁴² Article 4 of the Belgian Protection of Journalistic Sources Act of 7 April 2005.

⁴³ K. Lemmens, "*Wovon Man Nicht Reden Kann, Darüber Muss Man Schweigen*". *Het Journalistieke Zwijgrecht Wettelijk Beschermd*" (die Keure 2008) 32 [Dutch].

after a terrorist attack) or during a criminal offence (for example during a hostage taking). Only a criminal judge, the investigating judge or the trial judge, can order the disclosure of sources.

Next, the crime must pose a serious threat for the physical integrity of one or more persons. The Act is restrictive since there are no other exceptions foreseen. Article 10 ECHR states, for example, freedom of expression can also be restricted for the protection of other persons. Furthermore the Recommendation hints to make an exception for the defence of a person accused or convicted of having committed a major crime. The Act however only mentions the exception of “a serious threat for the physical integrity” and no other exceptions. Furthermore, the Act includes all the crimes of terrorism mentioned in article 137 of the Belgian Criminal Code as crimes that pose a serious threat for the physical integrity. The article does not clarify any other crimes that can be seen as a serious threat for physical integrity and it does not define ‘serious threat for physical integrity’.⁴⁴ This decision is up to the judge.

Additionally, the Act provides conditions with regard to the subsidiarity principle.⁴⁵ Article 4 states that it must be imperative that the information is of crucial importance for the prevention of the crime, unless there are other reasonable alternative measures to obtain the information. The Act also provides a proportionality condition, when it states that the information must be crucial to prevent the crime.⁴⁶ Finally, the *a priori* judicial review of the exception to the right of non-disclosure is in line with the case-law of the ECHR, which envisages an effective protection of the right of non-disclosure of journalistic sources.⁴⁷ Even though the Recommendation does not foresee an exception in cases concerning the infringement of the honour or reputation of a person, a journalist cannot be protected by the right of non-disclosure. A journalist has the choice between revealing its sources, so he will not be liable for unlawful or defamatory journalism, or protect its sources and risk to be held personally liable.⁴⁸ Another important exception to the right of non-disclosure is the following. Pictures and videos of for example riots, demonstrations or other acts of violence do not fall under the protection afforded by the Act, because they do not fall under the definition of a journalistic source. Police and security services can demand footage of to identify suspects and gather evidence. If, however, the images can reveal the identity of informants or the origin of documents, the Act is applicable again.⁴⁹

8. In the Light of the Case Law of the European Court of Human Rights, How Do National Courts Apply the Respective Laws with

⁴⁴ Ibid., 34.

⁴⁵ Ibid., 33.

⁴⁶ P. Martens, *Mediarecht voor journalisten*, (Garant 2005), 140-145 [Dutch]; S. Hoebeke and B. Mouffe, *Le droit de la presse*, (Anthemis 2012) 155-177 [Dutch].

⁴⁷ ECHR, September 14, 2010, *Sanoma Uitgevers BV vs. The Netherlands*; D. Voorhoof and P. Valcke, *Handboek Mediarecht*, (Larcier 2011) 303 [Dutch].

⁴⁸ D. Voorhoof and P. Valcke, *Handboek Mediarecht* (Larcier 2011) 304 [Dutch].

⁴⁹ D. Voorhoof and P. Valcke, *Handboek Mediarecht*, (Larcier 2011) 308-309 [Dutch].

Regard to the Right to Protect Sources? In Particular, How Do They Balance the Different Interests At Stake?

In first instance, some cases will be discussed which predate the entry into force of the Act on the protection of journalistic sources of 2005. This will be followed by a discussion of a few cases which postdate the entry into force of the Act. It goes without saying, that as the cases are examples of the application of the Act, these are more relevant for the present.

Court of First Instance of Brussels – June 7 2002

The first example is a judgement from the Brussels' Court of First Instance. The facts took place in 2002, a few years before the entry into force of the Act. It concerned the Flemish newspaper 'De Morgen' which had published an article about a new TGV-station in the Belgian city of Liège. The article was written on the basis of an internal document of the NMBS, the Belgian railway company. On the basis of this document, it was argued that the building of the station would be excessively expensive. The NMBS denied the existence of this document and demanded the disclosure of the document in court. The Court of First Instance referred to the protection of the secrecy of sources in the sense of article 10 ECHR. It decided that the disclosure of the document would probably result in the identification of the source of the information in violation the principle of secrecy of sources.

The Court referred to the *Goodwin* case⁵⁰ from the European Court of Human Rights to highlight the importance of the secrecy of journalistic sources in a democratic society.⁵¹ The case at issue was clearly decided in accordance with the case-law from the Court of Human Rights.⁵²

Court of First Instance of Brussels – June 29 2007

In 2007, there was a case concerning the registration of phone calls of a journalist. The journalist had written an article in the Flemish newspaper 'De Morgen' about a terrorism threat in Antwerp. In the article the journalist referred to her source of information, i.e. a confidential police report. The Belgian authorities feared there was an internal leak within the police department. To find the identity of the person who leaked the information in question, the phone activity of the journalist was monitored. On the basis of article 88*bis* of the Belgian Criminal Procedure Code, the monitoring of phone activity is only possible under exceptional circumstances. The journalist claimed that the registration was in violation of the secrecy of journalistic sources. As the facts of the case predated the Act on protection of journalistic sources, the Court of First Instance of Brussels derived the principle of the secrecy from journalistic sources on article 10 ECHR and art 19 of the Constitution. The Court of First Instance argued that the protection of journalistic sources is one of the cornerstones of a

⁵⁰ *Goodwin v United Kingdom* [1996] European Court of Human Rights.

⁵¹ *De Morgen v Belgium* [2002] President Court of First Instance Brussels AM [2002] 459.

⁵² Dirk Voorhoof and Peggy Valcke, *Handboek mediarecht*, (4th edn, Larcier, 2015) 73 [Dutch].

democratic society, but that the right to freedom of expression can be limited in the sense of article 10 paragraph 2.

In this case the aim of monitoring the phone activity was identifying the person who leaked the information and had thereby violated his professional confidentiality. The aim was not the prevention of a crime like terrorism. The Court of First Instance said that because of the nature of the facts, it was disproportionate to provide an exception to the secrecy of journalistic sources, and that it would have been possible to take other kinds of investigation measures. The Court thus convicted the Belgian state for monitoring the journalist's phone activity, as the Court found that need for identification of the person who violated his professional confidentiality did not trump safeguarding the secrecy of journalistic sources.⁵³

With regard to the balancing of interests, the Court used the same conditions as the ECtHR. Moreover, the findings of the Court are in following the principles stemming from the *Tillack* case of the ECtHR. In this case the ECtHR held that the secrecy of journalistic sources should be protected, even if the information is the result of a violation of the professional confidentiality.⁵⁴

Also, the Court found that the condition of subsidiarity was not fulfilled because there are less radical means to find the person who leaked the information, referring to the *Ernst* case.⁵⁵ For instance, there was the possibility to investigate within the police department, without involving the journalist.⁵⁶

Court of Cassation – February 6 2008

In 2008, the Belgian Court of Cassation heard a case on the protection of journalistic sources. At the time of this case, the Act on the protection of journalistic sources had already entered into force. The prosecutor of Verviers suspected that a police officer had given confidential information to a journalist. Because the police officer was suspected for the crime of violation of his professional confidentiality in the sense of article 458 of the Criminal Code, the investigating judge commanded the monitoring of the police officer's phone activity and the confiscation of his mobile phone. The police officer appealed against these measures, arguing that the measures were in violation of the secrecy of journalistic sources. The Belgian Court of Cassation replied that the secrecy of journalistic sources in the sense of article 5 of the Act on the protection of journalistic sources is not an absolute right. Moreover, the Court of cassation held that the protection does not apply to persons who do not fall within the scope of the Act. A police officer who gave the information to the journalist, does not fall within the scope. The protection merely includes the journalist and his assistants. It is not applicable to the informant of the

⁵³ De Graaf v Belgium [2007] Court of First Instance of Brussels, AM [2007], 500 [Dutch].

⁵⁴ Tillack v Belgium [2007] European Court of Human Rights, Rechtskundig Weekblad [2009], 1067.

⁵⁵ Ernst v Belgium [2003] European Court of Human Rights.

⁵⁶ Roemen and Schmit v Luxemburg [2003] European Court of Human Rights.

journalist. As a consequence, the police officer was prosecuted for the violation of his professional confidentiality.⁵⁷

The case was decided along the lines of the case law of the ECtHR. In *Tillack v. Belgium*,⁵⁸ the ECtHR held that journalists have the right to non-disclosure of the source of their information, even if the information is the result of the violation of the professional confidentiality. However, the ECtHR did not extend the protection of art 10 of the ECHR to informants of journalists.⁵⁹

This implied that informants did not fall under the protection of article 10 of the European Convention on Human Rights.⁶⁰ But, in February 12 2008, a few days after the judgment of the Belgian Court of Cassation, the ECtHR decided, in *Guja v. Moldova*,⁶¹ that informants enjoy the protection of article 10 of the European Convention of Human Rights as well. It follows that the above judgment of the Court of Cassation is now outdated.

Criminal Court of Dendermonde – November 3 2008 and Court of First Instance of Brussels – May 5 2010

In a case of November 3 2008, the Criminal Court of Dendermonde held that the prosecution of a journalist for the crime of unlawful use of documents of a criminal procedure in the sense of article 460ter of the Belgian Criminal Code is not a violation of the Act on the protection of journalistic sources or article 10 ECHR. However, the journalist cannot be punished for complicity to the crime of article 460ter of the Criminal Code when there is no evidence of his participation to the unlawful use of the information and his knowledge of the malicious intent of the principal perpetrator. The mere fact that the journalist possesses copies of the documents out of the criminal procedure, cannot be considered sufficient evidence.⁶²

In 2010, the Court of First Instance of Brussels dealt with the same issue in a case involving the publication of an article on a certain person who was being prosecuted for forgery and fraud. The suspect, assuming that the complainant had leaked information to the journalist in question, argued that the complainant committed the offence of unlawful use of documents out of the criminal procedure basis as enshrined in article 460ter of the Belgian Criminal Code, and claimed that the journalist was his accomplice. The journalist on his turn invoked the secrecy of journalistic sources to avoid having to disclose the source of his information.

The Court of First Instance said that there was no evidence supporting the accusations made by the suspect. In addition, the Court of First Instance remarked that when a journalist denies that one of the parties handed over procedural documents out of a criminal procedure, there cannot be a prosecution for the crime on the basis of article 460ter of the Criminal Code, as the

⁵⁷ H.F. v O.M. [2008] Court Of Cassation of Belgium, Tijdschrift Strafrecht [2008], 457 [French].

⁵⁸ Tillack v Belgium [2007] European Court of Human Rights, Rechtskundig Weekblad [2009], 1067.

⁵⁹ Bart De Smet, "Beperkte draagwijdte van het journalistieke bronnengeheim" [2008] Rechtskundig Weekblad 1727 [Dutch]

⁶⁰ Bart De Smet, "Beperkte draagwijdte van het journalistieke bronnengeheim" [2008] Rechtskundig Weekblad 1727 [Dutch]

⁶¹ Guja v Moldova [2008] European Court of Human Rights.

⁶² [2008] Criminal Court of Dendermonde, AM [2009], 455 [Dutch].

journalist cannot be forced to disclose his source, which is a fundamental right of the journalist.⁶³ The Court of First Instance thus used the same reasoning as the Criminal Court of Dendermonde in its judgment of 3 November 2008.

In these two cases, the Belgian Courts found that the protection of journalistic sources outweighed the potential prosecution under article 460ter of the Criminal Code. This does not mean that a journalist cannot be convicted for the crime of article 460ter. If there is sufficient evidence to prove the complicity of the journalist, he can be convicted in accordance with the *Masschelin* case of the ECtHR.⁶⁴

In the *Masschelin* case, prosecution of a journalist for complicity to the crime in the sense of article 460ter of the Criminal Code was considered not to be a violation of art 10 ECHR. The ECtHR said that there was complicity of the journalist because he incited the civil parties in the criminal procedure to copy documents out of the criminal procedure to transfer them to him. As such, the Court considered the behaviour of the journalist to be in violation of journalistic deontology.⁶⁵

However, the merely malicious intent of the principal perpetrator is not enough to set aside the protection of journalistic sources. The journalist can only be forced to disclose his source when there is an overriding requirement in the public interest. In the opinion of the ECtHR, the detection of a leakage cannot be regarded as an overriding requirement in the public interest.⁶⁶ This arises from the general principle of protection of journalistic sources as mentioned in the *Goodwin* case.⁶⁷

9. What Are the Criteria for Using Electronic Surveillance and Anti-Terrorism Laws, which may Include Measures such as Interceptions of Communications, Surveillance Actions and Search or Seizure Actions in Order to Identify Journalists' Sources of Information? Are the National Law Provisions Accessible, Precise, Foreseeable And Include Clear Legislative Norms in the Context Of Surveillance And Anti-Terrorism Provisions?

Council of Europe

⁶³ G.L. v D.C.D. and V.D.E.P. [2010] Court of First Instance of Brussels, AM [2010], 387 [Dutch].

⁶⁴ *Masschelin v Belgium* [2007] European Court of Human Rights.

⁶⁵ *Masschelin v Belgium* [2007] European Court of Human Rights.

⁶⁶ *Financial Times Ltd. and others v United Kingdom* [2010] European Court of Human Rights.

⁶⁷ *Goodwin v United Kingdom* [1996] European Court of Human Rights.

Recommendation No R (2000) 7 contains two relevant principles. Principle 3 describes certain limits to the right of non-disclosure. In its first paragraph, the article determines that the right of non-disclosure cannot be subject to other restrictions than those mentioned in article 10, paragraph 2 of the European Convention of Human Rights on the freedom of expression. Competent authorities need to pay particular attention to the importance of the right of non-disclosure and can only order a disclosure if there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature. Paragraph 2 stipulates that there can only be an overriding public interest if reasonable alternative measures to the disclosure do not exist or have been exhausted, and the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure.

Principle 6 is the second relevant principle in the recommendation. It elaborates on interception of communication, surveillance and judicial search and seizure. The principle determines that these measures should not be applied if their purpose is to circumvent the right of journalists not to disclose information identifying a source. In the second paragraph, it requires that if information identifying a source has been properly obtained by police or judicial authorities by any of the above actions, although this might not have been the purpose of these actions, measures should be taken to prevent the subsequent use of this information as evidence before courts, unless the disclosure would be justified under Principle 3.

Belgian law

In Belgium, there is no specific constitutional provision regarding the protection of journalistic sources. The Constitution only contains a general privacy protection provision. Article 22 stipulates that everyone is entitled to have their private and family life respected, except under the circumstances and conditions determined by the law.

The federal Act of April 7 2005 offers legal protection of journalistic sources. This Act has been explained in detail in the responses to the first three questions.

One of the first cases in which the law of 2005 was applied, provides an excellent example of use and implications of the law. In a judgment of June 29 2007, the court of first instance of Brussels convicted the Belgian state to pay damages to a journalist and her newspaper for the illegal registration of telephone calls of the journalist. The judge ruled that the police used the tap for facts which already took place in contradiction to the preventive aim of the exception, that alternative measures were possible and that the journalist did not do anything wrong herself. As a consequence the facts were insufficient to allow an exception to the protection of journalistic sources.⁶⁸ A potential terrorist aim seems to fall under the exception to the right of a journalist to remain silent regarding its sources of the Law of 2005. The Law of 2005 however does not seem

⁶⁸ Rb. Brussel 29 June 2007, AM 2007/5, 500.

to allow special investigative measures in case of a potential terrorist aim, unless it is the only way to prevent the attack.⁶⁹

The question remains if there are any exceptions to these provisions outside the law of 2005. The law of 2005 on the protection of journalistic sources only protects against judicial authorities and the police force, it does not afford any protection against state security or any other intelligence service.

The ISS Act, which has been mentioned above in the questions in title 5 and 6, contains, following the modifications in 2010, specific limitations and modalities regarding special investigative techniques and the protection of journalistic sources.⁷⁰ In article 3, of the ISS Act a journalist is defined as a professional journalist. This limits the area of application in contrast to the general law of 2005 after the ruling of the Belgian Constitutional Court.⁷¹

Article 2, second paragraph of the ISS Act lays down a general prohibition to obtain, to analyse and to exploit data which is protected by the right of non-disclosure. The only exception to the rule is the case in which the authorities have serious indications that the journalist actively and personally co-operates to the origination or development of a potential threat such as defined in articles 7, 8 and 11. These articles list threats of the internal or external security of the state, military security, the existence of the democratic and constitutional order, international relations, scientific or economic potential or any other fundamental interest of the country as defined by the King. This includes every individual or collective activity from within the country or abroad related to espionage, terrorism, extremism, proliferation of or participation to harmful sectarian organisations of criminal organizations. For example, the dissemination of propaganda and the encouragement or the direct or indirect support, including by providing financial, technical and logistical resources, providing information about possible targets, the development of structures and capacity for the achievement of the objectives pursued.⁷²

⁶⁹ C. Baekeland, "De 'War on Terror' en het journalistieke bronnengeheim: droomhuwelijk of (v)rechtscheiding", C. Declerck, P. Foubert en A. Ooms (eds.), *Geheimen in het recht*, Antwerpen, Intersentia, 2011, 155-184.

⁷⁰ Regulation Act of 30 November 1998 of the intelligence and security services, BS 18 December 1998; see also question 4.

⁷¹ Constitutional Court, 7 June 2006.

⁷² Definitions: Espionage is defined as researching or providing information which is not accessible to the public and upholding relations which can facilitate the gathering of this information. Terrorism is defined as the use of violence against persons or material interests for ideological or political reasons, with the aim of reaching its objectives through terror, intimidation or threats. Extremism is defined as racist, xenophobic, anarchist, nationalist, authoritarian and totalitarian ideas or intentions, whether they are of a political, ideological, religious or philosophical nature, which are theoretically or practically inconsistent with the principles of democracy and human rights, with the good functioning of democratic institutions or other foundations of the rule of law. Proliferation is defined as the trade of materials, products, goods. or know-how which may contribute to the production or development of non-conventional or highly sophisticated weapon systems, such as the development of nuclear, chemical and biological weapons programs, the associated transmission systems, and the persons, structures or countries involved. A harmful sectarian organization is defined as any group with philosophical or religious biases or a group that pretends to have these, and who uses illegal activities, which causes harm to individuals or society or human dignity. A criminal organization is defined as any structured association of more than two persons, which

Furthermore, the ISS Act obliges the authorities to inform the chairman of the AVBB (the general association of professional journalists in Belgium) if special or exceptional techniques of data collection as described in article 18 are used. The chairman is sworn to secrecy about the investigation. A special administrative commission and a permanent Commission supervise the operation and make sure that there is a direct connection between the obtained data and the threat. This administrative Commission consists of an investigative judge, a judge and a member of the prosecution's office.⁷³ The permanent Commission of supervision on the intelligence and security services consists of three members appointed by the parliament.⁷⁴

The ISS Act gradually builds up protection of journalistic sources. The more serious the violation of the principle of protection of sources, the smaller the area of application of investigative measures, the more expanded the control mechanisms and the stricter the conditions of application.

Firstly, there are general methods of data collection such as the demand of information of public authorities, the normal observation and the search of locations accessible to the public. For the application of these measures the only condition is that there are serious indications about the personal and active involvement of the journalist to the threats as specified above. In principle there is a prohibition to collect data of journalists, so even the general methods of data collection are in se prohibited, unless the conditions of the exceptions are fulfilled.

Secondly, special techniques of data collection, such as the more thorough observation, searches with technical equipment of locations accessible to the public, measures to identify and/or locate users and data of electronic communication can only be used in the professional sphere of a professional journalist. This is on the condition that the authorities have serious indications about the personal and active involvement of the journalist and if the head of the department, the Administrator-General of State Security or the Head of the General Intelligence and Security Service of the Armed Forces, gives a written approval for the action after a control of the legality, subsidiarity and proportionality of the measure and after notifying the Commission. Additionally the situations or persons to which the measure is applied need to be of interest for the fulfillment of the tasks imposed on the security services. There is a double control mechanism for these kinds of measures. The administrative Commission controls the implementation of the measure during its application and there is a general a posteriori control of the operation by the Commission.

lasts a period of time, with the purpose to jointly commit crimes and offenses or to acquire direct or indirect material benefits. These organizations use intimidation, threats, violence, fraudulent practices or corruption, or they use commercial or other structures to conceal or facilitate the commission of crimes.

⁷³ Art. 43/1 Regulation Act of 30 November 1998 of the intelligence and security services, BS 18 December 1998.

⁷⁴ Art. 28 Organization Act of 18 July 1991 of monitoring police forces and intelligence services and the Coordinating Body for Threat Analysis, BS 26 July 1991.

Finally, exceptional techniques can only be applied if the regular and special techniques prove insufficient. Examples of exceptional techniques are observations and searches of places used for professional purposes and/or the residence of the journalist, the inspection of banking details of the journalist, hacking of computers, bugging and recording of communication, etc. The same conditions of control of legality, subsidiarity and proportionality, serious indications about the personal and active involvement of the journalist and an interest of state security in the matter are valid. Different is the fact that the head of department can only approve the measure after receiving a uniform advice of the administrative Commission or, in absence thereof, of the competent minister. In addition to the double control mechanism a member of the commission should always be present when these techniques are being used. Extra protection is afforded by the obligation of the head of the department and the possibility of the Commission to end or suspend the measure if the threat, which justified the measure, is remedied.⁷⁵ These exceptional techniques can only be used for a period of two months, this can be prolonged on request of the head of department for a period of maximum two months if extraordinary circumstances make it necessary. In the Regulation act are the conditions of application less detailed than those of the law of 2005. The main condition is the personal and active involvement of the journalist in the origination or development of potential threats such as described above. But even if this condition is fulfilled, the authorities still need to balance it with the exceptional character of the breach of protection.

Article 15 of the law of December 19 2003, regarding terrorist crimes, allows the police force and judicial authorities to bug and/or record (tele)communication to prevent terrorist attacks. This rule cannot be used solely to identify the journalist's source.⁷⁶

The next question is if this legislation meets the test of the ECHR. It should be accessible, precise, foreseeable and provide clear norms. Firstly, it could be said that the term 'potential threats' is rather vague in light of the criminal *lex certa*-principle. The principle requires that all offences are clearly described.⁷⁷

Secondly, problems could arise regarding the sanctioning of the illegal use of these measures regarding journalists' sources. Article 18 stipulates that if the security services do not abide by the protections of the Regulation Act, the data cannot be used anymore. Article 43.2 arranges an a posteriori legality control by the permanent Commission, but only for specific and exceptional measures and after a complaint. The permanent Commission can prohibit using the data and

⁷⁵ D. Voorhoof en P. Valcke, *Handboek mediarecht*, Brussel, Larcier, 2011, 298-309; R. Verstraeten, "Het beroeps- en bronnengeheim en de BIM-wet", in W. Van Laethem, D. Van Daele en B. Vangeebergen (eds.), *De wet op de bijzondere inlichtingenmethoden*, Antwerpen, Intersentia, 2010, 151-173.

⁷⁶ C. Baekeland, "De 'War on Terror' en het journalistieke bronnengeheim: droomhuwelijk of (v)rechtscheiding", in C. Declerck, P. Foubert en A. Ooms (eds.), *Geheimen in het recht*, Antwerpen, Intersentia, 2011, 155-184.

⁷⁷ R. Verstraeten, "Het beroeps- en bronnengeheim en de BIM-wet", in W. Van Laethem, D. Van Daele en B. Vangeebergen (eds.), *De wet op de bijzondere inlichtingenmethoden*, Antwerpen, Intersentia, 2010, 151-173.

obliging the authorities to destroy the data. But it remains unclear what is meant with 'destroy', because there is no retroactive solution if the data already have been used.⁷⁸

Thirdly, a positive element regarding the protection of journalistic sources is that the Law of 2005 is seen as a *lex specialis* in relation to the Regulation Act of 1998.

Fourthly, a limitation in case of terrorism is recognized by the Constitutional Court. On the one hand, data regarding finished or ongoing terrorist actions falls under the protection of journalistic sources. On the other hand: if the journalist possesses the information that can prevent a severe threat to the physical integrity of persons, he is required to reveal its source to the authorities.⁷⁹

The question remains what exactly has to be considered as a severe threat. Certain authors recognise a proportionality and subsidiarity principle in the condition of a severe threat to the physical integrity of a person.⁸⁰

Finally, another question arises. Should there be a direct or indirect causal relation between the terrorist aim and the severe threat to physical integrity? According to a member of the Senate Commission of Justice, there should be a direct relation. However, this has not been confirmed by the legislator.⁸¹ So we can conclude that the law could be more precise concerning some provisions, but there is no overall problem of imprecision.⁸²

Regarding the accessibility of Belgian law; according to article 129 of the Belgian Constitution, a law can only be applicable if published in the Official Belgian Gazette. So, like every other Belgian law, the laws described above are published in the Official Belgian Gazette. Following this the presumption arises that *nemo ius ignorare censetur*, which states that everyone is presumed to know the law. All laws are generally accessible via the online publication of the Official Belgian Gazette. This method has never been criticized by the ECHR before.

Regarding the foreseeability of the legislation in question first should be referred to the Malone judgment of the ECHR.⁸³ The ECHR observed that *the requirement of foreseeability cannot mean that*

⁷⁸ R. Verstraeten, "Het beroeps- en bronnengeheim en de BIM-wet", in W. Van Laethem, D. Van Daele en B. Vangebergen (eds.), *De wet op de bijzondere inlichtingenmethoden*, Antwerpen, Intersentia, 2010, 151-173.

⁷⁹ Constitutional Court 7 June 2006, nr. 91/2006, §B.38.2; J. Ceuleers, "Eindelijk: het journalistiek zwijgrecht (bijna) wettelijk erkend", *AM* 2004, 226; E. Brewaeys, "Informatiebronnen van journalisten", *NJW* 2005, 542-551.

⁸⁰ K. Lemmens, "Wovon man nicht reden kann, darüber muss man schweigen. Het journalistiek zwijgrecht beschermd", in D. Voorhoof (ed.), *Het journalistiek bronnengeheim onthuld*, Brugge, Die Keure, 2008, 34; P. Deltour, "Uitstekende Bronnenwet botst op taaie gerechtelijke gewoonten en nieuwe uitdagingen", in D. Voorhoof (ed.), *Het journalistiek bronnengeheim onthuld*, Brugge, Die Keure, 2008, 49; G. Schuijt, "Journalistieke bronbescherming met of zonder wet", in D. Voorhoof (ed.), *Het journalistiek bronnengeheim onthuld*, Brugge, Die Keure, 2008, 76; K. Lemmens, "La protection des sources journalistiques. Une commentaire de la loi du 7 avril 2005", *JT* 2005, 669-677.

⁸¹ Parl. St. Senaat 2004-05, nr. 3-670/6, 45.

⁸² P. Deltour, "Journalistiek en bijzondere politiemethoden", *Orde van de dag*, 2003, 48; C. Baekeland, "De 'War on Terror' en het journalistieke bronnengeheim: droomhuwelijk of (v)rechtscheiding", C. Declerck, P. Foubert en A. Ooms (eds.), *Geheimen in het recht*, Antwerpen, Intersentia, 2011, 155-184.

⁸³ *Malone v. UK* (1984)

an individual should be enabled to foresee when authorities are likely to intercept his communications so that he can adapt his conduct accordingly. But foreseeability implies that domestic law *must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence.* In this regard we can say that the ISS Act lacks sufficient precision to be entirely foreseeable, but the general way in which it is constructed is logically to be anticipated by professional journalists.

The ISS Act emanated from a decision of the Constitutional Court of 21 December 2004 concerning the Act of 6 January 2003 pertaining to special investigative measures in the combatting of terrorism and serious organised crime.⁸⁴ The Court nullified some of the clauses because they violated the right to a fair trial as stated in article 6, ECHR. Although the new ISS Act remedied these shortcomings, it also created some new controversies especially with regard to its compatibility with article 8(1), ECHR, by introducing new restrictive measures such as unannounced police access to non-residential private property and the placing of technical surveillance equipment there. This was already mentioned in the advisory opinion of the Belgian Supreme Administrative Court.⁸⁵ It is said that the government wanted to limit judicial scrutiny and public debate on the matter; because of the fact that the ISS Act was seen as urgent, so the Supreme Administrative Court had only five days to review the proposal and by submitting it only two months before the legislative deadline as set by the Constitutional Court to Parliament.⁸⁶

On a last note, the European Court of Human Rights has identified the following minimum safeguards a national surveillance law must meet in order to be compatible with Article 8, ECHR⁸⁷: 1. categories of people which may be subjected to electronic surveillance; 2. the offences and activities which may give rise to an interception order; 3. limits on the duration of surveillance operations; 4. Strict procedures for ordering the examination, use, and storage of the data obtained through surveillance; 5. precautions to be taken when communicating the data to third parties; and 6. strict rules on the destruction or erasure of surveillance data to prevent surveillance from remaining hidden after the fact; 7. The bodies responsible for supervising the use of surveillance powers must be independent and responsible to, and be appointed by, Parliament rather than the Executive.⁸⁸ The ISS Act addresses all of these concerns explicitly, even though it could have been more precise on some specific issues, as mentioned before.

⁸⁴ Belgian Constitutional Court, Judgment, no. 202/2004, 21 December 2004.

⁸⁵ Belgian Supreme Administrative Court, Advisory Opinion 39.092/2, see document of the federal parliament 51/2055/001 of 28 October 2005.

⁸⁶ E. De Wet, "The reception process in the Netherlands and Belgium", in H. Keller and A. Stone Sweet, *A Europe of Rights, the impact of the ECHR on national legal systems*, Oxford University Press, 2008, 277-284.

⁸⁷ *Klass and Others v. Germany, Liberty and Others v. the United Kingdom*, no. 58243/00, 1 July 2008 and *Rotaru v. Romania*, no. 28341/95, [GC], 4 May 2000.

⁸⁸ S. Sottiaux, *Terrorism and the limitation of rights, the ECHR and the US Constitution*, Hart Publishing, 2008, 274-278; A. Galetta and P. De Hert, *Complementing the Surveillance Law Principles of the ECtHR with its*

10. Can Journalists Rely on Encryption and Anonymity Online to Protect Themselves and Their Sources Against Surveillance?

There is little legislation in Belgium regarding encryption and online anonymity. Regarding journalism, there are almost no specific norms. The only rule regarding encryption can be found in the law of June 13 2005 regarding electronic communications. Article 48 establishes the freedom to use encryption. Article 127.2 determines that the delivery or use of services or equipment which impedes or renders it impossible to track or identify communication or users of communication is prohibited, except encryption systems used for confidentiality of communication and security of payments.⁸⁹

Until recently, Article 126 of the Electronic Communications Act of June 13 2005 stipulated, on the one hand, that providers of telephone, internet and other communication services were obliged to save traffic records, location data, identification data of the end-users, data concerning the used communication service and the presumed equipment used, the so-called metadata. On the other hand the electronic communication providers were prohibited to keep records of the content of the communication. The information was available for police, justice and intelligence services. This article had been modified by the Act of July 30 2013⁹⁰, and implemented by the Royal Decree of September 19 2013,⁹¹ in order to implement the EU Data Retention Directive 2006/24/EG. Following the *Digital Rights Ireland* ruling in which the Court of Justice declared Directive 2006/24/EG invalid.⁹² The Belgian Constitutional Court invoked basically the same reasons in its ruling of June 11 2015 to annul the Belgian Act of 2013 pursuant to Articles 10-11 of the Belgian Constitution, the principle of non-discrimination.⁹³ The most important reasons for the annulment were the following. It was disproportional to save the metadata of all communications of all Belgian citizens and there were not enough guarantees against abuse of the saved information. The Minister of Justice is working on a new legislative proposal, which is essentially the same as the annulled articles. Therefore there is a lot of criticism by Human Rights Organisations.⁹⁴

Environmental Law Principles: An Integrated Technology Approach to a Human Rights Framework for Surveillance, Utrecht Law Review.

⁸⁹ Law of 13 June 2005 regarding electronic communication, BS 20 June 2005; J. Dumortier en H. Graux, "Recente ontwikkelingen in het domein van privacy- en gegevensbescherming", in P. Valcke en J. Dumortier (eds.), *Themis 81*, ICT- en Mediarecht, Brugge, Die Keure, 2013, 131-132.

⁹⁰ Law of 30 July 2013 to modify article 2, 126 and 145 of the law of 13 June 2005 regarding electronic communication and of article 90decies of the Criminal Procedure Code.

⁹¹ Royal Decree of 19 September 2013 to implement article 126 of the Law of 13 June 2005 regarding electronic communication, BS 8 October 2013.

⁹² Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, CJEU, 8 April 2014 (*Digital Rights Ireland*), C-293/12 en C-594/12.

⁹³ Art. 10-11 Belgian Constitution, Belgian Constitutional Court nr. 84/2015 of 11 June 2015.

⁹⁴ http://www.mensenrechten.be/index.php/site/nieuwsberichten/datarentiewet_2.0_op_komst_regering_wil_opnieuw_al_uw_communicatiegegevens

Currently, articles 124 and 145 of the Electronic Communications Act of June 13 2005 lay down the protection of communication. It stipulates that it is prohibited to take knowledge of the existence of telecommunication or the identity of the persons involved and that it is prohibited to modify, erase, reveal, retain or use the information without consent of the persons directly and indirectly involved. However this, provision only envisages taking knowledge [N.B. for the translators: the Dutch phrase is “met opzet kennis nemen van”] of the existence of communications, not taking knowledge of their substance.⁹⁵ The latter is protected by Articles 259*bis* and 314*bis* of the Criminal Law Code which lay down the secrecy of telecommunications (for civil servants and public agents, resp. the general public). The prohibition to intercept private communications is applicable to individuals as well as government officials. This is only true for private communications, but the law stipulates that private communications are all communications of which the participants do not have the intention to make it publically available. The main problem of the protection is the fact that there can only be an a posteriori control.⁹⁶ The CoE Convention on Cybercrime of 2001 was ratified on 3 August 2012, but the principles were already implemented in the Belgian legal system by inter alia the law of 28 November 2002 concerning computer crimes.

So, to conclude, there is no express prohibition of encryption of information in Belgian law and the content of electronic communications is per definition anonymous, unless exceptional techniques of investigation are used, as explained under the question in title 9.

11. Are Whistle-blowers Explicitly Protected under the Law Protecting Journalistic Sources? Is There Another Practice Protecting Whistle-blowers? Is there legislation prohibiting authorities and companies from identifying whistle-blowers?

11.1. Are Whistle-blowers Explicitly Protected under the Law Protecting Journalistic Sources?

National law

Whistle-blowers are people who, as a member of an organisation, reveal wrongs and information that could cause social harm. Some Belgian authors have made a distinction between the practice

⁹⁵ J. Dumortier, R. Vanhecke en S. Missotten, “Laat de Belgische wetgeving gerechtelijk aftappen van privécommunicatie via GSM of internet toe?”, *Computerrecht* 1997, 145-149; J. Dumortier, *ICT-recht*, Leuven, Acco, 2013; P. Van Linthout en J. Kerkhofs, “Actuele uitdagingen in cybercrime voor de advocatuur en de magistratuur: vervolgen en verdedigen met een bot scalpel?” in P. Valcke & J. Dumortier (eds.), *Themis 81 - ICT- en mediarecht*, Brugge, Die Keure, 2013.

⁹⁶ B. Docquir, *Le droit de la vie privée*, Brussel, Larcier, 2008, 354.

of “reporting” and “whistleblowing”.⁹⁷ In the case of the latter, the whistle-blower will make information public outside of the organisation. In case of reporting, one will report a wrong by way of an internal procedure to a supervisor or an external reporting point.⁹⁸

The rules in Belgium relating to the protection of journalistic sources are applicable to the protection of the journalists themselves, but don't apply to the whistle-blower himself. Nevertheless there's a need to grant the whistle-blower some protection; if not, none would report wrongs of an organisation and the responsible persons would possibly avoid the consequences of their actions.⁹⁹

The law protecting journalistic sources does not protect whistle-blowers, nor have the Belgian authorities issued a law that follows up on the Recommendation CM/Rec (2014)7 of the Council of Europe on the protection of whistle-blowers.¹⁰⁰ Belgian legislation nevertheless provides the protection of whistle-blower in the public sector. Belgium is a federal state; in this case the protection is regulated on a federal level as well as on a regional level. This protection is regulated on a federal level by the law of 15 September 2013 concerning the report of an alleged breach on integrity in the federal administrative authorities by its staff, and on a regional level by the Flemish Decree for the establishment of a Flemish Ombudsman service of 7 may 2004. This decree applies generally the same principles.¹⁰¹

The law of September 15 2013 is applicable to persons working for the federal government who want to report wrongs, or, as called in the law, breaches of integrity.¹⁰² This is as close as the law comes to a definition of a whistle-blower.

The breaches of integrity are defined in the law as:

- a) an act or omission by a staff member which is a violation of the laws, decisions, circulars, internal rules and internal procedures that apply to the federal administrative authorities and their staff;
- b) an act or omission by a staff member that involves an unacceptable risk to the life, health or safety of persons or to the environment;
- c) an act or omission by a staff member which manifestly shows a serious failure in professional duties or in the management of a federal administrative authority;

⁹⁷ Philippe de Baets, Gerwinde Vynckier and Gudrun Vande Walle, *Melden meer dan 'klokkenluiden*, Orde van de dag 2015/72, 8.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Recommendation CM/Rec(2014)7 adopted by the Committee of Ministers of the Council of Europe on 30 April 2014

¹⁰¹ The Law of 15/9/13 concerning the report of an alleged breach on integrity in the federal administrative authorities by her staff (Wet betreffende de melding van een veronderstelde integriteitsschending in de federale administratieve overheden door haar personeelsleden) and the Flemish Decree for the establishment of a Flemish Ombudsservice of 7 may 2004 (decreet houdende instelling van de Vlaamse Ombudsdienst).

¹⁰² Art. 2 1° and 2° Law of 15/9/13

d) the knowingly recommending or advising by a staff member to commit a breach of integrity as referred to in a), b) and c).¹⁰³

The staff members can report these breaches of integrity to a “confidant of integrity” or to the Central Reporting Point for Assumed Integrity Violations, but not without prior advice of the confidant of integrity or the Reporting Point.¹⁰⁴ Both instances fall under the jurisdiction of the Ombudsman, which serves as an intermediary between the government and the people.

Under the law of September 15 2013, the ombudsmen will protect whistle-blowers from measures with an adverse effect on conditions of employment or labour conditions which result from reporting the alleged breach of integrity. Such a measure could consist, among other things, of a bad evaluation or the dismissal of the staff member.¹⁰⁵ A staff member claiming that he’s the victim of such a measure, or claiming that he’s threatened by such a measure, may submit a complaint to the ombudsman. However, the burden of proof will fall on the federal government if there have been taken such measures during the period of protection.¹⁰⁶ This period of protection starts two weeks after receiving the question for advice and does not end until 2 years after the conviction or the roundup of the additional written report. An exception is made if the staff member himself was involved in the breach of integrity or if his report was unfair.¹⁰⁷ The protection in this federal law is comparable to the protection offered by the Flemish Decree of May 7 2004.

At present, a similar protection for whistle-blowers in the private sector does not exist in the Belgian legislation. Nevertheless, some general principles of labor law can apply, such as the protection against workplace bullying and the principle of awe and respect between an employer and his employee, is possible.¹⁰⁸ Another principle that is applicable to (manual) workers is that an employer isn’t allowed to arbitrarily dismiss a worker; administrative workers would have to use the figure of legal abuse.¹⁰⁹ Whether these general principles actually provide for extensive protection, is highly doubtful.¹¹⁰

However, in the (few) Belgian court cases, most whistle-blowers received de facto protection against retaliation. An example is the case law of the Court of appeal of Brussels concerning

¹⁰³ Art. 2 3° Law of 15/9/13

¹⁰⁴ Art 3 §1, 6 §1 and 8 Law of 15/9/13.

¹⁰⁵ Art 15 Law of 15/9/13.

¹⁰⁶ Art 16 Law of 15/9/13.

¹⁰⁷ Art 15 Law of 15/9/13.

¹⁰⁸ Article 16 law of 3 July 1978 concerning labor contracts (wet betreffende de arbeidsovereenkomsten); the law of 4 august 1996 (law concerning the wellbeing of employees during the execution of their job (Wet betreffende het welzijn van de werknemers bij de uitvoering van hun werk); Wim Vandekerckhove, *Providing An Alternative To Silence: Towards Greater Protection And Support For Whistle-blowers In Belgium*, [2013] report of Transparency International Belgium, 26.

¹⁰⁹ art. 63 law of 3 July 1978; Wim Vandekerckhove, *Providing An Alternative To Silence: Towards Greater Protection And Support For Whistle-blowers In Belgium*, [2013] report of Transparency International Belgium, 26.

¹¹⁰ Wim Vandekerckhove, *Providing An Alternative To Silence: Towards Greater Protection And Support For Whistle-blowers In Belgium*, [2013] report of Transparency International Belgium, 27 – 30.

labour matters, where the dismissal of an employee who had sent an open letter to all employees of a company concerning the financial irregularities of his colleagues did not hold up in court. The Court decided that the criticism against colleagues was not considered to be unhealthy in a transparent and democratic society.¹¹¹

In another case, the Council of State decided that the freedom of expression had to be respected in case of a civil servant who had 'blown the whistle'. A restriction of that freedom of expression can only be justified with a pertinent and sufficient justification. Furthermore the restriction has to be proportional to the legitimate aim. The government also has to refrain from imposing sanctions which would have an excessive chilling effect on the freedom of expression.¹¹²

Compatibility with the case-law of the ECtHR

The Belgian case-law seems to be in line with the case-law of the European Court of Human Rights, but nevertheless less nuanced than said case law. The case law of the ECtHR often offers protection for whistle-blowers by prohibiting measures with an adverse effect on the basis of article 10 ECHR, both in the public and in the private sector. One of the reasons of this prohibition is the chilling effect it might have on future whistle-blowers.¹¹³

While the prevention of the disclosure of confidential information can be accepted as a legitimate aim, the measure is often found not necessary in a democratic society. The Court bases its judgement on following criteria: whether the public interest was involved; whether the information was authentic; whether there was any damage that the authority suffered as a result; whether the sanction was severe, which motives the employee had for disclosing the information and whether the action of disclosing the information was a last resort.¹¹⁴

11.2. Is There Another Practice Protecting Whistle-blowers?

Apart from the case law and the legislation concerning whistle-blowers in the public sector, the Privacy Commission has also issued a recommendation concerning the compatibility of reporting systems with the law of December 8 1992 concerning the protection of privacy with

¹¹¹47.015 926 (2007) Court of Appeal concerning labour matters in Brussels; Patrick Humblet, *Kritiek op werkgever moet kunnen*, De Juristenkrant 18 april 2007, 20 and Tom Messiaen, *Klokkenluiders. Overzicht van de wetgeving*, NJW 2007, 922 – 926.

¹¹²168.781 (2007), Council of State; Patrick Humblet, *Kritiek op werkgever moet kunnen*, De Juristenkrant 18 april 2007, 20.

¹¹³ *Matúš v. Hungary* (2014) European Court of Human Rights; European Court of Human Rights, *Goggins e.a. v United Kingdom* (2012) European Court of Human Rights; *Heinisch v Germany* (2011) European Court of Human Rights; *Sosinowska v Poland* (2011); *Wojtas-Kaleta v. Poland* (2009) European Court of Human Rights; *Guja v. Moldova* (2008) European Court of Human Rights; *Fuentes Bobo v. Spain* (2000) European Court of Human Rights and Dirk Voorhoof, *Freedom of Expression and Information and the Case Law of the European Court of Human Rights and the Court of Justice of the EU. Overview and highlights 2014*, 8.

¹¹⁴ *Ibid.*

regard to the processing of personal data.¹¹⁵ This recommendation states that there needs to be a balance between the relevant rights of all the parties. It would violate the privacy of the employees and their mutual relationships if the employees were supposed to act as a controller of their colleagues.

However, reporting systems are not contrary to the law of December 8 1992 if they respect the principles laid down in that law, such as honesty, legitimacy, proportionality, accuracy of the data, security of the processing operations and the right of access to the data and the erasing of data for the persons of whom the data are kept in the context of the reporting system.¹¹⁶

11.3. Is There Legislation Prohibiting Authorities and Companies from Identifying Whistle-blowers?

In the private sector, no protection and thus no such prohibition exists; one can only rely on the law of December 8 1992. However, in the public sector there exists a possibility to impede the authorities from identifying the whistle-blower. The whistle-blower has to report the breach of integrity to his supervisor, who will keep the identity of the staff member confidential and make sure the staff member does not experience any negative drawbacks. However, the whistle-blower can choose not to tell his supervisor, in which case he will report to the confidant of integrity. The whistle-blower also has the choice between an open report, by which the whistle-blower gives his permission to the Ombudsman to make his identity public, or a confidential report, in which case he does not. The whistle-blower has therefore the choice to protect his identity from the government, but the Ombudsman will always know this identity.

12. Conclusion

Since its birth, Belgium has always been one of the most liberal nation states of the European continent. Founded on constitutional principles of equality and political freedom, Belgium has

¹¹⁵ Recommendation concerning the compatibility of reporting systems with the law of 8 December 1992 concerning the protection of the privacy with regard to the processing of personal data (Aanbeveling betreffende de verenigbaarheid van meldsystemen (klokkenluidersystemen) met de wet van 8 december 1992 tot bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens, www.privacycommission.be/sites/privacycommission/files/documents/aanbeveling_01_2006.pdf

¹¹⁶ Law of 8 december 1992 concerning the protection of the privacy with regard to the processing of personal data (Wet tot bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens); recommendation concerning the compatibility of reporting systems with the law of 8 December 1992 concerning the protection of the privacy with regard to the processing of personal data (Aanbeveling betreffende de verenigbaarheid van meldsystemen (klokkenluidersystemen) met de wet van 8 december 1992 tot bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens); X, *Whistleblowing Legislation (Whistleblowing in Belgium)* <<http://expolink.co.uk/whistleblowing/legislation/>> accessed 9 february 2016.

long had a considerable lead when it came to protection of a democratic core element: correct, unbiased and high-quality news.

However, as the world gradually became smaller and more complicated, Belgian legislation stayed behind. Even entering the 21st century, not much had changed to the Belgian constitution, apart from some creative and complicated federalisation. No legal provision, constitutional or otherwise, explicitly protected journalists' sources.

Only, in 1996, the European Court of Human Rights challenged this status quo with their decision in *Goodwin*. Belgium, however, would not be rushed and only presented its implementation in 2005 after it was convicted itself. The ensuing Law concerning the protection of journalistic sources is however not free of critique.

Opinions on the quality of the implementation vary and doubt exists whether a correct balance has been achieved between the interests of justice on the one hand, and the protection of freedom of the press on the other. While the protection offered to sources is broad and detailed in both terms of scope and content, the exceptions are equally broad but without much detail. This makes that the balancing exercise is often only made *ex post* and on the basis of very general wordings.

Whether or not these provisions serve as a sufficiently dissuasive element is not entirely clear: is the small number of Belgian cases on the topic proof that it is, or do they attest to the fact that victims do not find their way to court? Moreover, Belgian courts have, up until now, showed the tendency to stick very close to the terminology put forward by the European Court of Human Rights and the relevant recommendations. Unfortunately, the jurisprudence of the Belgian courts up to this date does not consistently demonstrate a thorough application of this terminology.

The relative lack of cases may also serve as a testament to a good functioning of the self-regulatory mechanisms organised by the professional associations. While the codes of these associations are more based on prescribing professional conduct and ethics than on enforceable rights, they do entail certain obligations of secrecy. It must, however, be noted that these obligations only exist in the internal relation and do not include enforceable rights for wronged sources. Also, these codes are only binding upon the members of the respective association. Therefore, the occasional author does not own his allegiance to anyone, except the source himself.

While these occasional authors do not fall within the scope of professional codes of conduct, the Belgian Constitutional Court did, however, not forget them. In 2006, the Court struck out those conditions from the law that made the definition of journalist quite restrictive. Belgian law now also grants protection to a person who has taken up his pen for the very first time and written an article on a small blog. The only element preventing that writing a rather lengthy postcard makes someone a journalist now is the requirement that the involved medium publishes with a minimal level of regularity.

Before turning to a general conclusion, it is also worth noting that Belgian primary legislation does not afford direct protection of the sources themselves. Whether or not such general

protection is needed or even wanted, it is however apparent from Belgian jurisprudence that local courts tend to afford a *de facto* protection to weaker parties.

The conclusion to be made from this short introduction must in the end be threefold. Firstly, the Belgian legal framework affords a wide and detailed protection of journalistic sources to an even wider group of recipients. Secondly, the framework however also includes a number of exceptions worded in quite broad and general terms. Third and lastly, Belgian courts have seemingly not yet presided over a sufficient number of relevant cases to develop an adequate understanding and application of the terminology used by both the law and European jurisprudence.

13. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

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14. Table of Provisions

*Note: this annex includes the main provisions referred to in the body of the text.
 Provisions of lesser importance are generally translated or transcribed in the body of the text.
 Care was given to a translation most fitting to the original Dutch content and purport. However, no rights should be derived
 from this translation, as important nuances may inadvertently be lacking.*

Provisions in native language	Corresponding translation
<p>Art. 19</p> <p>De vrijheid van eredienst, de vrije openbare uitoefening ervan, alsmede de vrijheid om op elk gebied zijn mening te uiten, zijn gewaarborgd, behoudens bestraffing van de misdrijven die ter gelegenheid van het gebruikmaken van die vrijheden worden gepleegd.</p>	<p>Art. 19</p> <p>The freedom of worship, the free public exercise thereof, together with the freedom of expressing one's opinion on any subject, are guaranteed, save for punishment of the offenses committed on the occasion of the use of these freedoms.</p>
<p>Art. 22</p> <p>Ieder heeft recht op eerbiediging van zijn privé-leven en zijn gezinsleven, behoudens in de gevallen en onder de voorwaarden door de wet bepaald.</p> <p>De wet, het decreet of de in artikel 134 bedoelde regel waarborgen de bescherming van dat recht.</p>	<p>Art. 22</p> <p>Each person has the right to respect for his private life and family life, save for the cases and under the conditions provided by law.</p> <p>The law, decree or rule as referred to in article 134 guarantee the protection of this right.</p>
<p>Art. 25</p> <p>De drukpers is vrij; de censuur kan nooit worden ingevoerd; geen borgstelling kan worden geëist van de schrijvers, uitgevers of drukkers.</p> <p>Wanneer de schrijver bekend is en zijn</p>	<p>Art. 25</p> <p>The press is free; censorship can never be introduced; no security deposit can be demanded from writers, publishers or printers.</p>

<p>woonplaats in België heeft, kan de uitgever, de drukker of de verspreider niet worden vervolgd.</p>	<p>When the author is known resident in Belgium, neither the publisher, the printer nor the distributor can be prosecuted.</p>
<p>Law of 30 November 1998 concerning regulation of the intelligence and security services (<i>ISS Act</i>)</p>	
<p>Art. 2</p> <p>§1. Deze wet is van toepassing op de Veiligheid van de Staat (VSSE), de burgerlijke inlichtingen- en veiligheidsdienst, en op de Algemene Dienst inlichting en veiligheid van de Krijgsmacht (ADIV), militaire inlichtingen- en veiligheidsdienst, die de twee inlichtingen- en veiligheidsdiensten van het Koninkrijk zijn.</p> <p>Bij het vervullen van hun opdrachten zorgen die diensten voor de naleving van, en dragen bij tot de bescherming van de individuele rechten en vrijheden alsook tot de democratische ontwikkeling van de maatschappij.</p> <p>De methoden voor het verzamelen van in deze wet bedoelde gegevens door de inlichtingen- en veiligheidsdiensten kunnen niet worden gebruikt met het doel de individuele rechten en vrijheden te verminderen of te belemmeren.</p> <p>Ieder gebruik van een specifieke of uitzonderlijke methode voor het verzamelen van gegevens impliceert het naleven van de principes van subsidiariteit en proportionaliteit.</p>	<p>Art. 2</p> <p>§1. This law is applicable to the State Security Service (VSSE), the civil intelligence and security service, and the General Intelligence and Security Service (GISS), the military service for intelligence and security, which are the two intelligence and security services of the Kingdom.</p> <p>In fulfilling their assignments those services provide for compliance with, and contribute to the protection of individual rights and freedoms and the democratic development of society.</p> <p>The methods for the collection of data referred to in this Law by the intelligence and security services cannot be used for the purpose of reducing or hindering the individual rights and freedoms.</p> <p>Any use of a specific or exceptional method for collecting data implies compliance with the principles of subsidiarity and proportionality.</p>

<p>§2. Het is de inlichtingen- en veiligheidsdiensten verboden gegevens die worden beschermd door ofwel het beroepsgeheim van een advocaat of een arts, ofwel door het bronnengeheim van een journalist te verkrijgen, te analyseren of te exploiteren.</p> <p>Bij uitzondering en ingeval de betrokken dienst vooraf over ernstige aanwijzingen beschikt dat de advocaat, de arts of de journalist persoonlijk en actief meewerkt of heeft meegewerkt aan het ontstaan of aan de ontwikkeling van de potentiële bedreiging, zoals bedoeld in de artikelen 7, 1°, 8, 1° tot 4°, en 11, kunnen deze beschermde gegevens worden verkregen, geanalyseerd of geëxploiteerd worden.</p> <p>§3. Onverminderd de wet van 11 december 1998 betreffende de classificatie en de veiligheidsmachtigingen, veiligheidsattesten en veiligheidsadviezen, de wet van 11 april 1994 betreffende de openbaarheid van bestuur en de wet van 8 december 1992 betreffende de bescherming van de persoonlijke levenssfeer ten opzichte van de verwerking van persoonsgegevens, en op verzoek van iedere natuurlijke persoon met een wettelijk belang, informeert het diensthoofd deze persoon schriftelijk dat hij het voorwerp heeft uitgemaakt van een methode zoals bedoeld in artikel 18/2, § 1 en 2, op voorwaarde :</p> <p>1° dat een periode van meer dan vijf jaar is verstreken sinds het beëindigen van de methode;</p> <p>2° dat met betrekking tot de aanvrager sinds het einde van de methode geen nieuwe</p>	<p>§2. It is forbidden for intelligence and security services to obtain, analyse or operate information protected by either the professional confidentiality of a lawyer or medical doctor, or the secrecy of sources of a journalist .</p> <p>Exceptionally and in case the service concerned possesses, in advance, serious indications that the lawyer, medical doctor or journalist is personally and actively participating, or has personally and actively been participating in the creation or development of a potential threat as referred to in article 7,18; 8,1° to 4°; and 11, this protected data can be obtained, analysed or operated.</p> <p>§3. Without prejudice to the law of 11 December 1998 on the classification and security clearances, certificates and safety advice, the law of 11 April 1994 concerning the protection of privacy with regard to the processing of personal data, and at the request of any natural person with a legal interest, the department informs the person in writing that he has been subject of a procedure referred to in article 18/2, §1 and §2, provided;</p> <p>1° a period of more than 5 years has elapsed since the ending of the method;</p> <p>2° no new data has been collected on the applicant since ending of the method.</p>
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<p>gegevens werden verzameld.</p> <p>De medegedeelde informatie stipt het juridische kader aan waarbinnen de dienst gemachtigd werd de methode te gebruiken.</p> <p>Het diensthoofd van de betrokken dienst informeert de commissie over elk verzoek om informatie en over het geleverde antwoord.</p> <p>De Koning bepaalt, bij een in de Ministerraad overlegd koninklijk besluit, na advies van het ministerieel Comité voor Inlichtingen en Veiligheid, de wijze waarop de informatie bedoeld in het eerste lid wordt medegedeeld.</p>	<p>The supplied information pinpoints the legal framework within which the service was authorized to use the method.</p> <p>The head of the department concerned shall inform the Commission about any requests for information and the provided answers.</p> <p>The King shall decide, by a Royal Decree discussed in the Council of Ministers, after consultation with the Ministerial Committee for Intelligence and Security, the way in which the information referred to in the first paragraph will be disclosed.</p>
<p>Art. 3</p> <p>In deze wet wordt verstaan onder:</p> <p>...</p> <p>16° “journalist”: een journalist die gerechtigd is de titel van een beroepsjournalist te dragen overeenkomstig de wet van 30 december 1963 betreffende de erkenning en de bescherming van de titel van beroepsjournalist</p> <p>...</p>	<p>Art. 3</p> <p>This law shall apply:</p> <p>...</p> <p>16° “journalist”: as a journalist who is entitled to use the title of professional journalist under the law of 30 December 1963 on the recognition and protection of the title of professional journalist</p> <p>...</p>
<p>Art. 7</p> <p>De Veiligheid van de Staat heeft als opdracht:</p>	<p>Art. 7</p> <p>The State Security Service (VSSE) has the</p>

<p>1° het inwinnen, analyseren en verwerken van inlichtingen die betrekking hebben op elke activiteit die de inwendige veiligheid van de Staat en het voortbestaan van de democratische en grondwettelijke orde, de uitwendige veiligheid van de Staat en de internationale betrekkingen, het wetenschappelijk of economisch potentieel, zoals gedefinieerd door de Nationale Veiligheidsraad¹, of elk ander fundamenteel belang van het land, zoals gedefinieerd door de Koning op voorstel van de Nationale Veiligheidsraad, bedreigt of zou kunnen bedreigen;</p> <p>2° het uitvoeren van de veiligheidsonderzoeken die haar overeenkomstig de richtlijnen van de Nationale Veiligheidsraad worden toevertrouwd;</p> <p>3° het inwinnen, analyseren en verwerken van inlichtingen die betrekking hebben op de activiteiten van buitenlandse inlichtingendiensten op Belgisch grondgebied</p> <p>4° het uitvoeren van alle andere opdrachten die haar door of krachtens de wet worden toevertrouwd.</p>	<p>task of:</p> <p>1° the collection, analysis and processing of information relating to every activity that threatens or could threaten the internal security of the State and the continued existence of the democratic and constitutional order, the external security of the State and internal relations, the scientific or economic potential, as defined by the National Security Council, or any other fundamental interest of the country as defined by the King on the proposal of the National Security Council;</p> <p>2° executing the investigations entrusted to it according to the guidelines of the National Security Council;</p> <p>3° gathering, analyzing and processing information relating to the activities of foreign intelligence services on Belgian territory;</p> <p>4° executing any other tasks entrusted to it by or under the law.</p>
<p>Art. 8</p> <p>Voor de toepassing van artikel 7 wordt verstaan onder :</p> <p>1° "activiteit die bedreigt of zou kunnen bedreigen" : elke individuele of collectieve activiteit ontplooid in het land of vanuit het buitenland die verband kan houden met spionage, inmenging, terrorisme, extremisme,</p>	<p>Art. 8</p> <p>For the purposes of article 7 this law shall apply:</p> <p>1° “activity that threatens or could threaten”: as every individual or collective</p>

<p>proliferatie, schadelijke sektarische organisaties, criminele organisaties, daarbij inbegrepen de verspreiding van propaganda, de aanmoediging of de rechtstreekse of onrechtstreekse steun, onder meer door het verstrekken van financiële, technische of logistieke middelen, het verstrekken van inlichtingen over mogelijke doelwitten, de ontwikkeling van structuren en van actiecapaciteit en de verwezenlijking van de nagestreefde doeleinden.</p> <p>Voor de toepassing van het vorige lid wordt verstaan onder :</p> <p>a) spionage : het opzoeken of het verstrekken van inlichtingen die voor het publiek niet toegankelijk zijn en het onderhouden van geheime verstandhoudingen die deze handelingen kunnen voorbereiden of vergemakkelijken;</p> <p>b) terrorisme : het gebruik van geweld tegen personen of materiële belangen om ideologische of politieke redenen met het doel zijn doelstellingen door middel van terreur, intimidatie of bedreigingen te bereiken;</p>	<p>activity undertaken in the country of from abroad that may be related to espionage, intervention, terrorism, extremism, proliferation, harmful sectarian organisations, criminal organisations, including the dissemination of propaganda, the encouragement or the direct or indirect support, including by providing financial, technical and logistical resources, providing information about possible targets, the development or structures and capacity for action and the achievement of the objectives pursued.</p> <p>For the purposes of the previous paragraph this law shall apply:</p> <p>a) espionage: as searching or providing of intelligence which is not accessible to the public and the maintenance of secrete understandings which can prepare or facilitate such acts;</p> <p>b) terrorism: as use of violence against persons or property for ideological or political motives and by means of terror, intimidation or threats;</p> <p>c) extremism: as racist, xenophobic, anarchist, nationalist, authoritarian and totalitarian ideas or intentions, whether of political, ideological, religious or philosophical nature, which are in theory or practice inconsistent with the principles of democracy and human rights, the proper functioning of democratic institutions or the foundations of the rule of law;</p> <p>d) proliferation: as trading or transactions of materials, products, goods or know-how that may contribute to the</p>
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<p>c) extremisme : racistische, xenofobe, anarchistische, nationalistische, autoritaire of totalitaire opvattingen of bedoelingen, ongeacht of ze van politieke, ideologische, confessionele of filosofische aard zijn, die theoretisch of in de praktijk strijdig zijn met de beginselen van de democratie of de mensenrechten, met de goede werking van de democratische instellingen of andere grondslagen van de rechtsstaat;</p> <p>d) proliferatie : de handel of de transacties betreffende materialen, producten, goederen. of know-how die kunnen bijdragen tot de productie of de ontwikkeling van non-conventionele of zeer geavanceerde wapensystemen. In dit verband worden onder meer bedoeld de ontwikkeling van nucleaire, chemische en biologische wapenprogramma's, de daaraan verbonden transmissiesystemen, alsook de personen, structuren of landen die daarbij betrokken zijn;</p> <p>e) schadelijke sektarische organisatie : elke groep met filosofische of religieuze inslag of die voorwendt dat te zijn en die qua organisatie of in haar praktijk schadelijke onwettige activiteiten uitoefent, individuen of de maatschappij nadeel berokkent of de menselijke waardigheid schendt;</p> <p>f) criminele organisatie : iedere gestructureerde vereniging van meer dan twee personen die duurt in de tijd, met als oogmerk het in onderling overleg plegen van misdaden en wanbedrijven, om direct of indirect vermogensvoordelen te verkrijgen, waarbij gebruik gemaakt wordt van intimidatie, bedreiging, geweld, listige kunstgrepen of corruptie, of waarbij commerciële of andere structuren worden aangewend om het plegen van misdrijven te verbergen of te vergemakkelijken.</p> <p>g) inmenging : de poging om met</p>	<p>production or development of non-conventional or highly sophisticated weapon systems. In this context, that shall, inter alia, include the development of nuclear, chemical and biological weapons programs, the associated transmission systems, and the persons, structures or countries involved.;</p> <p>e) harmful sectarian organisations: as any group with a philosophical or religious approach or pretending to have so and that utilises an organisational structure or practice that equates to an unlawful activity, causes harm to society or individuals, or violates human dignity;</p> <p>f) criminal organisation: as a structural and lasting organisation between more than 2 people with a view to mutually commit crimes and offences, to acquire direct or indirect financial benefits, in which use is made of intimidation, threats, violence, fraudulent practices or corruption, or commercial and other structures are used to hide or facilitate the commission of crimes;</p> <p>g) Intervention: as the attempt to influence with unauthorized, fraudulent or clandestine means, the decision-making processes;</p>
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<p>ongoorloofde, bedrieglijke of clandestiene middelen beslissingsprocessen te beïnvloeden;</p> <p>2° "de inwendige veiligheid van de Staat en het voortbestaan van de democratische en grondwettelijke orde":</p> <p>a) de veiligheid van de instellingen van de Staat en het vrijwaren van de continuïteit van de regelmatige werking van de rechtsstaat, de democratische instellingen, de elementaire beginselen die eigen zijn aan iedere rechtsstaat, alsook de mensenrechten en de fundamentele vrijheden;</p> <p>b) de veiligheid en de fysieke en morele vrijwaring van personen en de veiligheid en de vrijwaring van goederen;</p> <p>3° "de uitwendige veiligheid van de Staat en de internationale betrekkingen" : het vrijwaren van de onschendbaarheid van het nationaal grondgebied, van de soevereiniteit en de onafhankelijkheid van de Staat, van de belangen van de landen waarmee België gemeenschappelijke doeleinden nastreeft, alsook van de internationale en andere betrekkingen die België met vreemde Staten en internationale of supranationale instellingen onderhoudt;</p> <p>4° "het wetenschappelijk of economisch potentieel": de vrijwaring van de essentiële elementen van het wetenschappelijk of economisch potentieel;</p>	<p>2° "the internal security of the State and the continued existence of the democratic and constitutional order":</p> <p>a) as the safety of the institutions of the State and the safeguarding of the continuity and proper functioning of the rule of law, democratic institutions, basic principles inherent to any rule of law, human rights and fundamental freedoms;</p> <p>b) as the safety and the physical and moral safeguarding of people and the security and safeguarding of assets;</p> <p>3° "the external security of: the State and international relations": as the safeguarding of the integrity of the national territory, the sovereignty and independence of the State, the interest of the countries with which Belgium pursues common goals, as well as the international and other relations Belgium maintains with foreign States and international or supranational organisations.</p> <p>4° "scientific or economic potential": as safeguarding the essential elements of the scientific and economic potential.</p>
<p>Art. 18/2</p> <p>§1. De specifieke methoden voor het verzamelen van gegevens zijn :</p>	<p>Art. 18/2</p> <p>§1. The specific methods for the collection of evidence are;</p>

<p>1° de observatie, met behulp van technische middelen, in publieke plaatsen en in private plaatsen die toegankelijk zijn voor het publiek, ofwel de observatie, al dan niet met behulp van technische middelen, van private plaatsen die niet toegankelijk zijn voor het publiek;</p> <p>2° de doorzoeking, met behulp van technische middelen, van publieke plaatsen, van private plaatsen die toegankelijk zijn voor het publiek en van de gesloten voorwerpen die zich op deze plaatsen bevinden;</p> <p>3° het kennisnemen van de identificatiegegevens van de afzender of de geadresseerde van post of van de titularis van een postbus;</p> <p>4° de identificatie of de lokalisatie, met behulp van een technisch middel, van de elektronische communicatiediensten en -middelen waarop een bepaald persoon is geabonneerd of die door een bepaald persoon gewoonlijk worden gebruikt;]2</p> <p>4° /1 de vordering van de operator van een elektronisch communicatienetwerk of van een verstrekker van een elektronische communicatiedienst tot het bekomen van de gegevens betreffende de betalingswijze, de identificatie van het betalingsmiddel en het tijdstip van betaling voor het abonnement of voor het gebruik van de elektronische</p>	<p>1° the observation, with assistance of technical means, in public places and in private places publicly accessible, either for observation, whether or not by technical means, of private places not accessible to the public;</p> <p>2° the search, with assistance of technical means, of public places, of private places publicly accessible and of closed objects located in these places;</p> <p>3° taking note of the identity of the sender or addressee of mail or of the owner of a mailbox;</p> <p>4° the identification or the localization, with assistance of technical means, of electronic communication services and – means which a particular person is subscribed to or which a particular person commonly uses;</p> <p>4°/1 the demand of the operator of an electronic communication network or from a provider of an electronic communication service regarding the method of payment, the identification of the means of payment and the date of payment for the subscription or the use of the electronic communication service;</p> <p>5° the measures to retrieve the data of electronic communication means and the localization of the origin or destination of electronic communication.</p>
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<p>communicatiedienst;]2</p> <p>5° de maatregelen tot opsporing van de oproepgegevens van elektronische communicatiemiddelen en de lokalisatie van de afkomst of de bestemming van elektronische communicatie.</p> <p>§ 2. De uitzonderlijke methoden voor het verzamelen van gegevens zijn :</p> <p>1° de observatie, al dan niet met behulp van technische middelen, in private plaatsen die niet toegankelijk zijn voor het publiek, in woningen of in een door een woning omsloten eigen aanhoorigheid in de zin van de artikelen 479, 480 en 481 van het Strafwetboek, of in een lokaal aangewend voor beroepsdoeleinden of als woonplaats door een advocaat, een arts of een journalist;</p> <p>2° de doorzoeking, al dan niet met behulp van technische middelen, van private plaatsen die niet toegankelijk zijn voor het publiek, van woningen of van een door een woning omsloten eigen aanhoorigheid in de zin van de artikelen 479, 480 en 481 van het Strafwetboek, of van een lokaal aangewend voor beroepsdoeleinden of als woonplaats door een advocaat, een arts of een journalist, en van gesloten voorwerpen die zich op deze plaatsen bevinden;</p> <p>3° de oprichting of het gebruik van een rechtspersoon ter ondersteuning van operationele activiteiten en het gebruik van agenten van de dienst, onder de dekmantel van een fictieve identiteit of hoedanigheid;</p> <p>4° het openmaken en het kennisnemen van de al dan niet aan een postoperator toevertrouwde post;</p>	<p>§2. The exceptional methods for the collection of data are;</p> <p>1° the observation, whether or not with assistance of technical means, of private places not accessible to the public, in housing or in a appurtenance enclosed by this housing in the sense of articles 479, 480 and 481 of the Criminal Code, or in a room used for professional purposes or as private residence by a lawyer, medical doctor or journalist;</p> <p>2° the search, whether or not with assistance of technical means, of private places not accessible to the public, in housing or in a appurtenance enclosed by this housing in the sense of articles 479, 480 and 481 of the Criminal Code, or in a room used for professional purposes or as private residence by a lawyer, medical doctor or journalist, and of closed objects located in these places;</p> <p>3° the creation or use of a legal entity to support operational activities and the use of agents of the service under guise of a fictitious identity or capacity;</p> <p>4° opening and taking note of mail, whether or not entrusted to a postal operator;</p>
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<p>5° het verzamelen van gegevens betreffende bankrekeningen en bankverrichtingen;</p> <p>6° het binnendringen in een informaticasysteem, al dan niet met behulp van technische middelen, valse signalen, valse sleutels of valse hoedanigheden;</p> <p>7° het af luisteren, het kennismaken van en het opnemen van communicaties.</p> <p>§ 3. Als een in § § 1 en 2 bedoelde methode aangewend wordt ten opzichte van een advocaat, een arts of een journalist, of van hun lokalen of communicatiemiddelen die zij voor beroepsdoeleinden gebruiken, of van hun woonplaats of verblijfplaats, mag deze methode niet uitgevoerd worden zonder dat, naargelang het geval, de voorzitter van de Orde van de Vlaamse balies, van de Ordre des barreaux francophones et germanophone, van de Nationale Raad van de Orde van Geneesheren of van de Vereniging van Beroepsjournalisten hiervan vooraf op de hoogte is gebracht door de voorzitter van de commissie bedoeld in artikel 3, 6°. De voorzitter van de commissie is verplicht om de nodige inlichtingen te verstrekken aan de voorzitter van de Orde of van de Vereniging van Beroepsjournalisten, waarvan de advocaat, de arts of de journalist deel uitmaakt. De betrokken voorzitter is tot geheimhouding verplicht. De straffen bepaald in artikel 458 van het Strafwetboek zijn van toepassing voor inbreuken op deze verplichting tot geheimhouding.</p> <p>Als een in § § 1 en 2 bedoelde methode aangewend wordt ten opzichte van een advocaat, een arts of een journalist, van hun lokalen of communicatiemiddelen die zij voor beroepsdoeleinden gebruiken, of van hun woonplaats of verblijfplaats, gaat de voorzitter van de commissie na of de via deze methode verkregen gegevens een rechtstreeks</p>	<p>5° the collection of data regarding bank accounts and banking transactions;</p> <p>6° the intrusion into a computer system, with or without the assistance of technical means, false signals, false keys or false identities;</p> <p>7° eavesdropping, taking note and recording of communications.</p> <p>§3. If a method referred to in §1 and §2 is used with regard to a lawyer, medical doctor or a journalist, or their premises or means of communication used for professional purposes, or their place of residence or stay, this should not be carried out without the chairman of the commission as referred to in article 3,6° notifying in advance, respectively, the president of the Order of the Flemish Bar or the Order of the French and German Bars, of the National Council of the Order of Physicians, or of the Association of Professional Journalists. The chairman of the commission is obliged to provide the necessary information to these respective Order or Association the lawyer, medical doctor or journalist belongs. The president in question is bound to secrecy. The sanctions provided in article 458 of the Criminal Code are applicable to infringements of this duty of confidentiality.</p> <p>If a method referred to in §1 and §2 is used with regard to a lawyer, medical doctor, or journalist, their premises or means of communication used for professional purposes, the chairman of the commission examines whether the data obtained through these methods are directly related to the</p>
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<p>verband hebben met de bedreiging, wanneer zij beschermd worden door het beroepsgeheim van een advocaat of arts of door het bronnengeheim van een journalist.</p> <p>Als een in § 2 bedoelde uitzonderlijke methode aangewend wordt ten opzichte van een advocaat, een arts of een journalist, dient de voorzitter van de commissie of het door hem aangewezen lid van de commissie aanwezig te zijn bij de aanwending van deze methode.</p>	<p>threat, when they are protected by the professional confidentiality of a lawyer or medical doctor, or the secrecy of sources of a journalist.</p> <p>If an exceptional method referred to in §2 is used with regard to a lawyer, a medical doctor or a journalist, the chairman of the commission or the member appointed by him must be present during the use of this method.</p>
<p>Law of 7 April 2005 concerning the protection of journalistic sources (<i>Act</i>)</p>	
<p>Art. 1</p> <p>Deze wet regelt een aangelegenheid als bedoeld in artikel 78 van de Grondwet.</p>	<p>Art. 1</p> <p>This law governs a situation as intended by article 78 of the Constitution.</p>
<p>Art. 2</p> <p>De bescherming van de bronnen als bepaald in artikel 3, genieten de volgende personen :</p> <p>1° journalisten, dus eenieder die als zelfstandige of loontrekkende werkzaam is, alsook iedere rechtspersoon, en die regelmatig een rechtstreekse bijdrage levert tot het verzamelen, redigeren, produceren of verspreiden van informatie voor het publiek via een medium;</p> <p>2° redactiemedewerkers, dus eenieder die door de uitoefening van zijn functie ertoe gebracht wordt kennis te nemen van informatie die tot de onthulling van een bron</p>	<p>Art. 2</p> <p>The protection of the sources as defined by article 3, is enjoyed by the following persons:</p> <p>1° journalists; everyone who works on a self-employed or salaried basis, and who adds on a regular basis to the gathering, editing, producing or distributing of information towards the public through</p> <p>2° editorial staff; everyone who, by the exercise of their function, is led to take knowledge of information that can lead to the disclosure of a source; regardless of whether</p>

<p>kan leiden, ongeacht of dat verloopt via het verzamelen, de redactionele verwerking, de productie of de verspreiding van die informatie.</p>	<p>this takes place through gathering, editorial process, production or distribution of that information.</p>
<p>Art. 3</p> <p>De personen bedoeld in artikel 2 hebben het recht hun informatiebronnen te verzwijgen.</p> <p>Met uitzondering van de gevallen bedoeld in artikel 4, kunnen zij er niet toe worden gedwongen hun informatiebronnen vrij te geven en inlichtingen, opnames en documenten te verstrekken die onder meer :</p> <p>1° de identiteit van hun informanten kunnen bekendmaken;</p> <p>2° de aard of de herkomst van hun informatie kunnen prijsgeven;</p> <p>3° de identiteit van de auteur van een tekst of audiovisuele productie kunnen bekendmaken;</p> <p>4° de inhoud van de informatie en van de documenten zelf kunnen bekendmaken, indien daarmee de informant kan worden geïdentificeerd.</p>	<p>Art. 3</p> <p>The persons referred to in article 3 have the right to withhold their sources of information.</p> <p>With exception from the cases referred to in article 4, these persons cannot be forced to divulge their sources of information, or to release information, images/recordings or documents that, inter alia:</p> <p>1° could reveal the identity of their informants;</p> <p>2° could disclose the nature or origin of the information;</p> <p>3° could reveal the identity of the author of a text or audiovisual production;</p> <p>4° could reveal the content of the information and documents itself, if the informant can be identified by this.</p>
<p>Art. 4</p> <p>De personen bedoeld in artikel 2 kunnen enkel op vordering van de rechter ertoe</p>	<p>Art. 4</p> <p>The persons referred to in article can only be forced to reveal their sources of information</p>

<p>gedwongen worden de informatiebronnen bedoeld in artikel 3 vrij te geven, indien die van aard zijn misdrijven te voorkomen die een ernstige bedreiging opleveren voor de fysieke integriteit van één of meer personen, daarin begrepen de misdrijven bedoeld in artikel 137 van het Strafwetboek, in de mate zij de fysieke integriteit in het gedrang brengen, en indien de volgende cumulatieve voorwaarden vervuld zijn :</p> <p>1° de gevraagde informatie is van cruciaal belang voor het voorkomen van deze misdrijven;</p> <p>2° de gevraagde informatie kan op geen enkele andere wijze verkregen worden.</p>	<p>as referred to in article 3 by a court order, and only if these are of a capability to prevent crimes that cause a serious threat to the physical integrity of one or more persons, therein understood the crimes as referred to in article 137 of the Criminal Code, to the extent that they endanger the physical integrity, and if the ensuing cumulative conditions are fulfilled:</p> <p>1° the requested information is of crucial importance for the prevention of these crimes;</p> <p>2° the requested information cannot be obtained in any other way.</p>
<p>Art. 5</p> <p>Gegevens die betrekking hebben op de informatiebronnen van de personen bedoeld in artikel 2, mogen niet het voorwerp uitmaken van enige opsporings- of onderzoeksmaatregel, tenzij die gegevens kunnen voorkomen dat de in artikel 4 bedoelde misdrijven worden gepleegd, en met naleving van de daarin bepaalde voorwaarden.</p>	<p>Art. 5</p> <p>Data relating to the sources of information of the persons referred to in article 2, may not be the subject of any investigational or inquisitor measures, unless that data can prevent that the crimes referred to in article 4 will be committed, and with compliance to the conditions laid down therein.</p>
<p>Art. 6</p> <p>De personen bedoeld in artikel 2 kunnen niet op grond van artikel 505 van het Strafwetboek worden vervolgd als zij hun recht uitoefenen om hun informatiebronnen te verzwijgen.</p>	<p>Art. 6</p> <p>The persons referred to in article 2 cannot be prosecuted on the basis of article 505 of the Criminal Code if they exercise their right to withhold their sources of information.</p>

<p>Art. 7</p> <p>Ingeval het beroepsgeheim in de zin van artikel 458 van het Strafwetboek wordt geschonden, kunnen de personen bedoeld in artikel 2 niet op grond van artikel 67, vierde lid, van het Strafwetboek worden vervolgd als zij hun recht uitoefenen om hun informatiebronnen te verzwijgen.</p>	<p>Art. 7</p> <p>In case that the professional confidentiality in the sense of article 458 of the Criminal Code is violated, the persons referred to in article 2 cannot be prosecuted on the ground of article 67, fourth paragraph, of the Criminal Code if they exercise their right to withhold their sources of information.</p>
<p>Law of 13 June 2005 concerning the electronic communication</p>	
<p>Art. 127</p> <p>§1. De Koning bepaalt, na advies van de Commissie voor de bescherming van de persoonlijke levenssfeer en van het Instituut, de technische en administratieve maatregelen die aan de operatoren of aan de eindgebruikers worden opgelegd om :</p> <p>1° in het kader van een noodoproep de oproeplijn te kunnen identificeren;</p> <p>2° de eindgebruiker te kunnen identificeren en het opsporen, lokaliseren, afluisteren, kennismaken en opnemen van privé-communicatie mogelijk te maken onder de voorwaarden bepaald door de artikel en 46bis, 88bis en 90ter tot 90decies van het Wetboek van strafvordering en door de wet van 30 november 1998 houdende regeling van de inlichtingen- en veiligheidsdiensten</p> <p>De Koning bepaalt, na advies van het Instituut, de tarieven voor de vergoeding van de medewerking van de operatoren aan de in het eerste lid, 2°, bedoelde verrichtingen alsook de termijn waarbinnen de operatoren</p>	<p>Art. 127</p> <p>§1/ The King shall determine, on the advice of the Commission for the protection of privacy and of the Institute, the technical and administrative measures imposed on operators or end-users to:</p> <p>1° be able to identify the calling line in the framework of emergency calls;</p> <p>2° to identify, trace, locate, eavesdrop, take note and record (of) private communications by an end user under the conditions as referred to by articles 46bis, 88bis and 90ter-90decies of the Code of Criminal Procedure, and by the law of 30 November 1998 regulating the Intelligence and Security Services.</p> <p>The King shall determine, on the advice of the Institute, tariffs for compensation for the cooperation of the operators in the operations referred to in paragraph 2 and the deadline by which operators or subscribers must comply with the measures imposed.</p>

of de abonnees moeten voldoen aan de opgelegde maatregelen.

§ 2. De levering of het gebruik van een dienst of van apparatuur die de uitvoering bemoeilijkt of verhindert van de in § 1 bedoelde verrichtingen, zijn verboden, met uitzondering van encryptiesystemen die kunnen worden gebruikt om de vertrouwelijkheid van de communicatie en de veiligheid van betalingen te garanderen.

§ 3. Totdat de maatregelen, bedoeld in § 1, in werking treden, is het verbod bedoeld in § 2 niet van toepassing op de mobiele openbare elektronische communicatiediensten die worden geleverd op basis van een voorafbetaalde kaart.

§ 4. Indien een operator binnen de door de Koning vastgestelde termijn niet voldoet aan de hem opgelegde technische en administratieve maatregelen, is het hem verboden de dienst, waarvoor de betrokken maatregelen niet genomen zijn, aan te bieden.

§ 5. De operatoren sluiten de eindgebruikers die binnen de door de Koning vastgestelde termijn niet voldoen aan de hen opgelegde technische en administratieve maatregelen af van de netwerken en diensten waarop de opgelegde maatregelen van toepassing zijn. Die eindgebruikers worden op geen enkele wijze vergoed voor de afsluiting.

Indien een operator binnen de door de Koning vastgestelde termijn niet overgaat tot de afsluiting van de eindgebruikers die niet voldoen aan de hen opgelegde technische en administratieve maatregelen, is het hem verboden de dienst, waarvoor de eindgebruiker niet heeft voldaan aan de hem opgelegde maatregelen, te verstrekken totdat de identificatie van de oproeper mogelijk is

§2. The provision or use of a service or equipment that hinders the implementation or prevents the execution of measures referred to in §1 are prohibited, with the exception of encryption systems that can be used to protect the confidentiality of communications and security of payments.

§3. Until the measures referred to in §1 come into effect, the prohibition referred to in §2 shall not apply to the mobile public electronic communication services provided on the basis of a prepaid card.

§4. If an operator does not meet the imposed technical and administrative measures imposed on a service of his within the deadline set by the King, he will be forbidden to offer the respective service.

§5. The operator shall disconnect the end-user who does not comply with the technical and administrative measures imposed on him within the deadline set by the King from the services on which measures are imposed. The end-users are in no way compensated for the disconnection.

If an operator does not comply with the order for disconnection of an end-users who does not comply with the technical and administrative measures imposed on him, he is forbidden continuing offering the service for which the end-user does not meet the imposed measures before the identification of the end-user is made possible.

<p>gemaakt.</p> <p>§ 6. Elke operator zet een interne procedure op voor de afhandeling van verzoeken om toegang tot persoonsgegevens van gebruikers op grond van paragraaf 1. Hij verstrekt op verzoek aan het Instituut gegevens over deze procedures, het aantal ontvangen verzoeken, de aangevoerde wettelijke motivering en zijn antwoord.</p>	<p>§6. Every operator sets up an internal procedure for handling requests for access to end-users' personal data pursuant to §1. It shall</p>
<p>Law of 15 September 2013 concerning the report of an alleged breach on integrity in the federal administrative authorities by her staff</p>	
<p>Art. 2</p> <p>Voor de toepassing van deze wet wordt verstaan onder :</p> <p>1° personeelslid : het statutair personeelslid, de stagiair of het personeelslid met een arbeidsovereenkomst;</p> <p>2° federale administratieve overheden : de federale administratieve overheden zoals bedoeld in artikel 14 § 1, 1°, van de wetten op de Raad van State, gecoördineerd op 12 januari 1973;</p> <p>3° veronderstelde integriteitsschending : de veronderstelling van</p> <p>a) een handeling of het nalaten van een handeling door een personeelslid die een inbreuk is op de wetten, de besluiten, de omzendbrieven, de interne regels en de</p>	<p>Art. 2</p> <p>For the application of this law shall apply the following definitions:</p> <p>1°: member of staff: the statutory member of staff, the trainee or the member of staff with an employment contract.</p> <p>2° federal administrative authorities: the federal administrative authorities referred to in Article 14 § 1, 1 ° of the laws on the Council of State, consolidated on January 12, 1973;</p> <p>3° an alleged breach of integrity: the presumption of</p> <p>a) an act or omission by a staff member which is a violation of the laws, decisions, circulars, internal rules and internal</p>

<p>interne procedures die van toepassing zijn op de federale administratieve overheden en hun personeelsleden;</p> <p>b) een handeling of het nalaten van een handeling door een personeelslid die een onaanvaardbaar risico inhoudt voor het leven, de gezondheid of de veiligheid van personen of voor het milieu;</p> <p>c) een handeling of het nalaten van een handeling door een personeelslid die manifest getuigt van een ernstige tekortkoming in de professionele verplichtingen of in het beheer van een federale administratieve overheid;</p> <p>d) het welbewust bevelen of adviseren door een personeelslid om een integriteitsschending te begaan zoals bedoeld in a), b) en c).</p>	<p>procedures that apply to the federal administrative authorities and their staff;</p> <p>b) an act or omission by a staff member that involves an unacceptable risk to the life, health or safety of persons or to the environment;</p> <p>c) an act or omission by a staff member which manifestly shows a serious failure in professional duties or in the management of a federal administrative authority;</p> <p>d) the knowingly recommending or advising by a staff member to commit a breach of integrity as referred to in a), b) and c).</p>
<p>Art. 3</p> <p>§ 1. Het systeem voor de melding van een veronderstelde integriteitsschending dient voor de melding van een veronderstelde integriteitsschending in de federale administratieve overheden door een personeelslid dat in dienstactiviteit is in één van deze overheden.</p>	<p>Art. 3</p> <p>The system for reporting presumed breach of integrity serves for the reporting of a suspected breach of integrity in the federal administrative authorities by a staff member in service of any of these authorities.</p>

<p>Art. 6</p> <p>§ 1. Het personeelslid dat wenst te handelen overeenkomstig artikel 8, § 1, vraagt eerst schriftelijk een voorafgaand advies aan een vertrouwenspersoon integriteit van de federale administratieve overheid waar hij in dienstactiviteit is;</p> <p>Het personeelslid dat wenst te handelen overeenkomstig artikel 8, § 2, vraagt eerst schriftelijk een voorafgaand advies aan het Centraal Meldpunt.</p>	<p>Art. 6</p> <p>§ 1. The staff member who wishes to act in accordance with Article 8, § 1, is required to ask a written preliminary opinion of the confidant of integrity of the federal administrative authority where he is employed;</p> <p>The staff member who wishes to act in accordance with Article 8 § 2, is required to ask a written preliminary opinion to the Central Reporting Point.</p>
<p>Art. 8</p> <p>§ 1. Een personeelslid brengt zijn functionele of een hiërarchische meerdere eerlijk en op basis van een redelijk vermoeden op de hoogte van een veronderstelde integriteitsschending in de federale administratieve overheid waar hij is tewerkgesteld. De betrokken functionele of hiërarchische meerdere gaat vertrouwelijk om met de identiteit en de rechtstoestand van dat personeelslid en zorgt ervoor dat hij geen nadelige gevolgen ondervindt.</p> <p>Als een personeelslid zijn functionele of een hiërarchische meerdere niet wenst op de hoogte te brengen van een veronderstelde integriteitsschending in de federale administratieve overheid waar hij is tewerkgesteld, meldt hij dit aan de vertrouwenspersoon integriteit. Tegelijkertijd deelt het personeelslid aan de vertrouwenspersoon integriteit zijn keuze mee voor :</p> <p>1° een open melding, waarbij hij de vertrouwenspersoon integriteit de uitdrukkelijke en schriftelijke toelating geeft zijn identiteit bekend te maken, of</p> <p>2° een vertrouwelijke melding, waarbij de vertrouwenspersoon integriteit met de</p>	<p>Art. 8</p> <p>§1 A staff member shall inform his functional or hierarchical superior in fairness and on the basis of a reasonable suspicion aware of an alleged breach of integrity in the federal administrative authority where he is employed. The functional or hierarchical superior in question shall treat the identity and legal status of that employee as confidential and shall ensure that he will not be adversely affected.</p> <p>If a staff member does not want to inform his functional or hierarchical superior of an alleged breach of integrity in the federal administrative authority where he is employed, he shall report this to the confidant of integrity. Simultaneously the staff member will inform the confidant of integrity of his choice for:</p> <p>1 ° an open report, in which he gives the confidant of integrity the express written permission to disclose his identity, or</p> <p>2 ° a confidential report, in which the confidant of integrity confidentially deals with the identity of the staff member, ensures maximum protection of the identity and makes the identity known to none, within the current legislation, without the express</p>

<p>identiteit van het personeelslid vertrouwelijk omgaat, maximaal afschermt en aan niemand bekend maakt, binnen de geldende wetgeving, zonder de uitdrukkelijke schriftelijke toelating van het betrokken personeelslid.</p> <p>§ 2. Een personeelslid meldt bij het Centraal Meldpunt :</p> <p>1° bij ontstentenis van een vertrouwenspersoon integriteit in de federale administratieve overheid waar hij is tewerkgesteld;</p> <p>2° als hij zijn functionele of een hiërarchische meerdere niet wenst op de hoogte te brengen van een veronderstelde integriteitsschending in de federale administratieve overheid waar hij is tewerkgesteld en die veronderstelde integriteitsschending ook niet wenst te melden bij de vertrouwenspersoon integriteit van zijn federale administratieve overheid;</p> <p>3° als zijn melding een veronderstelde integriteitsschending betreft in een federale administratieve overheid waar hij is tewerkgesteld maar waarbij de hoogste hiërarchische meerdere van die federale administratieve overheid vermoedelijk betrokken is;</p> <p>4° als zijn melding een veronderstelde integriteitsschending betreft in een federale administratieve overheid waar hij niet tewerkgesteld is.</p>	<p>written permission of the staff member.</p> <p>§ 2. A staff member reports to the Central Service Desk:</p> <p>1 ° in the absence of a confidant of integrity within the federal administrative authority where he is employed;</p> <p>2 ° if he does not wish to inform his functional or hierarchical superior of an alleged breach of integrity in the federal administrative authority where he is employed nor does he wish to report the alleged breach of integrity to the confidant of integrity of its federal administrative authority;</p> <p>3 ° if his report concerns an alleged breach of integrity in a federal administrative authority where he is employed and the highest hierarchical superior of this federal administrative authority has been implicated;</p> <p>4 ° if his report concerns an alleged breach of integrity in a federal administrative authority where he is not employed.</p>
<p>Art. 15</p> <p>§1. De federale ombudsmannen beschermen de volgende personen tegen een maatregel met een nadelig gevolg voor de arbeidsvoorwaarden of de arbeidsomstandigheden, zoals bedoeld in § 2 van dit artikel, dat voortvloeit uit de melding van een veronderstelde integriteitsschending</p>	<p>Art. 15</p> <p>§1. The Federal Ombudsmen shall protect following persons against a measure with an adverse effect on conditions of employment or labor conditions, as provided for in § 2 of this Article, resulting from the reporting of an alleged breach of integrity to the confidential integrity of the Central Reporting Point:</p>

<p>bij de vertrouwenspersoon integriteit of het Centraal Meldpunt : 1° het personeelslid dat de veronderstelde integriteitsschendingen heeft gemeld; 2° het personeelslid dat wordt betrokken bij het onderzoek; en 3° het personeelslid-raadsman dat het personeelslid dat wordt betrokken bij het onderzoek adviseert.</p> <p>§ 2. Onder een maatregel met een nadelig gevolg voor de arbeidsvoorwaarden of -omstandigheden, dat voortvloeit uit de melding van een veronderstelde integriteitsschending wordt onder meer verstaan :</p> <p>1° het verlenen van ontslag anders dan op eigen verzoek; 2° het tussentijds beëindigen of het niet verlengen van een aanstelling in tijdelijke dienst; 3° het niet omzetten van een aanstelling in tijdelijke dienst voor een proeftijd in een aanstelling in vaste dienst indien deze in het vooruitzicht kan worden gesteld; 4° het verplaatsen of overplaatsen of het weigeren van een verzoek daartoe; 5° het nemen van een ordemaatregel; 6° het nemen van een maatregel van inwendige orde; 7° het nemen van een tuchtmaatregel; 8° het onthouden van salarisverhoging; 9° het onthouden van promotiekansen; 10° het onthouden van faciliteiten die andere medewerkers wel krijgen; 11° het weigeren van verlof; 12° het toekennen van een ongunstige evaluatie.</p> <p>§ 3. De beschermingsperiode gaat in : 1° voor het personeelslid dat de</p>	<p>1° the employee who reported the alleged breaches of integrity; 2° the staff member who is involved in the investigation; and 3° the employee-counsel who gives advice to the staff member involved in the investigation.</p> <p>§ 2. A measure with an adverse effect on the terms or conditions of employment, resulting from the reporting of an alleged breach of integrity, would include, inter alia:</p> <p>1 ° the granting of discharge other than at their own request; 2. the termination or non-renewal of a temporary appointment; 3 ° The absence of conversion of a temporary appointment for a trial period in a permanent appointment if this could have been envisaged; 4 ° The moving or transferring or the refusal of such request; 5 ° The taking of a measure of order; 6 ° The taking of a measure of internal order; 7 ° The taking of a disciplinary measure; 8 ° The withholding of salary increase; 9 ° The withholding of promotion; 10 ° The withholding of facilities that do get other employees; 11 ° The refusal to grant leave; 12 ° The assigning of a negative evaluation.</p> <p>§ 3. The period of protection begins:</p>
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<p>veronderstelde integriteitsschending heeft gemeld, op de ontvangstdatum, bedoeld in artikel 6, § 4, eerste lid; 2° voor het personeelslid en het personeelslid-raadsman die worden betrokken bij het onderzoek, op de datum waarop zij door de federale ombudsmannen en, desgevallend, de deskundigen bij het onderzoek naar de melding van de veronderstelde integriteitsschending worden betrokken.</p> <p>De Koning bepaalt de duur van de beschermingsperiode. Deze bedraagt minstens twee jaar na het afronden van het aangevulde schriftelijke verslag of na een definitieve gerechtelijke veroordeling.</p> <p>§ 4. De bescherming wordt niet toegekend aan het personeelslid dat een veronderstelde integriteitsschending wil melden in een federale administratieve overheid maar niet heeft gehandeld overeenkomstig artikel 8.</p> <p>§ 5. De bescherming die aan het personeelslid dat de veronderstelde integriteitsschending meldt wordt toegekend overeenkomstig §§ 1, 2 en 3, wordt opgeheven op datum van de afronding van het aangevulde schriftelijk verslag, bedoeld in artikel 14, § 1, als daarin voldoende elementen aanwezig zijn om te besluiten dat :</p> <p>1° het personeelslid dat de veronderstelde integriteitsschending heeft gemeld heeft gehandeld in de wetenschap dat deze melding niet eerlijk was;</p> <p>2° het personeelslid dat de veronderstelde integriteitsschending heeft gemeld zelf betrokken is bij de gemelde veronderstelde integriteitsschending.</p>	<p>1 ° for the employee who reported the alleged breach of integrity, on the date of receipt referred to in Article 6, § 4, first paragraph;</p> <p>2 ° for the staff member and the counselor who are involved in the investigation, the moment when they get involved by the Federal Ombudsmen or, where applicable, by the experts involved in the investigation into the reporting of the alleged breach of integrity,</p> <p>The King determines the duration of the protection period. This is at least two years after completion of the supplemented written report or after a final court judgment.</p> <p>§ 4. The protection is not granted to the member of staff who wants to report an alleged breach of integrity in a federal administrative authority but not acted in accordance with Article 8.</p> <p>§ 5. The protection given to the member of staff who reported the alleged breach of integrity granted under §§ 1, 2 and 3, shall be abolished on the date of the completion of the completed written report referred to in article 14, § 1, if there are sufficient elements present to conclude that:</p> <p>1 ° the member of staff who reported the alleged breach of integrity acted in the knowledge that this report was not fair;</p> <p>2 ° the member of staff himself was involved in the reported alleged breach of integrity.</p>
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<p>Art. 16</p> <p>§ 1. Een personeelslid dat beweert dat hij het slachtoffer is van of bedreigd wordt met een maatregel, bedoeld in artikel 15, § 2, kan tijdens de beschermingsperiode, zoals bedoeld in artikel 15, een met redenen omklede klacht indienen bij de federale ombudsmannen.</p> <p>§ 2. Indien tijdens de beschermperiode tegen een beschermd personeelslid, maatregelen zoals bedoeld in artikel 15, § 2 worden genomen, dan valt de bewijslast, dat er zich geen maatregelen of de dreiging met maatregelen hebben voorgedaan of voordoen, ten laste van de federale administratieve overheid waar het bestaan van of de dreiging met maatregelen zich vermoedelijk hebben voorgedaan of voordoen.</p>	<p>Art. 16</p> <p>§ 1. A staff member who claims he is the victim of or threatened by a measure referred to in Article 15, § 2, during the period of protection as provided in Article 15, may submit a reasoned complaint to the federal ombudsmen.</p> <p>§ 2. If during the protection period, measures as referred to in Article 15, § 2 are taken against a protected staff member, then the burden of proof, that no action or threat of action have occurred or occurs, will be borne by the Federal Administrative government where the existence or the threat of action is likely to have occurred or occurs.</p>
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ELSA BOSNIA AND HERZEGOVINA

Contributors

National Coordinator

Nasir Muftić

National Academic Coordinator

Tahir Herenda

National Researchers

Harun Išerić

Nihad Odobašić

Tahir Herenda

National Linguistic Editors

Nejira Ajkunić

National Academic Supervisor

Kristina Ćendić

1. Introduction

1.1. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information?

While writing this paper we have been in a very unenviable situation as a National Research Group. Bosnia and Herzegovina has no proper legislation on media law and several issues raised by this paper, while being very precise could only be semi-answered due to that. Our country is still being struck by consequences of transition and dominant legal issues nowadays are unfortunately not media freedom. Jurisprudence on media law and questions of this Legal Research Group hardly exist. This also applies to media law scientific articles and literature, which in Bosnia and Herzegovina are pauperized. All mentioned made the writing of this paper difficult and some questions impossible to answer. In those situations, we analysed existing legislation and applied analogy where it was possible in order to give answers.

Bosnia and Herzegovina has a complex constitutional order. For the purpose of better understanding, we will briefly address it, since it is connected with the scope of jurisdiction of different levels of government in Bosnia and Herzegovina (or B-H). There are two entities in Bosnia and Herzegovina – Federation of Bosnia and Herzegovina (or FB-H) and Republika Srpska (or RS), and Brcko District (or BD). Unlike RS, FB-H has ten cantons, and both entities along with BD have municipalities. As it will be explained in following chapters, jurisdiction on this matter is divided between B-H and entities, and in FB-H cantons have certain jurisdiction as well. It is important to emphasize that divided jurisdiction on this matter is in favor of entities.

The legislation of Bosnia and Herzegovina provides protection of freedom of expression and journalistic sources in several levels. The Constitution of B-H prescribes that European Convention of Human Right and Fundamental Freedoms and its Protocols shall apply directly in B-H, along with the jurisprudence of European Court of Human Rights. Also, international documents succeeded by former Yugoslavia and those ratified by B-H authorities which provide this protection, have priority over all other national law, among which one of the important ones in this matter is Recommendation no. R (2000) 7, on the right of journalists not to disclose their sources of information. Law on Protection against Defamation brought in by entities and BD provides special protection to journalists other natural person regularly or professionally engaged in the journalistic activity of seeking, receiving or imparting information to the public, who has obtained information from confidential source, prescribing the right not to disclose the identity of that source. B-H also has self-regulatory mechanism in order to protect mentioned rights.

Further on, other documents address this matter, such as the Press Council in Bosnia and Herzegovina which prescribes in its Press Code that journalists have an obligation to protect the identity of those who provide information in confidence, whether or not they explicitly request confidentiality. In its Guidelines for police in dealing with journalists of OSCE Mission in Bosnia and Herzegovina, it is stated that police cannot force journalist to reveal confidential source of information. The Code of Honour of BH journalists association declares that journalists have the right not to disclose source of information.

Even though B-H legislation does not contain provisions regarding breaches of confidentiality of journalistic sources in criminal proceedings, situation or crimes for which there is a provided possibility of breaching confidentially of journalist sources and who makes decision on breaching of confidentially of journalist sources, these issues are regulated indirectly by other laws.

There is no definition of journalist in national legislation. Nonetheless, we tried to define it by using provisions of laws on protection against defamation and international documents adopted by B-H. Consequently, B-H legislation provides protection of journalist sources for a wider scope of persons – not just for journalists in a traditional point of view, but also for others who are permanently of professionally involved in journalist activities. It also provides protection for participants in civil proceedings regarding defamation.

Legal safeguards for journalists are guaranteed by several laws. Laws on protection against defamation prescribe that the right to disclose the identity of a confidential source is not under any circumstances limited to proceedings conducted in terms of the law. Criminal Procedure Codes prescribe that witness cannot be a person who held professional secret, which naturally refers to, among others, journalists. However, four criminal codes in force in Bosnia and Herzegovina define illegal obtaining of classified information and unauthorised use, which is a criminal offense. This might refer to the press, although so far there were no court proceedings against journalists to run based on the unlawful obtaining confidential data and unauthorised use. Bosnia and Herzegovina lacks regulations providing for violation of the confidentiality of journalistic sources in the context of criminal proceedings or for other reasons, such as "national reasons" or "core national interests", or in other circumstances.

Concerning the compliance of national legislation with the Recommendation No R (2000) 7, it can be concluded that B-H legislation is in accordance with it, which will be specifically addressed in later chapters. The principles of disclosure of journalistic sources set forth by the Recommendation cannot be applied in case of B-H, given that journalists in B-H do not have an obligation to share their sources under any circumstances.

Bosnia and Herzegovina has no single judgment which would involve protection of journalistic sources. However, there are two cases that are in the phase of investigation, which will be mentioned later.

Criteria for using electronic surveillance and anti-terrorism laws are prescribed in the criminal procedure codes. In practice, these provisions rarely occur in connection with identifying journalistic sources

In addition to this, journalists in Bosnia and Herzegovina are generally not inclined to encryption and anonymity online in order to protect themselves and their sources of surveillance.

Law which protects whistle-blowers is the Law on Protection of Whistle-Blowers in Institutions of Bosnia and Herzegovina (Off. Gazette of B-H No. 100/13) is a *lex specialis* that protects whistle-blowers in institutions of Bosnia and Herzegovina and legal entities founded by Bosnia and Herzegovina. This definition is not completely in accordance with definition provided in Recommendation No. R (2014) 7. For the Law whistle-blower is every person employed in state

institutions, while the Recommendation provides protection also for whistle-blower employed in private sector.

1.2. What type of legislation provides this protection?

- Constitution of B-H
- Constitution of RS
- Constitution of FB-H
- Constitution of BD
- Criminal Code of B-H (Official Gazette No. 03/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 32/07, 08/10, 47/14)
- Criminal Code of FB-H (Official Gazette No. 36/03, 37/03, 21/04, 69/04, 18/05)
- Criminal Code of RS (Official Gazette No. 49/03, 108/04, 37/06, 70/06)
- Criminal Code of BD (Official Gazette No. 10/03, 45/04, 06/05, 21/10, 52/11)
- Criminal Procedure Code of B-H (Official Gazette No. 03/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13)
- Criminal Procedure Code of BD (Official Gazette No. 10/03, 48/04, 06/05, 06/05, 12/07, 14/07, 21/07)
- Criminal Procedure Code of FB-H (Official Gazette No. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07)
- Criminal Procedure Code of RS (Official Gazette No. 53/12)
- Law on Protection Against Defamation of FB-H (Official Gazette No. 19/03)
- Law on Protection Against Defamation of RS (Official Gazette No. 28/94)
- Law on Protection Against Defamation of Brcko District of Bosnia and Herzegovina (Official Gazette No. 14/03)
- Law on Media of Canton Sarajevo (Official Gazette No. 13/98)
- Law on Protection of Classified Information of Bosnia and Herzegovina (Official Gazette No. 54/05)

1.3. How exactly is this protection construed in national law?

Protection of freedom of expression and journalistic sources in B-H exists on several levels of government. Protection is being provided by constitution's provisions according to which international documents have priority over all other national law. The special importance is given to the European Convention of Human Rights and Fundamental Freedoms and European Court of Human Rights jurisprudence. Protection is also being provided by laws on national and entity level, and self-regulatory mechanism.

There are few laws on the national level which prescribe ways of protection of journalistic sources. That is the consequence of the fact that entities have jurisdiction over this matter, as it was expressed in Article 3 of Constitution of B-H: "All governmental functions and powers not

expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.“ Though, laws which address matter of Media law in general on the national level do it indirectly, usually prescribing general provisions on matter over which B-H has jurisdiction.

Laws on entity level which provide protection of freedom of expression and journalistic sources are numerous. Most important ones are laws on Protection against Defamation brought in also by BD. Mentioned laws can be considered *lex specialis*, since they provide additional protection to freedom of expression. *Lex generalis* laws, which protect other rights besides freedom of expression and journalistic sources, are Criminal codes and Criminal Procedure codes.

Bosnia and Herzegovina also has self-regulatory mechanism expressed through Press Council. The Press and Online Media Code, issued by the mentioned body, prescribes detailed information regarding our topic, which will be addressed in following chapters.

2. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

Media regulation in Bosnia and Herzegovina was largely shaped by the international community which initiated passing new media laws after the war 1992-1995. These laws were in line with the international standards regarding protection of freedom of expression and their provisions remained rather modern and well-tailored. In fact, Bosnia and Herzegovina was one of the first countries in the region that abolished defamation as a criminal offense, which is the crucial characteristic of defamation laws in the country. In addition to this, Bosnia and Herzegovina brought in 2001 laws on defamation at the entity level. Under these laws a journalist who has obtained information from a confidential source has the right not to reveal his/her identity and this right is not under any circumstances limited in proceedings conducted in terms of these laws. This normatively represented a significant step forward in the protection of media freedom. However, regulations in Bosnia and Herzegovina do not prescribe situations or sanctions when a journalist or a third party violates the confidentiality of sources of information. Nonetheless, Bosnia and Herzegovina has incorporated provisions of international documents in the Constitution, and it is a signatory of important international agreements regarding media freedoms. Specifically, the Committee of Ministers of the Council of Europe in Recommendation no. R (2000) 7 on the right of journalists not to disclose their sources of information recommend to the member states to:

- implement the principles attached to the Recommendation in the framework of its national law and practice
- expand Recommendation and the attached principles, together with translation where necessary,
- in particular draw attention about principles to authorities, the police and the judiciary and make them available to journalists, media and their professional organizations.

In the Annex to this Recommendation, seven principles are noted and the first principle of the right of journalists to reveal sources of information: "The local laws and practices of Member States should provide an explicit and clear protection of the rights of journalists not to disclose information that could indicate the identity of the source according to Article 10 of the Convention for the protection of human rights and fundamental freedoms and established principles, which should be considered as minimum standards for the respect of that right." Related to this, acts that protect the confidentiality of journalistic sources in Bosnia and Herzegovina are The Press and Online Media Code of the Press Council in Bosnia and Herzegovina and laws on protection against defamation in both entities and in Brcko District:

- The Law on Protection against Defamation of the Federation of Bosnia and Herzegovina (Article 9);
- The Law on Protection against Defamation of the Republika Srpska (Article 10);
- The Law on Protection against Defamation of the Brcko District of Bosnia and Herzegovina (Article 9).

The texts of these articles of the laws related to the confidentiality of journalistic sources are essentially identical in the three laws (the differences are linguistic and terminological nature).

The laws on defamation define that:

"1) Journalist and other natural person regularly or professionally engaged in the journalistic activity of seeking, receiving or imparting information to the public, who has obtained information from confidential source has the right not to disclose the identity of that source.

This right includes the right not to disclose any document or fact which may reveal the identity of the source particularly any oral, written, audio, visual or electronic material. The right to disclose the identity of a confidential source is not under any circumstances limited to proceedings conducted under this Law.

2) The right to disclose the identity of a confidential source is extended to any other natural person involved in proceedings under this law, and that as a result of their professional relationship with a journalist or other person within the meaning of paragraph 1 of this Article, find out the identity of a confidential source of information."

Reporters, editors, publishers and people who are sources of information hence have benefits from the protection of journalists' sources. The protection of sources of information allows journalists to work freely, particularly in the field of investigative journalism, and increases the trust between journalists and the people who are sources of information. This type of protection allows the media to observe and warn of the various phenomena and irregularities in the company ("watchdog").

Therefore, it is defamation laws that protect journalistic sources and contain provisions ensuring freedom of expression in the country. At this point, it is necessary to mention the concept of insult, too, and the fact that recently there have appeared certain challenges in this regard. Namely, unlike the law on defamation - which is intended to provide a remedy or protection, whenever there are facts that can be proven, the insults that have hurt the reputation of a particular person, "outrage" - as provided by another legal regulation - is not a subject to factual

evidence. Here we are talking about the Law on Protection of Public Order of the Republika Srpska, adopted in early 2015. In accordance with this law, "insult" is defined as "causing feelings of physical threat or pain among citizens, the way that offends another person on political, religious or ethnic grounds ", it is possible that it subsume the facts that are of public interest.

More precisely speaking, the definition of "insult" is not clear and not sufficiently precise, and does not even exclude the statements made in the field of political speeches and debates or in the area that is of interest to the public. In the light of the European Court of Human Rights' practice, this definition could find itself under scrutiny, in particular when concerning the insult of others on political grounds. In Recommendation 1897 from 2010, on respect for media freedom the European Council states: "(...) the law of defamation and insult should not be used to silence critical comments, and irony in the media. The reputation of the nation, military, historical figures or religion cannot and must not be protected by laws on defamation and insult. Governments and parliaments must clearly and openly reject the false allegations of "awakened national interest" directed against the work of journalists (...) ". It is also clear that the ECHR provides that all restrictions on freedom of expression must be clearly defined. In fact, part of the Article 1 of the ECHR, which is about freedom of opinions and to receive and impart information and ideas without interference by public authorities is probably the most problematic because of produced problems in practice. The abovementioned Law on public Peace and Order thus came out to hold onto this requirement and enabled police to evaluate whether the offense was committed.

The ECtHR issued several decisions in which it was stated that all the exceptions mentioned or prescribed limits must be strictly interpreted, and that the state must ensure that all restrictions on freedom of expression are proportionate to the objective to be achieved, given that the right to freedom of expression "is one of the cornerstones of any society." All this results in that the fact that the definition of "insult" given by the Law on Public Peace and probably would not pass the test of foreseeability and accessibility, since it is used terminology that limits freedom of speech too general and "their open character gives prosecutors and judges almost unlimited power for the suppression of expression online ".

While the media today, in addition to legislative, judicial and executive authorities, are considered as the fourth pillar of democracy - because their role is to control the power of the public, it often happens just the opposite - the government does not want criticism and wants to control and dispense information to the media communicated to the public .

3. Is there in, domestic law, a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

3.1. Prohibition of a journalist from disclosing his/her sources

3.1.1. Constitutional provisions

According to the H constitution, authorities in the field of media regulation are on level of entities (Republic of Srpska (RS) and Federation of Bosnia and Herzegovina (FH)), Brcko District (BD) and ten cantons in Federation in B-H. H Constitution declares that: 'The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law (article 2 paragraph 2). In accordance to the presented, case law of European Court for Human Rights is obligatory for Bosnian courts including Constitutional court of H. Freedom of expression is guaranteed by H Constitution¹, as well as by Constitution of FB-H², RS³ and BD⁴.

3.1.2. Law on Protection against Defamation and journalist associations regulation

Regulations which contain protection of journalist sources are: Law on Protection against Defamation of Brcko District (Off. Gazette of BD No. 14/03), Law on Protection against Defamation of FH (Off. Gazette of FH No. 19/03, 73/05), Law on Protection against Defamation of RS (Off. Gazette of RS No. 37/01) and Press Code of the Press Council in Bosnia and Herzegovina. Laws prescribe which persons have the privilege to disclose identity of confidential source from which they got certain information. They are⁵:

- a. Journalists (in accordance with principle 1 of Recommendation R (2000) 7),
- b. Other persons that are permanently or professionally involved in journalistic activities: seeking, receiving or imparting information to the public (in accordance to the principle 2 of Recommendation R (2000) 7),
- c. Every other person who participates in procedure regarding charges for damages for defamation, which due to its professional relationship with a journalist or a person described above finds identity of confidential source.

¹ Constitution of H, article 2, paragraph 3, point h: "All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include: h) freedom of expression."

² Constitution of FH, article 2, paragraph 2, point l: "All persons within the territory of Federation of Bosnia and Herzegovina shall enjoy: l) fundamental freedom: freedom of expression and media..."

³ Constitution of RS, article 2, paragraph 26: "Freedom of the press and other means of public communication shall be guaranteed. Anyone is free to establish news organisations and publishing houses, to publish newspapers or to disseminate information via other media, in accordance with the law. Censorship of the press and other media of public information shall be prohibited. It is the duty of the public information media to inform the public timeously, truthfully and without bias. The right to correct untruthfully published information which has damaged a right or an interest of an individual or body shall be guaranteed, as shall be the right to compensation for damages arising thereby."

⁴ Constitution of BD, article 2, paragraph 13, point 4: "All persons on territory of BD exercise freedom and liberties given in ECHR."

⁵ Law on protection against defamation of Brcko District (Off. Gazette of BD No. 14/03), article 9
Law on protection against defamation of FH (Off. Gazette of FH No. 19/03, 73/05), article 9
Law on protection against defamation of RS (Off. Gazette of RS No. 37/01), article 10

Laws also contain protection for certain documents or facts which may reveal the identity of a source. Special protection is prescribed for: oral, written, audio, visual and electronic material. Right to disclose the identity of a source is not limited under any circumstances in procedure regarding charges for damages for defamation (in accordance with principle 4 of Recommendation R (2000) 7). Laws on protection against defamation however do not contain provisions on breach the secrecy of journalist sources.

The Press Council in Bosnia and Herzegovina prescribes in Press Code⁶ that journalists have an obligation to protect the identity of those who provide information in confidence, whether or not they explicitly request confidentiality.⁷ There are no sanctions applied for this.

In its Guidelines for police in dealing with journalists of OSCE Mission in Bosnia and Herzegovina⁸, it is stated that police cannot force journalist to reveal confidential source of information.⁹

Code of Honour of BH journalists association¹⁰ declares that journalists have the right not to disclose source of information.¹¹

B-H legislation does not contain provisions regarding: breaches of confidentiality of journalistic sources in criminal proceedings, situation or crimes for which is provided possibility of breaching confidently of journalist sources and who makes decision on breaching of confidently of journalist sources.

3.1.3. Criminal procedure Act and secret data protection

Criminal procedure codes in Bosnia and Herzegovina¹² contain provisions by which a witness cannot be a person who by his/her statement would violate duty of keeping professional secret.

⁶ Pres code Press council in Bosni and Herzegovina,
http://english.vzs.ba/index.php?option=com_content&view=article&id=218&Itemid=9&lang=en accessed
January 15 2016

⁷ Article 13

⁸ Smjernice za policiju u ophođenju sa medijima OSCE Misije u Bosni i Hercegovini
<http://www.bhnovinari.ba/images/stories/pdf/zakoni/osceuputezapolicijuuophodenjusmedijima.pdf> accessed
January 14 2016 [Bosnian]

⁹ Article 7

¹⁰ Code of Honour of BH journalists association
http://www.bhnovinari.ba/index.php?option=com_content&view=article&id=362&Itemid=223&lang=bs
accessed January 12 2016 [Bosnian]

¹¹ Article 4

¹² Criminal procedure code of H (Official Gazette No. 03/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13), Criminal procedure code of FH (Official Gazette No. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07), Criminal procedure code of RS (Official Gazette No. 53/12), Criminal procedure code of BD (Official Gazette No. 10/03, 48/04, 06/05, 06/05, 12/07, 14/07, 21/07).

A journalist can be one of these persons, which keeps professional secret, unless he/she is not exempted from that duty by special act or statement of person who benefits from keeping a secret.¹³

One of crimes contained in criminal codes in H¹⁴ is illegal obtaining secret information and their unauthorised use.¹⁵ It is not a crime if someone publishes or mediates in publishing a secret of B-H, FH, RS and BD whose content is contrary to constitutional order of B-H, FH, RS and BD with the aim to reveal a violation of the constitutional order of the B-H, FH, RS and BD if disclosure does not undermine the security of the B-H, FH, RS and BD.¹⁶ Theoretically speaking, it could happen that journalist commit such crime and be processed for that. That did not happen yet.¹⁷

Law on protection of secret data of B-H¹⁸ stipulates obligation of Bosnian citizens who come in possession or gain insight in secret data in a way that is not unlawful, undertake obligation of keeping data that are a secret.¹⁹ There is no sanction for breaking this obligation.

3.1.4. Criminal codes and labour codes in Bosnia and Herzegovina

Criminal codes in Bosnia and Herzegovina²⁰ have criminalised an unauthorised revelation of professional secret. Laws state that beside listed persons²¹, if any other person, which includes and journalist, unauthorized reveal the secret he found out in the exercise of his occupation, shall be punished by a fine (only in CC of Republic Srpska) or imprisonment up to one year. Labour law of Bosnia and Herzegovina²² contains provision on worker responsibilities for grave violation of official duties. Among others, grave violations of official duties are: revelation of an official secret. Sanctions are: suspension from work and salary for a period of two days to thirty days, demotion to a lower position or termination of employment.²³ Labour laws provide an opportunity for employer to release employee in case of grave violation of official duties without

¹³ CPC of H, article 82, CPC of FH, article 96, CPC of RS article 147, CPC of BD article 82 a

¹⁴ Criminal Code of H (Official Gazette No. 03/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 32/07, 08/10, 47/14), Criminal Code of FH (Official Gazette No. 36/03, 37/03, 21/04, 69/04, 18/05), Criminal code of RS (Official Gazette No. 49/03, 108/04, 37/06, 70/06, 73/10, 1/12, 67/13), Criminal code of BD (Official Gazette No. 10/03, 45/04, 06/05, 21/10, 52/11).

¹⁵ CC of H article 164 paragraph 2, CC of BD article 157 paragraph 2, CC of FH article 158 paragraph 2, CC of RS

¹⁶ CC of H article 164 paragraph 9, CC of BD article 157 paragraph 5, CC of FH article 158 paragraph 5, CC of RS

¹⁷ Bajraktarević Sena, Nihada Jeleč, Zaštita povjerljivosti novinarskih izvora, Parlamentarna skupština BiH – Sekretarijat zajednička služba, 2013, p. 8 [Bosnian]

¹⁸ Law on protection of secret data of H (Official Gazette No. 54/05, 12/09)

¹⁹ Article 11 of the Law on protection of secret data of H (Official Gazette No. 54/05, 12/09)

²⁰ Criminal Code of FH (Official Gazette No. 36/03, 37/03, 21/04, 69/04, 18/05), article 187; Criminal code of RS (Official Gazette No. 49/03, 108/04, 37/06, 70/06, 73/10, 1/12, 67/13), article 173; Criminal code of BD (Official Gazette No. 10/03, 45/04, 06/05, 21/10, 52/11), article 184.

²¹ Doctors, lawyers, social worker, psychologist etc.

²² Labour law of Bosnia and Herzegovina (Official Gazzete No. 26/04, 07/05, 48/05, 60/10, 32/13) article 60, point 3.

²³ Ibid. Article 62, point 2.

notice period.²⁴ Laws do not contain definitions of what grave violations are, but concerning H labour law we can conclude that they could include and revelation of official secret. Labour law of RS²⁵ defines grave violation of working obligations as such behaviour of workers at work or in connection with work that inflicts serious damage to the interests of the employer, as well as the behaviour of workers who are reasonably be concluded that further work workers at the employer would not be possible.²⁶ Under this definition we can include and breach of journalistic sources. Sanctions are: written warning, fee, the end of employment.²⁷

3.2. Conclusion

Criminal codes of FB-H, RS and BD and labour laws of B-H, FB-H, RS and BD provide prohibitions to journalist to disclose their sources and provide sanctions in case they act opposite.

4. Who is a journalist according to the national legislation? Is it in your view a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media actors? Is the protection of journalists' sources extended to anyone else?

4.1. Looking for definition of the journalist

No single act defines a term journalist. Unfortunately, neither legislation nor journalist associations provide definition of journalist.

However, the Law on Protection against Defamation of FB-H states that every person causing damage to natural person or legal entity by expressing or disseminating false facts when identifying this natural or legal entity to a third person is liable for defamation and “that the author, editor, publisher and the person who supervised the content with such expression in some other way are all liable for defamation expressed in the mass media.” The Law on Protection against Defamation of Republika Srpska states “that there is a liability for defamation if a person capable of work causes damage to the reputation of another natural or legal entity by identifying this person to a third person if they caused damage as authors, editors or publishers of the expression or as persons who, in some other way, efficiently controlled the content, just as the legal entity that published the expression.” The laws thus contain provisions regarding to

²⁴ Labour law of BD (Official Gazzete No. 19/06, 01/15), article 74; Labour law of FB-H (Official Gazzete No. 26/16), article 97 b

²⁵ Labour law of RS (Official Gazzete No. 1/16)

²⁶ Article 138

²⁷ Article 140

whom the liability refers however the concept of “author” is disputable in both, and do not offer a specific definition of a journalist.

However, there was a definition in Law on Media of Sarajevo Canton 1998. Journalist, according to this Law, was a professional who collects and processes dates and prepare information for media, who is employed by a publisher or who lives from its journalist work, or one who works in press office of state or public institution or other legal body. The Law was repealed in 2009, while laws adopted later on do not contain definition of journalist.

In practice, a journalist and a person who collects information in B-H has a professional press card. It is issued by media for which this person works. The press card contains the following information: name, photo, title of media, address, logo and official stamp of media for which he/she works.

4.2. Indirect definition of journalist

In order to find out definition of journalist we should consider already cited articles of laws on protection against defamation which provide protection of journalist sources for:

- a. Journalists,
- b. Other persons that are permanently or professionally involved in journalistic activities: seeking, receiving or imparting information to the public,
- c. Every other person who participates in procedure regarding charges for damages for defamation, which due to its professional relationship with journalist or person described under point b finds identity of confidential source.

Using *argumentum a contrario*, we can conclude that journalist is a person that permanently and professionally is involved in journalistic activities: seeking, receiving and imparting information to the public. So, for a person to be a journalist, it has to:

- a. Permanently and professionally be involved in journalistic activities. It means that a person has to work as a journalist. It cannot be his/her temporary work. He/she cannot be an amateur.
- b. Second element would be journalistic activities that are: Seeking, receiving or imparting information to the public. All these activities have to be facing a public. It does not have to include cumulatively all three activities.

This definition is in accordance with definition of journalist provided in the Recommendation R (2000) 7.

Finally, protection of journalist sources is not just limited to journalists, but also to:

- a. persons who are not journalists, however who that are permanently or professionally involved in journalistic activities: seeking, receiving or imparting information to the public, E.g. citizen journalists, bloggers, since the definition of journalism has spread to a wide range of actors, including bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere.
- b. Every other person who participates in proceedings regarding charges for damages for defamation, which due to its professional relationship with journalist or person described under point a. finds out the identity of confidential source. E.g. journalist employer, editors, lawyers, employees at the media outlet in question, etc.

4.3. Conclusion

In conclusion, we can say that B-H legislation provides protection of journalist sources for wider scope of persons – not just for journalists in a traditional point of view, but also for others who are permanently of professionally involved in journalist activities. It also provides protection for participants in civil proceedings regarding defamation.

5. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

According to the laws on defamation, as previously stated, the right to disclose the identity of a confidential source is not under any circumstances limited to proceedings conducted in terms of the law. In addition, the Criminal Procedure Code of Bosnia and Herzegovina provides that a questioned witness "cannot be a person who by his/her statement would violate the duty of professional secrecy". As that person is classified as "... a journalist to protect sources of information, unless if exempt from that duty by a special regulation or statement of the person who benefits from the secret being kept".²⁸

There is an identical provision in the Criminal Procedure Code of the Federation B-H²⁹, in the Criminal Procedure Code of the Republika Srpska³⁰ in the Criminal Procedure Code of the Brcko District of Bosnia and Herzegovina.³¹ However, four criminal codes in force in Bosnia and Herzegovina³² define illegal obtaining of classified information and unauthorised use, which is a criminal offense. This, in theory, might refer to the press, although so far there were no court proceedings against journalists to run based on the unlawful obtaining confidential data and unauthorized use. Here is the following Article 164 of the Criminal Code of Bosnia and Herzegovina relating to this question:

"(1) An official or responsible person in the institutions of Bosnia and Herzegovina or a military person, who is authorized to classify data or to access secret data and who without authorisation

²⁸ Article 82 of the Criminal Procedure Code (Official Gazette, Nos. 03/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09)

²⁹ Article 96 of the Law on Criminal Procedure of the Federation of BiH (Official Gazette of the Federation of Bosnia and Herzegovina, Nos. 35/03, 37/03, 56/03)

³⁰ Article 147 of the Criminal Procedure of the Republika Srpska (Official Gazette of the Republika Srpska, no. 53/12)

³¹ Article 82 of the Law on Criminal Procedure of Brcko District of Bosnia and Herzegovina (Official Gazette of the Brcko District of Bosnia and Herzegovina, no. 44/10)

³² The Criminal Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, Nos. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10); The Criminal Code of the Federation of Bosnia and Herzegovina (FBiH Official Gazette, 37/03, 21/04, 69/04, 18/05, 42/10 and 42/11); The Criminal Code of the Republika Srpska (RS Official Gazette No. 108/04, 37/06, 70/06 and 73/10) and the Criminal Code of Brcko District of Bosnia and Herzegovina (Official Gazette of BD, No. 6/05 and 21/10)

communicates, delivers or otherwise makes available classified information, or obtain secret information with the aim of conveying it to an unauthorized person, shall be punished by imprisonment for six months to five years.

(2) The sentence referred to in paragraph (1) of this Article shall be imposed when, in order to make an unauthorized use, illegally obtaining classified information or who communicates, delivers or in some other way makes available classified information without permission, and when communicates, delivers or otherwise make available or transmit in communicating, conveying or otherwise make available another fact or instrument which contains information and which he knows to have secret data and which the possession of an illegal manner.

(3) The prison sentence from one to ten years shall be imposed on whoever commits the offense referred to in paragraphs (1) and (2) of this Article: by greed; or in respect of data in accordance with the law as "strictly confidential" or with the degree "secret" or "top secret" or with the degree "top secret"; or for the purpose of communicating, conveying or otherwise making available classified information or its use outside of Bosnia and Herzegovina.

(4) If the criminal offense referred to in paragraphs (1), (2) and (3) of this Article, committed in time of war or imminent threat of war or a state of emergency or when an order was issued for the recruitment and employment of the Armed Forces of Bosnia and Herzegovina, the perpetrator shall be punished by imprisonment for five years. "

In addition to the Criminal Code of Bosnia and Herzegovina, the Law on Protection of Classified Information³³ establishes the illegality of acquiring the secret data. The Law on Protection of Classified Information explicitly states who has the access to classified information of a certain degree, and Article 10 provides that all citizens of Bosnia and Herzegovina who come into possession or gain access to classified information in a way that is not unlawful, undertake to preserve the data are secret. Therefore, "the criminal laws and the Law on Protection of Classified Information established the illegality of acquiring data as a condition for the crime."³⁴

It is interesting to note that in Bosnia and Herzegovina, unlike some other countries (e.g., Croatia), there are no regulations providing for violation of the confidentiality of journalists' sources in the context of criminal proceedings or for other reasons, such as "national reasons" or "core national interests", or in other circumstances. In some countries, the decision on the violation of the confidentiality of journalistic sources is issued by the judge (e.g. in Sweden and

³³ Law on protection of classified information of Bosnia and Herzegovina (Official Gazette B-H, 54/05 and 12/09), source: website of the Official Gazette of B-H
<http://www.slist.ba/secure/2005s/glasnik/Broj%2054/broj54.htm> (date of accessing the site on December 16, 2013)

³⁴Sevima Sali-Terzic, International standards related to freedom of expression, access to information and the protection of national security; Chapter 8: Restrictions on press freedom and the protection of national security in the publication Media Law in Bosnia and Herzegovina, editoris Mehmed Halilovic and Amer Dzihana, Internews in Bosnia and Herzegovina, Sarajevo, 2012, p. 229

Slovenia), or the main police officer and even the Minister of the Interior (in the UK). In Bosnia and Herzegovina what is also not overlooked is the possibility to search the premises or home media journalists, unlike the Canadian, German and British law, where there are "provisions of the special conditions for the search of press rooms."³⁵ In addition, there are no sanctions regarding the violation of the confidentiality of journalists' sources, done outside the legal requirements or concealing violations of the confidentiality of journalists' sources and the confidentiality of the investigation.

Regarding the self-regulatory mechanisms, the confidentiality of sources of information is as follows defined in the Press and Online Media Code of the Press Council in Bosnia and Herzegovina: "Whenever possible, journalists should rely on open, identified sources of information. These are to be preferred to anonymous sources, whose honesty and accuracy of the public cannot evaluate. Journalists have an obligation to protect the identity of those who provide information in confidence, regardless of whether or not they explicitly request confidentiality."³⁶ However, the self-regulatory body has so far primarily dealt with issues such as hate speech and discrimination in media (and most recently, in online media and comments), privacy, protection of minors, etc. The body has not seen explicit cases related to disclosure of sources; instead these cases occurred when dealing with e.g. defamation. Namely, according to defamation laws in B-H, when it comes to court proceedings, the courts assess the actions taken by the plaintiff regarding mitigating the consequences of defamatory speech. These actions of mitigation may be: turning to media outlet in question and asking for a retraction, or turning to the Press Council.

The procedure related to the Press Council includes submitting a complaint, which is then discussed by the Complaints Commission. In case the Press Council decides there was a violation of the right to honour and reputation (in line with the Press Code) and informs the media outlet about it, and if the media outlet does not publish a retraction/correction/apology, then the injured person can turn to the court. However, the practice has so far shown that high-profile plaintiffs (e.g. political figures) skip the step of involving the self-regulatory body altogether, thus no such defamation cases have been noticed before the Press Council. Similarly, the role of the Press Council may have been less significant in terms of protection of journalistic sources, because the issue of sources is most often the subject of topics on criminal activities, and offenses with a greater 'weight', thus these issues are more likely to become the subject of court proceedings than of the Complaints Commission.

³⁵ Alen Rajko, Protection of sources of information, Vol. 37 (2000), no. 1, 1.5.2000, p. 214, source: Hrcak - Portal of scientific journals of Croatian: http://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=43396 (date of accessing the site 16.12.2013.)

³⁶ Article 13 of the Press and online media, the Press Council in Bosnia and Herzegovina. Source: website of the Press Council of Bosnia and Herzegovina http://www.vzs.ba/index.php?option=com_content&view=article&id=218&Itemid=9&lang=bs (date of accessing the site 11.12.2013.)

On the other hand, the Press Council has so far served as a body which places a great importance on preserving freedom of expression and full respect of journalistic rights and freedoms in general. Therefore, this is one of the bodies which closely cooperate with the association of B-H Journalists which gathers journalists in the country through journalistic clubs in cities all over B-H. In practice, when coming across certain doubts, journalists often turn to this association for advice, and for consultancy when they face possible legal actions or even threats, chilling effect, etc. These steps are not prescribed by law, but they have become the practice in Bosnia and Herzegovina. B-H Journalists hence offers advice and guidance to journalists who come to them with an issue, and on some occasions contact the OSCE Media Freedom Representative, the Press Council, and others, who may voice their concerns about problems of journalists.

6. In the respective national legislation are the limits of non-disclosure of the information in line with the principles of the Recommendation No R (2000) 7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

Recommendation No R (2000) 7 sets out the basic principles of non-disclosure of journalistic sources in its Appendix. The first principle is the right of non-disclosure of journalists. Domestic law and practice in member states should provide explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the principles established herein, which are to be considered as minimum standards for the respect of this right. The question of first principle has already been answered in within the first question of this paper therefore it does not require additional analysis.

The second principle broadens the scope of protection to persons who by their professional relations come to know of information identifying a source. The same provision that protects journalists also protects all other persons that are professionally engaged:

“The right to disclose the identity of a confidential source is extended to any other natural person involved in proceedings under this law, and that as a result of their professional relationship with a journalist or other person within the meaning of paragraph 1 of this Article, find out the identity of a confidential source of information.”

The third principle requires that the right of journalists not to disclose information identifying a source must not be a subject to other restrictions than those mentioned in Article 10, paragraph 2 of the Convention. B-H Constitution declares that: “The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its

Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law” (Article 2 paragraph 2). Therefore it can be concluded that the national legislation is in accordance to the third principle.

The fourth principle requires that authorities have alternative evidence to journalistic sources in case of alleged infringement of the honour or reputation of a person. In Bosnia and Herzegovina defamation has been decriminalized since 2002, which means that there cannot be criminal sanctions, fines or imprisonment, or a person having criminal records for making a false statement, and state authorities no longer investigate defamation. It is up to individuals, whose reputation or honour has been allegedly damaged to start a civil procedure against journalists. Therefore, the question of this principle is obsolete when it comes to B-H.

The fifth principle prescribes conditions concerning disclosures. Criminal Procedure Law of Bosnia and Herzegovina prescribes that persons that can violate their duty to keep professional secret by giving testimony, cannot be processed as a witness. Therefore, all the questions that arise in regards of principle 5 are not present in the case of Bosnia and Herzegovina, since journalists do not have an obligation to share their sources under any circumstances.

The sixth principle deals with interception of communication, surveillance and judicial search and seizure. In criminal procedure laws of Bosnia and Herzegovina, these are considered to be special investigative actions, and are subjected to a specific set of rules. These special investigative actions can be considered as alternative measures in the absence of the journalistic obligation to disclose his sources. Special investigative actions are aimed against alleged perpetrators of specific crimes, which are named:

- a) criminal offenses against the integrity of Bosnia and Herzegovina;
- b) criminal offenses against humanity and values protected under international law;
- c) criminal offenses of terrorism;
- d) criminal offenses for which, pursuant to the law, a prison sentence of minimum of three (3) years or more may be pronounced.

Argumentum a contrario it can be concluded that these measures will not be applied if their purpose is to circumvent the right of journalists not to disclose information identifying a source. Since the disclosure of journalist sources as a journalistic obligation does not exist in the B-H, we will analyse the proportionality of special investigative actions. It is regulated in the Criminal Procedure Code of B-H as follows:

Investigative action from Article 116. (2) of this law can be ordered for crimes:

- a) against the integrity of B-H
- b) against humanity and values protected by international law
- c) terrorism
- d) for crimes that can be punished by three years of law or a harder punishment.

Regarding the second part of this principle “Where information identifying a source has been properly obtained by police or judicial authorities by any of the above actions, although this might not have been the purpose of these actions, measures should be taken to prevent the subsequent use of this information as evidence before courts, unless the disclosure would be justified under Principle 3.”, the Criminal Procedure Law prescribes the following : “No data or information received through the undertaking of actions referred to in Article 116 of this Code

shall be used as evidence if they are not related to a criminal offense referred to in Article 117 of this Code.”

The seventh principle establishes protection against self-incrimination. Article 78 of Criminal procedure law prescribes the right against self-incrimination, which has not been derogated by any *lex specialis* provision in other B-H laws, therefore it can be concluded that the requirements of this principle have been fulfilled.

The other two questions asked (Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information can be answered together. Given the analysis of the principles of the Recommendation and adequate legal frame in B-H, we can conclude that there are no special provisions that regulate the obligation of journalists to disclose their sources; on the contrary, they are not obliged to disclose them at any circumstances, given the Article 82 of Criminal Procedure Law. However, the authorities do not have a specific regime of alternative measures to be applied in order to protect the right of journalists not to disclose information.

7. In the Recommendation No R (2000) 7 the following principles should be respected when the necessity of disclosure is stated: absence of reasonable alternative measures, outweighing legitimate interest (protection of human life, prevention of major crime, defence of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the disclosure outweigh the interest in the non-disclosure?

As it has been answered through questions raised in the previous part of the paper, journalists in B-H do not have an obligation to share their sources under any circumstances. Journalists in the B-H therefore enjoy more protection regarding this issue, since their confidentiality cannot be endangered. That being said, this question cannot be posed in the context of B-H legislation. However, we still believe that this question needs to be regulated in B-H therefore we have decided to analyse the Polish legislation towards this question, as an example of successful legislative intervention in the case of necessity.

In comparison, many other European countries have such provisions in their criminal codes or criminal procedure laws. For example, laws of the Republic of Poland do not allow breach of confidentiality of journalistic sources because of “reasons of state” or “fundamental interest of the state“. However, a more precise provision can be found in Article 240 of Criminal Code, which prescribes that a person that has confidential information about preparation, attempt or commitment of serious crimes (genocide, coup d'etat, endangering the independence of the Republic, seceding a part of the Republic, violent change of constitutional order, attack on a state authority based on constitution, espionage, assassination of head of state, assassination of a unit of Armed forces of Poland, murder, causing life-threatening injuries or property in a large

extent, acts of terrorism kidnapping of planes or ships and taking hostages) does not promptly inform an agency responsible for prosecuting such offences shall be subject to the penalty of deprivation of liberty for up to 3 years . In regards of the conditions set in Article 10 (2), it is obvious that all of the “serious crimes“ mentioned in the Penal Code of the Republic of Poland represent limitations “in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime“. In Poland only a court (judge) can decide on breach of confidentiality of journalistic sources.

In regards to the principles of the Recommendation, the Penal code doesn't provide “reasonable alternative measures” prescribed in the Principle 3, since it obliges anyone that has confidential information to promptly inform a responsible agency. However, given the crimes, and the fact that court or a judge decides on breach of confidentiality, the request enshrined in the third principle (an overriding requirement of the need for disclosure is proved, the circumstances are of a sufficiently vital and serious nature, the necessity of the disclosure is identified as responding to a pressing social need, and member states enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights) are fulfilled.

Polish Penal Code does not deal with the infringement of the honour of reputation of a person therefore the questions posed in principle 4 are not compatible with the Polish legislation. In regards to the principle 5, several things are to be noted. Point a. of the principle has not been fulfilled by the Polish legislation, since it obliges the person that have the information to come to the authorities, not the other way around. Since the Penal Code does not provide the right not to disclose information identifying a source, the requests of point b. are also obsolete. Requests of the point c. are fulfilled, since only a court/judge can decide on breach of confidentiality. Verdicts for all crimes prescribed in the Penal Code are subjected to judicial review, including the crime prescribed by Article 240. Therefore, requests of point d. are also fulfilled. Penal code does not deal with the requests posed in point e. of principle 5.

This kind of legislation enables the state to protect its core interests, and by listing out the possible situations, and not *exempli causa*, it provides predictability for interested parties, which in most cases are journalists. Polish laws, however, do not prescribe a possibility of alternative measures that can be enforced in order to prevent disclosure of journalistic sources.

8. In the light of the case-law of the European Court of Human Rights how do national courts apply the perspective laws with regard to the right to protect sources? In particular, how do they balance the different interests at stake?

Unfortunately, Bosnia and Herzegovina has a scarcity of jurisprudence regarding protection of journalistic sources. More precisely, there is no single judgment which would involve protection of journalist sources. Also, there were no cases against Bosnia and Herzegovina before European Court for Human rights regarding interference in rights guaranteed by the Article 10 of the European Convention on Human Rights.

There are only two cases regarding disclosure of sources. They have ended in the phase of investigation.

8.1. Case “Dva papka”

8.1.1. Circumstances of the Case

The first case is called affair “*Dva papka*”. The most popular Bosnian website www.klix.ba in November 2014, after general elections in October 2014, published a video³⁷. In that video, prime minister of Republika Srpska, Željka Cvijanović, speaks about bribing members of Republika Srpska parliament in order to form parliamentary majority. The video shocked and disturbed the public.³⁸ The affair was later on named as “*Dva papka*” (“two assholes”) referring to two members of the parliament who were bribed. Later, the Dutch forensic experts found that the video was authentic.³⁹ From the moment of published the video, Klix.ba was under political pressure to reveal its sources.⁴⁰ At the beginning, the police of Republika Srpska was claiming that video was mounted. Later, the police of Republika Srpska with the presence of prosecutor of the Special Prosecutor Office of Republika Srpska, conducted an informative conversation with journalists of Klix.ba. During such conversations on December 4 2014, investigators tried to get name of the source which delivered the video. After journalists refused to identify the source, investigators tried by quoting the law by which journalists are allegedly criminally responsible and by which they are allegedly threatened with a prison sentence⁴¹. *Due to*

³⁷ Klix.ba u posjedu snimke na kojem Cvijanović govori o „kupovini” zastupnika, <http://www.klix.ba/vijesti/bih/klix-ba-u-posjedu-snimka-na-kojem-cvijanovic-govori-o-kupovini-zastupnika/141115059>, accessed January 15 2016 [Bosnian]

³⁸ Article 10 of the ECHR protect the information that may „offend, shock or disturb the State or any sector of the population.” *Handyside v United Kingdom* [1976] 1 E.H.R.R. 737 § 49

³⁹ Holandski forenzičari potvrdili: Snimak Željke Cvijanović o "dva papka" je autentičan, <http://www.klix.ba/vijesti/bih/holandski-forenzicari-potvrdili-snimak-zeljke-cvijanovic-o-dva-papka-je-autentican/150827052>, accessed January 15 2016 [Bosnian]

⁴⁰ MUP RS-a vrši pritisak na portal Klix.ba zbog afere prisluškivanja Željke Cvijanović, <http://www.klix.ba/vijesti/bih/mup-rs-a-vrsi-pritisak-na-portal-klix-ba-zbog-afere-prisluškivanja-zeljke-cvijanovic/141204057>, accessed January 16 2016 [Bosnian]

⁴¹ Article 147 of Criminal code of RS (Official Gazette No. 49/03, 108/04, 37/06, 70/06, 73/10, 1/12, 67/13) refers to the crime: Unauthorised wiretapping and audio recording:

(1) The one who, with special devices without authorization taps or records a conversation or a statement that it is not intended to him/her, or enables an uninvited person to have knowledge of a conversation or statement that was unauthorized interception or recorded, shall be punished by a fine or imprisonment up to one year.

(2) By the sentence referred to in paragraph 1 of this Article, will be punished one who records a statement that it intended to him/her, without the knowledge and consent of the person who gives statement, with the intention of abuse of such a statement, or one who provides with such statement an unauthorized person.

(3) If offenses referred to in para. 1 and 2 of this Article is committed by an official in discharge of duty, he/she shall be punished with imprisonment up to three years.

*the fact that as journalists we have every right to protect our sources, this interview we realised as a serious pressure on the media, and certainly we will look for the protection of journalists' associations and other institutions in BiH.*⁴² Prosecutors were threatening by charges for crime of unauthorised wiretapping and audio recording.

8.1.2. The search of the Klix.ba facilities

The pressure culminated by the search of Klix.ba facilities on December 29, 2016.⁴³ For more than seven hours, the members of Republika Srpska police by the warrant of Special prosecutor office of RS and Sarajevo Municipal Court were searching the facilities looking for something which could lead them to the source which delivered the video. Besides the documents, investigators exempted hard disk drives of all computers in the newsroom, private cell phones, USB sticks, CDs, notebooks and other stationery. The search provoked many reactions, including the reaction of Dunja Mijatović, OSCE Representative on Freedom of Media. Dunja Mijatović stated the following: *Protection of sources is a crucial element of investigative journalism. Detention, interrogation and pressure on members of the media to reveal their sources is simply unacceptable.*⁴⁴ Madam Representative labelled search of klix.ba facilities as *grave and disproportionate intrusion into the journalists' right to report about public interest issues.*

A few days later, on January 5 2016, deciding on complaint of Klix.ba on search warrant, Sarajevo Municipal Court found a warrant to be illegal, as it was not issued in accordance with the law and contrary to the Articles 8 and 10 of European Convention on Human Rights.⁴⁵ Municipal Court stated that the first instance Court did not examine conditions under which it is allowed to interfere with human rights proscribed by the ECHR and that the explanation of the warrant for the search contained no basis or purpose of the search. Such warrant was also contradictory to the Recommendation No. R (2000) 7.⁴⁶ The Court ordered the Police of Republika Srpska to return confiscated documents and property of Klix.ba.

8.1.3. The search of the Klix.ba facilities was unconstitutional

⁴² MUP RS-a vrši pritisak na portal Klix.ba zbog afere prisluškivanja Željke Cvijanović, <http://www.klix.ba/vijesti/bih/mup-rs-a-vrsi-pritisak-na-portal-klix-ba-zbog-afere-prisluškivanja-zeljke-cvijanovic/141204057>, accessed January 16 2016 [Bosnian]

⁴³ MUP RS više od sedam sati pretresao prostorije Klix.ba zbog slučaja "Dva papka", <http://www.klix.ba/vijesti/bih/mup-rs-vise-od-sedam-sati-pretresao-prostorije-klix-ba-zbog-slucaja-dva-papka/141229061>, January 10 2016 [Bosnian]

⁴⁴ Raid against Klix.ba a clear attack on media freedom and journalists' right to protect sources in Bosnia and Herzegovina, says Mijatović, <http://www.osce.org/fom/133056>, accessed January 15 2016 [Bosnian]

⁴⁵ Pročitajte šta o pretresu Klix-a piše u odluci Vijeća Općinskog suda u Sarajevu, <http://www.klix.ba/vijesti/bih/procitajte-sta-o-pretresu-klix-a-pise-u-odluci-vijeca-opcinskog-suda-u-sarajevu/150106109#1>, accessed January 14 2016 [Bosnian]

⁴⁶ Foundation Public Law Centre, Zakonska zaštita novinarskih izvora, http://www.fcip.ba/templates/ja_avian_ii_d/images/green/Prikaz_CJP.pdf, accessed April 10 2016 [Bosnian]

In conclusion, search of Klix.ba facilities was unconstitutional⁴⁷ as it was not in accordance with article 10 of the ECHR⁴⁸. The ECtHR states that „an order of source disclosure...cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest“.⁴⁹ The Sarajevo Municipal Court did not provide any arguments that the search was in the public interest. Exactly the opposite, there was a public interest in informing the public about the video in question as it refers to the matter of public interest: forming the government as one of the main postelection events in a democratic societies. Mehmed Halilović, media law expert, stated that “in this concrete case, Special Prosecutor of Republika Srpska is protecting certain persons and officials, not right of the public to receive information which media are obliged and have duty to publish.”⁵⁰ „The freedom of political debate is at the very core of the concept of a democratic society.“⁵¹ The Klix.ba was without a doubt exercising its role of public-watchdog⁵².

8.2. Case regarding investigation against Editor Senad Avdić and lawyer Dražen Zubak

The second case would be the investigation against the editor of political magazine Senad Avdić and lawyer Dražen Zubak. Investigation was conducted by Canton Sarajevo Prosecutor Office in order to find out information about persons who submitted allegedly “secret documents” to Mr. Avdić and Zubak. In its reaction, the Association B-H Journalists, stated that “the use of unnamed sources of information is a fundamental right and a legitimate journalistic research process of journalists who wish to publish information of public importance”.⁵³ In its reaction, the Canton Sarajevo Prosecutor Office, stated there was no an investigation against Mr. Avdić and Mr. Zubak and that they were called to present their statement as witnesses and remembered that they were not obliged to give their statement if they would break a keeping professional secret.⁵⁴

⁴⁷ Šaršević Edin, Da li je pretres redakcijske prostorije neustava? Slučaj portala Klix.ba, Foundation Public Law Centre http://www.fcjp.ba/templates/ja_avian_ii_d/images/green/Edin_Sarcevic3.pdf accessed April 10 2016 [Bosnian]

⁴⁸ See case: *ressiot and others v France* App no 15054/07 and 15066/07 (ECtHR 28 June 2012)

⁴⁹ *Goodwin v the United Kingdom* [1996] 22 E.H.R.R. 123 § 39

⁵⁰ Završen pretres redakcije bh portala <http://balkans.aljazeera.net/vijesti/policija-pretresa-bh-portal-klixba-1> accessed April 10 2016 [Bosnian]

⁵¹ *Lingens v Austria* [1986] 8 E.H.R.R. 407 § 42

⁵² *Thorgeirson v Iceland* App no 13778/88 (ECtHR 25 June 1992) § 63

Barthold v Germany [1985] 7 EHRR 383 § 58

⁵³ Protest otvaranju krivične istrage protiv urednika i advokata Slobodne Bosne http://www.bhnovinari.ba/index.php?Option=com_content&view=article&id=872%3Aprotest-povodom-otvaranja-krivine-istrage-protiv-urednika-i-advokata-slobodne-bosne&catid=62%3AAsaopenja&Itemid=240&lang=bs accessed January 17 2016 [Bosnian]

⁵⁴ DALIDA BURZIĆ ODGOVORILA „SB“ I UDRUŽENJU NOVINARA: Nismo otvorili istragu protiv Avdića i Zubaka http://www.slobodnbosna.ba/vijest/26052/dalida_burzic_odgovorila_sb_i_udruzenju_novinar_a_nismo_otvorili_istragu_protiv_avdica_i_zubaka.html, accessed January 21 2016 [Bosnian]

8.3. Conclusion

Mehmed Halilović, former deputy Ombudsman of Federation for Bosnia and Herzegovina for the media, stated that journalists in B-H often refer to protection of sources when it is not necessary. "So far in court proceedings, as far as I know there were no cases in which journalists based its defence on protection of journalist sources. The importance of the obligation to protect sources is huge for the media however too much use could depreciate it. In fact, journalists always take responsibility for the content of the information, so the reference to confidential sources only protects those sources however not the journalists of their responsibility".⁵⁵

It seems that some journalists understand the right to protect their sources as a way of avoiding responsibility for possible defamation. That is how, during the judicial proceedings, journalists state that the certain information they got from confidential sources and therefor they reveal it, and at the same time they did not conduct a further check of its truthfulness.⁵⁶

9. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

Criteria for using electronic surveillance and anti-terrorism laws are prescribed in the Criminal Procedure Act of Bosnia and Herzegovina. The Criminal Procedure Code of Bosnia and Herzegovina and same Acts at the entity level, prescribe when it may come to a search of the person or facilities, application of measures such as secret surveillance and technical recording of persons and objects, surveillance and technical recording of telecommunications, etc. The Criminal Procedure Act in its Article 116 defines the criteria for conducting special investigative actions: "Any person against whom there are grounds for suspicion that he/she alone or with others involved or participate in the commission of the criminal offense under Article 117⁵⁷ of

⁵⁵ Nikola Jovanović, Moj izvor je moja tajna, <http://www.media.ba/bs/novinarstvo-tehnikiforme-novinarstvo-tehnik-i-forme/moj-izvor-je-moja-tajna> accessed January 19 2016 [Bosnian]

⁵⁶ Srdić Mladen, Kratka analiza sudske prakse u primjeni Zakona o zaštiti od klevete, http://vsudfbih.pravosudje.ba/vstv/faces/vijesti.jsp?id=32317&vijesti_jezik=B accessed January 20 2016 [Bosnian]

⁵⁷Article 117 (The crimes for which the special investigative actions can be determined):

Measures referred to in Article 116, paragraph 2 of this law can be determined for the following crimes:

- a) against the integrity of Bosnia and Herzegovina,
- b) against humanity and values protected by international law,

this law can be determine the special investigative measures, if they otherwise cannot obtain evidence or that their acquisition was associated with great difficulty.”⁵⁸ Among other special investigative actions listed in Article 116 (2), we consider that in terms of the protection of journalistic sources of information most important are:

- surveillance and technical recording of telecommunications;
- access to computer systems and computerized data processing;
- surveillance and technical recording of premises.

The same Act scaled search of premises, other facilities and moveable property in its Article 51, which states that "A search of premises and other facilities of the suspect, accused or other persons, as well as their personal property outside the premises may be conducted only when there are sufficient grounds to suspect that among them are the perpetrator, the accessory, traces of a criminal offense or objects relevant to the proceeding.”⁵⁹

Therefore, from these legal norms, it is evident that they are applicable only if journalistic sources are directly connected with criminal offenses. However, in practice, these provisions rarely occur in connection with identifying journalistic sources, since they are generally related to the perpetration of other crimes. One of the cases that drew the attention of the public, and is related to the protection of journalistic sources, was the already mentioned case of a search of the premises of one of the most popular web portals in the country - www.klix.ba, known as case “Dva papka” which was described in previous question. In conclusion it can be noted that the Laws⁶⁰ are accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions, but the question of implementation of the law is often irregular, which can be seen in the above example of the search of the premises of the web portal Klix.ba.

Related to this, accessibility and precision of the law have been the subject of discussion in front of the ECtHR in the judgment *Sunday Times v. United Kingdom*⁶¹, where the Court held that the fulfilment of the requirement "prescribed by law" requires the fulfilment of two cumulative set of conditions: (1) the law has to be sufficiently available (the possibility of informing the citizens), and (2) the law has to be so precise to enable the citizen to regulate his/her behaviour, i.e. to be aware of all the consequences that his/her actions can cause. On the basis of the ECtHR' opinion, and bearing in mind the way in which mentioned laws in Bosnia and Herzegovina are formulated and regularly published, we believe that the problem lies in the question of their implementation, and not a question of quality of laws.

c) terrorism,

d) for which the law may impose a sentence of imprisonment of three years or more.

⁵⁸The Criminal Procedure Act of Bosnia and Herzegovina, Article 116 (1).

⁵⁹The Criminal Procedure Act of Bosnia and Herzegovina, Article 51 (1).

⁶¹*Sunday Times v UK* App no. 6538/74 (ECtHR, April 26 1979).

10. Can journalists rely on encryption and anonymity online to protect themselves and their sources against surveillance?

The right to privacy and the right to freedom of expression entail a corollary right to communicate anonymously. Allowing people to speak anonymously has long been recognised as worthy of protection in order to encourage communication that might otherwise invite reprisal or stigmatisation, from political pamphleteering, to anonymous tips for journalists, to blowing the whistle on improprieties in the workplace or government. Anonymity, of course, may also be sought by persons engaged in criminal activity, so it is not an absolute right. But neither may the freedom to communicate anonymously be subject to such restrictions as would eliminate the right *a priori*.⁶²

Encryption and anonymity provide individuals and groups with a zone of privacy online to hold opinions and exercise freedom of expression without arbitrary and unlawful interference or attacks. Echoing Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Covenant on Civil and Political Rights specifically protects the individual against “arbitrary or unlawful interference with his or her privacy, family, home or correspondence” and “unlawful attacks on his or her honour and reputation”, and provides that “everyone has the right to the protection of the law against such interference or attacks”. The General Assembly of the UN, the United Nations High Commissioner for Human Rights and special procedure mandate holders have recognised that privacy is a gateway to the enjoyment of other rights, particularly the freedom of opinion and expression.⁶³

Encryption and anonymity are especially useful for the development and sharing of opinions, which often occur through online correspondence such as e-mail, text messaging, and other online interactions. Encryption provides security so that individuals are able “to verify that their communications are received only by their intended recipients, without interference or alteration, and that the communications they receive are equally free from intrusion”.⁶⁴ Given the power of metadata analysis to specify “an individual’s behaviour, social relationships, private preferences and identity”,⁶⁵ anonymity may play a critical role in securing correspondence. Besides correspondence, international and regional mechanisms have interpreted privacy to involve a range of other circumstances as well.⁶⁶

⁶² https://www.hrw.org/sites/default/files/related_material/EncryptionandAnonymity_Feb1015.pdf, accessed February 15 2016.

⁶³ [General Assembly resolution 68/167, A/HRC/13/37](#) and [Human Rights Council resolution 20/8](#).

⁶⁴ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/CallForSubmission.aspx>, accessed February 23 2016.

⁶⁵ *Ibid.*

⁶⁶ Human Rights Committee, general comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation. See also European Court of Human Rights, factsheets

Individuals and civil society are subjected to interference and attack by State and non-State actors, against which encryption and anonymity may provide protection. In Article 17 (2) of the International Covenant on Civil and Political Rights, States are obliged to protect privacy against unlawful and arbitrary interference and attacks. Under such an affirmative obligation, States should ensure the existence of domestic legislation that prohibits unlawful and arbitrary interference and attacks on privacy, whether committed by government or non-governmental actors. Such protection must include the right to a remedy for a violation.⁶⁷ In order for the right to a remedy to be meaningful, individuals must be given notice of any compromise of their privacy through, for instance, weakened encryption or compelled disclosure of user data.

Journalists in Bosnia and Herzegovina are generally not inclined to encryption and anonymity online in order to protect themselves and their sources of surveillance. The fact that surveillance of journalists and their sources is not known to the public does not exclude this possibility, because the technology for monitoring the road (in) directly in the hands of powerful politicians who can point to powerful weapon against anyone, including journalists.⁶⁸

11. Are whistle-blowers explicitly protected under law protecting journalistic sources? Is there another practice protecting whistle-blowers? Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

Laws that protect journalistic sources are Laws on Protection against Defamation. However, they do not contain any provisions regarding protection of whistle-blowers.

Another practice can be presented through the Law on Protection of Whistle-Blowers in Institutions of Bosnia and Herzegovina (Off. Gazette of B-H No. 100/13) is a *lex specialis* that protects whistle-blowers in institutions of Bosnia and Herzegovina and legal entities founded by Bosnia and Herzegovina. The law regulates the following: the status of persons who report corruption in institutions of B-H and legal entities founded by B-H, procedure of reporting, obligation of institutions regarding reporting corruption, procedure of protection of persons who report corruption and finally it proscribes sanction for violation of law provisions.

According to the Law, a whistle-blower is every person employed in institutions of Bosnia and Herzegovina and legal entities founded by B-H, who due to justified doubt or circumstances

ondata protection (www.echr.coe.int/Documents/FS_Data_ENG.pdf) and right to protection of one's image (www.echr.coe.int/Documents/FS_Own_image_ENG.pdf).

⁶⁷See Human Rights Committee general comment No.16 and general comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant; and CCPR/C/106/D/1803/2008.

⁶⁸Softveri za spijuniranje u BiH, <http://www.balkans.aljazeera.net/vijesti/softveri-za-spijuniranje-u-bih>, accessed February 23 2016 [Bosnian].

which indicate the existence of corruption in any institution of B-H, in good faith submits a complaint to the responsible persons or institutions according to this Law.

This definition is not completely in accordance with definition provided in Recommendation No. R (2014) 7. For the Law, whistle-blower is every person employed in state institutions, but the Recommendation provides protection also for whistle-blower employed in private sector. The Agency for Prevention of Corruption and Coordination of Fight against Corruption delivers to a person the status of whistle-blower.

The Law makes a distinction between two forms of reporting corruption: internal and external. One of the external forms is reporting to the public corruption or other forms of making information that indicates corruption available to the public. Conditions to do so are:

1. Whistle-blower believes that he/she will be exposed to the harmful measures of particular person,
2. In case of protected reporting, authorized subjects will not conduct adequate acts or evidences and information will be covered or destroyed
3. In case that, after reporting corruption, authorized subjects did not conduct adequate measures.

Before reporting corruption is unveiled, whistle-blower has to consider any damage which could result with reporting. In case of revealing a business secret in reporting corruption, the whistle-blower will not be considered materially, criminally or disciplinary responsible. Corruption report has to be made in good will that is defined as whistle-blower's attitude based on facts and circumstances about which he/she has his/her own knowledge and considers them true.

The law does not have any provisions prohibiting authorities and companies from identifying whistle-blowers.

12. Conclusion

We believe that in this paper we have presented the state of the protection of journalist sources in Bosnia and Herzegovina in a precise and correct manner, in line with available legislation.

The paper firstly emphasised the theoretical strength of laws in Bosnia and Herzegovina, which are mainly in line with international documents and modern standards of protection of freedom of expression. In fact, Bosnia and Herzegovina is one of the first countries in the region that abolished defamation as a criminal offense which resulted in the creation of three almost identical laws (two at entity levels and one at the district level) containing provisions that refer to protection of journalists in general and are applicable in a variety of situations. The laws on protection against defamation in B-H also contain the provision regarding the protection of journalistic sources, but this provision is rarely evoked as there have been almost no cases before courts in B-H that dealt with this issues. .

In addition to this, regulations in Bosnia and Herzegovina prescribe which persons have the privilege to disclose identity of confidential source from which they got certain information,

among them, journalists are set at the first place. However, this part may be concluded to be problematic, as with the arrival of new technologies and the emergence of new media, the term 'journalist' has become much wider and today we even have citizen journalists which are not associated with a specific media outlets. More precisely, neither legislation nor journalist associations provide definition of journalist. In practice, in B-H, a journalist is only a person who collects information and has a professional press card, issued by media for which person works.

This may prove to be increasingly troublesome as the news consumption shifts and as online media take the priority over traditional media, thus gathering a variety of actors who could fall under the definition of a journalist.

Laws also contain protection for certain documents or facts which may reveal the identity of a source. The right to disclose the identity of a confidential source is not under any circumstances limited to proceedings conducted in terms of the law. In addition, the Criminal Procedure Code of Bosnia and Herzegovina states that "cannot be questioned as a witness a person who by his statement would violate the duty of professional secrecy".

In general, the regulation is mostly in accordance with the international principles, except those which deal with the journalistic obligation to disclose his/her sources, since those provisions do not exist in the laws of B-H. In other words, Bosnia and Herzegovina has a paucity jurisprudence regarding protection of journalistic sources. It is therefore important to notice that the research has reflected on the self-regulatory body in B-H, the Press Council, as well as the OSCE Mission in B-H and the Association of B-H journalists which have on several occasions mentioned the issue of protection of journalistic sources.

When it comes to encryption and anonymity, the research has discussed the situation in B-H by focusing on the fact that journalists in Bosnia and Herzegovina are generally not inclined to encryption and anonymity online in order to protect themselves and their sources of surveillance. The fact that surveillance of journalists and their sources is not known to the public does not exclude this possibility, because the technology for monitoring the road (in) directly in the hands of powerful politicians who can point to powerful weapon against anyone, including journalists. The research has also reflected on the concept of a whistle-blower, which is, according to domestic legislation: every person employed in institutions of Bosnia and Herzegovina and legal entities founded by B-H, who due to justified doubt or circumstances which indicate the existence of corruption in any institution of B-H, in good faith submits a complaint to the responsible persons or institutions according to this Law.

Overall, the research has offered an entirely new insight into the current state in Bosnia and Herzegovina when it comes to protection of journalistic sources. Its contribution lies in the fact that the literature and research on the topic is extremely scarce or even non-existent, and even domestic courts have rarely seen this unexplored field when dealing with cases referring to media. Only few cases related to this issue have been noticed in B-H, and thus this research can conclude that the lack of specific legislation in this respect may bring the problem to full enjoyment of journalistic rights and freedoms, but on the other hand, that journalists in B-H are very often under strong political pressures, threats, etc. Thus they are under the chilling effect,

and, most importantly, unaware of their rights under the existing legislation and under all international documents of which B-H is signatory.

13. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

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- Constitution of RS
- Constitution of FB-H
- Constitution of BD
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- Criminal Code of FB-H(Official Gazette No. 36/03, 37/03, 21/04, 69/04, 18/05)
- Criminal code of RS (Official Gazette No. 49/03, 108/04, 37/06, 70/06)
- Criminal code of BD (Official Gazette No. 10/03, 45/04, 06/05, 21/10, 52/11)
- Criminal Procedure Code of B-H(Official Gazette No. 03/03,32/03,36/03,26/04,63/04,13/05,48/05,46/06,76/06,29/07,32/07,53/07,76/07,15/08,58/08,12/09,16/09,93/09,72/13)
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14. Table of Provisions

Provisions in native language	Corresponding translation
<p>Zakon o zaštiti od klevete Federacije Bosne i Hercegovine</p> <p>Član 9.</p> <p>Zaštita povjerljivih informacija</p> <p>1. Novinar i drugo fizičko lice koje je redovno ili profesionalno uključeno u novinarsku djelatnost traženja, primanja ili saopćavanja informacija javnosti, koje je dobilo informaciju iz povjerljivog izvora ima pravo da ne otkrije identitet tog izvora. Ovo pravo uključuje i pravo da ne otkrije bilo koji dokument ili činjenicu koji bi mogli razotkriti identitet izvora, a naročito usmeni, pismeni, audio, vizuelni ili elektronski materijal. Pravo na neotkrivanje identiteta povjerljivog izvora nije ni pod kakvim okolnostima ograničeno u postupku koji se vodi u smislu ovog zakona.</p> <p>2. Pravo na neotkrivanje identiteta povjerljivog izvora ima i svako drugo fizičko lice koje učestvuje u postupku u smislu ovog zakona, a koje kao rezultat svog profesionalnog odnosa sa novinarom ili drugim licem u smislu stava 1. ovog člana, sazna identitet povjerljivog izvora informacija.</p>	<p>The Law on Protection against Defamation of the Federation of Bosnia and Herzegovina</p> <p>Article 9</p> <p>Protection of Confidential Sources</p> <p>1. A journalist, and any other natural person regularly or professionally engaged in the journalistic activity of seeking, receiving or imparting information to the public, who has obtained information from a confidential source has the right not to disclose the identity of that source. This right includes the right not to disclose any document or fact which may reveal the identity of the source particularly any oral, written, audio, visual or electronic material. Under no circumstances shall the right not to disclose the identity of a confidential source be limited in proceedings under this Law.</p> <p>2. The right not to disclose the identity of a confidential source is extended to any other natural person involved in proceedings under this Law who, as a result of his or her professional relationship with a journalist or other person referred to in paragraph 1 of this Article, acquires knowledge of the identity of a confidential source of information.</p>
<p>Zakon o zaštiti klevete Republike Srpske</p>	<p>The Law on Protection against Defamation of the Republika Srpska</p>

<p>Član 10. Zaštita povjerljivih informacija</p> <p>1. Novinar, kao i svako drugo fizičko lice koje je redovno ili profesionalno uključeno u novinarski posao traženja, primanja ili saopštavanja informacija javnosti, koju je dobio informaciju od povjerljivog izvora nije dužan saopštiti izvor informacije. Ovo pravo uključuje pravo da ne otkrije bilo koji dokumenat koji bi mogao da razotkrije identitet izvora, naročito uključujući: usmene, pisane, audio, vizuelne ili elektronske materijale. Ni pod kakvim okolnostima pravo na neotkrivanje identiteta povjerljivog izvora nije ograničeno kontekstom postupka u smislu ovog zakona.</p> <p>2. Pravo na neotkrivanje identiteta povjerljivog izvora odnosi se na svako drugo fizičko lice koje učestvuje u postupku u skladu sa ovim zakonom, a koje kao rezultat svog profesionalnog odnosa sa novinarom ili drugim licem iz stava 1. ovog člana, sazna identitet povjerljivog izvora informacije..</p>	<p>Article 10 Protection of Confidential Sources</p> <p>1. A journalist, and any other natural person regularly or professionally engaged in the journalistic activity of seeking, receiving or imparting information to the public, who has obtained information from a confidential source is not obliged to disclose the identity of that source. This right includes the right not to disclose any material which may reveal the identity of the source including, but not limited to, any oral, written, audio, visual or electronic material. Under no circumstances shall the right not to disclose the identity of a confidential source be limited in proceedings under this Act.</p> <p>2. The right not to disclose the identity of a confidential source is extended to any other natural person involved in proceedings under this Act who, as a result of his or her professional relationship with a journalist or other person referred to in subsection 1. of this Article, acquires knowledge of the identity of a confidential source of information.</p>
<p>Zakon o zaštiti klevete Brčko Distrikta</p> <p>Član 9. Zaštita povjerljivih informacija</p> <p>1. Novinar i drugo fizičko lice koje je redovno ili profesionalno uključeno u novinarsku djelatnost traženja, primanja ili saopćavanja informacija javnosti, koje je dobilo informaciju iz povjerljivog izvora ima pravo da ne otkrije identitet tog izvora.</p>	<p>The Law on Protection against Defamation of the Brčko Distrikt</p> <p>Article 9 Protection of confidential sources</p> <p>1. A journalist, and any other natural person regularly or professionally engaged in the journalistic activity of seeking, receiving or imparting information to the public, who has obtained information from a confidential source is not obliged to disclose the identity of that source.</p>

<p>Ovo pravo uključuje i pravo da ne otkrije bilo koji dokument ili činjenicu koji bi mogli razotkriti identitet izvora, a naročito usmeni, pismeni, audio, vizuelni ili elektronski materijal. Pravo na neotkrivanje identiteta povjerljivog izvora nije ni pod kakvim okolnostima ograničeno u postupku koji se vodi u smislu ovog zakona.</p> <p>2. Pravo na neotkrivanje identiteta povjerljivog izvora ima i svako drugo fizičko lice koje učestvuje u postupku u smislu ovog zakona, a koje kao rezultat svog profesionalnog odnosa s novinarom ili drugim licem u smislu stava 1 ovog člana, sazna identitet povjerljivog izvora inform</p>	<p>This right includes the right not to disclose any material which may reveal the identity of the source including, but not limited to, any oral, written, audio, visual or electronic material. Under no circumstances shall the right not to disclose the identity of a confidential source be limited in proceedings under this Act.</p> <p>2. The right not to disclose the identity of a confidential source is extended to any other natural person involved in proceedings under this Act who, as a result of his or her professional relationship with a journalist or other person referred to in subsection 1. of this Article, acquires knowledge of the identity of a confidential source of information</p>
<p>Ustav B-H</p> <p>(Član 2)</p> <p>Sva lica na teritoriji Bosne i Hercegovine uživaju ljudska prava i slobode iz stava 2. ovog člana, što uključuje: h) Slobodu izražavanja.</p> <p>(Član 2, stav 2)</p> <p>Prava i slobode predviđeni u Evropskoj konvenciji za zaštitu ljudskih prava i osnovnih sloboda i u njenim protokolima se direktno primjenjuju u Bosni i Hercegovini. Ovi akti imaju prioritet nad svim ostalim zakonima.</p>	<p>The Constitution of the Bosnia and Herzegovina</p> <p>(Article 2)</p> <p>All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include: h) freedom of expression.</p> <p>(Article 2, paragraph 2)</p> <p>The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.</p>
<p>Ustav Federacije Bosne I Hercegovine</p>	<p>The Constitution of the Federation of</p>

<p>(Član 2, paragraph 2, tačka 1)</p> <p>Sva lica na teritoriji Federacije Bosne i Hercegovine uživaju ljudska prava i slobode i: 1) temeljnu slobodu: slobodu izražavanja i štampe.</p>	<p>Bosnia and Herzegovina</p> <p>(Article 2, paragraph 2, point 1)</p> <p>All persons within the territory of Federation of Bosnia and Herzegovina shall enjoy: 1) fundamental freedom: freedom of expression and media.</p>
<p>Ustav Republike Srpske</p> <p>(Član 2, paragraf 26)</p> <p>Zajamčena je sloboda tiska i drugih sredstava javnog priopćavanja. Slobodno je osnivanje novinskih i izdavačkih poduzeća, izdavanje novina i javno priopćavanje drugim sredstvima sukladno zakonu. Cenzura tiska i drugih vidova javnog priopćavanja je zabranjena. Sredstva javnog priopćavanja dužna su da pravodobno, istinito i objektivno obavješćuju javnost. Jamči se pravo na ispravak neistinitog obavješćivanja kojim se povređuje nečije pravo ili na zakonu zasnovani interes, kao i pravo na naknadu otete nastale po toj osnovi.</p>	<p>Constitution of RS</p> <p>(Article 2, paragraph 26)</p> <p>Freedom of the press and other means of public communication shall be guaranteed. Anyone is free to establish news organisations and publishing houses, to publish newspapers or to disseminate information via other media, in accordance with the law. Censorship of the press and other media of public information shall be prohibited. It is the duty of the public information media to inform the public timeously, truthfully and without bias. The right to correct untruthfully published information which has damaged a right or an interest of an individual or body shall be guaranteed, as shall be the right to compensation for damages arising thereby.</p>
<p>Statut Brčko Distrikta (Glava 2, član 13, tačka 4)</p> <p>Sva lica na teritoriji Distrikta uživaju prava i slobode koje su im date Evropskom konvencijom o ljudskim pravima i osnovnim slobodama.</p>	<p>Constitution of BD</p> <p>(Article 2, paragraph 13, point 4)</p> <p>All persons on territory of BD exercise freedom and liberties given in ECHR.</p>
<p>Kodeks za štampu i online medije</p>	<p>Code of Honour</p>

<p>Član 4.</p> <p>Diskriminacija</p> <p>Novinari moraju izbjeći prejudicirane i uvredljive aluzije na nečiju etničku grupu, nacionalnost, rasu, religiju, pol, seksualnu opredijeljenost, fizičku onesposobljenost ili mentalno stanje.</p> <p>Aluzije na nečiju etničku grupu, nacionalnost, rasu, religiju, pol, seksualnu opredijeljenost, fizičku onesposobljenost ili mentalno stanje će biti napravljene samo onda kada su u direktnoj vezi sa slučajem o kojemu se izvještava.</p> <p>Član 13.</p> <p>Povjerljivost izvora informacija</p> <p>Kad god je to moguće, novinari se trebaju oslanjati na otvorene, identifikovane izvore informacija. Ovakvi izvori treba da budu pretpostavljeni anonimnim izvorima, čije poštenje i tačnost javnost ne može da ocijeni.</p> <p>Novinari imaju obavezu da štite identitet onih koji daju informacije u povjerenju, bez obzira na to da li su ili ne te ličnosti izričito zahtijevale povjerljivost.</p>	<p>Article 4</p> <p>Discrimination</p> <p>Journalists must avoid prejudicial or insulting references to a person's ethnic group, nationality, race, religion, gender, sexual orientation, physical disability or mental disability.</p> <p>References to a person's ethnic group, nationality, race, religion, gender, sexual orientation, physical disability or mental disability shall be made only when directly relevant to the occurrence being reported.</p> <p>Articles 13</p> <p>Confidentiality of Sources</p> <p>Whenever possible, journalists should rely on open, identified sources of information. These sources are to be preferred to anonymous sources, whose honesty and accuracy cannot be judged by the public.</p> <p>Journalists have an obligation to protect the identity of those who provide information in confidence, whether or not they explicitly request confidentiality.</p>
<p>Zakon o krivičnom postupku B-H</p> <p>Član 51.</p> <p>Pretresanje stana, ostalih prostorija i pokretnih stvari</p> <p>(1) Pretresanje stana i ostalih prostorija osumnjičenog, odnosno optuženog i drugih osoba, kao i njihovih pokretnih stvari izvan stana može se poduzeti samo onda ako ima dovoljno osnova za sumnju da se kod njih nalaze učinitelj,</p>	<p>Criminal Procedure Code of B-H</p> <p>Article 51</p> <p>Search of dwellings, other premises and personal property</p> <p>(1) A search of dwellings and other premises of the suspect, accused or other persons, as well as his personal property outside the dwelling may be conducted only when there are sufficient grounds for suspicion that the</p>

saučesnik, tragovi krivičnog djela ili predmeti važni za postupak.

(2) Pretresanje pokretnih stvari, u smislu odredbe stava 1. ovog člana, obuhvata i pretresanje kompjutera i sličnih uređaja za automatsku obradu podataka koji su s njima povezani. Na zahtjev Suda, osobe koje se koriste ovim uređajima dužne su omogućiti pristup, predati diskete, trake ili neki drugi oblik na kome su pohranjeni podaci, kao i pružiti potrebna obavještenja za upotrebu tih uređaja. Osoba koja odbije njihovu predaju, iako za to ne postoje razlozi iz člana 84. ovog zakona, može se kazniti prema odredbi člana 65. stav 5. ovog zakona.

Član 78.

Pouka osumnjičenom o njegovim pravima

(1) Kad se osumnjičeni prvi put ispituje, pitat će se za ime i prezime, nadimak ako ga ima, ime i prezime roditelja, djevojačko obiteljsko ime majke, gdje je rođen, gdje stanuje, dan, mjesec i godina rođenja, koje je narodnosti i čiji je državljanin, jedinstveni matični broj građana državljanina Bosne i Hercegovine, čime se zanima, kakve su mu obiteljske prilike, je li pismen, kakve je škole završio, je li, gdje i kad služio vojsku odnosno ima li čin rezervnog vojnog starješine, vodi li se u vojnoj evidenciji i kod kojeg organa nadležnog za poslove odbrane, je li odlikovan, kakvog je imovnog stanja, je li, kad i zašto osuđivan, je li i kad je izrečenu kaznu izdržao, da li se protiv njega vodi postupak za koje drugo krivično djelo, a ako je maloljetan, ko mu je zakonski zastupnik. Osumnjičeni će se poučiti da je dužan odazvati se pozivu i odmah saopćiti svaku promjenu adrese ili namjeru da promijeni boravište, a upozorit će se i na posljedice ako po tome ne postupi.

perpetrator, the accessory, traces of a criminal offense or objects relevant to the criminal proceedings might be found there.

(2) Search of personal property pursuant to Paragraph 1 of this article shall include a search of the computer and similar devices for automated data processing connected with it. At the request of the Court, the person using such devices shall be obligated to allow access to them, to hand over diskettes and magnetic tapes or some other forms of saved data, as well as to provide necessary information concerning the use of the devices. A person, who refuses to do so, although there are no reasons for that referred to in Article 84 of this Code, may be punished under the provision of Article 65 Paragraph 5 of this Code.

Article 78

Instructing the Suspect on His Rights

(1) At the first questioning the suspect shall be asked the following questions: his name and surname; nickname if he has one; name and surname of his parents; maiden name of his mother; place of birth; place of residence; date, month and year of birth; ethnicity and citizenship; identification number of Bosnia and Herzegovina citizen; profession; family situation; is he literate; completed education; has he served in the army, and if so, when and where; whether he has a rank of a reserve officer; whether he is entered in the military records and if yes with which authority in charge of defense affairs; whether he has received a medal; financial situation; previous convictions and, if any, reasons for the conviction; if convicted whether he served the sentence and when; are there ongoing proceedings for some other criminal offense; and if he is a minor, who is his legal representative. The suspect shall be instructed to obey summonses and to inform the authorized officials

<p>(2) Na početku ispitivanja osumnjičenom će se saopćiti za koje krivično djelo se tereti i osnove sumnje protiv njega, a poučit će se i o sljedećim pravima:</p> <p>a) da nije dužan iznijeti svoju odbranu niti odgovarati na postavljena pitanja,</p> <p>b) da može uzeti branitelja po svom izboru koji može biti prisutan njegovom ispitivanju, kao i da ima pravo na branitelja bez naknade u slučajevima predviđenim ovim zakonom, da se može izjasniti o djelu koje mu se stavlja na teret i iznijeti sve činjenice i dokaze koji mu idu u korist,</p> <p>c) da ima pravo u toku istrage razmatrati spise i razgledati pribavljene predmete koji mu idu u korist, osim ako je riječ o spisima i predmetima čije bi otkrivanje moglo dovesti u opasnost cilj istrage,</p> <p>d) da ima pravo na besplatne usluge prevoditelja ako ne razumije ili ne govori jezik koji se koristi prilikom ispitivanja.</p> <p>(3) Osumnjičeni se može dobrovoljno odreći prava navedenih u stavu 2. ovog člana, ali njegovo ispitivanje ne može započeti ukoliko se i dok se njegova izjava o odricanju ne zabilježi pismeno i dok ne bude potpisana od strane osumnjičenog. Osumnjičeni se ni pod kojim okolnostima ne može odreći prava na prisustvo branitelja ako je njegova odbrana obavezna u</p>	<p>immediately about every change of an address or intention to change his residence, and the suspect shall also be instructed about consequences if he does not act accordingly.</p> <p>(2) At the beginning of the questioning, the suspect shall be informed of the charge against him, the grounds for the charge and he shall be informed of the following rights:</p> <p>a) the right not to present evidence or answer questions;</p> <p>b) the right to retain a defense attorney of his choice who may be present at questioning and the right to a defense attorney at no cost in such cases as provided by this Code;</p> <p>c) the right to comment on the charges against him, and to present all facts and evidence in his favor;</p> <p>d) that during the investigation, he is entitled to study files and view the collected items in his favor unless the files and items concerned are such that their disclosure would endanger the aim of investigation;</p> <p>e) the right to an interpreter service at no cost if the suspect does not understand the language used for questioning.</p> <p>(3) The suspect may voluntarily waive the rights stated in Paragraph 2 of this Article but his questioning may not commence unless his waiver has been recorded officially and signed by the suspect. To waive the right to a defense attorney shall not be possible for the suspect under any circumstances in case of a mandatory defense under this Code.</p>
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<p>skladu s ovim zakonom.</p> <p>(4) U slučaju da se osumnjičeni odrekao prava da uzme branitelja, a kasnije izrazi želju da uzme branitelja, ispitivanje će se odmah prekinuti i ponovo će se nastaviti kada osumnjičeni dobije branitelja ili mu se branitelj postavi ili ako osumnjičeni izrazi želju da nastavi da odgovara na pitanja.</p> <p>(5) Ako se osumnjičeni dobrovoljno odrekne prava da ne odgovara na postavljena pitanja, mora mu se i u tom slučaju omogućiti da se izjasni o svim činjenicama i dokazima koji mu idu u korist.</p> <p>(6) Ako je postupljeno protivno odredbama ovoga člana, na iskazu osumnjičenog ne može se zasnivati sudska odluka.</p> <p>Član 82.</p> <p>Osobe koje ne mogu biti saslušane kao svjedoci</p> <p>Ne može se saslušati kao svjedok:</p> <p>a) osoba koja bi svojim iskazom povrijedila dužnost čuvanja državne, vojne ili službene tajne, dok je nadležni organ ne oslobodi te dužnosti,</p> <p>b) branitelj osumnjičenog, odnosno optuženog u pogledu činjenica koje su mu postale poznate u svojstvu branitelja,</p> <p>c) osoba koja bi svojim iskazom povrijedila dužnost čuvanja profesionalne tajne (vjerski službenik, odnosno ispovjednik, novinar u svrhu zaštite izvora informacija, advokat, bilježnik, liječnik, babica i dr.), osim ako je oslobođena te dužnosti posebnim propisom ili izjavom osobe u čiju je korist ustanovljeno čuvanje tajne,</p>	<p>(4) In the case when the suspect has waived the right to a defense attorney, but later expressed his desire to retain one, the questioning shall be immediately suspended and shall resume when the suspect has retained or has been appointed a defense attorney, or if the suspect has expressed a wish to answer the questions.</p> <p>(5) If the suspect has voluntarily waived the right not to answer the questions asked, he must be allowed to present views on all facts and evidence that speak in his favor.</p> <p>(6) If any actions have been taken contrary to the provisions of this Article, the Court's.</p> <p>Article 82</p> <p>Persons Not To Be Heard As Witnesses</p> <p>The following persons shall not be heard as witnesses:</p> <p>a) A person who by his statement would violate the duty of keeping state, military or official secrets until the competent body releases him from that duty;</p> <p>b) A defense attorney of the suspect or accused with respect to the facts that became known to him in his capacity as a defense attorney;</p> <p>c) A person who by his statement would violate the duty of keeping professional secrets, including the religious confessor, professional journalists for the purpose of protecting the information source, attorneys-at-law, notary, physician, midwife and others, unless he was released from that duty by</p>
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<p>d) maloljetna osoba koja s obzirom na uzrast i duševnu razvijenost nije sposobna shvatiti značaj prava da ne mora svjedočiti.</p> <p>Član 116.</p> <p>Vrste posebnih istražnih radnji i uvjeti za njihovu primjenu</p> <p>(1) Protiv osobe za koju postoje osnovi sumnje da je sama ili s drugim osobama učestvovala ili učestvuje u učinjenju krivičnog djela iz člana 117. ovog zakona mogu se odrediti posebne istražne radnje, ako se na drugi način ne mogu pribaviti dokazi ili bi njihovo pribavljanje bilo povezano s nesrazmjernim teškoćama</p> <p>(2) Istražne radnje iz stava 1. ovog člana su: a) nadzor i tehničko snimanje telekomunikacija, b) pristup kompjuterskim sistemima i kompjutersko sravnjenje podataka, c) nadzor i tehničko snimanje prostorija, d) tajno praćenje i tehničko snimanje osoba i predmeta, e) prikriiveni istražitelj i informator, f) simulirani otkup predmeta i simulirano davanje potkupnine, g) nadzirani prijevoz i isporuka predmeta krivičnog djela.</p> <p>(3) Istražne radnje iz stava 2. tačke a. ovog člana mogu se odrediti i prema osobi za koju postoje osnovi sumnje da učinitelju, odnosno od učinitelja krivičnog djela iz člana 117. ovog zakona prenosi informacije u vezi s krivičnim djelom, odnosno da učinitelj koristi njeno sredstvo</p>	<p>a special regulation or statement of the person who benefits from the secret being kept;</p> <p>d) A minor who, in view of his age and mental development, is unable to comprehend the importance of his privilege not to testify.</p> <p>Article 116</p> <p>Types of Special Investigative Actions and Conditions of Their Application</p> <p>(1) If evidence cannot be obtained in another way or its obtaining would be accompanied by disproportional difficulties, special investigative measures may be ordered against a person against whom there are grounds for suspicion that he has committed or has along with other persons taken part in committing or is participating in the commission of an offense referred to in Article 117 of this Code.</p> <p>(2) Measures referred to in Paragraph 1 of this Article are as follows: a) surveillance and technical recording of telecommunications; b) access to the computer systems and computerized data processing; c) surveillance and technical recording of premises; d) covert following and technical recording of individuals and objects; e) use of undercover investigators and informants; f) simulated purchase of certain objects and simulated bribery; g) supervised transport and delivery of objects of criminal offense.</p> <p>(3) Measures referred to in Item a) of Paragraph 2 of this Article may also be ordered against persons against whom there are grounds for suspicion that he will deliver to the perpetrator or will receive from the perpetrator of the offenses referred to in Article 117 of this Code information in relation to the offenses, or grounds for</p>
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<p>telekomunikacije.</p> <p>(4) Na razgovore osobe iz stava 1. ovog člana i njenog branitelja shodno se primjenjuju odredbe o komunikaciji osumnjičenog i branitelja.</p> <p>(5) Pri izvršavanju istražnih radnji iz stava 2. tačke e. i f. ovog člana policijski organi ili druge osobe ne smiju preduzimati aktivnosti koje predstavljaju podstrekavanje na učinjenje krivičnog djela. Ako su takve aktivnosti poduzete, ta okolnost isključuje krivično gonjenje podstrekavane osobe za krivično djelo izvršeno u vezi s ovim radnjama.</p> <p>Član 117.</p> <p>Krivična djela za koja se mogu odrediti posebne istražne radnje</p> <p>Istražne radnje iz člana 116. stav 2. ovog zakona mogu se odrediti za krivična djela:</p> <ol style="list-style-type: none"> a) protiv integriteta Bosne i Hercegovine, b) protiv čovječnosti i vrijednosti zaštićenih međunarodnim pravom, c) terorizma, d) za koja se prema zakonu može izreći kazna zatvora najmanje tri godine ili teža kazna. 	<p>suspicion that the perpetrator uses a telecommunication device belonging to those persons.</p> <p>(4) Provisions regarding the communication between the suspect and his or her defense attorney shall apply accordingly to the discourse between the person referred to in Paragraph 1 of this Article and his or her defense attorney.</p> <p>(5) In executing the measures referred to in Items e) and f) of Paragraph 2 of this Article police authorities or other persons shall not undertake activities that constitute an incitement to commit a criminal offense. If nevertheless such activities are undertaken, this shall be an instance precluding the criminal prosecution against the incited person for a criminal offense committed in relation to those measures.</p> <p>Article 117</p> <p>Criminal Offenses as to Which Undercover Investigative Measures May Be Ordered</p> <p>Measures referred to in Paragraph 2 of Article 116 of this Code may be ordered for following criminal offenses:</p> <ol style="list-style-type: none"> a) criminal offenses against the integrity of Bosnia and Herzegovina; b) criminal offenses against humanity and values protected under international law; c) criminal offenses of terrorism; d) criminal offenses for which, pursuant to the law, a prison sentence of minimum of three (3) years or more may be pronounced.
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<p>Zakon o krivičnom postupku FB-H</p> <p>Član 96.</p> <p>Osobe koja ne mogu biti saslušane kao svjedoci</p> <p>Ne može se saslušati kao svjedok:</p> <p>a) osoba koja bi svojim iskazom povrijedila dužnost čuvanja državne, vojne ili službene tajne, dok je nadležni organ ne oslobodi te dužnosti,</p> <p>b) branilac osumnjičenog, odnosno optuženog u pogledu činjenica koje su mu postale poznate u svojstvu branioca,</p> <p>c) osoba koja bi svojim iskazom povrijedila dužnost čuvanja profesionalne tajne (vjerski službenik, odnosno ispovjednik, novinar u svrhu zaštite izvora informacija, advokat, bilježnik, ljekar, babica i dr.), osim ako je oslobođena te dužnosti posebnim propisom ili izjavom osobe u čiju je korist ustanovljeno čuvanje tajne,</p> <p>d) maloljetna osoba koja s obzirom na uzrast i duševnu razvijenost nije sposobna shvatiti značaj prava da ne mora svjedočiti.</p>	<p>Criminal Procedure Code of FB-H</p> <p>Article 96.</p> <p>Persons Not To Be Heard As Witnesses</p> <p>The following persons shall not be heard as witnesses:</p> <p>a) A person who by his statement would violate the duty of keeping state, military or official secrets until the competent body releases him from that duty;</p> <p>b) A defense attorney of the suspect or accused with respect to the facts that became known to him in his capacity as a defense attorney;</p> <p>c) A person who by his statement would violate the duty of keeping professional secrets, including the religious confessor, professional journalists for the purpose of protecting the information source, attorneys-at-law, notary, physician, midwife and others, unless he was released from that duty by a special regulation or statement of the person who benefits from the secret being kept;</p> <p>d) A minor who, in view of his age and mental development, is unable to comprehend the importance of his privilege not to testify.</p>
<p>Zakon o krivičnom postupku Republike Srpske</p> <p>Član 147.</p> <p>Lica koja se ne mogu saslušati kao svjedoci</p> <p>Ne može se saslušati kao svjedok:</p>	<p>Criminal Procedure Code of Republika Srpska</p> <p>Article 147</p> <p>Persons Who Shall Not Be Heard As Witnesses</p> <p>The following persons shall not be heard as witnesses:</p>

<p>a) lice koje bi svojim iskazom povrijedilo dužnost čuvanja državne, vojne ili službene tajne, dok ga nadležni organ ne oslobodi te dužnosti,</p> <p>b) branilac osumnjičenog, odnosno optuženog u pogledu činjenica koje su mu postale poznate u svojstvu branioca,</p> <p>c) lice koje bi svojim iskazom povrijedilo dužnost čuvanja profesionalne tajne (vjerski službenik, odnosno ispovjednik, novinar u svrhu zaštite izvora informacija, advokat, bilježnik, ljekar, babica i drugi), osim ako je oslobođeno te dužnosti posebnim propisom ili izjavom lica u čiju je korist ustanovljeno čuvanje tajne i</p> <p>d) maloljetno lice koje s obzirom na uzrast i duševnu razvijenost nije sposobno da shvati značaj prava da ne mora svjedočiti.</p>	<p>a) A person who by his statement would violate the duty of keeping state, military or official secrets until the competent body releases him from that duty;</p> <p>b) A defence attorney of the suspect or accused with respect to the facts that became known to him in his capacity of a defence attorney;</p> <p>c) A person who by his statement would violate the duty of keeping professional secrets (the priest - confessor, journalist for the purpose of protecting the information source, attorney-atlaw, notary, physician, midwife and others), unless he was released from that duty by a special regulation or statement of the person who benefits from the secret being kept;</p> <p>d) A minor who, in view of his age and mental development, is unable to comprehend the importance of his right not to testify.</p>
<p>Zakon o krivičnom postupku Brčko Distrikta</p> <p>Član 82</p> <p>Osobe koje ne mogu biti saslušane kao svjedoci</p> <p>Ne može se saslušati kao svjedok:</p> <p>a) osoba koja bi svojim iskazom povrijedila dužnost čuvanja državne, vojne ili službene tajne, dok je nadležni organ ne oslobodi te dužnosti,</p> <p>b) branilac osumnjičenog, odnosno optuženog u pogledu činjenica koje su mu postale poznate u svojstvu branioca,</p>	<p>Criminal Procedure Law of Brčko District</p> <p>Article 82</p> <p>Persons Not To Be Heard As Witnesses</p> <p>The following persons shall not be heard as witnesses:</p> <p>a) A person who by his statement would violate the duty of keeping state, military or official secrets until the competent body releases him from that duty;</p> <p>b) A defense attorney of the suspect or accused with respect to the facts that became known to him in his capacity as a defense attorney;</p>

<p>c) osoba koja bi svojim iskazom povrijedila dužnost čuvanja profesionalne tajne (vjerski službenik, odnosno ispovjednik, novinar u svrhu zaštite izvora informacija, advokat, bilježnik, ljekar, babica i dr.), osim ako je oslobođena te dužnosti posebnim propisom ili izjavom osobe u čiju je korist ustanovljeno čuvanje tajne,</p> <p>d) maloljetna osoba koja s obzirom na uzrast i duševnu razvijenost nije sposobna shvatiti značaj prava da ne mora svjedočiti.</p>	<p>c) A person who by his statement would violate the duty of keeping professional secrets, including the religious confessor, professional journalists for the purpose of protecting the information source, attorneys-at-law, notary, physician, midwife and others, unless he was released from that duty by a special regulation or statement of the person who benefits from the secret being kept;</p> <p>d) A minor who, in view of his age and mental development, is unable to comprehend the importance of his privilege not to testify.</p>
<p>Zakon o zaštiti tajnih podataka B-H</p> <p>Član 10.</p> <p>Uslovi za pristup tajnim podacima</p> <p>Pristup tajnim podacima moguć je samo uz uslove utvrđene Zakonom i drugim podzakonskim propisima izdatim na osnovu Zakona, odnosno međunarodnim ili regionalnim sporazumima koje je zaključila Bosna i Hercegovina</p> <p>Član 11.</p> <p>Tajnost podataka</p> <p>(1) Svi zvaničnici iz člana 5. i člana 6. Zakona, kao i drugih službenika i namještenika koji imaju zakonsko ovlaštenje za pristup tajnim podacima, imaju obavezu da bi takve informacije u tajnosti da ih izvadite iz oznake klasifikacije bez obzira koliko doći do njih, i to je istina, čak i nakon isteka mandata, prestanka radnog odnosa ili prestanka dužnosti ili članstvo u nadležnom državnom organu.</p> <p>(2) Službenici i namještenici koji nemaju zakonske ovlasti za pristup tajnim podacima, kao i građani Bosne i Hercegovine koji dolaze u posjed ili dobiti pristup tajnim informacijama na</p>	<p>Law on protection of secret data of Bosnia and Herzegovina</p> <p>Article 10</p> <p>Conditions for access to secret data</p> <p>Access to secret data shall be possible only under the conditions as stipulated by this Law and other bylaws issued on the basis of this Law, and/or international or regional agreements concluded by Bosnia and Herzegovina.</p> <p>Article 11</p> <p>Safekeeping of secret data</p> <p>(1) All officials referred to in Article 5, or Article 6 of this Law as well as other officials and employees with legal authorization to access secret data shall have an obligation to keep secret data regardless of the manner in which they were obtained, and this obligation shall also be applicable after termination of their mandate, cessation of employment and/or cessation of exercising the duty or membership in relevant state authority.</p> <p>(2) Officials and employees without a legal authorization to access secret data as well as citizens of B-H who acquire or gain access to secret data in a manner, which is not contrary</p>

<p>način koji je u suprotnosti sa zakonom, preuzme obavezu čuvanja podataka iz stava (1) ovog član.</p> <p>(3) Lica iz stava (2) ovog člana dužni su da obavijeste glava tijelu u kojem su zaposleni ili organu unutrašnjih poslova neovlašten pristup tajnim podacima i dati izjavu o okolnostima pod kojima su stekli pristup tajnim podacima.</p>	<p>to the law, shall assume the obligation to keep the data referred to in Paragraph (1).</p> <p>(3) Persons referred to in Paragraph (2) shall have the obligation to report to the manager of the body in which they are employed or to an authority of internal affairs any unauthorized access to secret data and give a statement about the circumstances under which they gained access to secret data.</p>
<p>Krivični zakon Bosne i Hercegovine</p> <p>Član 164.</p> <p>Odavanje državne tajne</p> <p>(1) Ovlaštena osoba koja protivno zakonu ili drugom propisu institucija Bosne i Hercegovine donesenim na osnovu zakona, drugome saopći, preda ili učini dostupnim državnu tajnu koja joj je povjerena, kaznit će se kaznom zatvora od jedne do deset godina.</p> <p>(2) Ko drugoj osobi saopći ili preda, ili posreduje u saopćavanju ili predaji podatka ili isprave za koju zna da je državna tajna, a do koje je protupravno došao, kaznit će se kaznom zatvora od šest mjeseci do pet godina.</p> <p>(3) Ako je krivično djelo iz stava 1. ovog člana učinjeno za vrijeme ratnog stanja ili neposredne ratne opasnosti, ili ako je dovelo do ugožavanja sigurnosti, privredne ili vojne moći Bosne i Hercegovine, učinitelj će se kazniti</p>	<p>Criminal Code of Bosnia and Herzegovina</p> <p>Article 164</p> <p>Disclosing a State Secret</p> <p>(1) An authorised person who in contravention of law or regulation of the institutions of Bosnia and Herzegovina passed on the basis of law, passes on or renders accessible a state secret entrusted to him, to another person, shall be punished by imprisonment for a term between one and ten years.</p> <p>(2) Whoever discloses or passes on to another person or mediates in disclosing information or a document which he knows to constitute a state secret, and which he obtained the possession of in an illegal manner, shall be punished by imprisonment for a term between six months and five years.</p> <p>(3) If the criminal offence referred to in paragraph 1 and 2 of this Article has been perpetrated during a state of war or imminent war danger, or if it has led to the endangerment of the security, economic or military power of Bosnia and Herzegovina,</p>

<p>kaznom zatvora najmanje tri godine.</p> <p>(4) Ovlaštena osoba koja učini krivično djelo iz stava 1. ovog člana iz nehata, kaznit će se kaznom zatvora od šest mjeseci do pet godina.</p> <p>(5) Nema krivičnog djela iz stava 2. ovog člana, ako neko objavi ili posreduje u objavljivanju državne tajne čija je sadržina suprotna ustavnom poretku Bosne i Hercegovine, u cilju da javnosti otkrije povredu ustavnog poretka ili međunarodnog ugovora, ako objavljivanje nema štetne posljedice za nacionalnu sigurnost Bosne i Hercegovine.</p>	<p>the perpetrator shall be punished by imprisonment for a term not less than three years.</p> <p>(4) An authorised person who perpetrates the criminal offence referred to in paragraph 1 of this Article by negligence, shall be punished by imprisonment for a term between six months and five years.</p> <p>(5) There shall be no criminal offence referred to in paragraph 2 of this Article, if somebody makes public or mediates in making public a state secret the contents of which are in contravention with the constitutional order of Bosnia and Herzegovina, with an aim of disclosing to the public facts which constitute a violation of the constitutional order or of an international agreement, provided that the making public does not undermine the national security of Bosnia and Herzegovina.</p>
<p>Krivični Zakon FB-H</p> <p>Član 187.</p> <p>Neovlašćeno otkrivanje profesionalne tajne</p> <p>(1) Advokat, branitelj, javni bilježnik, doktor medicine, doktor stomatologije, babica ili drugi zdravstveni djelatnik, psiholog, djelatnik starateljstva, vjerski ispovjednik ili druga osoba koja neovlašćeno otkrije tajnu koju je saznala u vršenju svog zvanja, kaznit će se kaznom zatvora do jedne godine.</p> <p>(2) Nema krivičnog djela iz stava 1. ovog člana ako neko tajnu otkrije u općem interesu ili interesu druge osobe koji je pretežniji od interesa čuvanja tajne.</p>	<p>Criminal Code of FB-H</p> <p>Article 187.</p> <p>Unauthorized Disclosure of a Professional Secret</p> <p>(1) An attorney, defence counsel, notary, physician, dentist, midwife or any other medical worker, psychologist, employee of social welfare institution, confessor or any other person who without authorization discloses a secret which become known to him in the exercise of his profession, shall be punished by imprisonment for a term not exceeding one year.</p> <p>(2) There shall be no criminal offence if someone discloses a secret in the public interest or in the interest of another person, which outweighs the interest of keeping the</p>

	secret.
<p>Krivični Zakon RS</p> <p>Član 173.</p> <p>Neovlašćeno otkrivanje profesionalne tajne</p> <p>(1) Advokat, ljekar ili drugo lice koje neovlašćeno otkrije tajnu koju je saznalo u vršenju svog poziva, kazniće se novčanom kaznom ili zatvorom do jedne godine.</p> <p>(2) Nema krivičnog djela iz stava 1. ovog člana ako je tajna otkrivena u opštem interesu ili interesu dugog lica koji je pretežniji od interesa čuvala nje tajne.</p> <p>(3) Gonjenje se preduzima po prijedlogu.</p> <p>Član 174</p> <p>Neovlašćeno prisluškivanje i tonsko snimanje</p> <p>(1) Ko posebnim uređajima neovlašćeno prisluškuje ili tonski snimi razgovor ili izjavu koja mu nije namenjena, ili omogući nepoznatom licu da se upozna sa razgovorom ili izjavom koja je neovlašćeno prisluškivana ili snimana, kazniće se novčanom kaznom ili zatvorom do jedne godine.</p>	<p>Criminal Code of RS</p> <p>Article 173.</p> <p>Unauthorized Disclosure of a Professional Secret</p> <p>(1) An attorney, medical doctor or any other person who without authorization discloses a secret which he has got to know in the exercise of his profession, shall be punished by a fine or imprisonment for a term not exceeding one year.</p> <p>(2) There shall be no criminal offense referred to in Paragraph 1 of this Article if a secret has been disclosed in the public interest or in the interest of another person which outweighs that of keeping the secret.</p> <p>(3) Prosecution shall be carried based on motion.</p> <p>Article 174</p> <p>Unauthorized wiretapping and audio recording</p> <p>(1) The one who, with special devices without authorization taps or records a conversation or a statement that it is not intended to him/her, or enables an uninvited person to have knowledge of a conversation or statement that was unauthorized</p>

<p>(2) Kaznom iz stava 1. ovog člana kazniće se i ko tonski snimi izjavu koja je njemu namjenjena, bez znanja i odobrenja onoga ko je daje, u namjeri da takvu izjavu zloupotrijebi, ili ko omogući nepozvanom licu da se upozna sa takvom izjavom.</p> <p>(3) Ako djelo iz stava 1. i 2. ovog člana učini službeno lice u vršenju službe, kazniće se zatvorom do tri godine.</p>	<p>interception or recorded, shall be punished by a fine or imprisonment up to one year.</p> <p>(2) By the sentence referred to in paragraph 1 of this Article, will be punished one who records a statement that it intended to him/her, without the knowledge and consent of the person who gives statement, with the intention of abuse of such a statement, or one who provides with such statement an unauthorized person.</p> <p>(3) If offenses referred to in para. 1 and 2 of this Article is committed by an official in discharge of duty, he/she shall be punished with imprisonment up to three years.</p>
<p>Krivični zakon Brčko Distrikta</p> <p>Član 184.</p> <p>Neovlašteno otkrivanje profesionalne tajne</p> <p>(1) Advokat, branilac, javni bilježnik, doktor medicine, doktor stomatologije, babica ili drugi zdravstveni radnik, psiholog, socijalni radnik, vjerski službenik ili drugo lice koja neovlašteno otkrije tajnu koju je saznalo u obavljanju svoga zvanja, kaznit će se kaznom zatvora do jedne godine.</p> <p>(2) Nema krivičnog djela iz stava 1 ovoga člana ako ko tajnu otkrije u općem interesu ili interesu drugog lica koje je pretežnije od interesa čuvanja tajne.</p>	<p>Criminal Code of BD</p> <p>Article 184.</p> <p>Unauthorized Disclosure of a Professional Secret</p> <p>(1) An attorney, defence counsel, notary, physician, dentist, midwife or any other medical worker, psychologist, employee of social welfare institution, confessor or any other person who without authorization discloses a secret which become known to him in the exercise of his profession, shall be punished by imprisonment for a term not exceeding one year.</p> <p>(2) There shall be no criminal offence if someone discloses a secret in the public interest or in the interest of another person, which outweighs the interest of keeping the secret.</p>

<p>Zakon o radu u institucijama Bosne i Hercegovine</p> <p>Član 60.</p> <p>1. Zaposlenik će disciplinski odgovarati za povredu jedne ili više službenih dužnosti propisanih ovim zakonom, kada je povreda rezultat njegove vlastite krivice.</p> <p>2. Povrede službenih dužnosti mogu biti teže i lakše.</p> <p>3. Teže povrede službenih dužnosti su:</p> <p>a) vršenje radnje koja je definirana kao krivično djelo protiv službene dužnosti, ili drugo krivično djelo, odnosno prekršaj, kojim se nanosi šteta ugledu poslodavca, što čini zaposlenika nepodobnim za rad kod poslodavca;</p> <p>b) odavanje državne, vojne i službene tajne, odnosno povreda propisa o čuvanju tih tajni;</p> <p>c) zloupotreba ili prekoračenje službenih ovlaštenja;</p> <p>d) neizvršavanje ili nesavjesno i nemarno vršenje povjerenih poslova;</p> <p>e) bavljenje djelatnostima kojima se onemogućava ili otežava građanima ili drugim licima da ostvaruju svoja prava kod poslodavca;</p> <p>f) bavljenje djelatnostima ili radom koji je direktno ili indirektno u suprotnosti s interesima poslodavca;</p> <p>g) prouzrokovanje poslodavcu veće materijalne štete na imovini ili aktivi namjerno ili iz krajnje nepažnje,</p> <p>h) neopravdan izostanak s posla više od dva dana u mjesecu;</p> <p>i) kršenje pravila radne discipline;</p> <p>j) neblagovremeno i neuredno izvršavanje</p>	<p>Law on Civil Service in Institutions of Bosnia and Herzegovina</p> <p>Article 60</p> <p>The employee will be responsible for a disciplinary violation of one or more official duties stipulated by this law, when violations result of his own guilt.</p> <p>2. Violation of official duties can be more grave and minor offences.</p> <p>3. Serious breaches of official duties are:</p> <p>a) carrying out actions defined as a criminal offense against official duty, or other serious or minor offenses which are harmful to the reputation of the employer, which makes the employee unfit for work at the employer;</p> <p>b) disclosure of a State, military and official secrets and contravention to the regulations on keeping those secrets;</p> <p>c) abuse or exceeding of official duties;</p> <p>d) failure to consciously and carefully execute official duties;</p> <p>e) undertaking actions which may impede or prevent citizens or other persons to exercise their rights with the employer;</p> <p>f) undertaking actions or activities which directly or indirectly contrary to the interests of the employer;</p> <p>g) causing the employer serious damage to property or assets deliberately or due to gross negligence,</p> <p>h) unexcused absence from work for more than two days a month;</p> <p>i) violation of labor discipline;</p> <p>j) an untimely and irregular execution of</p>
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<p>povjerenih poslova;</p> <p>k) neprimjereno ponašanje prema građanima, saradnicima i drugim licima u vršenju službene dužnosti.</p> <p>l) svaka druga povreda koja se posebnim zakonom utvrdi kao teža povreda.</p> <p>4. Pravilnikom o disciplinskoj i materijalnoj odgovornosti zaposlenika (u daljem tekstu: Pravilnik o disciplinskoj odgovornosti) utvrđuju se lakše povrede službene dužnosti.</p> <p>5. Odgovornost za izvršenje krivičnog djela, odnosno prekršaja, ne isključuje disciplinsku i materijalnu odgovornost zaposlenika, pod uslovom da takvo djelo istovremeno predstavlja i povredu službene dužnosti;</p> <p>6. Pravilnik iz stava 4. ovog člana donosi Vijeće ministara za budžetske korisnike, a poslodavac za ostale zaposlenike.</p> <p>Član 62.</p> <p>1. Za učinjene povrede službene dužnosti iz člana 60. ovog zakona zaposleniku se mogu izreći sljedeće disciplinske mjere i disciplinske kazne, i to:</p> <p>a) za lakše povrede službene dužnosti izriču se disciplinske mjere: opomena i javna opomena;</p> <p>b) za teže povrede službene dužnosti izriču se disciplinske kazne:</p> <ul style="list-style-type: none"> • suspenzija s radnog mjesta i obustava isplate plaće u periodu od najmanje dva do najviše 30dana; • novčana kazna do 30% od osnovne plaće zaposlenika na period do šest mjeseci 	<p>entrusted tasks;</p> <p>k) indecent attitude towards the citizens, collaborators and other parties in the performance of official duties.</p> <p>l) any other violation of a specific law establishes as a serious violation.</p> <p>4. Regulations on disciplinary and material responsibility of employees (hereinafter: the Regulations on Disciplinary Responsibility) determine minor breaches of official duties.</p> <p>5. Responsibility for the execution of the offense or offenses, does not exclude the disciplinary and material responsibility of the employee, provided that the act also constitutes a breach of official duties;</p> <p>6. Regulation referred to in paragraph 4 of this Article by the Council of Ministers for budget users, and the employer to other employees.</p> <p>Article 62</p> <p>1. For violation of official duties under Article 60 of this Law, an employee may receive the following disciplinary measures and disciplinary punishments, including:</p> <p>a) for minor breaches of official duties shall be imposed disciplinary measures: warning and a public reprimand;</p> <p>b) for a serious breach of official duties shall be imposed disciplinary penalties:</p> <ul style="list-style-type: none"> • suspension from work and suspension of payment of wages for a minimum of two to a maximum of 30 days; • a fine of up to 30% of the basic salary of the employee for a period up to six months • Suspension of the right to increase wages in
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<ul style="list-style-type: none"> • suspenzija prava na povećanje plaće u periodu najduže do dvije godine; • degradiranje na niže radno mjesto; • prestanak radnog odnosa. 	<p>the period up to two years;</p> <ul style="list-style-type: none"> • downgrading to a lower position; • termination of employment.
<p>Zakon o radu Federacije Bosne i Hercegovine</p> <p>Član 97.</p> <p>(1) Poslodavac može otkazati ugovor o radu radniku, bez obaveze poštivanja otkaznog roka, u slučaju da je radnik odgovoran za teži prijestup ili za težu povredu radnih obaveza iz ugovora o radu, a koji su takve prirode da ne bi bilo osnovano očekivati od poslodavca da nastavi radni odnos.</p> <p>(2) U slučaju lakših prijestupa ili lakših povreda radnih obaveza iz ugovora o radu, ugovor o radu se ne može otkazati bez prethodnog pisanog upozorenja radniku.</p> <p>(3) Pisano upozorenje iz stava 2. ovog člana sadrži opis prijestupa ili povrede radne obaveze za koje se radnik smatra odgovornim i izjavu o namjeri da se otkaže ugovor o radu bez davanja</p>	<p>Labor Law of Federation of Bosnia and Herzegovina</p> <p>Article 97</p> <p>(1) An employer may terminate a labor contract to an employee, without the obligation to abide by the notice period, if the employee is responsible for a serious offense or serious breach of duties arising from labor contract, which are of such a nature that the employer cannot be reasonably expected to continue with his employment.</p> <p>(2) In case of a minor offense or minor breach of duties arising from a labor contract, the labor contract cannot be terminated without a prior written warning to the employee.</p> <p>(3) The written warning referred to in</p>

<p>predviđenog otkaznog roka za slučaj da se prijestup ponovi u roku od šest mjeseci nakon izdavanja pisanog upozorenja poslodavca.</p> <p>(4) Kolektivnim ugovorom ili pravilnikom o radu utvrđuju se vrste prijestupa ili povreda radnih obaveza iz st. 1. i 2. ovog člana.</p>	<p>paragraph 2 of this Article shall contain a description of the offense or breach of duty for which the employee is deemed responsible, as well as a statement about the intention to terminate a labor contract without the prescribed notice period if the offense is repeated within six months from the issuance of the written warning by the employer.</p> <p>(4) A collective agreement or Rulebook on labor shall determine types of offenses or breaches of duty referred to in paragraphs 1 and 2 of this Article.</p>
<p>Zakon o radu Republike Srpske</p> <p>Član 137.</p> <p>(1) Radnik je dužan da se na radu pridržava obaveza propisanih zakonom, kolektivnim ugovorom, pravilnikom o radu i ugovorom o radu, i da svoje radne obaveze izvršava na način kojim neće onemogućavati ili ometati druge radnike u izvršavanju njihovih radnih obaveza.</p> <p>(2) Za povredu radnih obaveza radnik je odgovoran poslodavcu, a ako je povredom radnih obaveza prouzročena materijalna šteta poslodavcu ili trećim licima, ili je učinjeno krivično djelo ili prekršaj, radnik je odgovoran materijalno, odnosno krivično i prekršajno.</p> <p>Član 138.</p> <p>(1) Težom povredom radnih obaveza smatra se takvo ponašanje radnika na radu ili u vezi sa radom kojim se nanosi ozbiljna šteta interesima poslodavca, kao i ponašanje radnika iz koga se</p>	<p>Labour Law of Republika Srpska</p> <p>Article 137</p> <p>(1) An employee is required to work to comply with the obligations laid down by law, collective agreement, rule book and employment contract, and to carry out their duties in a manner that not impede or interfere with other workers in carrying out their work duties.</p> <p>(2) For the violation of duties worker is responsible employer, and if the violation of labor obligations caused damage to the employer or third parties, or a criminal act or offense, the employee is responsible financially or criminal and misdemeanor.</p> <p>Article 138</p> <p>(1) A serious breach of working obligations is such behavior of workers at work or in connection with work that inflicts serious damage to the interests of the employer, as</p>

<p>osnovano može zaključiti da dalji rad radnika kod poslodavca ne bi bio moguć.</p> <p>(2) Ako radnik učini propust u radu ili u vezi sa radom koji se ne smatra težom povredom radnih obaveza u smislu stava 1. ovog člana, poslodavac će ga pismeno upozoriti na takvo ponašanje ili izreći mjeru iz člana 140. stav 1. tačka 1) ili 2) ovog zakona, pa ukoliko radnik, i pored tog upozorenja, ponovi isti ili drugi propust, u roku od jedne godine, takvo ponovljeno ponašanje smatraće se težom povredom radnih obaveza zbog koje poslodavac može otkazati ugovor o radu.</p> <p>Član 139.</p> <p>Lakšom povredom radnih obaveza smatraju se propusti u radu i u vezi sa radom koji nemaju značajnije štetne posljedice po poslodavca i koji se ne smatraju težim povredama radnih obaveza, a utvrđuju se opštim aktom.</p>	<p>well as the behavior of workers who are reasonably be concluded that further work workers at the employer would not be possible.</p> <p>(2) If a worker does omission in the workplace or in connection with work that is not considered a serious violation work obligations under paragraph 1 of this Article, the employer will issue a written warning to such behavior or impose a measure under Article 140, paragraph 1, item 1) or 2) of this law, and if a worker, despite this warning, repeated the same or other failure, within one year, such repeated behavior be considered a serious breach of obligations for which the employer can terminate the employment contract.</p> <p>Article 139</p> <p>Minor violation of work obligations are considered to be failures at work and in relation to the work that no significant adverse effects on between employers and who are not considered serious violations of work obligations and are determined by the general act.</p>
<p>Zakon o radu Brčko Distrikta</p> <p>Članak 74</p> <p>(1) Poslodavac može otkazati ugovor o radu zaposleniku bez obveze poštovanja otkaznog roka propisanog člankom 80 ovog zakona, u slučaju da je zaposlenik odgovoran za teži prijestup ili za težu povredu radnih obaveza iz ugovora o radu ili ako je u pitanju zaposlenje takve prirode da ne bi bilo razumno očekivati od poslodavca da nastavi radni odnos sa</p>	<p>Labour Law of Brcko District</p> <p>Article 74</p> <p>(1) An employer may terminate a labor contract to an employee, without the obligation to abide by the notice period stipulated in Article 80 in this Law, if the employee is responsible for a serious offense or serious breach of duties arising from labor contract, which are of such a nature that the employer cannot be reasonably expected to</p>

<p>zaposlenikom.</p> <p>(2) U slučaju prijestupa ili povreda radnih obveza koje jesu ozbiljne ali ne dosežu težinu prijestupa iz stavka 1 ovog članka, poslodavac će spomenutom zaposleniku uručiti pismeno upozorenje koje sadrži opis prijestupa i/ili povrede radnih obveza za koje poslodavac zaposlenika smatra odgovornim. To pismeno upozorenje također treba sadržavati i izjavu o namjeri poslodavca da se otkaže ugovor o radu bez davanja predviđenog otkaznog roka, ukoliko opetuje prijestup ili povredu radnih obveza.</p> <p>(3) Kolektivnim ugovorom ili pravilnicima mogu se utvrditi vrste prijestupa ili povreda obveza navedenih u staccima 1 i 2 ovog članka.</p>	<p>continue with his employment.</p> <p>(2) In case of a minor offense or minor breach of duties, which are not as serious as in paragraph 1 of this Article, employer shall give an employee warning letter which contains description of offence or breach of duties for which employer is responsible. Letter must also contain a statement of intent of the employer to terminate the contract of employment without providing the notice, if repeating the offense or breach of obligations.</p> <p>(3) A collective agreement or Rulebook on labor shall determine types of offenses or breaches of duty referred to in paragraphs 1 and 2 of this Article.</p>
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ELSA BULGARIA

Contributors

National Coordinator

Ana Petrova

National Academic Coordinator

Simona Veleva
LL.M., PhD candidate

National Researchers

Ana Petrova
Anna Uzunova
Krasimir Mitkov
Magdalena Miteva
Maya Aleksandrova
Nikoleta Bezergyanova
Silvana Tonkova
Simeon Stoychev
Tsvetina Kondieva

National Linguistic Editor

Simona Veleva
LL.M., PhD candidate

National Academic Supervisor

Dr. Peter Iliev
LL.M., Ph.D. (LL.D., J.D.)

1. Introduction

Nowadays, journalists tend to depend more frequently on non-journalists for the supply of information on issues of public interest. These people often provide information on a confidential basis, motivated by fear of repercussions, which might affect their physical safety or job security. Journalists have interest in not divulging names of sources because otherwise they may lose them in the future. Protecting the secrecy of journalists' sources means to protect the independence, reliability and freedom of the media. As stated in one of the most fundamental cases of the European Court of Human Rights in that matter - *Goodwin v. United Kingdom*, any intrusion in the journalists' right not to disclose their sources is interference with the freedom of expression, guaranteed by Article 10 of the European Convention of the Protection of Human Rights and fundamental freedoms. Furthermore, the law should only justify such interference, if it falls under Article 10 Para. 2. Compulsion on journalists should only be imposed in extreme circumstances, if it is necessary for justified in the public or individual interests. Only the establishment of efficient legal safeguards and self-regulations at national level can achieve this.

2. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

Bulgaria, as a member state of the European Union since January 1 2007 and state party to the European Convention of the Protection of Human Rights and fundamental freedoms (ECHR) since October 2 1992, has to observe the endorsed European principles and standards in this field in order to guarantee the pluralism and independence of mass media by protecting its sources. The ECHR and all EU treaties in the field of media law are part of the Bulgarian legislation due to Article 5, para.4 of the Constitution of Bulgaria.

The Constitution of the Republic of Bulgaria was adopted on July 12 1991 and it enshrines all the basic principles and values, which led the way in the further development of the country – “universal human values of liberty, peace, humanism, equality, justice and tolerance”. The constitutional legislator was guided by the international standards in the field of human rights and fundamental freedoms, which are the foundation of justice and peace and are best maintained by an effective political democracy.

On constitutional level, the freedom of expression, freedom of the press and the right to seek, obtain and disseminate information are proclaimed in Articles 39-41 (“communication rights”). The formulating of the rights and restrictions directly corresponds with Article 10 of the European convention of human rights and Article 19 of the International covenant on civil and political rights.

In Bulgaria, the right of journalist to protect their sources is regulated on legislative level explicitly in the “Radio and television act” in Art. 15. Para. 1-4, which will be examined in detail further in the report in points 3 and 4.

The Bulgarian Civil Procedure Code and the Penal Procedure Code do not provide any specific procedural safeguards for the journalists' right not to disclose their sources. The Penal code provides the sanctions, which will be reviewed in the following question.

What should also be taken in consideration, is decision 7/1996 of the Constitutional Court of Republic of Bulgarian on case 1/1996¹. The Constitutional Court has given a binding interpretation of those provisions of the Constitution in Decision 7/96 in correspondence to the request of the President to clarify the meaning of Art. 39-41 in order for conflicting jurisprudence to be avoided in the future. Although it is not explicitly stated in the Constitution, the journalists' right not to disclose his source corresponds with Art. 41. Para. 1., regulating the right to seek, receive, and disseminate information. Furthermore, in Article 41. Para. 2, the restrictions of this principle are given. In this decision the Constitutional Court states "the right to freely seek, receive and impart information, enshrined in Art. 41, para. 1 of the Constitution is described in the present opinion as unhindered access to all sources of information. This view is justified by Article 10, para. 1 of the European Convention on Human Rights, according to which freedom of expression "shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers". According to this view some of the terms used in the text of Art. 41, para. 1 of the Constitution require further clarification. Among them is the phrase "good name" to be associated primarily with the honor and dignity of the citizen and society with established authority. Another reason for restriction is the national security, which include such involvement, which aims to protect important state interests, which may lead to reduced defense capability or failure of economic, political or other interests. By "public order" should be understood the established by regulations order that ensures peace and normal ability to exercise civil rights."² The restrictions proclaimed in Art. 39, par. 2 and Art. 41, par. 2 directly correspond to the restrictions of Art. 10, par. 2 of the Convention.

Further protection of this matter aims the "National Council for Journalistic Ethics", which was established in 2005 to create a system of self-regulation of print and electronic media in Bulgaria, through interpretation and application of the Code of Ethics of the Bulgarian media and resolution of disputes between the media and their audience. By examining individual complaints of citizens through the establishment of high professional journalistic standards, the Commission defends the enshrined in the Constitution of the Republic of Bulgaria communication rights and freedoms. Despite not being legally binding, the Ethical Code of the Bulgarian Media has an article in section 1.3, devoted to the protection of journalistic sources. It states "1.3.3. We shall protect the identity of confidential sources of information." This is a clear sign of the professional understanding of the significance of keeping sources non-disclosed.

¹ Decision 7/1996 of the Constitutional Court (Конституционен съд) of the Republic of Bulgarian on case 1/1996

² Ibidem

3. Is there, in domestic law, a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

3.1 Bulgarian Legislation

In the Constitution of the Republic of Bulgaria there is no specific article that protects the journalistic sources. However in Chapter 2 (called Citizens' Fundamental Rights and Duties), in articles 39 some general principles can be found regarding the freedom of speech, which can be applied for the disclosure of journalistic sources too. Article 40 states that “the press and the other mass communication media are free and shall not be subjected to censorship”. To emphasize that right in article 41 it is clearly stated, “everyone has the right to seek, receive, and disseminate information. This right shall not be exercised to the detriment of the rights and reputation of others, or to the detriment of national security, public order, public health and morality.” In the aforementioned case № 1/1996 of the Constitutional Court of the Republic of Bulgaria (Конституционен съд на Република България) the judges clarified art. 39, 40, 41 of the Constitution in the context of the need to clarify the "communication rights". Furthermore, these rights are the basis for other democratic tools such as the political pluralism (art. 11 (1)). Those 3 articles are functionally connected. The state shouldn't try to limit the range of those rights. However if other rights are threatened, some of them can be limited. This does not mean in context of articles 4 and 32 (regarding the interference in private life and attacks against a person's honour, dignity and reputation) that person cannot be criticized. Especially, if that person is a politician or civil servant.³ Another article, which regulates this topic, is art.5, Para. 4 that says:

Any international treaty, which has been ratified according to a procedure established by the Constitution, which has been promulgated, and which has entered into force for the Republic of Bulgaria, shall be part of the domestic law of the land. Any such treaty shall take priority over any conflicting standards of domestic legislation.

3.1.3 Other Acts

The Civil Procedure Code and the Criminal Procedure Code of Bulgaria does not provide specific privileges for the journalist, so they can refuse to reveal their sources. Only in the Criminal Procedure Code under article 121, paragraph 1 is stated that “witnesses shall not be obligated to testify on questions, the answers to which might incriminate them, their relatives of ascending and descending line, brothers, sisters, spouses or individuals with whom they live together, in the commission of crime”

³ Decision from 20.03.2014 of Sofia Regional Court on case 44041/2012 (not in force to date 25.04.2016)

Article 15 of the Radio and Television Act secures the possibility for the media service providers not to disclose their sources of information. There is an exception of this rule – if an action was brought before the Council for electronic media or if there is a pending process before the court. In the same article it is stated that journalists shall not be obligated to disclose their sources of information either to the audience or to the management of a media service provider (art. 15, para. 2). As it is stated in the book “Freedom of Expression”⁴ the question whether the Radio and Television Act is applicable to journalists who also work in print media, remains open.

According to article 19 of the APIA (Access to Public Information Act) the access to any information, which is “public”, defined by the same act, regarding the mass communication media herein shall be exercised while applying and reconciling the principles of transparency and of economic freedom, as well as respecting the protection of personal data, trade secrecy, and non-disclosure of the identity of the sources of the mass communication media who provide information on condition of anonymity.

Last but not least is the Ethical Code of the Bulgarian Media. Par. 1.3.3 regulates that the identity of the sources of information shall be protected.

3.2 International Acts

The minimum requirements regarding protection of sources in the European Community can be found in Recommendation No.R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their source. This recommendation advises the countries to accept some changes in the domestic law led by the following principles: right of non-disclosure of journalists; right of non-disclosure of other persons; limits to the right of non-disclosure; alternative evidence to journalists' sources; conditions concerning disclosure; interception of communication, surveillance and judicial search and seizure; protection against self-incrimination. Bulgaria has ratified the European Convention on Human rights on 7th September 1992. The relevant case-law is applicable in Bulgaria and can be used in the courtroom.

3.3 Sanctions

General sanction connected with the topic can be found under Section VI “Disclosure of secret of another” of the Penal Code. Art. 145 proclaims: “ Who illegally discloses a secret of another dangerous for the good name of somebody, which has been entrusted to him or has become known to him in connection with his profession, shall be punished by imprisonment of up to one year or a fine of one hundred to three hundred levs.” Further sanction is given by the right to compensation under the **Law on Contracts and Obligations**, which is another way for protection, in cases of tort before the Civil Court.

⁴ Boyko Boev, Aleksander Kashumov, Krasimir Kunev, Neli Ognyanova, Polina Rusinova, “Freedom of expression”, Sibi 2010, pp. 171-196

4. Who is a “journalist” according to the national legislation? Is it in your view a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media Actors? Is the protection of journalists’ sources extended to anyone else?

4.1. Definition of a Journalist According to Bulgarian Legislation

The theoretical works on the subject of journalism can provide various definitions of the term “journalist”. Most of them regard journalists as all the media associates engaged in the collection, analysis, proofreading, commenting and distributing of news, comments, radio or television programs.⁵ However, Bulgarian legislation lacks explicit definition of who can be referred to as a journalist.

The scope of the journalistic profession can be implicitly brought out from legal acts. The main legal source in the field of journalism is The Radio and Television Act. Still it does not offer legal definition of the term journalist. It is stated in Article 1 of the Act that its purpose is to settle the media services, provided by media service providers under the jurisdiction of the Republic of Bulgaria.⁶ The subject of the Act is the services enumerated under Article 2 of the Act not the authors of the services. Although some rights and obligations of the journalists are written down, **there is no** definition in the Act of the term “journalist”. Therefore in some way the term journalist can be described implicitly with the rights and obligations under the Act such as the ones to refuse the fulfilment of an assigned task if it is not related to the fulfilment of the provisions of the Act or of the respective contracts and contradicts their personal convictions.⁷

In Bulgaria’s National Classification of Professions and Positions (NCPP)⁸ the journalistic profession is listed under the Second Class – Specialists and more exactly the branch of Jurists and Specialist in the field of public science and culture. The profession is named Journalist and under it are listed some of the specialties of which it is comprised. The profession of a journalist includes a wide range of professions, which all have something in common but differ in characteristics. Under the classification of the profession Journalist are written down the following specialties – Chief Editor, Editor of magazine/newspaper, Journalist, Reporter,

⁵ Maria Popova, *Theory of Journalism*, 95. See also Sofia University Faculty of Journalism and Mass communications, *Journalistic Jobs - Status and Dynamics in Bulgaria*, 8.

⁶ Radio and Television Act, published in State Gazette, issue 138, 1998

⁷ Ibid. Article 11

⁸ The National Classification of Professions and Positions, 2011. Pinpoints the professional and positional structure in the republic of Bulgaria and ensures the direct application of the International Standard Classification of Occupations, 2008. Hereinafter referred to as **The NCPP**.

Reporter/Journalist in magazine, newspaper, etc.⁹ From the description are expressly excluded Book Editors, Camera Operators, Photo reporters, Writers and Poets. Journalists are characterized as people who research, investigate, interpret and transmit news and public events through newspapers, radio and television.¹⁰ Also the NCPP provides detailed explanation of the main tasks which a Journalist performs. It is the fullest definition of the journalistic duties since the NCPP is in force for all the organizations and structures which offer jobs in Bulgaria.¹¹ However detailed it is, it is not and should not be regarded as an explicit definition but should be considered as a guideline for the functions a journalist performs. 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 provides a definition of a journalist. The definition finds reflection in the Standpoint on the subject of the protection of sources of information i.e. Article 1.3.3 of the Ethical Code of the Bulgarian Media,¹² issued on March 24 2015. The concept of journalistic profession is defined in terms of the scope of the protection. This protection does not regard the providers of information but the people who can be referred to as journalist in order to be protected due to their professional duty. Journalist is described as any individual or legal entity, which gathers and spreads information on a daily basis or professionally by the means of mass communication.¹³ The scope of the protection includes traditional and new media. This definition is fully accepted by the NCJE in its Official Statement.¹⁴

We can conclude that a full definition, which describes the elements of the term journalist, does not exist in the form of a legal definition accepted under national legislation. However, there are legal acts, which regulate the right and obligations of journalist.

4.2. Definition of the Purpose of the Protection of Journalist Sources

Principle 1, written down in the Appendix of Recommendation No. R (2000) 7 i.e. Right of non-disclosure of journalists, asks for protection of journalist and their right not to disclose information about their sources in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁵ Bulgaria ratified the European Convention on Human Rights in 1992. Article 10 of the ECHR finds reflection in Article 39 of the Constitution of the Republic of Bulgaria. Article 39 of the Constitution expresses the notion of freedom of opinion and its expression. This principle is one of the main principles on which Media Law is based.

⁹ Ibid.

¹⁰ Ibid.

¹¹ The National Council of Journalistic Ethics. Hereinafter after referred to as **The NCJE**.

¹² Ethical Code of the Bulgarian Media. Hereinafter referred to as **The Ethical Code**.

¹³ Recommendation No. R (2000) 7, Appendix, Definitions (a.).

¹⁴ Standpoint of the National Council of Bulgarian Media, Point 2.

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms 1950. Hereinafter referred to as **The European Convention on Human Rights (ECHR)**.

When considering the purpose of the protection of journalist sources the provision listed under Article 39 of the Constitution should be examined closely. Court Decision Number 7 of June 4 1996 of the Constitutional Court of the Republic of Bulgaria on Constitutional Case Number 1/96¹⁶ is delivered in order to provide interpretation of Articles 39, 40, 41 of The Constitution.¹⁷ The proceeding was initiated by a request to the Court from the President of the Republic. In it the Constitutional Court links the present Articles to Article 10 of the ECHR and also Article 19 of The 1948 Universal Declaration of Human Rights.¹⁸ In other Court Decision Number 15 of September 28 1993 in accordance with Constitutional Case Number 17 from 1993 the same Court states that the principle in Article 39 (1) presents “the opportunity for each person to realize itself in the social reality. It is also the basis of political pluralism and eliminates all forms of political, idealistic or faith monopoly.” The importance of Article 39 of the Constitution is undoubted. Nonetheless it does not cast any light on the subject of the protection of sources.

One of the basic principles deriving from the articles mentioned above is the principle of the protection of the sources of information and also the protection of personal information and the authenticity of the information provided. It is listed in the Ethical Code of the Bulgarian Media under Article 1 - Supplying the public with reliable information i.e. 1.3 Sources. The Ethical Code’s role in Bulgarian legislation will be further examined in Question 4 (4.3.1). Point 1.3.3 of the Ethical Code declares: *We shall protect the identity of confidential sources of information.* In addition The Official Statement of the NCJE which was discussed above in its first point states that in some cases journalist can directly apply the non-disclosure principle. Journalists may keep in secret the sources they used or are using when their disclosure will discredit the people presenting the information. Such decision should be made considering the obligations a journalist have to inform the public for the sources of the information and the obligations to the provider of the information. This on the other hand contravenes with the right given in Article 39 of the Constitution as an opinion and its express cannot serve as or be used to violate the right of person or for the perpetration of a crime, or the incitement of enmity or violence against anyone.¹⁹

We can come to the conclusion that restricted definition of the purpose of the protection of sources does not exist but can be extracted from the main principle of freedom of opinion.

¹⁶ 7/1996 of the Constitutional Court (Конституционен съд) of Republic of Bulgarian on case 1/1996

¹⁷ Legal basis of Media Law in Bulgaria.

¹⁸ Referred to as **UDHR**. Article 19 - 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.

¹⁹ The Constitution of the Republic of Bulgaria 1991, Article 39 (2).

4.3. The Scope of Protection of Other Media Actors and Anyone Else

Article 38 of the Constitution declares that “no one may be persecuted or restricted in his rights because of his convictions, or be obligated or forced to provide information about his own or another person's convictions”. The Radio and Television Act develops the legal basis of the fundamental human right, presented in the abovementioned Article. It declares under Article 15 (1) that radio and television operators shall not be obliged to disclose their sources of information except in some cases and under Article 15 (2) that journalists shall not be obliged to disclose the sources of information not only before the audience but also before the management of an operator except in some cases mentioned in the Act. From this we can come to the conclusion that journalist; radio and television operators are equal regarding the right of non-disclosure, which is an obligation as well.²⁰

5. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

5.1 Legal Safeguards

5.1.1 The Radio and Television Act and Access to Public Information Act

In contrast to others European Constitutions²¹, the right to protect journalists' sources and its legal safeguards finds its basis in the Constitution of Bulgaria in the guarantee of freedom of expression.²² However, there is no explicit provision for such protection. This goal is accomplished at a legislative level.

The legal basis of Bulgarian media law, as it was mentioned above, is the Radio and Television Act (RTA), aimed to transpose the revised Television without Frontiers Directive (TWF).²³ Since then RTA has been amended twenty times and today it contains updated rules and principles regarding the better protection of the freedom and pluralism of speech and information. However, it's disputable whether the scope of this act includes the protection of the press media. That is a matter of concern because RTA is the special law in this field and there is no other

²⁰ The Standpoint of the National Council, Decision 1

²¹ For instance the Constitutions of Portugal and Macedonia. The Constitution of Macedonia Art.16 Para.6 “The right to protect a source of information in the mass media is guaranteed”.

²² The Constitution of Republic of Bulgaria (1991) Art.39 para.1

²³ Nelly Ognyanova, Bulgarian media policy and law: How much Europeanization, Central European Journal of Communication 2 (2009) ISSN 1899-5101

domestic legislation, which safeguards the right of the journalist in the press media not to reveal the identity of their informants.

According to Article 15 of RTA, radio and television operators shall not be obliged to disclose their sources of information to the Council for electronic media. Nevertheless, this provision doesn't provide absolute privilege but admits exception in cases of "pending court proceedings or pending proceedings on a claim of affected person." Thus, the text is concise and gives the opportunity for different interpretations.

Another paragraph of the same article²⁴ stipulates that journalists are obliged to keep secret the source of information if this is explicitly requested by the person who has provided it. This rule raises inconsistency. On one hand, the Radio and Television Act imposes upon journalists the duty of not disclosing the identity of their sources, on the other there aren't envisaged any special privileges for protection in case of disclosure order. In this situation the only way journalist could avoid revealing their confidential sources is by self-regulatory mechanisms.

A further legal safeguard is offered in some circumstances through the Access to Public Information Act. In accordance to Article 19 the access to information on mass media should be carried out while observing and balancing the principles of the confidentiality of the sources of the mass media, which provide information on condition of anonymity.

5.2.2 Procedure laws

There are different methods journalists to be forced to divulge the names of their confidential sources. They can be treated with libel lawsuit or summoned as witnesses. The latter one is a consequence of the lack of efficient procedure provisions for protection of sources.

Bulgarian procedure codes, penal and civil, don't contain any special articles related either to an entitlement to journalists to keep the secrecy of their source or the circumstances in which such disclosure is admissible.

The Bulgarian Penal Procedure Code observes the circumstances in which witnesses shall not be obligated to testify²⁵. The right of not revealing sources of information is envisaged only in cases when the disclosure might incriminate the witness or their relatives in the commission of crime. Moreover, in accordance to Article 120 Para.4 a witness who refuses to testify outside the hypothese of Article 121 shall be punished by fine of up to BGN one thousand. According to Article 166 of The Civil Procedure Code determines that refusal to testify is inadmissible but witness could refuse to answer to a particular question if in this way would incur of inflict immediate damage, defamation or criminal prosecution. This article will be also applied in case the source is already known, but the journalist refuses to divulge further information. It comes clear that there are no explicit legal safeguards for protection of journalists'. This however, was

²⁴ The Radio and Television Act Art. 15 Para.4

²⁵ Penal Procedure Code Art.121

developed with the practice of the court. In the light of the abovementioned Constitutional decision 7/1996 is the practice of the Bulgarian court, including the very recent one, which recalls: “that freedom of expression constitutes one of the foundations of the democratic society and the safeguards to be provided to the press are of particular importance. The press must not overstep the boundaries set out *inter alia* in the interests of protecting the reputation and rights of others, but its duty is to impart information and ideas of public interest. Not only does the press have as its task to distribute such information and ideas, but also the public has a right to receive them. If this were not so, the press would not be able to play its vital role of 'public watchdog'. Journalists have the right not to disclose the identity of their sources, behavior cannot be defined as illegal because it is one of the guarantees of freedom of speech and the public role of the media to disclose and present relevant information.”²⁶ The court cites *Goodwin v. United Kingdom*, *Sunday Times v. United Kingdom*, *Lingens v. Austria* in this and other cases, related to protection of journalistic sources.²⁷

The Bulgarian court applies those ideas stating: “the established journalistic practices of checking authenticity of published information and the prior involvement of the person concerned before publication is a main condition in order not to be disturbed the balance between the right to information and protection of privacy”.²⁸

5.3 Self – regulations

The self – regulation system in the mass media in Bulgaria has been placed on a good foundation, but it is still not widely accepted either by professional circles or the public at large.

5.3.1 Codes of Ethics and the National Council of Journalism Ethics

Bulgaria is one of the first Eastern European countries in which major media owners from the Union of Publishers in Bulgaria have become involved in the creation and implementation of a media self-regulatory mechanism, the Code of Ethics for the Bulgarian media, signed in 2004.²⁹ The Ethical Committees that were set up to oversee compliance with the Code, however, rule only on cases related to media that have signed the document. Thus emerges the paradox – having rules only for radio and television, but not for print media, and rules valid only for the

²⁶ Decision from 11.04.2016 of Sofia City Court on case 16570/2015

²⁷ Decision 3614/2013 of Sofia City Court on case 29/2012; Decision 17/2011 of the Supreme Court of Cassation on case 641/2010

²⁸ *Ibid.* 3614/2013

²⁹ SEENPM, *Freedom of speech in South East Europe: Media independence and self-regulation*, 2007

signatories of this Code. As a result a considerable number of media outlets are excluded from the scope of both legal and self-regulations.³⁰

The Union of Publishers in Bulgaria has also contributed to the establishment of self-regulatory body – the National Council for Journalism Ethics. The National Council for Journalistic Ethics was officially registered as a foundation in 2005. One of the main goals of the Council, according to its Statute, is to strengthen the freedom of speech, safeguard journalists' rights and protect editorial sources of information. In 2014, the Bulgarian Media Union published a Code of Ethics and Professionalism of the Bulgarian Media. Representatives of the Bulgarian media, gravitating to New Media Group, which vigorously refused to sign the Code, adopted in 2004, signed the Code of Ethics and Professionalism. The problem that comes in mind in this context is that the existence of two alternative codes can hardly be taken as a positive and adequate development but rather a step towards imposing self-regulation for private benefits. This inference is suggested by the absence of a body to supervise the implementation of the second code.

In accordance to the Ethical Code of the Bulgarian Media, journalists are obliged to protect the identity of confidential sources of information³¹. In March 24 2015, the National Council for Journalistic Ethics adopted a Statement, based on this matter. Thus, the Council stressed the importance of this not only right but obligation of journalists and gave additional explanations about its content. In the spirit of European principles and standards the Statement states that the protection of sources could be put to restrains only after the observation of the prerequisites of legitimacy, proportionality, necessity and judgment, made by independent and unprejudiced court.

The Code also treats the parameters of what is known as public interest. It's states that a publication or a broadcast is on the public interests only if it protects public health, safety, and security; helps the prevention and the disclosure of serious crimes and the abuse of power, or prevents the public from the danger of being seriously misled. There are numerous positive examples of the practice of the court about decisions in which the Court takes into consideration the violation of the Code and states that: "According to the Ethical Code of the Bulgarian Media, when a journalist exports facts, which affect the honor of another person, he or she must verify their authenticity before they are spread. Legal provisions for the manner in which this test is performed are not implemented. Established perception is the affirmation that the journalist has received confirmation from at least two independent sources. The legal significance of the due diligence is manifested when, despite its performance, the facts prove untrue. In this case, if the check is made *bona fide*, guilt shall be excluded and the journalist shall not be responsible for

³⁰ Ivan Radev, "A necessary upgrade and restart of the media self-regulation process in Bulgaria" (Association of European Journalists-Bulgaria, 12 May 2014) <<http://www.cej-bulgaria.org/eng/p.php?post=1672/>> accessed 2 March 2016 [Bulgaria]

³¹ Ethical Code of the Bulgarian Media Art.1.3.3 "We shall protect the identity of confidential sources of information".

damages caused by the offending act.”³² The court takes into consideration that the journalist has the right not disclose her or his sources, when necessary.³³

6. In the respective national legislation are the limits of non-disclosure of the information in line with the principles of the Recommendation No R (2000) 7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

6.1 Limits of non-disclosure of the information in ECHR and Recommendation No R (2000) 7.

The right of journalists to protect and not disclose their sources is not absolute. In the case of *Goodwin v United Kingdom* (1996), the Court of Human Rights in paragraph 39 is noted that:

Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an **overriding requirement in the public interest**.

Article 10, paragraph 2 of the Convention outlines the major limitations of non-disclosure of the information, which include sufficiently vital and serious circumstances in the scope of protection of national security, human life, health, morals etc. In the case of *Sunday Times v. The United Kingdom*, (no. 2), para. 50 the Court of Human Rights explains the meaning of the expression “necessary in a democratic society”, used in Article 10 para. 2 of the ECHR, which, according to the Court, implies the existence of a “pressing social need”. The Court establishes that the Contracting States should have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts.³⁴

³² Decision 1316/2013 of Sofia City Court on case 557/2007

³³ Decision 85/2012 of the Supreme Court of Casation on case 1486/2011

³⁴ *Sunday Times v. The United Kingdom* (no.2), para. 50 (c), 26 November 1991 <<http://hudoc.echr.coe.int/eng?i=001-57708>> accessed March 03 2016

In that matter Recommendation No R (2000) 7 in Principle 3 reaffirms these requirements and does not attempt to amend Article 10 of the Convention. It recommends common standards to be applied by national authorities in member States³⁵, which corresponds to the content of the phrase “prescribed by law” (Article 10 para.2 of the ECHR). As a rule, this would mean a written and public law adopted by the Parliament³⁶.

6.2 Applicable legislation in Bulgaria

As it was said, in Bulgaria the right of journalists not to disclose their sources of information in case they received the information confidentially, which is implemented in Recommendation No R (2000) 7, is not explicitly listed in the constitutional regulations.

The Bulgarian national law in Article 34, 39, 40 of the Constitution of the Republic of Bulgaria only outlines the cases in which the freedom and confidentiality of correspondence, the freedom of expression and the right for access to information are limited. These restrictions are “permissible solely with authorization from the judiciary, where this is necessitated for detection or prevention of grave crime” (see article 34, Section 2 of the Constitution). Furthermore, the freedom of expression and information “shall not be used to the detriment of the rights and reputation of others, or for incitement to a change of the constitutionally established order by force, to the commission of criminal offences, or for incitement to animosity or to personal violence” (see article 39 Section 2 of the Constitution). If we may use the method of *analogia legis*³⁷ we may assume that the mentioned limitations may also apply to journalists’ right not to disclose their sources of information.

As mentioned above, according to Article 15 of RTA the radio and television operators shall not be obliged to disclose their sources of information of the Council for electronic media. That is also noted in the Ethical Code of the Bulgarian Media³⁸. However, our Civil Procedure Code and Code of Criminal Procedure, which regulate the interrogation of witnesses, do not give journalists the privilege not to disclose their sources of information. Moreover, Article 290 Section 1 of the Penal Code says “who, before a court or other respective body of the authority, as a witness, verbally or in writing, deliberately confirms a falsehood or **conceals the truth** shall be punished for perjury by imprisonment of up to five years”. As it can be seen journalists are not only deprived of special privilege of not identifying their sources but they may be sanctioned for not doing so.

³⁵ Explanatory memorandum to Recommendation No. R (00) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information (Adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministers' Deputies)

³⁶ Monica Macovei, Freedom of expression: A guide to the implementation of Article 10 of the European Convention on Human Rights, Council of Europe, January 2004, p.30

³⁷ Analogia legis is considered an interpretive argument, which refers to the application of a legal norm regulating a case to an essentially similar case for which no legal norm exists

³⁸ Article 1.3.3 of Ethical Code of the Bulgarian Media.

Another way in which a source can be revealed is by searching a journalist's home and office and actions concerning the private or business premises, belongings or correspondence of journalists or their employers or personal data related to their professional work.³⁹ In the respective national legislation this matter is arranged in the Code of Criminal Procedure (CCP)⁴⁰. Neither of its provisions provides special regulations when these particular actions are not directed towards journalists or the media or any other national acts. According to Article 159 CCP upon request of the court or the bodies of pre-trial proceedings, all institutions, legal persons, officials and citizens shall be obligated to preserve and hand over all objects, papers, computerized data, including traffic data that may be of significance to the case. In pre-trial proceedings search and seizure shall be performed with an authorisation by a judge from the respective first instance court or a judge from the first-instance court in the area of which the action is taken, upon request of the prosecutor.⁴¹ In cases of urgency, where this is the only possible way to collect and keep evidence, the bodies of pre-trial proceedings may perform physical examination without authorisation, but not later than 24 hours thereafter⁴², following a decision of the court which is trying the case⁴³. This procedure corresponds to the international standards in this field.

7. In the Recommendation No R (2000) 7 the following principles should be respected when the necessity of disclosure is stated: absence of reasonable alternative measures, outweighing legitimate interest (protection of human life, prevention of major crime, defence of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the disclosure outweigh the interest in the non-disclosure?

In Bulgaria, the principles are implemented in the national law system. They take form in The Radio and Television Act, which serves as a codifying tool that is trying to ensure the rights and the legal position of the journalists and the providers of information to the public. The Act is also used to regulate the status of the Council for Electronic Media, which is the main regulatory, body regarding the electronic media services.

The Radio and Television Act is codifying basically the entirety of the law related to the journalism and mass media services, since it contains most (yet not all) of the legal rules, relating media service providers. Yet we are lacking the working mechanisms to protect, to defend journalists from the investigating bodies. We are also lacking the measures to make sure that everyone that is trying to provide information in the form of any media service or in any media form gets enough protection.

³⁹ Recommendation No R (2000) 7 of the Committee of Ministers, Principle 6

⁴⁰ Code of Criminal Procedure, Article 159-165

⁴¹ *Ibid.*, Article 161, Section 1

⁴² *Ibid.*, Section 2

⁴³ *Ibid.*, Section 3

Bulgaria is a member of the Council of Europe and is bound to the European Convention of Human Rights, the Convention does indeed have a direct legal effect, and so it has the required legal force so that the authorities or the jurisdictions can apply the act. This effect is implemented in numerous cases. For example, Sofia Appeal Court in a case for insult proclaims: "The court of first instance correctly found in its reasoning that, according to the European Court of Human Rights (ECHR), one of the basic principles of free journalism is failure to disclose sources of information. In this sense, the preservation of information sources is one of the guarantees of freedom of expression, particularly freedom of expression in article 10 of the Convention for the Protection of Human Rights and based Freedoms (ECHR)."⁴⁴

8. In the light of the case law of the European Court of Human Rights how do national courts apply the respective laws with regard to the right to protect sources? In particular, how do they balance the different interests at stake?

8.2 Application

Modern legislations must guarantee that in every society all kind of matter could be discussed freely. It is not considered a violation when the information is subject of a case. It is proved that revealing is more important than protecting the source, if there is no existence of other ways of receiving the information and if assesement by unprejudiced court or organisation is made. The domestic court cites in numerous cases the principles and the case-law of the ECtHR.⁴⁵ In decision 212/2013 on case 5560/2012 Sofia City Court states that: "the case-law in the country and that of the ECtHR is constant." Citing the practice of the ECtHR including *Lingens v. Austria*, the court has reached the following conclusion: "It is necessary strictly and accurately to distinguish between facts and opinions. The existence of facts can be demonstrated (shown) while the truthfulness of the assessment is not subject to proof. Regarding the legal assessments, this requirement cannot be met and is an attack against freedom of expression." Moreover, in the same decision the ECHR underlined that "the limits of permissible criticism of a politician are wider than criticism of individuals." In this sense, and Decision 7/1996 the Constitutional Court of the Republic of Bulgaria has advocated that "... statements that affect the activity of state bodies or constitute criticism of political figures, government officials or the government, deserve a high level of protection. Hence it can be concluded that the government as a whole, as well as political figures and public officials can be subjected to public criticism at a level higher than that suffered by individuals." The decision is based on the practice of the ECtHR in correspondence to the Bulgarian practice. Revealing information, which is possessed by the government, is crucial for the democratic societies and allows the citizenship to observe the

⁴⁴ Decision 212/2013 of the Sofia City Court on case 5560/2012

⁴⁵ Decision 941/2013 of the Sofia City Court on case 2400/2013; 4939/2013 on case 26/2012; 3614/2013 on case 29/2012; 18311/2014 on case 16594/2013

activity of the secular power. Sometimes the public interest is so massive that it overcomes the obligations for privacy policy imposed by the law.

8.3 Balance of Interests

Any kind of interferences with privacy should be assessed legally and proportionally. Depending on the competing interests at stake the degree of discretion seems to vary. National courts are obliged of being well organised in interest balancing. If the standard of **Article 8** were to be followed it would still demand national courts to provide horizontal effect of the right to privacy. The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.

A journalist may reveal his source if only a vital public or individual interest is at stake. In some cases the more important the violated interest is, the more important it will be to protect the sources. Courts may only order disclosure when in the particular case the information is of a great level of importance and conflicting interests are at stake.

In most national legislations the party who wants disclosure should indicate interest and argument that the information is of a great importance. The courts should scale the risk of disclosure to freedom of expression. The law standards and requirements, both international and national, must carefully be followed and balanced. The domestic court makes a test for balance, taking into "consideration the provisions of art. 10 of the ECHR, which regulates freedom of expression, as long as it corresponds to the constitutional right to freedom of expression enshrined in Article 39, para. 2 of the Constitution of Bulgaria. Para. 2 gives the limitations of the right, which shall not be used to the detriment of the rights and reputations of others. In deciding whether the right to protection of reputation of citizens must prevail over the right to freedom of expression, the court must always determine what is the balance between the right to freedom of expression in the public interest and the need to respect the right of honor, dignity and reputation of citizens. The criteria for achieving the right balance are proof of the presence or absence of good faith on the part of the journalist. "Good faith" involves applying at least minimal effort on the part of the authors to verify any information before its publication. The need for a thorough examination and confirmation of the factual claims, increased by strengthening the defamatory nature of the information highest expression of which is the attribution of a crime. Only when the journalist makes the necessary verification of the authenticity of the information according to the established journalistic practice, internal rules of the Bar or publisher using objectively existing and possible sources of information, there is professional integrity, which excludes criminal or civil liability for defamation."⁴⁶

⁴⁶ Decision 212/2013 of Sofia City Court on case 212/2013

9. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

9.1 The Special Surveillance Means Act

The Special Surveillance Means Act (The SSMA) presently is the principal legislative enactment regulating the use of special means of surveillance and was adopted in October 1997.

The SSMA governs the conditions for and the manner of use of special means of surveillance, as well as the control of their use and of the results obtained thereby. It defines special means of surveillance as technical devices which can be used for creating photographs, audio and video recordings and marked objects, as well as the methods for operating them.

By section 3(1) of the SSMA, special means of surveillance may be used when necessary to prevent or uncover grave crime (Article 93 § 7 of the Criminal Code of 1968 defines a "grave" crime as one punishable by more than five years' imprisonment), if the requisite intelligence cannot be obtained through other means. Section 4 provides that special means of surveillance may also be used for activities relating to national security.

Special means of surveillance may be used against:

- Individuals suspected, on the basis of the information available, of planning, committing, or having committed grave crimes
- Individuals who might be unwittingly involved in the above by the suspected perpetrators.
- Individuals and objects related with national security (section 12(1)).
- Individuals who have agreed to that in writing, to protect their lives or property (section 12(2)).

Only the following bodies may request the use of special means of surveillance and draw on the intelligence obtained thereby, in the spheres of their respective competencies:

- The central "Security" and "Police" services of the Ministry of Internal Affairs, as well as the national and territorial directorates of that Ministry;
- The "Military Information" and "Military Police and Military CounterIntelligence" services of the Ministry of Defence;
- The National Intelligence Service;
- The National Investigation Service, the Sofia Investigation Service and the regional investigation services;

- The Prosecutor General, the Supreme Cassation Prosecutor's Office, the Supreme Administrative Prosecutor's Office, the Military Appellate Prosecutor's Office, the appellate prosecutor's offices, the Sofia City Prosecutor's Office and the regional and - regional military prosecutor's offices (section 13(1) and- (2))⁴⁷.

9.2 Researches

In the end of 2000 the Supreme Cassation Prosecutor's Office carried out a special inquiry on the use of special means of surveillance by the Ministry of Internal Affairs during the period January 1 1999 – January 1 2001. The report stated that the overall number of warrants for the use of special means of surveillance during the period January 1 1999 – January 1 2001 was just over 10,000, and that did not include tapping of mobile phones. Out of these, only 267 or 269 had subsequently supplied evidence for use in criminal proceedings. In 243 cases special means of surveillance had been used against persons in respect of whom there had been no grounds for suspecting them for committing a serious intentional offence. In a number of cases the orders for the deployment of such means had not been signed by the Minister of Internal Affairs himself, but by unknown persons on his behalf. In 36 cases the dates of the applications for warrants and of the warrants themselves had been modified. In 28 cases the warrants had not been assigned a number. In some cases the warrants had authorised measures implemented more than twenty-four hours before their issue. In two cases the persons in respect of whom the warrants had been issued were not the persons under investigation.

In an interview published by the daily *Trud* on January 26 2001 the Minister of Internal Affairs said that during his thirteen months in office he had signed 4,000 orders for the use of special means of surveillance.

During the period December 2002 – February 2003 various newspaper publications reported a number of cases where it was alleged that the services of the Ministry of Internal Affairs had unlawfully used special means of surveillance. The allegations included illegal tapping of the telephones of opposition leaders, journalists, a former constitutional court judge, and other judges. In an interview published on 11 December 2002 the Minister of Justice stated that “a tremendously high number of wiretappings take place in Bulgaria, but apparently for aims different from those of the criminal process”.⁴⁸

A report carried out by the Bulgarian newspaper “Sega” found that during the period of July 7 2014 – December 31 2014 in the Sofia City Court the number of applications for warrants for the use of special means of surveillance amounted to 1647. The refusals for issuing a warrant were just 23. During the period July 7 2015 – November 9 2015 during the presidency of the

⁴⁷ Association for European Integration and Human Rights and Ekimdzhev v. Bulgaria, no. 62540/00, 28 June 2007

⁴⁸ Ibid, para 52.

new president of the Sofia City Court the number of applications were 156. 63 orders were issued and 63 were refused to be issued. A 7-time decline of the issued warrants is observed.⁴⁹ According to The National Bureau 9 were the people who were unlawfully monitored.⁵⁰

In the case of *Weber and Saravia v. Germany*⁵¹, the Court reiterated its case law and noted that legislation which by its mere existence entailed a threat of surveillance for all those to whom it might be applied necessarily struck at freedom of communication between users of the telecommunications services and thereby amounted in itself to an interference with the exercise of the applicants' rights under Article 8, irrespective of any measures actually taken against them. This principle was applied in the *Kennedy v. the United Kingdom*⁵² judgment, in which it was stipulated that in order to assess whether an individual could claim an interference as a result of the mere existence of legislation permitting secret surveillance measures, the Court had to have regard to the availability of any remedies at the national level and the risk of secret surveillance measures being applied to the person concerned. Where there was no possibility of challenging the alleged application of secret surveillance measures at domestic level, widespread suspicion and concern among the general public that secret surveillance powers were being abused could not be said to be unjustified. In such cases, even where the actual risk of surveillance was low, there was a greater need for scrutiny by the Court.⁵³

9.3 Bulgarian Court Practice

In a final judgment from February 12 2004 (реш. № 1195 от 12 февруари 2004 г. по адм. д. № 9881/2003 г.), given pursuant to an appeal by a person who had been refused information on whether the use of special means of surveillance had been authorised against him during the period January 1 1996 – November 1 2001, the Supreme Administrative Court held that while Article 41 of the Constitution enshrined the right to obtain information from a state body, that right was subject to limitations when, for instance, this information was a state or an official secret. It was apparent from section 33 of the SSMA that information about the use of special means of surveillance was not to be disclosed. The refusal to provide the requested information was thus compatible with Article 32 § 2 of the Constitution and Article 8 of the Convention.

⁴⁹ Doroteya Dachkova, **Исканията за СРС са намалели драстично след оставката на Янева** (Sega newspaper, 23 November 2015) <<http://www.segabg.com/article.php?id=779637/>> accessed 04.03.2016 [Bulgarian]

⁵⁰ Marieta Nikolaeva, **Деветима незаконно подслушвани у нас през 2015 г.** (BTV News, 29 November 2015) <http://btvnovinite.bg/article/bulgaria/devetima-nezakonno-podslushvani-u-nas-prez-2015-g.html/>> accessed 04.03.2016 [Bulgarian]

⁵¹ *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 78, ECHR 2006-XI

⁵² *Kennedy v. the United Kingdom*, no. 26839/05, 18 May 2010.

⁵³ National security and European case law,

<https://www.coe.int/t/dghl/standardsetting/dataprotection/TPD_documents/Jurisprudence%20CEDH_En%20%28final%29.pdf> accessed 14.04..2016.

In a final judgment of May 15 2004 (реш. № 4408 от 15 май 2004 г. по адм. д. № 996/2004 г.), given pursuant to an appeal by the same person as in case no. 9881/2003 (see paragraph 49 above), concerning a further refusal to inform him of measures of covert surveillance against him, the Supreme Administrative Court held that his request for such information had properly been denied, because the information relating to special means of surveillance and the intelligence obtained by using them was a state secret within the meaning of section 25 of the PCIA and points 6 and 8 of part II of Schedule No. 1 to the PCIA. On the other hand, the eventual intelligence obtained pursuant to a warrant to use special means of surveillance, as well as the warrant itself, were an official secret within the meaning of section 26(1) of the PCIA. This followed also from the prohibition to divulge information about special means of surveillance laid down in section 33 of the SSMA. The court went on to hold that the fact that the use of special means of surveillance could only be authorised by the presidents of the regional courts was sufficient to ensure independent judicial review of the activities of the executive and provided sufficient safeguards against unwarranted restriction on the citizens' rights.⁵⁴

9.4 The European Court of Human Rights Court Practice

In the case *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00 of 28 June 2007 The European Court of Human Rights analyses the Bulgarian legislation on secret surveillance measures, whether its norms are clear, precise and foreseeable and if there are efficient guarantees against the risk of abuse. In its judgement the Court in paragraphs 70-73 accepts that the SSMA provides a legal basis for the interference and is accessible to the person concerned, who must moreover be able to foresee its consequences for him or her, and is compatible with the rule of law. However, regarding the third requirement - the law's foreseeability and compatibility with the rule of law, the Court states several shortcomings such as the lack of external control over the use of secret surveillance measures, lack of regular report to an independent body or to the general public on the overall operation of the system, the persons subjected to secret surveillance are not notified of this fact at any point in time and under any circumstances, lack of sufficient guarantees against the risk of abuse. The court finds that: "the system of secret surveillance in Bulgaria is, to say the least, overused, which may in part be due to the inadequate safeguards which the law provides"⁵⁵

9.5 Anti-terrorism Legislation

The Law on Measures against the Financing of Terrorism is promulgated in State Gazette in 2003. The Act prevents and detects actions by natural persons, legal persons, groups and organizations that are directed at financing terrorism by blocking/freezing of funds, financial

⁵⁴ Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, no. 62540/00, para 49-50, 28 June 2007

⁵⁵ Ibid, para 92

assets and other property and prohibition to provide financial services, funds, financial assets or other property (Article 2 – 3 The Law on Measures Against the Financing of Terrorism).

The information necessary to achieve the purposes of this Act shall be collected, processed, systematized, analysed, stored, used and provided by the State Agency for National Security (Article 4, *ibid*).

According to Article 5 a list of the natural persons, legal persons, groups and organisations in respect whereof the measures under this Act should be applied is made.

10. Can Journalists rely on Encryption and Anonymity Online to Protect Themselves and their Sources against Surveillance?

The interception of communications constitutes an interference with the right to privacy of those communications under Article 8 ECHR, whether made via email, phone, text message, or social media, as it was ruled by the European Court of Human Rights in *Klass v. Germany*⁵⁶, *Weber and Saravia v. Germany*⁵⁷ and *Kennedy v. United Kingdom*⁵⁸ cases. The same is true in respect of accessing communications data, or metadata (for example *Malone v. United Kingdom*⁵⁹). The same concerns the interception of communications aimed to obtain information about journalists' sources which has always been regarded as one of the types of intrusive surveillance impairing internationally recognized human rights, including freedom of expression and the right to privacy and therefore, requiring limitation in its use.⁶⁰

Freedom of expression is established under Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.⁶¹ Right to privacy is established under Article 12 of the Universal Declaration of Human Rights.

In 2012, the United Nations Human Rights Council adopted a landmark resolution affirming “the same rights that people have offline must also be protected online”.⁶² It acknowledged the 2011 reports on ‘the right to freedom of opinion and expression exercised through the Internet’ by UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression Frank La Rue, which highlighted how freedom of expression can be

⁵⁶ <<https://stewartroom.co.uk/wp-content/uploads/2014/07/Cases-ECHR-Klass.pdf>> accessed 1 March 2016

⁵⁷ <<http://www.bailii.org/eu/cases/ECHR/2006/1173.html>> accessed 1 March 2016

⁵⁸ <<http://www.bailii.org/eu/cases/ECHR/2010/682.html>> accessed 1 March 2016

⁵⁹ <<https://stewartroom.co.uk/wp-content/uploads/2014/07/Cases-ECHR-Malone.pdf>> accessed 1 March 2016

⁶⁰ “Interception of journalists communication” <<https://internetlawreview.wordpress.com/tag/echr/>> accessed 1 March 2016

⁶¹ Office of the United Nations High Commissioner for Human Rights, (23 March 1976), International Covenant on Civil and Political Rights. <www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed 1 March 2016

⁶² United Nations Human Rights Council, “The promotion, protection and enjoyment of human rights on the Internet” (16 July 2012) <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/20/8> accessed 1 March 2016

fostered as well as violated through the internet.⁶³ La Rue warned of 'increased restrictions on the Internet through the use of increasingly sophisticated technologies to block content monitor and identify activists and critics, criminalization of legitimate expression, and adoption of restrictive legislation to justify such measures'.⁶⁴ La Rue also emphasized the importance of 'private, secure, and anonymous' communications, describing the 'chilling effect' of excluding individuals from vital social spheres and 'dissuading the free expression of information and ideas' when restrictions are placed on people's ability to communicate anonymously.⁶⁵ Later in 2013, La Rue's 'surveillance' report was further reinforced by a UN General Assembly resolution on the right to privacy in the digital age. It called on states to respect the right to privacy in digital communications and take measures to prevent violations, including a review of existing laws and practices and the establishment of oversight mechanisms.⁶⁶

Bulgarian authorities have not yet enacted a law, which explicitly stipulates the right of journalists to encryption and anonymity online in order to protect themselves and their sources against surveillance. So the rights to privacy and freedom of opinion and expression shall apply to secure online communication of journalists, specifically by encryption or anonymity. The Electronic Communications Act, the Protection of Classified Information Act and the Ordinance on Cryptographic Security of Classified Information regulate the work of the State Security Agency and the legal procedures in Bulgaria, which provide for individuals and organizations to use encryption methods to protect online communication and messages and anonymous online communication and transmission of information. As The Permanent Mission of the Republic of Bulgaria to the United Nations Office and other International organizations in Geneva said: "There is no regulation prohibiting persons or organisations to use specific software encryption applications, special software for Internet anonymity or software tools for anonymous communication."⁶⁷ However, there are some restrictions. According to the Electronic Communications Act, radio equipment and/or electronic communication devices including hardware devices to the equipment or the terminal devices for encryption of electronic messages and using cryptographic keys longer than 56 bits are produced or imported after registration in the State Agency for National Security. Cryptographic devices for banking transactions, smart cards, devices for encoding television signals, mobile phones without built-in additional crypto

⁶³ Frank La Rue, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. (10 August 2011) (United Nations General Assembly document A/66/290). <<http://www.ohchr.org/Documents/Issues/Opinion/A.66.290.pdf>> accessed 1 March 2016

⁶⁴ Frank La Rue, "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression". Office of the United Nations High Commissioner for Human Rights. (A/HRC/17/27). <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A_HRC.17.27_en.pdf> accessed 1 March 2016

⁶⁵ La Rue, A/HRC/23/40, op. cit., p. 7

⁶⁶ United Nations General Assembly, "The right to privacy in the digital age" (20 November 2013) (UN Doc A/C.3/68/L.45/Rev.1. <http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/68/L.45/Rev.1> accessed 1 March 2016

⁶⁷ <<http://www.ohchr.org/Documents/Issues/Opinion/Communications/States/Bulgaria.pdf>> accessed 1 March 2016 [Bulgarian]

module and cryptographic means used by agencies or other organization with diplomatic status are not subject to registration. The legislation provides sanctions for the persons who produce or import radio equipment and/or electronic communication devices without necessary registration.

The problem of the rights to privacy and freedom of opinion and expression in Bulgaria is regulated in the Bulgarian Constitution, data protection and criminal legislation. In 1981, The Council of Europe adopted Convention №108 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has been ratified by the Republic of Bulgaria in 2002. Most constitutions adopted since 1990 contain provisions on the rights of access, control and data protection. In The Bulgarian Constitution these rights are addressed in Article 32, 33 and 34. They relate to privacy and family life of citizens, prohibition of attack against citizen's honor, dignity and reputation, prohibition tracking the use of photography, film recording or subjects to other similar actions without citizen's knowledge or despite his disagreement, inviolability of the home, freedom rights and secrecy of correspondence and other communications. With the Personal Data Protection act, which was adopted in 2000, Bulgaria transposed the principles and norms of Directive 95/46/EU harmonizing its domestic legislation with the European Union's legislation.

The Access to Public Information Act also protects the sources of information. Article 19 stipulates that "the access to information under Article 18 is being applied at the same time with keeping and balancing the principles for transparency and economic freedom and the principles for protection of the personal data, the trade secret and the confidentiality of the sources of information of the media, who have agreed to disclose information on the condition of confidentiality." The principle of protection of sources of information was also laid down in the Ethical code of the Bulgarian media, where in 1.3.3, it is written: „We will not disclose our confidential sources of information." In a decision, taken on March 24 2015, the National Council for Journalistic Ethics has made a statement on the topic: „Journalists bear not just the right, but also the obligation to protect their sources, whenever they are confidential. The right for protection of sources may be a subject to restrictions only when the requirements for legality, proportionality, and necessity in the democratic society are met, and after a decision of an independent and unbiased court." The right of citizens to encryption and anonymity online to protect themselves against surveillance is laid down in the Criminal Code of the Republic of Bulgaria under Article 145a, Article 171 and Article 171a.

In 2015, the Criminal Code and in particular Article 171a was amended - unlawful storage of traffic data shall be punished by deprivation of liberty of up to three years or probation. So far this punishment was applied only to their illegal acquisition, disclosure and dissemination. Bulgaria have to draw up guidelines for public authorities and private service providers concerning the protection of the confidentiality of journalists' sources in the context of the interception or disclosure of computer data and traffic data of computer networks in accordance with Articles 16 and 17 of the Convention on Cybercrime and Articles 8 and 10 of the European Convention on Human Rights.

In order to protect the rights to privacy and freedom of opinion and expression of individuals, the Supreme Administrative Court Decision №13627/11.12.2008 annulled Article 5 of Regulation 40/2008 for the categories of data and the order in which they are stored and provide

for the needs of security and detection of crime. The text formulated this way does not set conditions preventing abuse of the opportunity to violate constitutionally guaranteed rights of citizens. According to the court in the repealed provision there is a lack of clarity about guaranteeing the right to protection against unlawful interference in private and family life, which determines the controversy with Article 8 of the European Convention on Human Rights, Article 32 and Article 34 of The Constitution of the Republic of Bulgaria.

In 2010, the Electronic Communications Act was amended after the transposition of Directive 2006/24/EU related to telecommunications data retention. According to the Directive, member states had to store citizens' telecommunications data for a minimum of 6 months and at most 24 months. Under the directive the police and security agencies were able to request access to details such as IP address and time of use of every email, phone call and text message sent or received. Permission to access the information was granted only by a court. Practice for protecting the rights to privacy and freedom of opinion and expression is observed in 2015, when The Constitutional Court Decision №2/12.03.2015 declared for unconstitutional Articles 250a-250e, 251 and 251a of the Electronic Communications Act. Making this decision made free monitoring of the Internet illegal. This happened after on April 8 2014 the Court of Justice of the EU declared the Directive invalid in response to a case brought by Digital Rights Ireland against the Irish authorities.⁶⁸

The amended Electronic Communications Act adopted in October 2015 accepts the following rules: Data obtained from Internet or telephone monitoring will be stored for six months, not twelve as previously provided. There will be a judicial control over the requests for extension of the period for data storage. Monitoring is to be applied only in cases of heavy crimes. Authorities won't have the power to access users' data without a warrant. There will be no access to data when people are declared missing. Another measure provides for an independent state body to control the destruction of data after their storage period. This happened while governments in the UK, Germany, Australia, France and elsewhere are proposing or have passed surveillance laws that grant sweeping powers to mandate data retention and to access users' data without warrants.⁶⁹

Questions of surveillance are all more relevant in the context of the Internet, as the ongoing evolution of Internet technology has included the rapid development of equipment and techniques to monitor online communications.⁷⁰ For example, in the case of *Bureau of Investigative Journalism and Alice Ross v. the United Kingdom*, currently under examination, the applicants complain under Articles 8 and 10 of the Convention about the interception of communications,

⁶⁸ European Union Agency for Fundamental Rights on Data Retention across EU <<http://fra.europa.eu/en/theme/information-society-privacy-and-data-protection/data-retention>> accessed 1 March 2016

⁶⁹ <https://www.accessnow.org/despite-opposition-france-approves-dangerous-new-surveillance-law/> accessed 1 March 2016

⁷⁰ ECHR Research Division, "Internet case-law of the ECHR" http://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf accessed 1 March 2016

including on the Internet.⁷¹ More precisely, they consider that the statutory regime in relation to the interception of external communications has affected their ability to undertake their work of investigative journalism without fear for the security of their communications. Ultimately, they argue this poses a risk to the public watchdog role of the press. *Big Brother Watch and Others v. the United Kingdom* (no. 58170/13) is another case in point. The applicants complain about the interception of communications by the intelligence services. This application, which is pending, concerns the compatibility with Article 8 of the collection, analysis, storage and destruction of the information thus intercepted.⁷²

11. Are whistle-blowers explicitly protected under the law protecting journalistic sources? Is there another practice protecting whistle-blowers? Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

11.1. Definition of "whistle-blower"

The concept of whistleblowing derived from the practice of the English police officer Bobby to report an offence by blowing a whistle⁷³. In the sense of Recommendation CM/Rec (2014) 7 of the Committee of Ministers to member States on the protection of whistle-blowers, the term '**whistle-blower**' is identified as "*any person who reports or disclose information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector*". However, similar term to "whistle-blower" cannot be found in Bulgarian law and the term "**signal**" is used instead. In addition the term "**investigative journalism**" is applicable when the signals come from websites, journalists and reporters⁷⁴. Such variety of words often lead to confusion, especially when applied to non-English speaking countries like Bulgaria - problem that was recognized even by Council of Europe⁷⁵.

⁷¹ <<http://hudoc.echr.coe.int/fre?i=001-150946>> accessed 1 March 2016

⁷² <<http://hudoc.echr.coe.int/fre?i=001-140713>> accessed 1 March 2016

⁷³ Georgi Potchekanski, Whistleblowing - legal protection in Bulgaria <<http://east-legal.com/whistleblowing-in-bulgaria/>>

⁷⁴ Lauren Kierans, Providing an Alternative to Silence: Towards Greater Protection and Support for Whistle-blowers in the EU. Country Report: Bulgaria, Transparency International, p.3
<<http://www.asktheeu.org/en/request/994/response/5856/attach/5/Country%20report%20Bulgaria.pdf>>

⁷⁵ Pieter OMTIZT, Report on topic "The protection of 'whistle-blowers' by the Committee on legal affairs and Human Rights. Council of Europe, p.7 para.16
<<http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19544/20110518ATT19544EN.pdf>>

11.2. Protection of Whistle-blowers in Bulgaria

Transparency International has classified the EU members according to their whistle-blower legal framework, according to which Bulgaria is part of the countries with none-to-very-limited provisions⁷⁶. When asked by Council of Europe about the applicable legislation that protects whistle-blowers, Bulgarian government has referred in its answer to the general provisions of PPC regarding witness protection law⁷⁷. In addition, there are also the provisions under the special Act of Protection of Individuals under Threat in Relation to Criminal Proceedings (APITRCP)⁷⁸. However, it should be noted that PPC covers only some aspects of the protection of whistle-blowers⁷⁹, but it does not cover all of them as the latter *"needs to start from the very moment he/she makes a disclosure and not only when a case comes to court"*⁸⁰ and obviously whistle-blowing will not always lead to commencement of litigation proceedings and in those cases the witnesses will be left unprotected.

Bulgaria does not have a specific law for the protection of whistle-blowers within the definition of Recommendation CM/Rec (2014) 7 of the Committee of Ministers to member States on the protection of whistle-blowers, but has different general rules covering various aspects of whistle-blowing that can be applied to such cases. To begin with, there are separate provisions in **APC** and the **Conflicts of Interests Prevention and Ascertainment Act**. However, the main concern with them is that they refer only to the public administration or to conflict of interests for individuals occupying public offices and not to the private sector contrary to requirements of the Recommendation CM/Rec (2014) 7. Whistle-blowers in the private sector enjoy only the general protection against unlawful dismissal under the **Labour Code** in article 344, and the right to compensation against retaliation under the **Law on Contracts and Obligations**, but the law is inadequate and the compensation levels are far too low. Nevertheless, the mechanisms for protecting whistle-blowers against retaliation are *not* effective as the scope of these provisions is far too limited and the compensation that may be awarded under is far too restricted.

The applicable rules for whistle-blowers in the public sector can be found in the **Administrative Procedure Code** (APC). According to article 107(4) of the same code reports may be filed for

⁷⁶ Transparency International, Whistleblowing in Europe. Legal protections for whistle-blowers in the EU, p.8 <https://issuu.com/transparencymagazine/docs/2013_whistleblowingineurope_en>

⁷⁷ Pieter OMTIIZT, Report on topic "The protection of 'whistle-blowers' by the Committee on legal affairs and Human Rights. Council of Europe, p.9 para.27 <<http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19544/20110518ATT19544EN.pdf>>

⁷⁸ For more details see Rabatlieva, Gergana – Comparative analysis of witness protection within the ICC and the Bulgarian Criminal Justice System, p.7-p.10 <<http://intralegalis.com/gallery/essay-comparative-analysis-of-the-witness-protection-within-icc-and-bulgarian-criminal-justice-system.docx>>

⁷⁹ Articles 121 and 123 of Penal Procedure Code (PPC) <http://www.vks.bg/english/vksen_p04_03.htm>

⁸⁰ Pieter OMTIIZT, Report on topic "The protection of 'whistle-blowers' by the Committee on legal affairs and Human Rights. Council of Europe, p.15 para.73 <<http://www.europarl.europa.eu/document/activities/cont/201105/20110518ATT19544/20110518ATT19544EN.pdf>>

the abuse of power and corruption, bad management of state or municipal property or other unlawful or inexpedient acts or omissions of administrative bodies and public officials in the respective administrations, which must be of such nature that could affect state or public interests, rights or legitimate interests of others. The APC under article 108 (1) also obliges the recipient body to conduct an internal check on foot of receiving the report. The main concern with these provisions is that they do **not** establish a specific system for protection of whistle-blowers besides the general rules cited above and the special rule of article 121 of the **Civil Servant Act**. The latter should be developed by the implementation of secondary legislation, namely within the internal rules and regulations of the relevant structures (ministries, agencies etc.)⁸¹. Noted, a step in the right direction is the protection from persecution under article 108(2) of the APC, which stipulates that no person can be persecuted for filing a claim pursuant to that legislation. It should be also stressed that the procedure via APC does **not** allow anonymous signals and at the same time the law does **not** contain rules on guaranteeing the confidentiality of the whistle-blower. Moreover, signals for offences committed more than two years ago are not accepted as per article 111(4) of the same code.

It is worth mentioning also the provisions of the **Civil Servant Act** as the Inspectorates within the ministries are the main bodies that are competent to receive signals for corruption and infringements and to perform internal checks pursuant to article 128(1). According to article 130 of the SCA they have to respect the confidentiality of the source, from which the signal has been received. It is also stated in article 132 that they are obliged to immediately report criminal offences that have come to their knowledge to the investigating authorities and to take the necessary steps to preserve the evidence of the crime. Similar provision also exists in the regarding the internal audit units under article 58 of the **National Audit Office Act** as they have to report all data of fraud committed that has come to their knowledge during their inspections.

The **Conflict of Interest Prevention and Ascertainment Act** also contains provisions related to whistle-blowers and although it is related to specific cases of conflict of interests, they are elaborated in more details than APC and can be use as a model for future legislation⁸². This law in article 24 stipulates that everyone who has information about a person holding public office who infringes a provision of that legislation has the right to submit a report on the allegation of conflict of interest. Moreover, some sort of protection for whistle-blowers is envisioned in the text of article 32, according to which the persons competent to consider the signal for conflict of interest are obliged not to reveal the identity of the whistle-blower or facts and data related to the signal. The most important provision is article 32(1), which says that those who report a suspicion of conflict of interest may not be persecuted solely for this reason. The persons assigned to examine such reports are obliged to make proposals to the competent administrative

⁸¹ Lauren Kierans, Providing an Alternative to Silence: Towards Greater Protection and Support for Whistle-blowers in the EU. Country report: Bulgaria, Transparency International, p.6 <<http://www.asktheeu.org/en/request/994/response/5856/attach/5/Country%20report%20Bulgaria.pdf>>

⁸² Lauren Kierans, Providing an Alternative to Silence: Towards Greater Protection and Support for Whistle-blowers in the EU. Country report: Bulgaria, Transparency International <<http://www.asktheeu.org/en/request/994/response/5856/attach/5/Country%20report%20Bulgaria.pdf>>

authorities in respect of concrete measures that must be implemented to preserve the dignity of the whistle-blower. These measures include prevention of any actions whereby the whistle-blower would be subjected to mental or physical harassment. It should be noted also that a person, who has been discharged, persecuted or who has suffered mental or physical harassment because of any actions taken as a result of a disclosure being made, is entitled to compensation for economic and non-economic damage. There is, however, no direct reference to whistleblowing as a reason for dismissal, which is atypical within the European context⁸³, but this general regulation could be used as a remedy in the absence of specific rules.

It should be mentioned that the comparative analysis between the general mechanism (regulated by the APC) and the special mechanism (regulated by the Conflict of Interest Prevention and Ascertainment Act) indicates some differences. The regulations are silent in relation to disclosures made first to supervisors and managers. Also, there is no explicit regulation in respect of cases where a whistle-blower is not satisfied as to how to make disclosure to a more senior recipient.

Bulgarian courts have heard a number of cases in which whistle-blowers have faced charges of criminal defamation. In 2009 a judge ruled that an individual did not commit defamation by posting on the Ministry of Interior's website information about alleged corruption committed by officials of the Ministry as the person "*lawfully exercised a constitutionally recognized right*" and was protected from persecution under APC. In 2011 a judge concluded that an individual who had been threatened with eviction after filing a complaint about an official was protected by the APC from being prosecuted, as the reports made to a public institution could not be considered defamatory because they did not damage the honor, reputation or dignity of a particular person. In 2013 another court ruled that an individual could not be charged with defamation for making disclosures about the management of municipal property because "*the right of whistleblowing are constitutionally guaranteed*". In 2011 a judge overturned a one-year censure filed against an individual who reported concerns in a police agency. In 2011, Sofia police officer was forced to resign after revealing that the Ministry of Interior was receiving large cash payments from various donors, who in turn were being protected from penalties stemming from traffic violations. The scandal received widespread attention by the media and even criticised by the European Commission⁸⁴.

⁸³ Mark Worth, Whistle-blower protection in Southeast Europe. An Overview of Laws, Practice and Recent Initiatives, p.19 <http://rai-see.org/wp-content/uploads/2015/07/Whistle-blower_Protection_in_SEE.pdf>

⁸⁴ all cases cited in Nevianka Kaneva - Report on the Situation of the Protection of Whistle-blowers and Suggestions for Regulations, Center for Prevention and Countering Corruption and Organized Crime

11.3. Protection of Whistle-blowers under the Law Protecting Journalistic Sources

Whistle-blowers are also protected under the law protecting journalistic sources. The journalist's right to keep in secret his/her sources of information is an essential element of the constitutional principle of freedom of press⁸⁵ and is protected under art. 40 and 41 of the **Constitution of the Republic of Bulgaria**. The right to preserve the confidentiality of the source of journalistic information is laid down in particularly in article 10 para.2 it.3 and in article 15 of the **Radio and Television Act**, it is reaffirmed in article 1.3.3 of **Ethical code of the Bulgarian media** and in article 19 of **The Access to Public Information Act**. Although the right to protect its source of information is recognized in the Bulgarian law, journalists cannot benefit from any privileges in the court proceedings to refuse to give statements in order to protect their sources except the general provisions under art.121 of PPC and art.166 of **CPC**. Journalists, who refuse to disclose their sources can be subject of court proceeding pursuant to art.290 **PC** for defamation or can be found guilty for perjury when asked to give statements. It is also possible journalist's office and home to be searched in order to find his source of information pursuant to art.159-165 PPC and with that his/her right to private life and freedom of expression violated⁸⁶. The most notorious case in this sense was the one that occurred after the banking crisis in June 2014 in Bulgaria, when the Financial Supervision Commission asked the media outlets "Ikonomedia" to reveal their sources, while at the same time also acknowledged that they were not under an obligation to do it. When they refused to communicate their sources, the FSC imposed them a fine in the amount of €75 000. These fines have triggered very strong criticism both at the national and international levels, because of the disproportionate character of these fines, particularly in view of the low budget of the media outlets fined⁸⁷. Before the fines were imposed, the journalists filed a claim before the Supreme Administrative Court, but it was found inadmissible on the grounds that the court reviewing the lawfulness of the fine once imposed would be in charge.

Bulgaria as a party to the **UN Convention against Corruption**, the **Civil Law Convention on Corruption** and the **Criminal Law Convention on Corruption** has undertaken certain commitments regarding whistle-blower protection. Moreover, the issue of whistleblowing was the subject of an evaluation within the monitoring duties carried out by GRECO and the OECD's Working Group on Bribery in International Business Transactions⁸⁸ and heaving in mind their recommendations, Bulgaria even considered in 2006-2007 adopting a legislation that covers whistleblowing protection in both public and private sector, but failed to do so.

⁸⁵ Radomir Cholakov, Dictionary on Media law

<https://books.google.bg/books/about/%D0%9C%D0%B5%D0%B4%D0%B8%D0%B9%D0%BD%D0%BE%D0%BF%D1%80%D0%B0%D0%B2%D0%BE.html?id=2gzgxSBtl04C&redir_esc=y>

⁸⁶ Ibidem, Boyko Boev and others, p.189.

⁸⁷ Niels Muizniek, Report by the Commissioner for Human Rights of the Council of Europe Following his visit to Bulgaria from 9 to 11 February 2015

<<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2801758&SecMode=1&DocId=2284888&Usage=2>>

⁸⁸ Lauren Kierans, Providing an Alternative to Silence: Towards Greater Protection of Whistle-blowers in the EU. Country report: Bulgaria, Transparency International

12. Conclusion

According to Reporters Without Borders' world press freedom index Bulgaria was ranked 36th in the year 2004. Currently, according to the 2016th index Bulgaria occupies 113th place. It is one of the countries in Europe, where the freedom of expression is most progressively and intentionally endangered for the recent years and has never been worse in the newest history of the country.

On legislative level, freedom of expression is guaranteed by the Constitution, by different laws and by the practice of the Bulgarian court, including the Constitutional Court. The protection of journalistic sources is implemental and crucial part of the freedom of expression as well as one of the basic conditions for democracy and is recognized by the law in several acts as the above analyzed RTA, APIA and the Ethical Code of the Bulgarian Media. However, the analyze shows that journalists cannot rely on the privilege to deny testimony in a process before the court in order to protect the identity of their sources. Therefore, journalists are under the threat to be convicted for defamation and perjury. The question whether the Radio and Television Act is applicable for journalists in the printed media or not remains controversial. Unfortunately, the law doesn't prescribe the "test for balance", accepted by the ECHR, although the Bulgarian court applies the test in numerous decisions, as seen above.

The Bulgarian legislator does not provide enough guarantees for the whistle-blowers. The focus of the legislation on this matter is currently on signals, concerning the public administration. However, signals regarding the private sector are not legally settled and the question regarding the protection of the whistle-blowers in those cases remains open. There are not enough guarantees also for non-journalists, including non-government organizations that give signals or would like to protect their sources.

In conclusion, in Bulgaria protection of journalistic sources is recognized by the law and by the practice of the court, but there are not enough procedural guarantees for journalists to protect themselves and their sources. The test for balance, prescribed by the ECHR is not implemented in the Bulgarian legislation. Whistle-blowers, non-government organizations and the medias themselves, when given crucial information of public interests, do not have enough protection and their rights and obligations need further development on legislative level. Such development is highly necessary and is vital for the improvement of the situation of the freedom of expression in Bulgaria, as one of the basic conditions for democracy and the rule of law and as a fundamental tool for the affirmation of the civil society in Bulgaria.

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- Electronic Communications Act 2007
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14. Table of Provisions

Provisions in native language	Corresponding translations
<p>Конституция на Република България</p> <p>Чл. 5</p> <p>(4) Международните договори, ратифицирани по конституционен ред, обнародвани и влезли в сила за Република България, са част от вътрешното право на страната. Те имат предимство пред тези норми на вътрешното законодателство, които им противоречат.</p>	<p>Constitution of the Republic of Bulgaria</p> <p>Article 5</p> <p>(4) Any international treaty, which has been ratified according to a procedure established by the Constitution, which has been promulgated, and which has entered into force for the Republic of Bulgaria, shall be part of the domestic law of the land. Any such treaty shall take priority over any conflicting standards of domestic legislation.</p>
<p>Конституция на Република България</p> <p>Чл. 32.</p> <p>(1) Личният живот на гражданите е неприкосновен. Всеки има право на защита срещу незаконна намеса в личния и семейния му живот и срещу посегателство върху неговата чест, достойнство и добро име.</p> <p>(2) Никой не може да бъде следен, фотографиран, филмиран, записван или подлаган на други подобни действия без негово знание или въпреки неговото изрично несъгласие освен в предвидените от закона случаи.</p>	<p>Constitution of the Republic of Bulgaria</p> <p>Article 32.</p> <p>(1) The privacy of citizens shall be inviolable. Everyone shall have the right to protection against any unlawful interference in their private or family life and against any attack on their honour, dignity, and reputation.</p> <p>(2) No one shall be followed, photographed, filmed, recorded, or subjected to any other similar actions without their knowledge or despite their express disapproval, save in cases provided for in the law.</p>

<p>Конституция на Република България</p> <p>Чл. 33.</p> <p>(1) Жилището е неприкосновено. Без съгласието на обитателя му никой не може да влиза или да остава в него освен в случаите, изрично посочени в закона.</p> <p>(2) Влизане или оставане в жилището без съгласие на неговия обитател или без разрешение на съдебната власт се допуска само за предотвратяване на непосредствено предстоящо или започнало престъпление, за залавяне на извършителя му, както и в случаите на крайна необходимост.</p>	<p>Constitution of the Republic of Bulgaria</p> <p>Article 33.</p> <p>(1) The home shall be inviolable. No one may enter a home or stay inside a home without the consent of the occupant thereof, save in the cases expressly stipulated in the law.</p> <p>(2) Entering a home or staying inside a home without the consent of the occupant thereof or without authorization from the judiciary shall be permissible solely for the prevention of an imminent crime or a crime in progress, for apprehension of the perpetrator of any such crime, as well as in the cases of extreme necessity.</p>
<p>Конституция на Република България</p> <p>Чл. 34</p> <p>(1) Свободата и тайната на кореспонденцията и на другите съобщения са неприкосновени.</p> <p>(2) Изключения от това правило се допускат само с разрешение на съдебната власт, когато това се налага за разкриване или предотвратяване на тежки престъпления.</p>	<p>Constitution of the Republic of Bulgaria</p> <p>Article 34</p> <p>(1) The freedom and confidentiality of correspondence and all other communications shall be inviolable.</p> <p>(2) Exceptions to this provision shall be allowed only with the permission of the judicial authorities for the purpose of discovering or preventing a grave crime.</p>

<p>Конституция на Република България</p> <p>Чл.38. Никой не може да бъде преследван или ограничаван в правата си поради своите убеждения, нито да бъде задължаван или принуждаван да дава сведения за свои или чужди убеждения.</p>	<p>Constitution of the Republic of Bulgaria</p> <p>Article 38. No one may be persecuted or restricted in his rights because of his convictions, or be obligated or forced to provide information about his own or another person's convictions.</p>
<p>Конституция на Република България</p> <p>Чл.39.</p> <p>(1) Всеки има право да изразява мнение и да го разпространява чрез слово - писмено или устно, чрез звук, изображение или по друг начин.</p> <p>(2) Това право не може да се използва за накърняване на правата и доброто име на друго и за призоваване към насилствена промяна на конституционно установения ред, към извършване на престъпления, към разпалване на вражда или към насилие над личността.</p>	<p>Constitution of the Republic of Bulgaria</p> <p>Article 39.</p> <p>(1) Everyone has the right to express an opinion or to impart an opinion by means of words - either in writing or orally, through sound, image, or by any other medium.</p> <p>(2) This right shall not be used to the detriment of the rights and reputation of others, or for incitement to a change of the constitutionally established order by force, to the commission of criminal offences, or for incitement to animosity or to personal violence.</p>
<p>Конституция на Република България</p> <p>Чл. 40.</p> <p>(1) Печатът и другите средства за масова информация са свободни и не подлежат на цензура.</p> <p>(2) Спирането и конфискацията на печатно издание или на друг носител на</p>	<p>Constitution of the Republic of Bulgaria</p> <p>Article 40</p> <p>(1) The press and the other mass media shall be free and shall not be subjected to censorship.</p> <p>(2) An injunction on or a confiscation of printed matter or another information</p>

<p>информация се допускат само въз основа на акт на съдебната власт, когато се накърняват добрите нрави или се съдържат призови за насилствена промяна на конституционно установения ред, за извършване на престъпление или за насилие над личността. Ако в срок от 24 часа не последва конфискация, спирането преустановява действието си.</p>	<p>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 not followed by a confiscation within 24 hours.</p>
<p>Конституция на Република България Чл. 41.</p> <p>(1) Всеки има право да търси, получава и разпространява информация. Осъществяването на това право не може да бъде насочено срещу правата и доброто име на другите граждани, както и срещу националната сигурност, обществения ред, народното здраве и морала.</p> <p>(2) Гражданите имат право на информация от държавен орган или учреждение по въпроси, които представляват за тях законен интерес, ако информацията не е държавна или друга защитена от закона тайна или не засяга чужди права.</p>	<p>Constitution of the Republic of Bulgaria Article 41</p> <p>(1) Everyone shall be entitled to seek, obtain and disseminate information. This right shall not be exercised to the detriment of the rights and reputation of others, or to the detriment of national security, public order, public health and morality.</p> <p>(2) Citizens shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of others.</p>

<p>Гражданско-процесуален кодекс</p> <p>Чл.166</p> <p>Отказ от свидетелстване</p> <p>(1) Никой няма право да се отказва от свидетелстване освен:</p> <p>1. пълномощниците на страните по същото дело и лицата, които са били медиатори по същия спор;</p> <p>2. роднините на страните по права линия, братята и сестрите и роднините по сватовство от първа степен, съпругът и бившият съпруг, както и лицето, с което страна е във фактическо съпружеско съжителство.</p> <p>(2) Не могат да откажат да свидетелстват, но могат да откажат да дадат отговор на определен въпрос, като посочат причината за това, лицата, които със своите отговори биха причинили на себе си или на лицата по ал. 1, т. 2 непосредствена вреда, опозоряване или наказателно преследване.</p> <p>(3) Свидетелите по делото не могат да бъдат пълномощници на страните по същото дело</p>	<p>Civil Procedure Code</p> <p>Article 166</p> <p>Refusal to Testify</p> <p>(1) No one has the right to refuse to testify except:</p> <p>1. the attorneys-in-fact of the parties to the same case and the persons who were mediators in the same dispute;</p> <p>2. the lineal relatives to the parties, the siblings and the affines in the first degree of affinity, the spouse and the former spouse, as well as the de facto cohabitee with a party.</p> <p>(2) The persons who, by the answers thereof, would incur or inflict on the persons referred to in Item 2 of Paragraph (1) any immediate damage, defamation or criminal prosecution, may not refuse to testify but may refuse to give an answer to a particular question, stating the reasons for this.</p> <p>(3) The witnesses in the case may not be attorneys-in-fact of the parties to the same case.</p>
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<p>Наказателен кодекс</p> <p>чл. 93, параграф 7: "Тежко престъпление" е това, за което по закона е предвидено наказание лишаване от свобода повече от пет години, доживотен затвор или доживотен затвор без замяна.</p>	<p>Penal Code</p> <p>Article 93 § 7: "Serious crime" is a crime for which the law stipulates a punishment of imprisonment of more than five years, life imprisonment or life imprisonment</p> <p>without an option</p>
<p>Наказателен кодекс на Република България</p> <p>Чл. 145а. (Нов - ДВ, бр. 62 от 1997 г.)</p> <p>(1) Който използва информация, събрана чрез използване на специални разузнавателни средства, извън нейното предназначение за опазване на националната сигурност или за целите на наказателното производство, се наказва с лишаване от свобода до три години и глоба до петстотин лева.</p> <p>(2) Когато деянието е извършено от длъжностно лице, което е придобило информацията или тя му е станала известна в кръга на неговата служба, наказанието е лишаване от свобода от една до пет години и глоба до пет хиляди лева.</p> <p>(3) В случаите по предходната алинея съдът може да постанови лишаване от права по чл. 37, ал. 1, точки 6 и 7 .</p>	<p>Penal Code</p> <p>Article 145a (New, SG No. 62/1997)</p> <p>(1) A person who makes use of information collected by special intelligence devices for purposes other than protection of the national security or for the purposes of penal proceedings, shall be punished by deprivation of liberty for up to three years and by fine of up to BGN five hundred.</p> <p>(2) Where the act has been committed by an official who has acquired such information or it has come to his knowledge within the sphere of his office, the punishment shall be deprivation of liberty for one to five years and a fine of up to BGN five thousand.</p> <p>(3) In cases under the preceding paragraph the court may rule also deprivation of rights under Article 37, paragraph (1), subparagraphs 6 and 7.</p>

<p>Наказателен кодекс на Република България</p> <p>Чл. 171.</p> <p>(1) (Изм. - ДВ, бр. 28 от 1982 г., бр. 10 от 1993 г.) Който противозаконно:</p> <ol style="list-style-type: none"> 1. отвори, подправи, скрие или унищожи чуждо писмо, телеграма, запечатани книжа, пакет или други подобни; 2. вземе чуждо, макар и отворено, писмо или телеграма с цел да узнае тяхното съдържание или пък със същата цел предаде другиму чуждо писмо или телеграма; 3. (нова - ДВ, бр. 92 от 2002 г.) узнае неадресирано до него съобщение, изпратено по електронен път, или отклони от адресата му такова съобщение, се наказва с лишаване от свобода до една година или с глоба от сто до триста лева. <p>(2) Ако деянието е извършено от длъжностно лице, което се е възползувало от служебното си положение, наказанието е лишаване от свобода до две години, като съдът може да постанови и лишаване от право по чл. 37, ал. 1, точка 6 .</p> <p>(3) (Доп. - ДВ, бр. 92 от 2002 г.) Който чрез използване на специални технически средства противозаконно узнае неадресирано до него съобщение, предадено по телефон, телеграф, чрез компютърна мрежа или по друго далекосъобщително средство, се наказва с</p>	<p>Penal Code</p> <p>Article 171</p> <p>(1) (Amended, SG. No. 28/1982, SG No. 10/1993) A person who contrary to the law:</p> <ol style="list-style-type: none"> 1. opens, falsifies, hides or destroys a letter, telegram, sealed papers, package and the like of another person; 2. takes another person's, although opened, letter or telegram for the purpose of obtaining knowledge of their contents, or for the same purpose delivers another person's letter or telegram to someone else; 3. (new, SG No. 92/2002) becomes aware of the content of an electronic message not addressed to him/her or prevents such a message from reaching its original addressee. <p>shall be punished by deprivation of liberty for up to one year or by a fine from BGN one hundred to three hundred.</p> <p>(2) If the act was perpetrated by an official who availed himself of his official position, the punishment shall be deprivation of liberty for up to two years, and the court may also rule deprivation of the right under Article 37 (1), sub-paragraph 6.</p> <p>(3) (Supplemented, SG No. 92/2002) A person who, by use of special technical means, unlawfully obtains information not addressed to him, communicated over the telephone, telegraph, computer network or another telecommunication means, shall be punished by deprivation of liberty for up to</p>
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<p>лишаване от свобода до две години.</p> <p>(4) (Нова - ДВ, бр. 38 от 2007 г.) Когато деянието по ал. 3 е извършено с користна цел или са причинени значителни вреди, наказанието е лишаване от свобода до три години и глоба до пет хиляди лева.</p>	<p>two years.</p> <p>(4) (New, SG No. 38/2007) Where the act under paragraph 3 has been committed with a venal goal in mind or considerable damages have been caused, the punishment shall be deprivation of liberty for up to three years and a fine of up to BGN five thousand.</p>
<p>Наказателен кодекс на Република България</p> <p>Чл. 171а. (Нов - ДВ, бр. 26 от 2010 г.)</p> <p>(1) (Изм. и доп. – ДВ, бр. 24 от 2015 г., в сила от 31.03.2015 г.) Който противозаконно придобие, съхранява, разкрие или разпространи данни, каквито се събират, обработват, съхраняват или използват съгласно Закона за електронните съобщения, се наказва с лишаване от свобода до три години или пробация.</p> <p>(2) Когато деянието по ал. 1 е извършено с користна цел, наказанието е лишаване от свобода от една до шест години.</p>	<p>Penal Code</p> <p>Art. 171a. (New - SG. 26 of 2010)</p> <p>(1) (amend. And suppl. - SG. 24 of 2015, effective 03.31.2015) A person who unlawfully acquire, store, disclose or disseminate the data they collected, processed, stored or used in accordance with electronic communications Act shall be punished by imprisonment of up to three years or probation.</p> <p>(2) Where the act under par. 1 is committed for gain, the punishment is imprisonment of one to six years.</p>
<p>Наказателен кодекс</p> <p>Чл. 290.</p> <p>(1) Който пред съд или пред друг надлежен орган на властта като свидетел устно или писмено съзнателно потвърди неистина или затаи истина, се наказва за лъжесвидетелстване с лишаване от свобода до пет години.</p>	<p>Penal Code</p> <p>Article 290</p> <p>(1) Who, before a court or other respective body of the authority, as a witness, verbally or in writing, deliberately confirms a falsehood or conceals the truth shall be punished for perjury by imprisonment of up to five years.</p>

<p>(2) Същото наказание се налага и на преводач или тълковник, който пред съд или пред друг надлежен орган на властта писмено или устно съзнателно даде неверен превод или тълкуване.</p>	<p>(2) The same punishment shall also be imposed to a translator or interpreter who, before a court or other respective body of the authority, verbally or in writing, deliberately presents untrue translation or interpretation.</p>
<p>Наказателен процесуален кодекс</p> <p>Чл.120 (4) Свидетел, който извън случаите по чл. 119 и чл. 121 откаже да свидетелства, се наказва с глоба до хиляда лева</p>	<p>Penal Procedure Code</p> <p>Article 120 (4) A witness who refuses to testify outside the hypotheses of Article 119 and Article 121 shall be punished by fine of up to BGN one thousand.</p>
<p>Наказателен процесуален кодекс</p> <p>Чл.121</p> <p>Обстоятелства, при които свидетелят не е длъжен да дава показания</p> <p>(1) Свидетелят не е длъжен да дава показания по въпроси, отговорите на които биха улчили в извършване на престъпление него, неговите възходящи, низходящи, братя, сестри или съпруг или лице, с което той се намира във фактическо съжителство.</p> <p>(2) Свидетелят не може да бъде разпитван относно обстоятелствата, които са му били поверени като защитник или повереник или са му станали известни като преводач при срещите на обвиняемия със защитника.</p>	<p>Penal Procedure Code</p> <p>Article 121</p> <p>Circumstances of which witnesses shall not be obligated to testify</p> <p>(1) Witnesses shall not be obligated to testify on questions, the answers to which might incriminate them, their relatives of ascending and descending line, brothers, sisters, spouses or individuals with whom they live together, in the commission of crime.</p> <p>(2) Witnesses may not be interrogated on circumstances which were confided thereto as defence counsel or attorney.</p>

<p>Наказателен процесуален кодекс</p> <p>Чл. 123.</p> <p>(1) Прокурорът, съдията-докладчик или съдът по искане на свидетеля или с неговото съгласие вземат мерки за неговата незабавна защита, когато са налице достатъчно основания да се предполага, че в резултат на свидетелстването е възникнала или може да възникне реална опасност за живота или здравето на свидетеля, на неговите възходящи, низходящи, братя, сестри, съпруг или лица, с които се намира в особено близки отношения.</p>	<p>Penal Procedure Code</p> <p>Article 123 Witness protection</p> <p>(1) The prosecutor, the judge-rapporteur or the court shall, upon request or with consent of the witness, take measures for his/her immediate protection, should there be sufficient grounds to assume that, as a result of testimony, a real threat has arisen or may arise to the life, health or property of the witness, his/her ascending and descending relatives, brothers, sisters, spouse or individuals with whom he is in a particularly close relationship.</p>
<p>Наказателен процесуален кодекс</p> <p>Чл. 159. (1) (Предишен текст на чл. 159 - ДВ, бр. 32 от 2010 г., в сила от 28.05.2010 г., изм., бр. 24 от 2015 г., в сила от 31.03.2015 г.)</p> <p>По искане на съда или на органите на досъдебното производство всички учреждения, юридически лица, длъжностни лица и граждани са длъжни да запазят и предадат намиращите се у тях предмети, книжа, компютърни информационни данни и други данни, които могат да имат значение за делото</p>	<p>Penal Procedure Code</p> <p>Article 159 Obligation to hand over objects, papers, computerised data, data about subscribers to computer information service and traffic data</p> <p>Upon request of the court or the bodies of pre-trial proceedings, all institutions, legal persons, officials and citizens shall be obligated to preserve and hand over all objects, papers, computerized data, including traffic data, that may be of significance to the case.</p>

<p>Наказателен процесуален кодекс</p> <p>Чл. 161.</p> <p>(1) В досъдебното производство претърсване и изземване се извършват с разрешение на съдия от съответния първоинстанционен съд или от първоинстанционния съд, в района на който се извършва действието, по искане на прокурора.</p> <p>(2) В неотложни случаи, когато това е единствена възможност за събиране и запазване на доказателствата, органите на досъдебното производство могат да извършат претърсване и изземване и без разрешението по ал. 1, като протоколът за извършеното действие по разследването се представя от наблюдаващия прокурор за одобряване от съдията незабавно, но не по-късно от 24 часа.</p> <p>(3) В съдебното производство претърсване и изземване се извършват по решение на съда, който разглежда делото.</p>	<p>Penal Procedure Code</p> <p>Article 161 Bodies making decisions on searches and seizures</p> <p>(1) In pre-trial proceedings search and seizure shall be performed with a authorisation by a judge from the respective first instance court or a judge from the first-instance court in the area of which the action is taken, upon request of the prosecutor.</p> <p>(2) In cases of urgency, where this is the only possible way to collect and keep evidence, the bodies of pre-trial proceedings may perform physical examination without authorisation under paragraph 1, the record of the investigative action being submitted for approval by the supervising prosecutor to the judge forthwith, but not later than 24 hours thereafter.</p> <p>(3) In court proceedings a search and seizure shall be performed following a decision of the court which is trying the case</p>
<p>Наказателен процесуален кодекс Лица, в присъствието на които се извършват претърсването и изземването Чл. 162.</p> <p>(1) Претърсването и изземването се извършват в присъствието на поемни лица и на лицето, което използва помещението, или на пълнолетен член на семейството му.</p>	<p>Penal Procedure Code</p> <p>Article 162 Persons present in the course of searches and seizures</p> <p>(1) Searches and seizures shall be conducted in the presence of certifying witnesses and of the person who uses the premises, or of an adult member of the person's family.</p>

<p>(2) Когато лицето, което използва помещението, или член на семейството му не може да присъства, претърсването и изземването се извършват в присъствието на домоуправителя или на представителя на общината или кметството.</p> <p>(3) Претърсването и изземването в помещение, което се ползва от държавни или общински служби, се извършват в присъствието на представител на службата.</p> <p>(4) Претърсването и изземването в помещение, което се ползва от юридическо лице, се извършват в присъствието на негов представител. Когато не може да присъства представител на юридическото лице, претърсването и изземването се извършват в присъствието на представител на общината или кметството.</p> <p>(5) Претърсване и изземване в помещения на чуждестранни представителства на международни организации и в жилища на техни служители, които се ползват с имунитет по отношение на наказателната юрисдикция на Република България, се извършва със съгласието на ръководителя на представителството и в присъствието на прокурор и представител на Министерството на външните работи.</p> <p>(6) Когато претърсването и изземването са свързани с компютърни информационни системи и програмни продукти, действията се извършват в присъствието на специалист - технически помощник.</p>	<p>(2) Where the person who uses the premises or a member of his/her family cannot attend, the search and seizure shall be effected in the presence of the house manager or of representative of the municipality or mayor's office.</p> <p>(3) Searches and seizures in premises used by state and/or municipal services shall be effected in the presence of a representative of the service.</p> <p>(4) Searches and seizures in premises used by a legal person shall be performed in the presence of a representative thereof. Where no representative of the legal person may be present, the search and seizure shall be carried out in the presence of a representative of the municipality or mayoralty.</p> <p>(5) Searches and seizures in premises of foreign missions and of missions of international organizations or in dwellings of their employees who enjoy immunity with respect to the criminal jurisdiction of the Republic of Bulgaria, shall be conducted with the consent of the head of mission and in the presence of a prosecutor and a representative of the Ministry of Foreign Affairs.</p> <p>(6) Where searches and seizures concern computerized information systems and software applications, these shall be conducted in presence of an expert- technical assistant.</p>
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<p>Административно-процесуален кодекс</p> <p>Чл. 107. (4) Сигнали могат да се подават за злоупотреби с власт и корупция, лошо управление на държавно или общинско имущество или за други незаконосъобразни или нецелесъобразни действия или бездействия на административни органи и длъжностни лица в съответните администрации, с които се засягат държавни или обществени интереси, права или законни интереси на други лица.</p>	<p>Administrative procedure code</p> <p>Art. 107. (4) Signals may be filed for abuse of power and corruption, bad management of state or municipal property or other unlawful or inexpedient actions or inactions of administrative bodies and officials in the respective administrations, by which are affected state or public interests, rights or legitimate interests of other persons.</p>
<p>Административно-процесуален кодекс</p> <p>Чл. 108. (2) Никой не може да бъде преследван само заради подаването на предложение или сигнал при условията и по реда на тази глава.</p>	<p>Administrative procedure code</p> <p>Art. 108. (2) Nobody may be prosecuted only because of the filing of a proposal or a signal under the conditions and by the order of this Chapter.</p>
<p>Административно-процесуален кодекс</p> <p>Чл. 111. (4) Не се образува производство по анонимни предложения или сигнали, както и по сигнали, отнасящи се до нарушения, извършени преди повече от две години.</p>	<p>Administrative procedure code</p> <p>CODE Art. 111. (4) Shall not be instituted proceedings on anonymous proposals or signals, as well as on signals, concerning violations, committed before more than two years.</p>

<p>Кодекс на труда</p> <p>Чл. 344. (1) Работникът или служителят има право да оспорва законността на уволнението пред работодателя или пред съда и да иска:</p> <ol style="list-style-type: none">1. признаване на уволнението за незаконно и неговата отмяна;2. възстановяване на предишната работа;3. обезщетение за времето, през което е останал без работа поради уволнението;4. поправка на основанията за уволнение, вписано в трудовата книжка или в други документи. <p>(2) Работодателят може и по свой почин да отмени заповедта за уволнение до предявяването на иск от работника или служителя пред съда.</p> <p>(3) В случаите, когато за извършване на уволнението се изисква предварителното съгласие на инспекцията по труда или на синдикален орган и такова съгласие не е било искано или не е било дадено преди уволнението, съдът отменя заповедта за уволнение като незаконна само на това основание, без да разглежда трудовия спор по същество.</p> <p>(4) Трудовите спорове по ал. 1 се разглеждат от районния съд в тримесечен срок от постъпването на исковата молба и от окръжния съд - в едномесечен срок от постъпването на жалбата.</p>	<p>Labour Code</p> <p>Art. 344. (1) The employee is entitled to challenge the lawfulness of the dismissal to the employer or to the court and ask:</p> <ol style="list-style-type: none">1. Recognition of the dismissal as unlawful and its cancellation;2. reinstatement;3. Compensation payment for the time that is unemployed due to dismissal;4. The amendment of the grounds for dismissal written in the service record or other documents. <p>(2) The employer may on its own initiative to revoke the dismissal order until the bringing of a claim by the employee before the court.</p> <p>(3) In cases when performing dismissal requires the prior consent of the labor inspectorate or trade union body and such consent has not been sought or has not been given before dismissal, the court will annul the order of dismissal as unlawful on that ground alone, without considering the labor dispute on its merits.</p> <p>(4) Labour disputes under par. 1 shall be considered by the district court within three</p>
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	months of receipt of the application and the district court - within one month from receipt of the complaint.
<p>Закон за радиото и телевизията</p> <p>Чл. 1. (Изм. - ДВ, бр. 12 от 2010 г.) Този закон урежда медийните услуги, предоставяни от доставчици на медийни услуги под юрисдикцията на Република България.</p>	<p>Radio and Television Act</p> <p>Art.1. (Amended, SG No. 12/2010) This Act shall regulate the media services provided under the jurisdiction of the Republic of Bulgaria.</p>
<p>Закон за радиото и телевизията</p> <p>Чл. 2. (Изм. - ДВ, бр. 12 от 2010 г.) (1) Медийни услуги по смисъла на този закон са аудио-визуални медийни услуги и радиоуслуги.</p> <p>(2) Аудио-визуална медийна услуга/радиоуслуга е:</p> <p>1. услуга, така както е определена в чл. 56 и 57 от Договора за функционирането на Европейския съюз (ОВ, С 115/47 от 9 май 2008 г.), която е в рамките на редакционната отговорност на доставчик на медийни услуги, чиято основна цел е предоставянето на аудио-визуални предавания/радиопредавания за информиране, забавление или образование на широката общественост чрез електронни съобщителни мрежи по смисъла на Закона за електронните съобщения;</p> <p>2. аудио-визуално търговско съобщение/търговско съобщение в</p>	<p>Radio and Television Act</p> <p>Art. 2. (Amended, SG No. 12/2010) (1) Within the meaning given by this Act, "media services" shall be audiovisual media services and radio services.</p> <p>(2) "Audiovisual media service/radio service" means:</p> <p>1. a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union (OJ C 115/47 of 9 May 2008 which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of audiovisual programmes/radio programmes in order to inform, entertain or educate the general public by electronic communications networks within the meaning given by the Electronic Communications Act;</p> <p>2. an audiovisual commercial communication/commercial communication</p>

<p>радиоуслуга по т. 1.</p> <p>(3) Аудио-визуално предаване е поредица от движещи се изображения със или без звук, което представлява обособена част от програмна схема или каталог, утвърден от доставчик на аудио-визуални медийни услуги и чиято форма е сравнима с формата и съдържанието на телевизионно излъчване.</p> <p>(4) Радиопредаване е обособена част от програмна схема на радиопрограма или каталог, утвърден от доставчик на радиоуслуги.</p> <p>(5) Разпоредбите на този закон не се прилагат за:</p> <ol style="list-style-type: none"> 1. медийни услуги, които не са за масово осведомяване, т.е. не са предназначени за значителна част от аудиторията; 2. дейности, които по принцип са с нестопански характер и които не са конкурентни на телевизията въз основа на програмна схема; 3. лична кореспонденция на ограничен брой адресати чрез електронни съобщителни мрежи; 4. всички услуги, чиято основна цел не е предоставянето на предавания, т.е. когато аудио-визуалното съдържание е включено случайно в услугата и не е нейна основна цел; 5. игрите на късмета, в които се залагат пари, включително лотария, наддаване и други форми на хазарт, както и онлайн игри и програми за търсене, но не и предавания, изцяло посветени на 	<p>in a radio service referred to in Item 1.</p> <p>(3) "Audiovisual programme" means a set of moving images with or without sound constituting an individual item within a programme schedule or a catalogue established by a media service provider and whose form is comparable to the form and content of television broadcasting.</p> <p>(4) "Radio programme" means an individual item within a programme schedule of a radio programme service or a catalogue established by a radio service provider.</p> <p>(5) The provisions of this Act shall not apply to:</p> <ol style="list-style-type: none"> 1. media services which are not for mass communication, i.e. are not intended for a substantial proportion of the public; 2. activities which are primarily non-economic and which are not in competition with television on the basis of a programme schedule; 3. private correspondence sent to a limited number of recipients over electronic communications networks; 4. all services whose principal purpose is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and is not its principal purpose; 5. games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, but not broadcasts entirely devoted to gambling or games of
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<p>хазартни игри или игри на къмета;</p> <p>6. електронни варианти на вестници и списания;</p> <p>7. самостоятелните текстови услуги.</p>	<p>chance;</p> <p>6. electronic versions of newspapers and magazines;</p> <p>7. stand-alone text-based services.</p>
<p>Закон за радиото и телевизията</p> <p>Чл. 10. (1) При осъществяването на своята дейност доставчиците на медийни услуги се ръководят от следните принципи:</p> <p>1. гарантиране на правото на свободно изразяване на мнение;</p> <p>2. гарантиране на правото на информация;</p> <p>3. запазване на тайната на източника на информация;</p> <p>4. защита на личната неприкосновеност на гражданите;</p> <p>5. недопускане на предавания, внушаващи нетърпимост между гражданите;</p> <p>6. недопускане на предавания, които противоречат на добрите нрави, особено ако съдържат порнография, възхваляват или оневиняват жестокост или насилие или подбуждат към ненавист въз основа на расов, полов, религиозен или национален признак;</p> <p>7. гарантиране на правото на отговор в програмите;</p>	<p>Radio and Television Act</p> <p>Art. 10. (1) In carrying out their activities the radio and television operators shall be guided by the following principles:</p> <p>1. guaranteeing the right to free expression of opinion;</p> <p>2. guaranteeing the right to information;</p> <p>3. preservation of the secret of the source of information;</p> <p>4. protection of the personal inviolability of the citizens;</p> <p>5. non-admission of programmes suggesting intolerance among the citizens;</p> <p>6. 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;</p> <p>7. guaranteeing the right to response;</p>

<p>8. гарантиране на авторските и сродните им права в предаванията и програмите;</p> <p>9. съхраняване на чистотата на българския език.</p> <p>(2) (Изм. - ДВ, бр. 79 от 2000 г., отм. - ДВ, бр. 12 от 2010 г.)</p> <p>(3) (Изм. - ДВ, бр. 79 от 2000 г., отм. - ДВ, бр. 12 от 2010 г.)</p> <p>(4) (Нова - ДВ, бр. 79 от 2000 г., отм. - ДВ, бр. 12 от 2010 г.)</p>	<p>8. guaranteeing the copyright and related rights of the broadcasts and programmes;</p> <p>9. preservation of the purity of the Bulgarian language.</p>
<p>Закон за радиото и телевизията</p> <p>Чл. 14. (1) (Изм. - ДВ, бр. 12 от 2010 г.) Доставчиците на линейни медийни услуги са длъжни да записват предоставените за разпространение от тях програми и предавания и да съхраняват записите в продължение на 3 месеца, считано от датата на предаването.</p> <p>(2) (Изм. - ДВ, бр. 12 от 2010 г.) В случай, че в срока по ал. 1 постъпи искане за отговор или бъде предявен иск срещу доставчика на медийни услуги във връзка със съдържанието на предаване или програма, записите се пазят до приключване на делото.</p> <p>(3) Лице, което твърди, че е било засегнато в предаване, има право на достъп до съответния архив и на копие от записа, направено за негова сметка.</p> <p>(4) (Изм. - ДВ, бр. 96 от 2001 г., изм. - ДВ, бр. 12 от 2010 г.) Съветът за електронни</p>	<p>Radio and Television Act</p> <p>Art. 14. (1) (amend. – SG 12/10) The media service providers shall be obliged to record the programmes and broadcasts provided by them for transmission and to keep the records for a period of 3 months considering from the date of broadcasting.</p> <p>(2) (amend. – SG 12/10) If, within the period under para 1, a request for response is received or a claim is made against the media service provider in connection with the contents of the programme or broadcasting the record shall be kept until the conclusion of the case.</p> <p>(3) A person who claims that he has been affected by a broadcasting shall have the right of access to the respective archives and to copy of the record, made for his account.</p> <p>(4) (amend., SG 79/00; revoked –SG 12.10; new –SG 17/13) The media service operators shall publish on their websites the full contents of their contracts with all</p>

<p>медии може да изисква от доставчиците на медийни услуги материали, както и да прави на място проверки, свързани с осъществяването на надзора по спазването на този закон.</p>	<p>parties, coalitions of parties and initiative committees registered for the elections within three days from signing the contracts</p>
<p>Закон за радиото и телевизията Чл. 15. (1) (Изм. - ДВ, бр. 96 от 2001 г., изм. - ДВ, бр. 12 от 2010 г.) Доставчиците на медийни услуги не са длъжни да разкриват източниците на информация, освен ако има висящо съдебно производство или висящо производство по жалба на засегнато лице, на Съвета за електронни медии.</p> <p>(2) (Изм. - ДВ, бр. 12 от 2010 г.) Журналистите не са длъжни да разкриват източниците на информация не само пред аудиторията, но и пред ръководството на доставчик на медийни услуги, освен в случаите по ал. 1.</p> <p>(3) (Изм. - ДВ, бр. 12 от 2010 г.) Доставчиците на медийни услуги имат право да включват в предавания информация от неизвестен източник, като изрично посочват това.</p> <p>(4) Журналистите са длъжни да пазят в тайна източника на информация, ако това изрично е поискано от лицето, което я е предоставило.</p>	<p>Radio and Television Act Art. 15. (1) (amend. – SG 12/10) The media service providers shall not be obliged to disclose their sources of information unless there are pending court proceedings or pending proceedings under a claim of affected person, to the Council for electronic media.</p> <p>(2) (amend. –SG 12/10) The journalists shall not be obliged to disclose the sources of information not only before the audience but also before the management of a media service provider, except in the cases under para 1.</p> <p>(3) (amend. –SG 12/10) The media service provider shall have the right to include in broadcasts information from unknown source explicitly announcing that.</p> <p>(4) The journalists shall be obliged to keep secret the source of information of this is explicitly requested by the person who has provided it.</p>
<p>Етичен кодекс на българските медии</p> <p>1.3.3. Няма да разкриваме поверителните</p>	<p>Ethical Code of the Bulgarian Media</p> <p>1.3.3. We shall protect the identity of</p>

<p>си източници на информация.</p>	<p>confidential sources of information.</p>
<p>Закон за достъп до обществена информация Чл. 19. (Изм. - ДВ, бр. 97 от 2015 г., в сила от 12.01.2016 г.) Достъпът до информацията по чл. 18 се осъществява при спазване и балансиране на принципите за прозрачност и икономическа свобода, а също така и за защита на личните данни, търговската тайна и тайната на източниците на средствата за масова информация, пожелали анонимност.</p>	<p>Access to Public Information Act Art. 19. (amend. – SG, 97/2015, in force from 12.1.2016) The access to the information underart. 18 shall be carried out while observing and balancing the principles of transparency and economicfreedom, as well as of protection of personal data, the business secret and the confidentiality of thesources of the mass media, which provide information on condition of anonymity.</p>
<p>Закон за специалните разузнавателни средства Чл. 3. (1) (Изм. - ДВ, бр. 70 от 2013 г., в сила от 9.08.2013 г.) Специалните разузнавателни средства се използват, когато това се налага за предотвратяване и разкриване на тежки умишлени престъпления по глава първа, глава втора, раздели I, II, IV, V, VIII и IX, глава пета, раздели I - VII, глава шеста, раздели II - IV, глава осма, глава осма "а", глава девета "а", глава единадесета, раздели I - IV, глава дванадесета, глава тринадесета и глава четиринадесета, както и за престъпления по чл. 167, ал. 3 и 4, чл. 169г, чл. 219, ал. 4, предложение второ, чл. 220, ал. 2, чл. 253, чл. 308, ал. 2, 3 и 5, изречение второ, чл. 321, чл. 321а, чл. 356к и чл. 393 от особената част на Наказателния кодекс, когато необходимите данни не могат да бъдат събрани по друг начин или събирането</p>	<p>The Special Surveillance Means Act Article 13:(1) (Amended, SG No. 70/2013, effective 9.08.2013) Special intelligence means shall be used to prevent or detect grave intentional criminal offences within the meaning of Chapter I, Chapter II, Sections I, II, IV, V, VIII and IX, Chapter V, Sections I-VII, Chapter VI, Sections II - IV, Chapter VIII, Chapter VIIIa, Chapter IXa, Chapter XI, Sections I - IV, Chapter XII, Chapter XIII and Chapter XIV, as well as crimes within the meaning of Article 167, paragraphs (3) and (4), Article 169d, Article 219, paragraph (4), sentence two, Article 220, paragraph (2), Article 253, Article 308, paragraphs (2), (3) and (5), sentence two, Article 321, Article 321a, Article 356j and Article 393 of the Special Part of the Criminal Code, should the case necessitate it, where there are no other means to collect the necessary information or the collection thereof would be exceptionally difficult.</p>

<p>им е свързано с изключителни трудности.</p>	
<p>Закон за специалните разузнавателни средства</p> <p>Чл. 4.</p> <p>По реда на този закон специалните разузнавателни средства могат да се използват и по отношение на дейности, свързани със защитата на националната сигурност.</p>	<p>The Special Surveillance Means Act</p> <p>Article 4</p> <p>Pursuant to the provisions of this Act, special intelligence means may also be used with regard to activities, concerning the protection of the national security.</p>
<p>Закон за специалните разузнавателни средства</p> <p>Чл. 12. (1) Специалните разузнавателни средства се използват по отношение на:</p> <p>1. (изм. - ДВ, бр. 70 от 2013 г., в сила от 9.08.2013 г.) лица, за които са получени данни и има основание да се предполага, че подготвят, извършват или са извършили тежко умишлено престъпление от изброените по чл. 3, ал. 1;</p> <p>2. лица, за чиито действия са получени данни и има основание да се предполага, че се използват от лица по т. 1, без да им е известен престъпният характер на извършваната дейност;</p> <p>3. лица и обекти, свързани с националната сигурност;</p> <p>4. (нова - ДВ, бр. 109 от 2008 г.) обекти за установяване самоличността на</p>	<p>The Special Surveillance Means Act, Article 12</p> <p>(1) Special intelligence means shall be used with regard to:</p> <p>1. (Amended, SG No. 70/2013, effective 9.08.2013) Persons who are reported to, and for whom there are reasonable grounds to presume that they are preparing to commit, are committing, or have committed grave intentional crime from among those listed in Article 3, paragraph (1);</p> <p>2. Persons whose activities are reported, and there are reasonable grounds to presume that they are being manipulated by the persons, referred to in Item 1 above, without being aware of the criminal nature of the activities perpetrated;</p> <p>3. Persons and facilities related to national security;</p> <p>4. (New, SG No. 109/2008) Facilities</p>

<p>лицата по т. 1 или 2.</p> <p>(2) Специалните разузнавателни средства могат да се използват и за опазване на живота или имуществото на лица, които са дали писмено съгласие за това.</p>	<p>for identifying the persons referred to in item 1 or 2 above.</p> <p>(2) Special intelligence means may be used for the protection of the life and the property of persons, who have consented to this in writing.</p>
<p>Закон за специалните разузнавателни средства</p> <p>Чл. 13. (1) Право да искат използване на специални разузнавателни средства и да използват събраните чрез тях данни и вещественни доказателствени средства съобразно тяхната компетентност имат:</p> <p>1. (изм. - ДВ, бр. 17 от 2003 г., бр. 45 от 2006 г., бр. 109 от 2007 г., бр. 43 от 2008 г., бр. 109 от 2008 г., бр. 93 от 2009 г., бр. 44 от 2012 г., в сила от 1.07.2012 г., бр. 52 от 2013 г., в сила от 14.06.2013 г., бр. 53 от 2014 г., бр. 14 от 2015 г.) Главна дирекция "Национална полиция", Главна дирекция "Борба с организираната престъпност", Главна дирекция "Гранична полиция", дирекция "Вътрешна сигурност", областните дирекции на Министерството на вътрешните работи, специализираните дирекции (с изключение на дирекция "Технически операции"), териториалните дирекции и самостоятелните териториални отдели на Държавна агенция "Национална сигурност";</p> <p>2. (изм. - ДВ, бр. 49 от 2000 г., бр. 109 от 2007 г.) службите "Военна информация" и "Военна полиция" към министъра на отбраната;</p>	<p>The Special Surveillance Means Act Article 13: (1) The following shall have the right to request the use of special intelligence means and to use the data and the material pieces of evidence collected, in accordance with their competence:</p> <p>1. (amended, SG No. 17/2003, SG No. 45/2006, SG No. 109/2007, SG No. 43/2008, SG No. 109/2008, SG No. 93/2009, SG No. 44/2012, effective 1.07.2012, SG No. 52/2013, effective 14.06.2013, SG No. 53/2014, SG No. 14/2015) the National Police Directorate General, the Directorate General for Combating Organized Crime, the Border Police Directorate General, the Internal Security Directorate, the regional directorates of the Ministry of Interior, the specialized directorates (except the Technical Operations Directorate), the territorial directorates and the autonomous territorial departments of the State Agency for National Security;</p> <p>2. (amended, SG No. 49/2000, SG No. 109/2007) "Military Information" and "Military Police" services with the Minister of Defence;</p> <p>3. the National Intelligence Service;</p>

<p>3. (Изм. – ДВ, бр. 79 от 2015 г. , в сила от 1.11.2015 г.) Държавна агенция "Разузнаване";</p> <p>4. (отм. - ДВ, бр. 109 от 2008 г.);</p> <p>5. (изм. - ДВ, бр. 17 от 2003 г., отм., бр. 109 от 2008 г.);</p> <p>6. (нова - ДВ, бр. 17 от 2013 г., изм., бр. 42 от 2015 г.) окръжните прокуратури - за престъпления по чл. 167, ал. 3, 4 и 5 и чл. 169г от Наказателния кодекс.</p> <p>(2) (Нова - ДВ, бр. 109 от 2008 г.) Наблюдаващият прокурор подава писмено мотивирано искане до съда за използване на специални разузнавателни средства по досъдебно производство.</p>	<p>4. (repealed, SG No. 109/2008);</p> <p>5. (amended, SG No. 17/2003, repealed, SG No. 109/2008);</p> <p>6. (new, SG No. 17/2013, amended, SG No. 42/2015) regional prosecutor's offices - for crimes under Article 167, paragraphs (3), (4) and (5) and Article 169 of the Criminal Code.</p> <p>(2) (New, SG No. 109/2008) The supervising prosecutor shall submit to the court a substantiated written request for use of special intelligence means for pre-court proceedings.</p>
<p>Закон за мерките срещу финансирането на тероризма, Чл. 2. Целите на този закон са предотвратяване и разкриване на действия на физически лица, юридически лица, групи и организации, насочени към финансиране на тероризма.</p>	<p>The Law on Measures Against the Financing of Terrorism, Article 2.</p> <p>The purposes of this Act shall be to prevent and detect actions by natural persons, legal persons, groups and organizations that are directed at financing terrorism.</p>
<p>Закон за мерките срещу финансирането на тероризма, Чл. 3. (1) Мерките по този закон са:</p> <p>1. блокиране на парични средства, финансови активи и друго имущество;</p> <p>2. забрана за предоставяне на финансови услуги, парични средства, финансови активи или друго имущество.</p>	<p>The Law on Measures Against the Financing of Terrorism, Article 3.</p> <p>(1) The measures under this Act shall be:</p> <p>1. blocking/freezing of funds, financial assets and other property;</p> <p>2. prohibition to provide financial services, funds, financial assets or other property.</p>

<p>(2) (Изм. и доп. - ДВ, бр. 19 от 2005 г., доп. - ДВ, бр. 28 от 2008 г., изм. - ДВ, бр. 38 от 2012 г., в сила от 19.11.2012 г.) Лицата, изпълнили мярка по ал. 1, незабавно уведомяват за това министъра на вътрешните работи, министъра на финансите, председателя на Държавна агенция "Национална сигурност" и Комисията за отнемане на незаконно придобито имущество.</p> <p>(3) Блокирането по ал. 1 има действие на заповест или възбрана.</p>	<p>(2) (Amended and supplemented, SG No. 19/2005, supplemented, SG No. 28/2008, amended, SG No. 38/18.05.2012 effective 19.11.2012) The persons who have implemented a measure under Paragraph (1) shall immediately notify the Minister of Interior, the Minister of Finance, the Chairperson of the State Agency for National Security and the Criminal/Illegal Assets Forfeiture Commission.</p> <p>(3) The blocking/freezing under Paragraph (1) shall have the effect of an attachment or distraint.</p>
<p>Закон за мерките срещу финансирането на тероризма, Чл. 4. (Изм. - ДВ, бр. 28 от 2008 г.) Информацията, необходима за осъществяване целите на този закон, се събира, обработва, систематизира, анализира, съхранява, използва и предоставя от Държавна агенция "Национална сигурност".</p>	<p>The Law on Measures Against the Financing of Terrorism, Article 4.</p> <p>(Amended, SG No. 28/2008) The information necessary to achieve the purposes of this Act shall be collected, processed, systematized, analyzed, stored, used and provided by the State Agency for National Security.</p>
<p>Закон за мерките срещу финансирането на тероризма, Чл. 5.</p> <p>(1) (Доп. - ДВ, бр. 28 от 2008 г.) По предложение на министъра на вътрешните работи, на председателя на Държавна агенция "Национална сигурност" или на главния прокурор Министерският съвет с решение приема, допълва и изменя списък на физическите лица, юридическите лица, групите и организациите, спрямо които се прилагат мерките по този закон.</p>	<p>The Law on Measures Against the Financing of Terrorism, Article 5.</p> <p>(1) (Supplemented, SG No. 28/2008) Acting on a motion by the Minister of Interior, the Chairperson of the State Agency for National Security or the Prosecutor General, the Council of Ministers shall adopt, supplement and modify a list of the natural persons, legal persons, groups and organizations in respect whereof the measures under this Act should be applied.</p> <p>(2) The following shall be included in the list</p>

<p>(2) В списъка по ал. 1 се включват:</p> <p>1. физически лица, юридически лица, групи и организации, посочени от Съвета за сигурност на Организацията на обединените нации като свързани с тероризъм или спрямо които са наложени санкции за тероризъм с резолюция на Съвета за сигурност на Организацията на обединените нации;</p> <p>2. (доп. - ДВ, бр. 33 от 2011 г., в сила от 27.05.2011 г.) лица, срещу които е образувано наказателно производство за тероризъм, финансиране на тероризъм, набиране или обучаване на отделни лица или групи от хора с цел извършване на тероризъм, образуване, ръководене или членуване в организирана престъпна група, която си поставя за цел да извършва тероризъм или финансиране на тероризъм, приготвяне към извършване на тероризъм, подправка на официален документ с цел улесняване извършване на тероризъм, явно подбуждане към извършване на тероризъм или закана за извършване на тероризъм по смисъла на Наказателния кодекс.</p>	<p>referred to in Paragraph (1):</p> <p>1. natural persons, legal persons, groups and organizations identified by the United Nations Security Council as associated with terrorism, or with respect to whom sanctions for terrorism have been imposed by a resolution of the United Nations Security Council;</p> <p>2. (supplemented, SG No. 33/2011, effective 27.05.2011) persons against whom criminal proceedings have been instituted for terrorism; financing of terrorism; recruitment and training of individuals or groups of people for the purpose of practising terrorism, forming, managing or membership of an organized crime syndicate having as its purpose the practice of terrorism or the financing of terrorism; preparation to practise terrorism; forgery of an official document for the purpose of facilitating the practice of terrorism, manifest incitement to practising terrorism; or a threat to practise terrorism, within the meaning given by the Penal Code.</p>
<p>ЗАКОН ЗА ПРЕДОТВРЯВАНЕ И УСТАНОВЯВАНЕ НА КОНФЛИКТ НА ИНТЕРЕСИ</p> <p>Чл. 24. (1) Всеки, който разполага с данни, че лице, заемащо публична длъжност, е нарушило разпоредба на този закон, може да подаде сигнал за конфликт на интереси.</p> <p>(2) Всеки, който разполага с данни за нарушение на разпоредбите на чл. 21 или 22, може да подаде сигнал за</p>	<p>CONFLICT OF INTEREST PREVENTION AND ASCERTAINMENT ACT</p> <p>Article 24. (1) Any person who possesses any data that a public office holder has violated any provision of this Act</p> <p>may submit an alert about a conflict of interest.</p> <p>(2) Any person who possesses any data on a</p>

<p>конфликт на интереси.</p> <p>(3) Когато разполага с данни, че лице, заемащо публична длъжност, е нарушило разпоредба на този закон, органът по избора или назначаването или съответната комисия по чл. 25, ал. 2, т. 1 и 3 незабавно изпраща сигнал до Комисията за предотвратяване и установяване на конфликт на интереси заедно със заверени копия от документите, относими към сигнала.</p> <p>(4) Сигналът, както и искането за установяване на конфликт на интереси, се подава писмено и се регистрира.</p>	<p>violation of the provisions of Articles 21 or 22 herein may submit an alert of a conflict of interest.</p> <p>(3) Where in possession of data that a public office holder has violated any provision of this Act, the electing or appointing authority or the relevant committee referred to in Items 1 and 3 of Article 25 (2) herein shall forthwith send an alert to the Commission for Prevention and Ascertainment of Conflict of Interest together with certified copies of the documents relevant to the alert.</p> <p>(4) The alert, as well as the request for ascertainment of a conflict of interest, shall be submitted in writing and shall be registered.</p>
<p>ЗАКОН ЗА ПРЕДОТВРАТЯВАНЕ И УСТАНОВЯВАНЕ НА КОНФЛИКТ НА ИНТЕРЕСИ</p> <p>Чл. 32. (1) Лице, което е подало сигнал за конфликт на интереси, не може да бъде преследвано само за това.</p> <p>(2) Лицата, на които е възложено разглеждането на сигнала, са длъжни да:</p> <ol style="list-style-type: none"> 1. не разкриват самоличността на лицето, подало сигнала; 2. не разгласяват фактите и данните, които са им станали известни във връзка с разглеждането на сигнала; 3. опазват поверените им писмени 	<p>CONFLICT OF INTEREST PREVENTION AND ASCERTAINMENT ACT</p> <p>Article 32. (1) A conflict of interest whistleblower may not be persecuted solely for this reason.</p> <p>(2) The persons who have been assigned to examine the alert shall be under an obligation:</p> <ol style="list-style-type: none"> 1. not to disclose the identity of the whistleblower; 2. not to make public any facts and data that have come to the knowledge thereof in connection with the examination of

<p>документи от неразрешен достъп на трети лица.</p> <p>(3) Лицата по ал. 2 предлагат на съответните ръководители предприемането на конкретни мерки за опазване достойнството на подалия сигнала, включително мерки, които да предотвратяват действия, чрез които му се оказва психически или физически тормоз.</p> <p>(4) Лице, което е уволнено, преследвано или по отношение на което са предприети действия, водещи до психически или физически тормоз, заради това, че е подало искане, има право на обезщетение за претърпените от него имуществени и неимуществени вреди по съдебен ред.</p>	<p>the alert;</p> <p>3. to safeguard the written documents entrusted thereto from unauthorised access of third parties.</p> <p>(3) The persons referred to in Paragraph (2) shall propose to the competent heads the taking of concrete measures to preserve the dignity of the whistle-blower, including measures to prevent any actions whereby the said whistle-blower is subjected to mental or physical harassment.</p> <p>(4) A person, who has been discharged, persecuted or in respect of whom any actions leading to mental or physical harassment have been taken by reason of having submitted a request, shall have the right to compensation for the personal injury and damage to property according to a judicial procedure.</p>
<p>ЗАКОН ЗА ДЪРЖАВНИЯ СЛУЖИТЕЛ</p> <p>Чл. 121. (1) Държавният служител има право да оспори законността на прекратяването на служебното си правоотношение пред органа по назначаването или пред съда чрез органа по назначаването и да иска:</p> <ol style="list-style-type: none"> 1. отмяна на акта, с който то е прекратено; 2. (отм. - ДВ, бр. 95 от 2003 г.) 3. обезщетение за времето, през което не е бил на служба поради прекратяването; 4. поправка на основанието за прекратяване на служебното 	<p>CIVIL SERVANTS ACT</p> <p>Article 121. (1) Any civil servant shall have the right to challenge the lawfulness of the termination of the civil-service relationship before the appointing authority or before a court of law care of the appointing authority and to seek:</p> <ol style="list-style-type: none"> 1. revocation of the act of termination; 2. (repealed, SG No. 95/2003); 3. compensation for the time of removal from service by reason of termination; 4. modification of the grounds for termination of the civil-service relationship

<p>правоотношение, вписано в служебната книжка или в други документи.</p>	<p>as entered in the civil-service record or in other documents.</p>
<p>ЗАКОН ЗА ДЪРЖАВНИЯ СЛУЖИТЕЛ</p> <p>Чл. 128. (1) Инспекторите извършват общи и специализирани проверки по утвърден от изпълнителния директор на Изпълнителна агенция "Главна инспекция по труда" годишен план, както и внезапни проверки по сигнали на ръководителите на инспекторатите в административните структури и на синдикалните организации или по жалби от държавни служители.</p>	<p>CIVIL SERVANTS ACT</p> <p>Article 128. (1) Inspectors shall conduct general and specialized examinations according to an annual plan endorsed by the Executive Director of the General Labour Inspectorate Executive Agency, as well as unscheduled examinations acting on alerts by the heads of the inspectorates in the administrative structures and the trade union organizations or on complaints by civilservants.</p>
<p>ЗАКОН ЗА ДЪРЖАВНИЯ СЛУЖИТЕЛ</p> <p>Чл. 130. Инспекторите са длъжни:</p> <ol style="list-style-type: none"> 1. да пазят в тайна поверителните сведения, които са им станали известни във връзка с упражняването на контрола; 2. да пазят в тайна източника, от който е получен сигнал за нарушение на служебното правоотношение. 	<p>CIVIL SERVANTS ACT</p> <p>Article 130. Inspectors shall be obligated:</p> <ol style="list-style-type: none"> 1. to respect the secrecy of any confidential information as may have come to the knowledge thereof in connection with the exercise of control; 2. to respect the confidentiality of the source wherefrom a tip-off on breach of the civil-service relationship has been received.
<p>ЗАКОН ЗА ДЪРЖАВНИЯ СЛУЖИТЕЛ</p> <p>Чл. 132. Когато при проверките се установят нарушения, които съдържат данни за извършено престъпление или други правонарушения, инспекторите</p>	<p>CIVIL SERVANTS ACT</p> <p>Article 132. Where any breaches giving reason to believe that a criminal offence or other wrongful acts have been committed are ascertained upon examinations, inspectors</p>

<p>уведомяват органите на прокуратурата.</p>	<p>shall notify the prosecuting authorities.</p>
<p>ЗАКОН ЗА СМЕТНАТА ПАЛАТА ЧЛ. ЧЛ. 58. (1) При наличие на данни за престъпление Сметната палата изпраща одитния доклад и материалите към него на прокуратурата.</p> <p>(2) Органите на прокуратурата уведомяват текущо Сметната палата за предприетите действия по изпратените материали по ал. 1.</p> <p>(3) Сметната палата не може да огласява данни в случаите по ал. 1 до приключване на наказателното производство.</p> <p>(4) При наличие на данни за престъпление при управлението на сметките за средства от Европейския съюз с решение на Сметната палата материалите от одита или одитният доклад се изпращат и на специализираните органи за превенция и борба с измамите и корупцията на Европейския съюз.</p>	<p>NATIONAL AUDIT OFFICE ACT</p> <p>Art. 58. (1) In case of data for a crime, the BNAO shall submit the audit report and its materials to the prosecution office.</p> <p>(2) The prosecution bodies shall notify currently the BNAO about the undertaken actions on the submitted materials under Para. 1.</p> <p>(3) The BNAO shall not disclose data in the cases under Para. 1 by the time the penal procedure is finalized.</p> <p>(4) In case of data for a crime in the management of the accounts for EU funds, with BNAO decision, the audit materials or the audit report shall also be submitted to the specialized bodies for prevention and fight with fraud and corruption of the EU.</p>
<p>ЗАКОН ЗА ПРЕДОТВРЯВАНЕ И УСТАНОВЯВАНЕ НА КОНФЛИКТ НА ИНТЕРЕСИ</p> <p>ЧЛ. 24. (1) Всеки, който разполага с данни, че лице, заемащо публична длъжност, е нарушило разпоредба на този закон, може да подаде сигнал за конфликт на интереси.</p> <p>(2) Всеки, който разполага с данни за нарушение на разпоредбите на чл. 21 или 22, може да подаде сигнал за</p>	<p>CONFLICT OF INTEREST PREVENTION AND ASCERTAINMENT ACT</p> <p>Article 24. (1) Any person who possesses any data that a public office holder has violated any provision of this Act may submit an alert about a conflict of interest.</p> <p>(2) Any person who possesses any data on a violation of the provisions of Articles 21 or 22 herein may submit an alert of a conflict of</p>

<p>конфликт на интереси.</p> <p>(3) Когато разполага с данни, че лице, заемащо публична длъжност, е нарушило разпоредба на този закон, органът по избора или назначаването или съответната комисия по чл. 25, ал. 2, т. 1 и 3 незабавно изпраща сигнал до Комисията за предотвратяване и установяване на конфликт на интереси заедно със заверени копия от документите, относими към сигнала.</p> <p>(4) Сигналът, както и искането за установяване на конфликт на интереси, се подава писмено и се регистрира.</p>	<p>interest.</p> <p>(3) Where in possession of data that a public office holder has violated any provision of this Act, the electing or appointing authority or the relevant committee referred to in Items 1 and 3 of</p> <p>Article 25 (2) herein shall forthwith send an alert to the Commission for Prevention and Ascertainment of Conflict of Interest together with certified copies of the documents relevant to the alert.</p> <p>(4) The alert, as well as the request for ascertainment of a conflict of interest, shall be submitted in writing and shall be registered.</p>
<p>ЗАКОН ЗА ПРЕДОТВРАТЯВАНЕ И УСТАНОВЯВАНЕ НА КОНФЛИКТ НА ИНТЕРЕСИ</p> <p>Чл. 32. (1) Лице, което е подало сигнал за конфликт на интереси, не може да бъде преследвано само за това.</p> <p>(2) Лицата, на които е възложено разглеждането на сигнала, са длъжни да:</p> <ol style="list-style-type: none"> 1. не разкриват самоличността на лицето, подало сигнала; 2. не разгласяват фактите и данните, които са им станали известни във връзка с разглеждането на сигнала; 3. опазват поверените им писмени документи от неразрешен достъп на трети лица. 	<p>CONFLICT OF INTEREST PREVENTION AND ASCERTAINMENT ACT</p> <p>Article 32. (1) A conflict of interest whistleblower may not be persecuted solely for this reason.</p> <p>(2) The persons who have been assigned to examine the alert shall be under an obligation:</p> <ol style="list-style-type: none"> 1. not to disclose the identity of the whistleblower; 2. not do make public any facts and data that have come to the knowledge thereof in connection with the examination of the alert; 3. to safeguard the written documents entrusted thereto from unauthorised access

<p>(3) Лицата по ал. 2 предлагат на съответните ръководители предприемането на конкретни мерки за опазване достойнството на подалия сигнала, включително мерки, които да предотвратяват действия, чрез които му се оказва психически или физически тормоз.</p> <p>(4) Лице, което е уволнено, преследвано или по отношение на което са предприети действия, водещи до психически или физически тормоз, заради това, че е подало искане, има право на обезщетение за претърпените от него имуществени и неимуществени вреди по съдебен ред.</p>	<p>of third parties.</p> <p>(3) The persons referred to in Paragraph (2) shall propose to the competent heads the taking of concrete measures to preserve the dignity of the whistle-blower, including measures to prevent any actions whereby the said whistle-blower is subjected to mental or physical harassment.</p> <p>(4) A person, who has been discharged, persecuted or in respect of whom any actions leading to mental or physical harassment have been taken by reason of having submitted a request, shall have the right to compensation for the personal injury and damage to property according to a judicial procedure.</p>
<p>Закон за електронните съобщения</p> <p>Чл. 274. (1) (Изм. - ДВ, бр. 43 от 2008 г., изм. - ДВ, бр. 93 от 2009 г.) Радиосъоръжения и/или крайни електронни съобщителни устройства, включващи хардуерни приспособления към съоръженията или крайните устройства за криптографиране на електронни съобщения и използващи криптографски ключ с дължина, по-голяма от 56 бита, се произвеждат или внасят след регистрация в дирекция "Технически операции" на Държавна агенция "Национална сигурност".</p> <p>(2) Не подлежат на регистрация по ал. 1 криптографски устройства за защита на банкови трансакции, смарт карти, криптори за кодиране на телевизионен сигнал, мобилни телефони без вграден допълнителен криптомодул и криптографски средства, използвани от</p>	<p>The Electronic Communications Act</p> <p>Art. 274. (1) Radio equipment or electronic communication terminal equipment, including hardware accessories to the radio equipment or terminal equipment for encryption of electronic communications and using cryptographic keys more than 56 bits long, shall be manufactured or imported after registration in the specialised directorate under Art. 113 of the Law for the Ministry of the Interior.</p> <p>(2) Cryptographic devices for bank transactions protection, smart cards, scramblers for scrambling television signals, mobile phones without a built-in additional cryptographic module and cryptographic devices used by representations or other organisations having a status of diplomatic missions shall not be subject to registration</p>

<p>представителства или други организации със статут на дипломатически мисии.</p> <p>(3) (Изм. - ДВ, бр. 43 от 2008 г.) За радиосъоръженията и крайните електронни съобщителни устройства по ал. 1 се води публичен регистър. Регистърът се публикува на страницата на Държавна агенция "Национална сигурност" в интернет.</p> <p>(4) В регистъра по ал. 3 се съдържа следната информация:</p> <ol style="list-style-type: none">идентификационни данни на производителя или вносителя:<ol style="list-style-type: none">за физически лица - трите имена и постоянен адрес;за юридически лица и физически лица - еднолични търговци - наименование (фирма), седалище, адрес на управление;наименование и тип на крайното устройство по ал. 1	<p>under paragraph 1.</p> <p>(3) Radio equipment and electronic communication terminal equipment under paragraph 1 shall be entered in a public register. The register shall be published on the Internet page of the Ministry of the Interior.</p> <p>(4) The register under paragraph 3 shall contain the following information:</p> <ol style="list-style-type: none">identification data about the manufacturer or importer: 68<ol style="list-style-type: none">for natural persons – full name and permanent address;for legal persons and natural persons-sole traders – name (company), headquarters, registered address.name and type of the terminal equipment under paragraph 1.
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ELSA CYPRUS

Contributors

National Coordinator:

Constantina Markou

National Researchers:

Charalambos Papasavvas

Christopher Lytras

Katerina Sofokleous

Nikoletta Kallasidou

Salome Charalambous

National Linguistic Editors:

Alexander Gioumouxouzis

Constantina Markou

National Academic Supervisor:

Eleni-Tatiani Synodinou

1. Introduction

The Cypriot legal system's peculiarities have led to its description as unique.¹ A mixed legal system, it is very much geared towards common law while still integrating substantial elements of the continental system. This translates into a plurality of legal sources with guidance potential for the Cypriot legal view on freedom of expression: the EU regional system, the ECHR system, and judicial precedent from common law jurisdictions across the globe, evident in Cypriot jurisprudence. The degree of press freedom in Cyprus is seen to be strong by the standards of international monitoring bodies, with Freedom House noting that Cypriot press is "free" with a score of 25 out of 100 (0 being the highest).²

However, the positive ranking of Cyprus is a marked change from the position throughout much of the 20th century. Historically, Cypriot media was constrained by strict government controls, particularly before independence.³ Researchers have noted that there are still barriers in reportage and press freedom, stemming from the country's separation. As the occupied part of the island is not under the effective control of the Cypriot government, the positive international assessment cannot be seen to concern freedom of expression encompassing all the territory of the island. For instance, the experience of female journalists is not consistent across the entire island and in the institutions of Cypriot media.⁴ A regrettable attestation to the disparity of the freedom of expression across Cypriot territory is the case of Kutlu Adali, a Turkish-Cypriot political columnist and the only Cypriot journalist to have died in Cyprus since 1992, whose case reached the ECtHR.⁵

Cypriot law includes important pieces of legislation that protect freedom of expression, and the right that journalists possess to safeguard the confidentiality of their sources is a part of it. It appears both in the form of government legislation and in self-regulatory mechanisms among professional journalists. Under the Constitution of 1960, every person has the right to freedom of speech and expression in any form and to hold opinions and receive or impart information and ideas without interference by any public authority. The Constitution, the Press Law of 1989, and the Journalistic Ethics Code will be the central object of examination in the following pages, along with more specialized pieces of legislation.

¹ Hatzimihail N., "Reconstructing Mixity: Sources of Law and Legal Method in Cyprus" in Palmer V., Mattar M., Koppel A. (eds.), *Mixed Legal Systems, East and West* (Ashgate 2015), pp. 75-99.

² Freedom House, *Cyprus: Freedom of the Press*, 2015,

Available at: <<https://freedomhouse.org/report/freedom-press/2015/cyprus>> Accessed March 4, 2016.

³ Whitten-Woodring J. and Belle D., *Historical Guide to World Media Freedom* (Sage Publications 2014); For a more in-depth historical overview of the Cypriot legal system see Hatzimihail N., "Cyprus as a Mixed Legal System" (2013) Vol.6 *Journal of Civil Law Studies*, pp.37-96.

⁴ Bailie M. and Azgin B., "Disturbing the Peace: Gender, Journalism and the Cypriot Press" (2011), Vol.12(5) *Journalism Studies*, pp. 689-704.

⁵ *Adali v. Turkey* App no 38187/97 (2005)

It will become quickly apparent through this report that there exists a distinct lack of national case-law on the subject of journalistic source protection, as well as other contemporary matters relating to it such as the nature of a journalist and encryption issues. Cypriot courts have, so far, touched upon such matters in a limited number of cases, in the context of rather unrelated facts, and in the form of *obiter* remarks rather than lengthy analyses. Regardless, this report endeavours to map the present regulatory framework of Cyprus on these issues and discuss as thoroughly as possible, in the light of applicable international frameworks and judgments, the direction of Cypriot courts. By doing so it examines the potential of future judgments, based on contemporary indications.

2. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

Freedom of expression and the protection of journalistic sources are safeguarded in the Cypriot legal order through various mediums.

Article 19 of the Constitution of the Republic of Cyprus provides that:

1. Every person has the right to freedom of speech and expression in any form.
2. This right includes freedom to hold opinions and receive and impart information and ideas without interference by any public authority and regardless of frontiers.
3. The exercise of the rights provided in paragraphs 1 and 2 of this Article may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.
4. Seizure of newspapers or other printed matter is not allowed without the written permission of the Attorney-General of the Republic, which must be confirmed by the decision of a competent court within a period not exceeding seventy-two hours, failing which the seizure shall be lifted.
5. Nothing contained in this Article shall prevent the Republic from requiring the licensing of sound and vision broadcasting or cinema enterprises.⁶

The Cypriot Press Law further delineates all aspects of the freedom of Cypriot press in a specialised manner. It recognises press products in the traditional way, only allowing within its definition those publications which are in print. This is found in Article 2:

⁶ Constitution of the Republic of Cyprus (Chapter II on Fundamental Rights and Freedoms) 1960, Article 19.

"Publication" in terms of newspapers or other printed means, means the distribution, sale, as well as the wall-posting or issuing of the newspaper or other publication in the public place or any assembly or part accessible to the public.

"Issue" in terms of newspapers or other printed means, means the printing of the newspaper or other publication.

"Newspaper" means any publication with the intention of informing the public, published daily or in larger, but in any case regular, time intervals, up to a maximum / month limit, containing material of general political and social interest.⁷

Cypriot case-law has not further dealt so far with the definition of press products and neither, in extension, with that of journalistic sources.

Beyond the Constitution and the Press law there is also the Journalistic Ethics Code, a self-regulatory mechanism which also defines the rights and obligations of journalists including the protection of sources in Article 14:

Professionals have a moral obligation to observe professional secrecy regarding the source of information obtained confidentially. The journalist is not obliged to reveal the source of his information. At the same time, it is the duty of the journalist to ensure that the sources of the information they provide is valid.⁸

However the Journalistic Ethics Code itself poses a limitation to the above principle. That is the exception of public interest provided in Article 15:

In this Code, cases falling into the concern of public interest justifying derogation from the rule are the following:

- a) Detection of crime or disclosure.
- b) Protection of public safety or health.
- c) Protection of human rights.
- d) Preventing deception of the public as a result of acts or statements by individuals or organisations.⁹

Public interest is a particularly prevailing concept in the Cypriot legal order and it is often raised in various cases. In light of ECtHR case-law on the matter, it can be considered a decisive factor that will influence the protection of journalistic sources in the future. The ECtHR has touched upon public interest in its *Financial Times Ltd & Ors v. UK* judgement¹⁰. In *Financial Times* the Court emphasized the importance of the 2000 Recommendation by the Council of Europe,

⁷ Press Act (145/89), Article 2.

⁸ Journalistic Ethics Code (1997), Article 14.

⁹ Journalistic Ethics Code (1997), Article 15.

¹⁰ *Financial Times Ltd & Ors v. UK* App no. 821/03 (2009)

underlining the weight of the protection of journalistic sources as a condition for press freedom. It dismissed claims of public interest for a national law allowing the unveiling of sources, finding the law an unjustified breach of Article 10 of the European Convention on Human Rights. Furthermore, in *Tillack v. Belgium*, it found that the search of a journalist's home and the seizure of all his working papers and tools ran contrary to Article 10.¹¹ Seeing as the Cypriot legal order lacks substantial case law on the matter, and considering the weight of both ECtHR case-law and case-law from other common law jurisdictions, these judgments should carry a special significance when Cypriot courts in the future turn outwards for an authoritative definition of the limits of source protection.

3. Is there, in domestic law, a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

3.1. Negative right of non-disclosure

The Cypriot Press Law of 1989 guarantees freedom of the press, the unhindered circulation of newspapers, the right of journalists not to disclose sources of information, and access to official information. It does not provide a positive legal obligation for journalists to *not* disclose their resources nor any sanctions in the case of breach, but rather equips them with the freedom not to do so, unless in exceptional circumstances.

According to the Press Law all journalists, Cypriot or foreign, have the right to free access to public sources of information, the freedom to seek and receive information from any competent authority of the Republic, and freedom to publish. The relevant authority must provide the requested information unless they relate to the state or public security, constitutional or public order, public morals or the protection of the reputation and rights of third parties. Article 8 provides:

1. All journalists, Cypriot and foreign, have the right not to disclose their sources of information and to refuse to give evidence without being subject to prosecution for it.
2. The only exception is for cases where a journalist publishes information about a criminal offense. It may then be required by the Court to consider the case, or investigator to reveal the source, provided that the court or the investigating judge is satisfied that there exist cumulatively the following conditions:
 - the information is clearly relevant to the criminal offense;
 - the information cannot be obtained by other means;

¹¹ *Tillack v. Belgium* App. no 20477/05 (2007) Recently upheld by *Ressiot and Others v. France* App no 15054/07 and 15066/07 (2012), a judgment applauded by the Cypriot Union of Editors.

- Overriding and compelling reasons of public interest require the disclosure of information.¹²

Cypriot courts have not adjudicated upon the exception of a criminal offence in particular concerning the exposure of a journalist's source. The ECtHR cases *Sanoma Uitgevers BV v Netherlands*¹³ and *Voskuil v. Netherlands*,¹⁴ which places this exception in cautious limits are particularly relevant. *Sanoma* involved the seizure of photographs which identified a journalist's source in the course of criminal investigations, while *Voskuil* concerned the detention of the journalist having such information. In *Sanoma*, the ECtHR underlined the importance of domestic procedural safeguards before any order of disclosure can be given, and in *Voskuil* it found a lack of overriding public interest, since national authorities had gone too far to identify the source. Such precedent places the exception in the Cypriot Press Law under strict limitations.

Although there is no clear detectable trend which points to whether Cypriot courts would follow a broad or strict interpretation of this case law, there are a few sparse mentions in Cypriot case-law which highlight the weight attributed to the freedom of expression as a cornerstone of human rights in Cyprus. This has been mentioned in the *Makrides* case: "The principle of anonymity which allows a publisher or reporter to refuse[...]to reveal the name of the author of an article published in his newspaper is inclined to play an important part in the realisation of the right to receive and impart information. [...] It is generally recognised that for the press to be enabled to perform the duty of imparting information to the public it should be allowed to receive information in confidence without revealing its sources."¹⁵

3.2. Positive obligation of non-disclosure

One cannot find any positive obligation not to breach the confidentiality or any corresponding sanctions in the Press Law. Journalists may refuse to testify before a court of law regarding their sources, however as pointed out in *Makrides* this may lead to contempt of court. Alternatively, such an action may lead to the journalist being considered an unreliable witness, as it happened in the case *Yaacoub v. The Republic* where the Assize Court found that no attention was to be given to the testimony of a journalist who cited confidentiality to not reveal sources of information.¹⁶

Seeing as the Press Law provides no direct provisions on the responsibility of non-disclosure of journalistic sources, one turns to other instruments to see if any such provisions can be found. The Journalistic Ethics Code itself poses no such consequences, limiting itself to the mention of

¹² Press Act (145/89), Article 8.

¹³ *Sanoma Uitgevers BV v Netherlands* App. no 38224/03 (2010).

¹⁴ *Voskuil v. Netherlands* App. no 64752/01 (2007).

¹⁵ *Kostas Makrides and other v. Ministry of Interior and Director of the Public Information Office* (1981), 3 CLR 321.

¹⁶ *Hossam Taleb Yaacoub v. The Republic* Criminal Appeal No. 72/2013, 19/3/2014.

a “moral” interest to not disclose such information in Article 14. This moral obligation is not expanded upon by the Code, nor is it expanded upon in case law.

The Cypriot Criminal Code does include a provision in its chapter for offenses against public power, regarding the breach of professional secrets and revealing of government secrets, however this provision would apply to press products by institutions linked to the government such as the Cyprus Broadcasting Corporation. Article 135 states that:

A public servant who publishes or communicates information or occurrences which he/she was informed of or documents received because of his/her office, whose confidentiality he/she was obliged to respect, unless the person has an obligation to publish or disclose them, is guilty of a misdemeanour.¹⁷

Furthermore, the Constitution establishes the protection of correspondence in Article 17:

Every person has the right to respect for, and to the secrecy of, his correspondence and other communication if such other communication is made through means not prohibited by law.¹⁸

Labour law does not provide further sanctions regarding journalists in particular. Specialised laws on confidentiality exist for different professional relations, e.g. banking, yet there is no one law applying sanctions for the disclosure of confidential information upon employees as a whole including journalists.

Potential civil actions could arise based on the law of negligence; however the Law on Civil Wrongs does not provide a specialised provision besides several loosely related provisions on defamation. In conclusion, it can be said that Cypriot law does not have any clearly delineated provision imposing a positive duty upon journalists to protect the confidentiality of their sources.

4. Who is a ‘journalist’ according to the national legislation? Is it, in your view, a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media actors? Is the protection of journalist’s sources extended to anyone else?

4.1. Who is a journalist according to Cypriot Law?

In Cyprus, the contentious question of who is a Journalist is addressed in the Press Law of 1989. This legislation draws a distinction between the ‘Cypriot journalist’ and the ‘foreign journalist’, both their definitions being provided by Article 2:

¹⁷ Criminal Code (Chapter 154), Article 135.

¹⁸ Constitution of the Republic of Cyprus (Chapter II on Fundamental Rights and Freedoms) 1960, Article 17.

“Cypriot journalist” means the citizen of the Republic or the foreigner whose main regular and paid professional activity is within a newspaper or newspapers that are published in the Republic and provides towards this newspaper or newspapers exclusively intellectual work as a manager, editor-in-chief, editor, commentator, caricaturist, cartoonist, press photographer, or corrector, engaging with the collection, editing, or revision of journalistic content. The term also includes correspondents of newspapers that are based within the Republic or abroad, as well as those, who, under the same conditions, work in news agencies, which operate in the Republic or in the writing and edition of news content for the broadcasting bulletin of the Cyprus Broadcasting Corporation and fall within the category of editors under the service of this Corporation, as well as the operators of the Press and Information Office and exercise journalistic activity.”
“Foreign journalist” means a foreigner who is a journalist by profession and represents a foreign news agency, broadcasting or television station in the Republic or is an entrusted correspondent or envoy extraordinary of such organisation.”¹⁹

The distinction between a Cypriot and a foreign journalist does not manifest itself in any significant practical manner in the law, other than in the procedural requirement of Article 6(4), for foreign journalists who come to Cyprus in their professional capacity for duration longer than a month:

A foreign journalist coming to the Republic for the exercise of his profession must, within one month, deliver his credentials to the Director of the Press and Information Office and apply for registration in the Register of Foreign Journalists.

Cypriot journalists carry a corresponding obligation for registration, with further requirements. The Press Law establishes the Press Council, and organ vested with essential powers over the regulation of the journalistic profession.²⁰ Article 3 provides that the Council bears responsibilities of safeguarding the freedom of press. Particularly, the Council has the responsibility to:

Issue a press card to Cypriot journalists, if satisfied by the production of the relevant certificate from the publisher and editor of the newspaper they (the applicants) are engaged in, or from the General Manager of the Cyprus Broadcasting Corporation, or from the Director of the Press and Information Office that the statutory requirements for this purpose are met.²¹

¹⁹ Press Act (145/89), Article 2.

²⁰ Press Act (145/89), Section II: Register of Foreign Journalists, Measures for the Consolidation of the Freedom of Press, Article 3(1).

²¹ Press Act (145/89), Article 3(2) σ.

However, the realisation of this organ has not been possible until this day, and journalists have established their own committee to oversee the application of the Journalistic Ethics Code. Instead, the actual requirements today for the registration of one as a journalist are the following, established by a subsequent amendment to the Press Law:

- Practicing the profession of a journalist,
- Having main, regular, and remunerated employment in mass media operating or issued in Cyprus,
- Providing the Press and Information Office with a letter from one's employer confirming one's journalistic capacity and employment at the relevant organization. The letter should state the name of the person concerned in Greek and English and the ID or passport number.
- Providing a digital photo of oneself to the Press and Information Office.²²

4.2. Evaluation

Is the Cypriot definition restrictive upon who qualifies as a journalist? Interestingly, the Cypriot law has two facets that must exist to enable one to be a "journalist" in the legal sense: falling within the definition of Article 2 of the Press Law, and fulfilling the requirements for registration. *Prima facie* it does seem that the law imposes a number of requirements that non-conventional journalists cannot comply with. The law must be juxtaposed with Recommendation 2000/7 of the Council of Europe to examine whether it indeed provides a restrictive definition according to contemporary standards.

The commentary to the Recommendation clearly states that protection of journalistic sources is not afforded to those who do not fall within the definition of "journalist", subject to Principle 2.²³ This principle urges the extension of the right of non-disclosure of sources to:

"Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information [...]"

Furthermore, the definition of "journalist" itself has a notably wider scope in the Recommendation:

The term "journalist" means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication;

Not only does the Recommendation effectively extend the status of press products to any products without differentiating between printed or simply disseminated material, but it also extends the journalistic status to any regular gatherer and communicator of all types of information including press, photographs, audiovisual, and computer-based material. According to Principle 2, for the purpose of the protection of sources, even persons that come to know of such sources through their closeness to journalists fall under the definition of a journalist. The

²² Press Act (145/89), Amendment 84/I of 2002.

²³ 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 (Council of Europe), *II Commentary, Definitions*, para. 10.

commentary further adds that freedom of expression is understood as implying free access to the journalistic profession and, therefore, the definition should not exclude part-timers, freelancers, newcomers to the profession, or independent investigators.²⁴

These aspects are not addressed in Cypriot Law nor has it been extended in any notable case. Cypriot legislation evidently provides for a traditional definition of the term “journalist” as one associated with a traditional media organisation.²⁵ Although the definition bears elements of viewing journalism as an activity, it still treats it as a profession. Evidently, this is a restrictive interpretation of the concept of journalism and journalists. The Press Law certainly could be modernised to further approach the standards of Recommendation 2000/7. However, an indication of judicial opinion is indeed given on the matter, in the *Makrides* decision:

The freedom of expression of course presupposes some other person to whom ideas are expressed or imparted and for this reason the freedom of expression includes the right to publication or circulation (see *Martin. v. Struthers* (1943) 87 Law ed. 1313) as well as freedom to receive and publish (see *Express Newspapers v. Union of Indian* (1958) S.C. 578-614). The freedom of expression and particularly the freedom of the press as protected by the Constitution and by the international conventions presupposes that there should not be imposed any preventive restriction in the form of a previous licence or preventive censorship. This view is supported by Article 19.5 of the Constitution which runs as follows: "Nothing in this Article contained shall prevent the Republic from requiring the licensing of sound and vision broadcasting or cinema enterprises".

The increasingly growing journalistic activity of the ‘citizen journalist’ triggers the necessity for a wider legal definition of the ‘journalist’ in Cyprus, especially since the rapidly shifting nature of journalism does not leave Cyprus unaffected. Today everything becomes more transparent and accessible through the Internet and social media, allowing anyone to practice journalism.²⁶ This growing journalistic activity is apparent among Cypriot citizens as well, who pursue it more and more using the tools of the modern technology and the reach of the internet to generate content that would otherwise not be revealed.²⁷ Such type of citizen journalism can go far beyond the reach of professional journalism, while Cypriot legislation does not touch upon it. This creates a *lacuna* of law leading to the objective interpretation of current law as restrictive on the concept of the journalist.

²⁴ 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 (Council of Europe), *II Commentary, Definitions*, para. 13 (ii).

²⁵ Kent T., “Who’s a Journalist? Closing in on a Definition” (Huffpost Media, 2013) <http://www.huffingtonpost.com/thomas-kent/whos-a-journalist-closing_b_4033856.html> Accessed May 2016.

²⁶ Avsaroglu N., “The Meaning of Journalism in the 21st Century” (Euronews Culture 2014) <<http://www.euronews.com/2014/09/16/the-meaning-of-journalism-in-the-21st-century/>> Accessed May 2016.

²⁷ Barnes C., “Citizen Journalism vs Traditional Journalism: A Case for Collaboration” (2012), *Caribbean Quarterly* (Vol. 58 No. 2/3).

5. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

The legal safeguards for the protection of journalistic sources are found in the Press Law (145/89). Article 8(1) provides that:

“A journalist, either Cypriot or foreigner, has the right not to disclose the source of the information that he/she published and to refuse on this occasion to provide evidence, without being penalized because of his/her refusal.”²⁸

However, as with most rights, the right to protection of journalistic sources is not absolute and is subject to limitations. Article 8(2) of the Press Law provides the conditions for the limitation of this right in exceptional circumstance of a relation to a criminal offence:

“In the exceptional circumstance whereby a journalist has published a piece of information that relates to a criminal offence, it is possible that he/she might be forced by means of Court order that undertook the specific offence, or by a coroner to disclose his/her sources, provided that the Court or the coroner is satisfied that the following conditions cumulatively apply:

- (a) The information is precisely related with the criminal offence;
- (b) There is no alternative means through which the same information can be acquired;
- (c) For reasons of higher public interest, it is necessary that the information is disclosed.

It is therefore evident that the protection of journalistic sources may only be lifted under special conditions and only regarding situations where the information in question is directly linked to a criminal offence. Comparing this to the requirements recognised by the ECtHR in its balancing test, the national and international principles theoretically align. The ECHR, in *Goodwin v. UK*, found that where and as far as an overriding requirement in the public interest exists and the case is sufficiently serious a disclosure might be considered necessary in a democratic society, in accordance with Article 10 of the European Convention of Human Rights.²⁹ A disclosure is lawful if the public interest outweighs the legitimate interest of the source in this case, and there are no alternative means of obtaining the necessary information, all in light of the principle of proportionality.

Regarding the hearing of complaints, the Press Council envisaged by the Press Law in Article 3 is statutorily vested with the power to review complaints and in particular:

²⁸ Press Act (145/89), Article 8.1.

²⁹ *Goodwin v. the United Kingdom* App no. 28957/95 (2002)

to investigate complaints regarding the press and its function and to examine, in its own motion or following a complaint, accusations against newspapers and journalists of non-professional acts or behaviour, and decide upon them and indicate the appropriate remedial measures.

As with other functions which the Press Council would be in power to perform had it come into existence, journalists have developed their own self-regulatory mechanism to oversee complaints. The Journalistic Ethics Code in Article 3 establishes the Committee of Journalistic Ethics which, among others, has overseeing capacity:

The Committee receives, deals with and decides on complaints of alleged violations of this Code by a journalist and/or mass media. It also provides, at its discretion and in the spirit of this Code, interpretative guidance lines. The media and those working for them undertake to cooperate with the Commission in conducting its inquiries.

Exceptionally, the Committee may hear the case *ex officio* which may amount to an infringement, given their importance and seriousness.

The Committee's objective is to settle as soon as possible, any dispute which may entail a material breach of this Code. If no settlement is reached, the Committee examines the complaint and decides whether it violated the Code.

The Committee is not entitled to impose any penalty or award compensation, or to deal with a complaint that is the subject of proceedings before a court or organ vested with that power.³⁰

Beyond the freedom of non-disclosure in Article 5 of the Journalistic Ethics code mentioned above, little else is statutorily or otherwise determined in terms of when and how this procedure can or must take place, or what procedures are undertaken in those circumstances, and such conditions have not risen so far in the case law.

The Criminal Code in any case does stipulate the liability of any person who disobeys lawful orders in Article 137, which could apply in the case of a journalist refusing to disclose their sources in spite of a court order:

Whoever disobeys an injunction, warrant, or order issued by a court, officer or person acting in any official capacity and is properly authorised for it, is guilty of misdemeanour and liable to imprisonment for two years, except when another penalty or procedure in connection with such disobedience is explicitly specified.

³⁰ Journalistic Ethics Code (1997), Article 3.

6. In the respective national legislation, are the limits of non-disclosure of the information in line with the principles of the *Recommendation No R (2000) 7*? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

The Committee of Ministers in 2000 adopted the Recommendation 2000 (7) which recognises the freedom of expression as an essential foundation for a democratic society.³¹ The development of free, independent, and pluralist media, in which the protection of journalists' sources is an elemental condition for journalistic work, is therefore crucial. Principle 1 of the Recommendation stipulates that:

“Domestic law and practice in member states should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the principles established herein, which are to be considered as minimum standards for the respect of this right.”

Cypriot law indeed does provide such clear basic protection in the form of a negative freedom, as seen in the Press Law and the Journalistic Ethics code. Principle 3 of the Recommendation further provides the limitations of this right, in different subsections, which will be juxtaposed with Cypriot provisions. Subsection (a) posits that the right of journalists not to disclose their source of information must not be subject to other restrictions than those mentioned in Article 10.2 of the Convention, therefore any intrusion upon this right must be a) prescribed by law b) necessary in a democratic society and c) established in the interests of national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary.³²

Cypriot judges have attested to the soundness of this provision while also applying its exceptions in their judgment in *Hadjinikolaou v. The Police*, a case concerning the public encouragement of violence through a newspaper article contrary to the Criminal Code, saying that:

“This Court attaches particular significance to the present case since it concerns the right of freedom of expression [...] guaranteed under Article 19 of the Constitution as well as the European Convention for the Protection of Human Rights which is applicable to Cyprus under the provisions of Article 169 of the

³¹ Recommendation No. R (2000) 7.

³² European Convention on Human Rights (entry into force September 1953), Article 10.2.

Constitution [...]. But even in the Constitution and the Convention there are reservations and limitations and rightly so, in our concurring opinion, because while no one can doubt that the right to freedom of expression is [...] a characteristic of any civilized society and democratic country, however, it must be such that the reasons for subjecting it to the law must not be overlooked [...].³³

Among the very few cases that touch upon the necessity, adequacy, and proportionality requirements while applying Article 10 of the Convention, this excerpt showcases that the criminal offence exception of Article 8 of the Press law is the most important exception where the disclosure of sources can be demanded. It can be inferred that Cypriot courts would follow the line of the Recommendation seeing as the current Cypriot legislation bears similarities to it – however, there is no substantial mention in Cypriot law of the gravity of the criminal offence in question.

As seen in Question 1, the Press Law only provides for the criminal offence exception, while the Journalistic Ethics Code expands this list by including this exception under the umbrella of specified public interest along with public safety or health, protection of human rights, and prevention of the deception of the public (Article 15). These run in accordance with Subsection (b) of Principle 3 on the limits of non-disclosure, which provides that the disclosure of information is unnecessary unless satisfactorily established that alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure (imposed by Article 8 Press Law) and that the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure.

Subsection (c) provides that these requirements are relevant at all stages of proceedings where non-disclosure is invoked. Beside the case-law and the limited wording of the Press Law, there is no further stipulation as to the procedural aspect of any such application before a court of law. Nothing precludes the application of subsection (c) in any stage of court proceedings where non-confidentiality is invoked.

Finally, according to the Recommendation, alternative methods of gaining information may include internal police investigations, investigation of persons connected to the journalists, and others. There is no provision in the law providing for alternative measures for gaining information before resorting to the request for disclosure of journalistic sources, besides the clear position that this must be the last means possible.

In conclusion, duly noting the lack of a sophisticated legislative direction on the matter, it can be said that the current indications of Cypriot law signify that it runs parallel to the requirements of Principle 3 of Recommendation 2000/7.

³³ *Hadjinikolaou v. The Police* (1976) 2 C.L.R. 63.

7. In the *Recommendation No R (2000) 7* the following principles should be respected when the necessity of disclosure is stated: absence of reasonable alternative measures, outweighing legitimate interest (protection of human life, prevention of major crime, defence of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the disclosure outweigh the interest in the non-disclosure?

Recommendation (2000) 7 states that the interest in disclosure may outweigh that of confidentiality in cases where the disclosure is necessary to safeguard human life, prohibit major crime, or defending a person accused of having committed a major crime. However, the interest should always be balanced against the damage to freedom of expression from the disclosure, and it should be ordered by an individual or body with an explicit legitimate interest that has taken all possible alternative measures to secure that interest. Even so, the extent of disclosure should be limited as far as possible, and any sanctions against journalists who refuse to disclose their source of information should be applied by an impartial court after a fair trial and be subject to appeal to a higher court if it be necessary.

Seeing as there is no national cases which deals particularly with the balancing of interests between disclosure and confidentiality of journalistic sources, one must turn to these provisions and extrapolate the criteria that would be applicable in a Cypriot case. Article 19 of the Cypriot Constitution, seen earlier, provides that exceptions to the right to freedom of expression may take place. These can be formalities, conditions, restrictions, or penalties which are prescribed by law and are necessary in the interests of the national security; the constitutional order; public safety, order, health, or morals; protection of reputation or rights of others; preventing the disclosure of information received in confidence; maintaining the authority and impartiality of the judiciary. These are significantly wider than the cases mentioned by the Recommendation, yet one must keep in mind that they apply as limitations of freedom of expression in general, not specifically to orders of disclosure of journalistic sources.

Looking back at *Hadjnikolaou*, mentioned earlier, it found that it was acceptable to limit the freedom of expression in order to subdue press which incited violence and thus violated provisions of the Criminal Code. The nature of the exceptions of the Recommendation seem to fall in line with the principle put forth by this case, since both revolve around matters of serious legal weight, such as large-scale crime.

Another criterion corresponding to the Recommendation may be extrapolated from Article 8 of the Press Law, and that is the necessity of having exhausted all alternative means of acquiring the sought-after information. As was mentioned, the law does not propose alternative means of investigation like the Recommendation does; yet it authoritatively states that in the exception of a criminal offence, exhausting alternative means is a must.

A holistic overview of the provisions examined so far sketch a legal landscape which, although lacks essential elements to protect confidentiality and journalistic sources directly, still provides

principles that draw a significant protective framework that corresponds to an extent with Recommendation 2000/7. This is a fortunate fact since, even in cases that entail a strong public interest in disclosing the identity of a source, there is a strong case to be made for the fundamental function of the protection of sources in a democracy:

“In some cases... the more important the interest violated, the more important it will be to protect the sources... It must be assumed that a broad protection of sources will lead to more revelations of hidden matters than if the protection is limited or not given at all.”³⁴

As G. Robertson and A. Nicol point out in their handbook on media law:

“Were it not for “unofficial sources” obligingly taking “off the record” to journalists, there would be simply be much less news in the newspapers. There would be fewer facts and less information for discussion, for dispute and sometimes for retraction, in democratic society [...]. If sources, frightened of exposure and reprisal, decide not to talk, there will not only be less news, but the news which is published, will be less reliable. It will not be checked for spin”.³⁵

Recommendation 2000/7 could be described as a weapon that can guarantee to journalists protection of their confidential source of information. The criteria that Cypriot law poses in order to compromise the level of this freedom seem to be rather vague and unreliable at present, but seem to follow the trail of the Recommendation.

8. In the light of the case law of the European Court of Human Rights how do national courts apply the respective laws with regard to the right to protect sources? In particular, how do they balance the different interests at stake?

How does the ECtHR place a balance between the public interest and the right to non-disclosure, and how do the ripple effects of this translate into the Cypriot legal order? ECtHR case-law has persistently upheld the thresholds it set for potential derogations to the non-disclosure right through decisions like *Goodwin* and *Sanoma*, but it has also made clear that Article 10 does not provide absolute protection.

This is best illustrated through the criminal offence exception, as in *Nordisk Film v. Denmark* in which a domestic order of disclosure of sources concerning a child sex ring was considered a proportionate interference, necessary to prevent a serious crime.³⁶ The notion of preventing

³⁴ *Kontrollutvalget v. Johansen* [1992] 1 L.N.R. 39, quoted in Steingrim Wolland, “Press Law in Norway” in *Press Law and Practice: A comparative Study of Press Freedom in European and other Democracies*, 116 para. 19

³⁵ G. Robertson & A. Nicol, *Robertson & Nicol on Media Law* (Sweet & Maxwell 4th edition, London 2002) pp. 254-255.

³⁶ *Nordisk Film & TV A/S v. Denmark* App. no 40485/02 (2005)

critical erosions of public interest by serious crime is prominent in the case-law.³⁷ Moreover, the Court demonstrated that not all sources fall within the meaning of “journalistic sources” in *Stichting Ostade Blade v Netherlands* which involved a letter claiming responsibility for a bomb attack.³⁸ The Court has previously ruled that even when sources may be unlawful an order of disclosure is unlikely to be proportionate;³⁹ however the particular gravity of this case offset confidentiality claims.

The Press Law of 1989 provides the right to journalists to maintain the confidentiality of their sources even withstanding government demands. On this, Terzis notes “authorities generally respect these rights in practice; however, in some cases journalists have been obstructed in their reporting, fined and threatened with more serious charges”.⁴⁰ Legal scholars, Stratilatis and Emilianides, explain that the progression away from traditional media in Cyprus has put pressure on the existing legal framework, which does not adequately guarantee the essential freedoms it protects.⁴¹

As seen earlier, the Cypriot Constitution takes on a rather expansive view of the notion of public interest in Article 19 for freedom of expression in general. But for specific derogations of a journalist’s right of non-disclosure, the exceptions are limited to public interest in the Journalistic Ethics Code (concerning the detection of crime, public safety/ health, human rights, or preventing the deception of the public) and criminal offences, with its criteria set out, in the Press Law.

A slight mention of the keeping of this balance was given in the Makrides case:

“The journalist may perhaps be called upon to reveal the sources of his information, in the name, however, of public interest and national security.”

Besides adding a consideration of national security, this case cannot be of any further indicative value for journalistic sources, since its subject matter did not relate to such revealing, nor did it deal with matters of criminal gravity. No other case has touched upon this considerably either. However a reading of the case demonstrates the strong reliance that Cypriot courts place on common law jurisprudence—and the UK approach to this matter is more allowing of derogations than the ECtHR standard.⁴² For example, the UK Court of Appeal recognized the notion that some sources are not worth protecting notably in *Camelot v Centaur* in 1997, a case concerning a company’s financial records.⁴³ The ECtHR expressed the same principle in *Stichting Ostade Blade* in 2014, a case concerning terrorism.

³⁷ *Ressiot and Others v. France* App no 15054/07 and 15066/07 (2012).

³⁸ *Stichting Ostade Blade v Netherlands* App no 8406/06 (2014).

³⁹ *Tillack v. Belgium* App no 0477/05 (2007).

⁴⁰ Georgios Terzis, *European Media Governance: National and Regional Dimensions*, (Bristol: Intellect Books, 2008) p. 207.

⁴¹ Stratilatis C. & Emilianides A., *Media Law in Cyprus*, (Kluwer: Netherlands 2015), p. 45.

⁴² Centre for Media Pluralism and Media Freedom (European University Institute) “On Protection of Journalistic Sources” October 10, 2014 < <http://journalism.cmpf.eui.eu/discussions/on-protection-of-journalistic-sources/> > Accessed June 2016.

⁴³ *Camelot Group Plc. v Centaur Communications* [1997] EWCA Civ 2554, [1999] QB 124.

A potential application of the above could lead to a balancing on interests that tips a little more to the end of disclosure of sources. However, given the historical relationship of Cypriots and the ECtHR on matters of utmost human rights importance, the weight that Cypriot courts should give to the ECtHR's interpretation is not dismissible.

9. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

The ECtHR's approach to surveillance and seizure may be extrapolated by various cases. Court orders requiring journalists to release information from sources that were international arms traders as in *Voskuil v The Netherlands*, or even where the source was a government secret service official as in *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* were not seen as proportionate.⁴⁴ In *Roemen and Schmit v Luxembourg*, investigators had been armed with search warrants and had raided a journalist's home.⁴⁵ The Court thought the central question was whether the law had upset the balance between the protection of journalistic sources and the effective prevention of crime, and found that it was not an effective measure therefore balance was not struck. The judgment built upon *Nordisk Film & TV A/S v. Denmark*,⁴⁶ which expressed the principle that an order would be held proportionate where it prevented a serious crime.

Lowenthal notes that the ever-growing reach of government authorities has curbed the ability of members of the press to retain their freedom, with journalists now required to go to ever increasing lengths to code their information and keep their valuable data private.⁴⁷ But are the legal measures in the Cypriot legal order accessible, precise and foreseeable in terms of surveillance? According to the findings of the ECHR, the *rule of law* test entails several factors: Does the domestic legal system sanction the offence? Is the legal provision accessible to citizens and is it sufficiently precise to allow them to reasonably foresee the consequences which an

⁴⁴*Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* App. no 39315/06 (2013).

⁴⁵*Roemen and Schmit v Luxembourg* App. no. 51772/99 (2003).

⁴⁶*Nordisk Film & TV A/S v. Denmark* App. no 40485/02 (2005)

⁴⁷ Tom Lowenthal, "Surveillance Forces Journalists to Think and Act Like Spies" April 17 2015, Available at: <<https://cpj.org/2015/04/attacks-on-the-press-surveillance-forces-journalists-to-think-act-like-spies.php#more>> Accessed 8 March, 2016.

action may entail? And lastly, does the law provide adequate safeguards against arbitrary interference with the respective rights?⁴⁸

Article 17 of the Constitution on the right to Privacy of Correspondence posits the following:

1. Every person has the right to respect and safeguarding of the privacy of correspondence and any other communication of his/hers, so long as the communication is conducted through such means not prohibited by law.

2. There shall be no interference with the exercise of this right unless it is permitted under the law in the following cases:

A. Persons who are in prison or detention.

B. Following a court order issued in accordance with the provisions of the law, at the request of the Attorney General, and the procedure is a measure that in a democratic society it is necessary in the interest of security of the Republic or the prevention, investigation, or prosecution of the following serious criminal offenses:

(a) premeditated murder or manslaughter,

(b) trafficking in adult or juvenile persons and offenses related to child pornography,

(c) marketing, supply, cultivation or production of narcotic drugs, psychotropic substances or dangerous drugs,

(d) offenses related to currency or paper money of the Republic and

(e) corruption offenses for which imprisonment of five years or more upon conviction is stipulated.

C. Following a court order, issued in accordance with the law, for the investigation or prosecution of a serious criminal offense for which five years imprisonment or more upon conviction is stipulated, and the intervention concerns access to the relevant electronic communication data traffic and position and the related data necessary to identify the subscriber or user.

On a related point, Article 15 of the Constitution provides:

1. Everyone has the right to respect for his/her private and family life.

2. There can be no interference on the exercise of this right except one in accordance with the law and necessary only in the interests of security of the Republic or the constitutional order or public security or public policy or public health or morals or the protection of rights and freedoms under the Constitution provided to every person or in the interest of transparency in public life or for purposes of taking measures against corruption in public life.

The Law on the Protection of Confidentiality and Private Communications goes into more detail in Article 8 (Issuance of a Judicial Warrant for Monitoring):⁴⁹

⁴⁸ Greer S., "The exceptions to Articles 8 to 11 of the European Convention on Human Rights" Human rights files No. 15 (Council of Europe Publishing, Strasbourg 1997), p.5.

⁴⁹ The Protection of Confidentiality of Private Communications (Interception and Access to Recorded Private Communication Content) Law of 1996 (92 (I) / 1996).

(1) The Judge may issue a judicial warrant for monitoring, as requested in the application or with such modifications or subject to such conditions which authorise the monitoring of private communications if satisfied that based on the facts presented by the applicant-

(A) There is reasonable suspicion or possibility that a person is committing, has committed or is likely to commit an offense

(B) There is reasonable suspicion or possibility that this private communication is connected or is relevant to the offense

(C) Ordinary examination or investigative procedures have been tried and failed or reasonably appear not expected to succeed if tried or to be dangerous for the proper investigation of the offense or the urgency of the situation is such that it was not practical to conduct surveys or investigations into the offense using other procedures

(D) There is a reasonable suspicion or possibility that the telecommunications device or machine with which, or part of it, or the place where private communication for which monitoring is requested will be held, is being used or is intended or expected to be used in connection with the commission of such offense or it is owned or is registered in the name of a person or commonly used by a person to which reference is made in subsection (1) (a) above;

(E) The issuance of such a court order is in the interest of justice.

The Article describes the contents of the warrant:

(2) A judicial warrant issued under subsection (1) may contain such terms and conditions as the judge considers appropriate and it describes-

(A) the identity of the person, if known, for which a monitoring of private communications is requested,

(B) the nature and location, if known, from where it is intended to monitor private communications, which are identified by the Authority,

(C) the type of private communication for which monitoring is requested and the specific offense to which it relates,

(D) the manner in which it seeks to carry out the monitoring,

(E) the institution or person who is responsible for monitoring and which is the authority or body or person with the permission of the Authority and on such conditions imposed by the Authority or the Chief of Police or the Director of Customs,

(F) the period for which the authorisation is granted, which contains an order whether the monitoring is terminated automatically or not when the described private communication has been received.

Lastly, the Article states that if the above requirements are met, certain actions can be taken:

(3) Judicial warrant issued under this section shall, upon request of the applicant, order the Authority or a person acting on the Authority's authorisation and subject to such conditions imposed by the Authority, provide the applicant or the Chief of Police or Director of Customs, without delay, all necessary information, facilities and technical assistance for the implementation of the court order.

(4) The court order may authorise entry into any premises specified therein for the purpose of installation, maintenance, use or removal of any

telecommunication equipment, which is used for monitoring, compliance with the provisions of any existing law.

(5) A judicial warrant issued under this section does not authorise or approve monitoring of any private communication for a period longer than necessary at the discretion of the judge to achieve the objective of the authorisation and, in any event, not for a period more than thirty days. Extensions of the court order may be given from time to time on application made in accordance with Article 7, and if the reasons described in subsection remain fulfilled (1). The time period of each extension is not greater than necessary, at the discretion of the judge, to achieve this objective and, in any event, not more than thirty days.

It is further important to see how this law itself defines offences in Article 3:

1) Except where specifically provided otherwise in this Act, any person who-

(A) willfully intercepts or monitors or otherwise accesses or attempts to intercept or monitor, or in any way to access or cause or permit or authorise any other person to intercept or monitor or access or attempt to intercept or to attend or to access the content of any private communication; or

(B) knowingly uses, attempts to use or cause or permit or authorise any other person to use or attempt to use any electronic, mechanical, electromagnetic, acoustic or other device or machine, for the purpose of interception or monitoring or access to the content of any private communication; or

(C) willfully discloses or attempts to disclose to any other person the contents of any private communication, knowing or having reason to know that the information obtained by interception or monitoring or access private communications content; or

(D) knowingly uses or attempts to use the content of any private communication, knowing or having reason to know that the information obtained by interception or monitoring or access private communications content,

is guilty of an offense and on conviction is liable to imprisonment not exceeding five (5) years.

In the recent case, *Siamisis*, which had to do with the submission of evidence for an online harassment offence, personal data of the accused processed without Court permission were not seen as a sound basis for his conviction. The case did not deal with the protection of journalistic sources in particular, but it is of interest, seeing as the court based its judgment on the provisions of a domestic law put in place to comply with the provisions of the Data Retention Directive:⁵⁰

In this case there was no consent of the appellant for the processing of traffic data of his PC and there was also no court permission for the interference of communication between the complainant and the appellant or to lift the confidentiality of the appellant's communication. Therefore, the process

⁵⁰ Data Retention Directive (2006/24/EC).

conducted by the Police and CYTA after the complainant gave police the public IP address of the harasser and, through the processing described above, led to the fixed telephone of the appellant and in extension to his identification, was in the circumstances illegal and a violation of the right of private life and the right to privacy of communication, which are guaranteed by Articles 15 and 17 of the Constitution.⁵¹

The law and the sample of *Siamisis* demonstrate that there is high regard for Articles 15 and 17 of the Constitution. The principles in *Siamisis* echo those expressed in the cornerstone case *Police v. Georgiades* on the privacy of correspondence, in which the learned judges drew from the ECtHR and international case-law to conclude that overhearing of a private conversation through an electronic device installed previously unknown to the defendant or his client was contrary to Articles 15 and 17 of the Constitution:

On a consideration of the objects of Part II of the Constitution, the character of the rights entrenched therein and, the background thereto, outlined in this judgment, I am of the opinion that the basic rights safeguarded in this part of the Constitution, those referring to fundamental freedoms and liberties, are inalienable and inhere in man at all times, to be enjoyed and exercised under constitutional protection. Interference by anyone, be it the State or an individual, is unconstitutional and, a right vests thereupon to the victim to invoke constitutional, as well as municipal, law remedies for the vindication of his rights. The rights guaranteed by Articles 15.1 and 17.1 fall in this category, aimed as they are, to safeguard the dignity of man and ensure a quality of life fit for man and his gifted nature.⁵²

In *Georgiades*, the Court also said that in Cyprus courts do not enjoy discretion in deciding whether or not to admit evidence obtained through illegal means when those means amount to violations of fundamental rights, safeguarded in part II of the Constitution. The law on the Protection of Confidentiality and Private Communications however makes further stipulations, which may be seen as too broad especially considering the catch-all type provision (1)(E). Furthermore, the Combating Terrorism Act of 2010 expands this further in Article 10 (Refusal to Disclose Information):

A person who holds any information which may help-

- (A) prevent the commission of a terrorism offense by another person or
- (B) ensure the arrest, prosecution, or conviction of another person for the commission of terrorist offenses and

conceals such information from any member of the Police, is guilty of an offense and, on conviction, is liable to imprisonment not exceeding two years or to a fine not exceeding ten thousand euro (€ 10.000) or to both such penalties.⁵³

⁵¹ *Demetris Siamisis v. The Republic* (2011) 2 CLR 308.

⁵² *Police v. Georgiades*, (1983) 2 CLR 33.

⁵³ The Combating Terrorism Act of 2010 (110 (I) / 2010).

The law defines terrorism in Article 5 (Terrorism Offences):

A person who intentionally performs an act which, given its nature, may seriously damage any country or any international organisation with a purpose;

- The serious intimidation of the public or a public portion or
- Unjust coercion of public authorities or of an international organisation to act or abstain from any act or practice or
- Seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation

And this act constitutes-

- (A) an offense listed in the Table of Annex I of this Act,
- (B) an offense listed in the Table of Annex II of this Act,
- (C) the manufacture or possession or acquisition or transfer or supply or use of firearms or radiological weapons or any explosive or other lethal device or nuclear or biological weapons or research and development of biological and chemical weapons,
- (D) causing extensive destruction in-
 - (I) government or public facilities,
 - (Ii) public transport systems,
 - (Iii) infrastructure, including IT systems,
 - (Iv) facilities or property of consular or diplomatic missions,
 - (V) a fixed platform on the continental shelf,
 - (Vi) use of public space,
 - (Vii) Private property,that may endanger human life or cause severe economic damage,
- (E) intervention or disruption or interruption of the water supply, power, or other fundamental natural resource, the effect of which endangers human life,

commits a terrorist offense and, on conviction, is liable to life imprisonment.

Stratilatis and Emilianides note that exceptions are a key issue for journalists in Cyprus, where there is a real concern that authorities will engage in such conduct in a matter which is not proportionate to protecting the rights of journalists.⁵⁴ Cyprus requires a stronger framework for the protection of journalistic sources. Claims based on surveillance and terrorism as seen on the laws that were examined may compromise the right of non-disclosure disproportionately. Although the law may be considered sufficiently clear and accessible and in many respects comprehensive, its foreseeability may be lacking, considering the scope of its exceptions and certain vague aspects, as seen above. This will deal irreconcilable damage to the circulation of information. The words of Lord Denning ring true: "if [newspapers] were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. Charlatans could not be exposed. Unfairness

⁵⁴ Stratilatis C. & Emilianides A., *Media Law in Cyprus*, (Kluwer: Netherlands 2015)

would go unremedied. Misdeeds in the corridors of power, in companies or in government departments would never be known".⁵⁵

10. Can journalists rely on encryption and anonymity online to protect themselves and their sources against surveillance?

In the case of *Makrides Vs Republic* (1981)⁵⁶ judge Hadjianastassiou J. explained that in print press, the principle of anonymity gives the power to a publisher to deny revealing the name of an article's author. Today the journalistic battlefield has turned digital and therefore, journalists too bear the responsibility to self-protect and prevent exposure of their identity. Encryption is a first layer of protection and a precautionary measure. The essentials of encryption are statutorily set out. The Electronic Communications and Postal Services Law of 2004 is the harmonizing law established to comply with the e-Privacy Directive of 2002.⁵⁷ The law devotes Chapter 14 to safety, confidentiality, and protection of data. Article 99 provides:

(1) Both the providers referred to in Article 98 (1), and their employees, shall take all appropriate technical and organisational measures to ensure the confidentiality of any communication carried out via an electronic communications network, the publicly available electronic communications services, and related traffic data.

(2) No person, other those communicating with each other, are allowed to listen, eavesdrop, store, interfere and / or conduct any other form of interception of communications and related traffic data without the consent of the users concerned, except to the extent provided in subsection (3).

(3) In the circumstances provided for by the law and with court permission, there can be interference of communications.

(4) The provisions of subsection (2) shall not affect any legally authorised recording of communications and related traffic data in the context of lawful business practice for the purpose of securing evidence of a commercial transaction and / or any other business communication.

(5) The storage of information, or gaining access to information already stored, in the terminal equipment of a subscriber or user is permitted only if the subscriber or user concerned has given his/her consent, based on clear and comprehensive information, in accordance with the provisions of the Processing of Personal Data (Protection of Individuals) Laws, 2001 and 2003, including for the purpose of processing.

Any technical storage or access for the sole purpose of carrying out the transmission of a communication over an electronic communications network,

⁵⁵ *British Steel Corporation v Granada Television Ltd* [1981] A.C. 1096, 1129.

⁵⁶ *Makrides Vs Republic* (1981)3 CLR 321.

⁵⁷ Directive on Privacy and Electronic Communications (2002/58/EC).

or that is strictly necessary in order for the information society service provider which has been explicitly requested by the subscriber or user to provide that service, is not prevented by this law.⁵⁸

The Internet Service Provider (ISP) as well as the Commissioner for Personal Data Protection are made the central figures in maintaining and assessing the safety of networks in Chapter 14. Article 98(A) provides:

(1) Subject to subsection (1) of section 98, the provider of publicly available electronic communications service must take, if necessary in conjunction with the provider of a public communications network with respect to network security, the appropriate technical and organisational measures to safeguard security of its services. Taking account of the latest technical possibilities and cost of their implementation, these measures shall ensure a level of security appropriate to the risk presented.

(2) Subject to the provisions of the Processing of Personal Data (Protection of Individuals) Laws, 2001 and 2003, the measures referred to in subsection (1) of this Article, shall at least:

(A) ensure that access to personal data may only be by authorised personnel for legally authorized purposes;

(B) protect stored or transmitted personal data against accidental or unlawful destruction, accidental loss or alteration, and unauthorised or unlawful storage, processing, access or disclosure; and

(C) ensure the application of a safety policy in relation to the processing of personal data

It is provided that the Commissioner and the Commissioner for Personal Data Protection have the power to audit the measures taken by providers of publicly available electronic communications services and to issue recommendations about best practices concerning the level of security to be achieved by these measures.

What is the threshold of IP disclosure in Cyprus and how does the Supreme Court interpret it? This is discussed by Judge Nicolaides in *Issaia*, a case concerning a writ of Certiorari that requested the Supreme Court to cancel a District Court order for disclosure of telecommunications data, particularly the applicant's IP address.⁵⁹ The judge stated that the exceptions provided in Article 17 of the Constitution, after amendments in 2010, should be activated sparingly and with great caution. The IP address is considered part of the user's private communication and, as seen also in *Siamisis*, it forms part of personal details through which a user can be identified. Importantly, the judge in *Issaia* stated that a request to the Court to disclose an IP address must precede a request for the identification of the user of said IP address. This creates a two-layer protection of anonymity.

⁵⁸ The Electronic Communications and Postal Services Law of 2004 (112 (I) / 2004).

⁵⁹ *Issaia Andreas and Another* (No. 1), (2012) 1 CLR 1966

According to Article 5 of the Retention of Telecommunications Data Aimed at Investigating Serious Criminal Offences Law (2007) it is possible to access data for the investigation of serious criminal offences:⁶⁰

Any service provider, upon presentation of an issued court order issued or letter accompanied by the approval of the Attorney General of the Republic, in accordance with the provisions of Article 4 shall be obliged to immediately and without any undue delay, place at the disposal of the police magistrate all data in the order or in the letter, as appropriate.

On what basis can such a court order be issued? This is clarified by Article 4:

(4) The judge may issue the order specified in subsection (1), as requested in the application or with such modifications or subject to such conditions, which can authorise access to data, if satisfied that based on the events submitted:

(A) There is reasonable suspicion or probability, that a person is committing, has committed, or is likely to commit a serious criminal offense ·

(B) there is reasonable suspicion or possibility that this data is linked or associated with a serious criminal offense.

However, two different articles within this law safeguard the confidentiality of communications: Articles 12 and provide:

(12) The retention of data relating to the content of communication and the disclosure of such content is prohibited and no provision of this Law may be interpreted in a manner contrary to this prohibition.

(22) Nothing in this law shall affect or may be considered to affect the application of the provisions of the Protection of the Confidentiality of Private Communications (Interception) Law.

Evidently the law focuses on the serious criminal offence exception in the manner of the discussed ECtHR case-law. The encryption put in place by the service providers and the anonymity safeguarded by the law however, might be surpassed without much difficulty depending on the circumstances. As seen earlier in *Siamisis*, in the case of online harassment the unlawful obtaining of personal data that leads to identification was not acceptable. It remains to be seen how these provisions will be applied in national cases in the future.

⁶⁰ Retention of Telecommunications Data Aimed at Investigating Serious Criminal Offences Law of 2007 (183 (I) / 2007).

11. Are whistle-blowers explicitly protected under law protecting journalistic sources? Is there another practice protecting whistle-blowers? Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

11.1 Whistle-blower protection under the Press Law

Journalists are protected under the Press Law of 1989, which provides that a journalist has the right not to disclose his source/whistle-blower and to refuse to testify in court without being prosecuted for his/her refusal.⁶¹ The exceptions, elaborated on earlier, to regarding information concerning criminal offences for which a journalist may be ordered by the court to disclose sources if the requirements of a) a direct link, b) no other ways of obtaining the information, and c) an imperative public interest, are fulfilled. Whistle-blowers are covered under the veil of the law and the exceptions that may force a journalist to expose sources. The Press Law makes no further mention of specialized provisions for the protection of whistle-blowers beyond Article 8.

However, with time came the internet age where a whistle-blower has the privilege to disclose information anonymously online. The problem therefore arises: is this sort of whistleblowing covered under the Press Act? The answer would be no, since one would not fulfil the traditional criteria for being a “journalist” under the Press Law. This scenario played out in the case of *Author of a Blog v Times Newspapers Ltd* [2009] at the UK Court of Appeal.⁶² The claimant was an anonymous blogger who was a serving detective constable while maintaining a blog in which he wrote about aspects of his police work and his opinions on a number of social and political issues relating to the police and the administration of justice. He sought an injunction to restrain the defendant, Times Newspapers Ltd, from publishing any information that would or could lead to his identification as the person responsible for that blog.

The issues arose as to whether the claimant had a reasonable expectation of privacy in relation to the particular information in question and, if so, whether there was some countervailing public interest such as to justify overriding that right. It was held that a journalist who wrote under a pseudonym for the purpose of functioning more effectively in his undercover work had no reasonable expectation of privacy in respect of his identity and, in particular, in relation to photographs which would, when published widely, reveal his identity.

It is often the practice of Cypriot courts to find guidance in British cases when there is no explicit legislation or judicial precedent – therefore it is highly likely that the same outcome would be followed by a Cypriot court as that of this authoritative case. Nevertheless, if the anonymous blogger were a journalist seeking an injunction for his personal details, then the landscape changes and so does the outcome. It would be more likely that he would be granted

⁶¹ Press Law (1989) Article 8(1).

⁶² *Author of a Blog v Times Newspapers Ltd* [2009] EWHC 1358 (QB).

the injunction since a journalist under Press Act of 1989 is given the right not to disclose his/her source and an injunction would simply enforce this right.

11.2. Is there another practice protecting whistle blowers?

Whistle blowers and journalists have a confidential relationship enabled by trust. The confidential relationship of a journalist with the whistle-blower is nothing like the professional privilege of confidentiality between a lawyer and his client, or a doctor and his patient. Taking as an example the Legal Ethics Code for lawyers in Cyprus, the nature of the confidential relationship between lawyer and client is captured in Article 13:

The lawyer is the guardian of confidential information and data entrusted to him by the client. Ensuring confidentiality is a prerequisite to create confidence between the client and the lawyer.⁶³

The relationship between journalist and whistle-blower is different as it does not aim to protect the interest of the whistle-blower but rather to create the necessary circumstances so that the information provided may flow freely and unhindered to the public.⁶⁴ A journalist's duty of confidentiality to the whistle-blower concerns the personal details of the whistle-blower and not the information given to the journalist to expose it to the public.⁶⁵ Also the journalist is bound under the Journalistic Ethics Code to value the confidentiality principle. Any misconduct of the code will be examined by two disciplinary boards.

Noteworthy is also the fact that, as elaborated earlier in discussing *Issaia*, the Internet has given a new tool to whistle blowers to post anonymous comments or blog online. In Cyprus there is a two-stage process to identify an anonymous comment made by a whistleblower. *Issaia* delineates that there must be two applications to the Court for an order: first one to uncover the IP address, and then one to identify the user behind it. The Court has discretionary power to issue such an order if it considers that the conditions set by the law are met.

Furthermore, the Combating Terrorism Act of 2010 provides in Article 19 that:

Any witness in criminal proceedings concerning an offense provided for in this Law, is considered as a witness in need of assistance and the provisions of the Witness Protection Law apply.

This protection is evidently provided for trial proceedings and not for the non-disclosure of sources by journalists. It provides for certain safeguards to shield the witness's identity from the accused. Witness Protection Law Article 5 posits:

⁶³ Legal Ethics Code Cyprus, Article 13 "Professional Confidentiality".

⁶⁴ Loukaidis L.G., *Topics of Cyprus Law* (Nicosia 1982) pp.111-112; *Branzburg v. Hayes* 408 U.S. 665 (1972)

⁶⁵ *Ibid.* Loukis G. Loukaidis pp.111-112.

- (1) In the determination of offenses and for the purposes of witness protection in need of assistance, the Court may order as-
 - (A) All or part of the case heard in camera; and
 - (B) the testimony of any witness in need of assistance or another person, the filing of which may be adversely affected, taken in the absence of the accused as instructed and make the necessary arrangements so that the accused know of the testimony of the witness and cross-examine him.
- (2) Without prejudice to the generality of subsection (1) the Court may, especially for witness protection purposes, to order-
 - (A) The installation of a special screen; or
 - (B) The use of CCTV; or
 - (C) Use of any other means or system,So that the accused cannot be visible from the control and vice versa.
- (3) In order to safeguard the rights of the accused, the Court must, in the above cases, be satisfied that the appropriate technological and other arrangements have been made and that all appropriate measures have been taken that the defendant be able to listen to the proceedings and give instructions his lawyer.

There exist no legally assured alternate practices for the protection of whistle blowers. This was identified as a problem on the findings of Transparency International through the Global Corruption Barometer 2013, with about half of the households surveyed refusing to report cases of corruption, underlining the fear of consequences as the main reason not to make such reports.⁶⁶

11.3. Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

There exists no legislation expressly prohibiting authorities and companies from identifying whistleblowers, save for the layers of protection discussed earlier. And even beyond that, in the existence of a court order, protection is difficult.

If a court order is granted to reveal an IP address, this amounts to a legal obligation which, if it is not fulfilled, may make an individual liable under section 42 of the Courts of Justice Act. The Court is able to impose a fine or imprisonment, proceed with sequestration of property, or adjudicate on compensation. Non-compliance with a court order can also bring into play the Criminal Code (section 137) which in that case provides for a fine or imprisonment for two years. In *Turban Kazim Shemsettin v. Timour* the respondents were sentenced to 30 days of imprisonment for contempt of Court under Section 42 of the Courts of Justice Act.⁶⁷ This was

⁶⁶ Transparency International <<http://www.transparency.org/gcb2013/country/?country=cyprus>> Accessed May 2016.

⁶⁷ *Turban Kazim Shemsettin v. Timour* Civil Appeal No. 64/2005.

deemed to be in full conformity with Article 162 of the Constitution which allows the Court to order imprisonment until a judgment or order is complied with.

Until 2002 it was not possible in the context of civil proceedings to punish an individual who was not party to the proceedings. This is affirmed in *Christoforou v. The Archbishop of Cyprus Chrysostomos* where the Supreme Court found that the jurisdiction of the Court in civil proceedings is confined to the parties before it and not to third parties who may be liable for criminal but not civil contempt.⁶⁸ Following the 80 (1)/2002 amendment of section 42 of the Courts of Justice Act 14/60, the law provides that it is possible to punish third parties for contempt if such parties have knowledge of it and knowingly and intentionally induce non-compliance.

What about protection under the Press Act? If a whistleblower is giving information to a journalist and the journalist is publishing it (and the exceptions of Press Act Art 8(2) do not apply) then the journalist has the power not to disclose the whistleblower without being prosecuted. But what is most likely to occur if a journalist refuses to identify a whistleblower is that authority or company will bring a defamation claim. In that case the burden of proof to prove that the statement is truthful lies on the defendant.⁶⁹

So if journalists do not summon their whistleblower to testify, their testimony may be considered hearsay evidence, therefore undermining their position. They themselves may also be considered an unreliable witness as it happened in *Yaacoub*. This will bring a journalist to a professional conflict: he/she must decide between financial loss and loss of professional reputation through a lawsuit on one hand, and his/her reputation in the whistleblower world, risking or severely damaging his/her ability to be contacted by whistleblowers ever again on the other. The journalist must choose between suffering the reputational and economic loss of the lawsuit, or he summoning the whistleblower to testify as a witness to promote his/her defense. This proves that the Press Act is not a sufficient way to protect whistleblowers and perhaps freedom of expression generally.

12. Conclusion

It is fairly noticeable that Cypriot law on press freedom has a traditional air that arguably does not fit the modern circumstances of journalism, and that may inhibit journalistic work and especially the adequate protection of journalistic sources. On the other hand, it is also evident that matters relating to personal data and encryption in the law have been heavily influenced by

⁶⁸ Re Archbishop of Cyprus Chrysostomos (1993) 1 CLR 961.

⁶⁹ *Eteria Ellinikes Ekdosis «Glafox Ltd» v. Loizja* (1984) 1 C.L.R. 729; Parkes R., Mullis A. et al, *Gatley on Libel and Slander* (Sweet & Maxwell, 2013) 12th Edn, Main Volume, Chapter 11, Section 11.4 "The Burden of Proof".

the paradigm of EU law, forming an elaborate web of protection. Although the law in several older pieces of legislation may not set an explicit standard for the gravity of the offence, newer pieces of legislation seem to place an emphasis on the gravity of the criminal offence, with the available indicative case law on data protection pointing to the direction of a high standard. Yet there are aspects of the law that may still be criticized as lacking foreseeability and clarity, thus creating an uncertain basis for Cypriot to stand on when deciding to impart information in a confidential veil.

It remains a fact however that aspects such as the definition of the journalist and the journalistic profession, the scope of protection of the confidentiality of sources, and the scope of the exceptions therein, require an update that would hold up to the standard of Recommendation 2000(7) for a better defined framework of protection. The question of whether bloggers are journalists by law, or cases that require a standard of gravity for a criminal offence to qualify as an exception to the non-disclosure rule will soon arise in Cyprus. When that time comes the Cypriot judge may be illuminated by dense case law on the matter, both emanating from the ECHR and from common law jurisdictions that commonly serve as a source of guidance, and inspiration. Yet the initial change must come from the legislator. The law should recognize the modern complexities of the journalistic world and provide equal and strong protection to the Cypriot journalist's sources, so that quality journalism may be allowed to emerge.

13. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

13.1. Legislation

- Combating Terrorism Act of 2010 (110(I)/2010)
- Constitution of the Republic of Cyprus (1960)
- Criminal Code (Chapter 154)
- Electronic Communications and Postal Services Act of 2004 (112 (I) / 2004)
- Press Act (145/89)
- Protection of Confidentiality of Private Communications (Interception and Access to Recorded Private Communication Content) Act of 1996 (92(I)/1996)
- Retention of Telecommunications Data Aimed at Investigating Serious Criminal Offences Act (183(I)/2007)
- Self-regulatory Mechanisms
- Journalistic Ethics Code (1997)
- Legal Ethics Code
- Data Retention Directive (2006/24/EC)
- Directive on Privacy and Electronic Communications (2002/58/EC)
- European Convention on Human Rights (1953)
- 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 (Council of Europe) Commentary, Definitions

13.2. Case Law

- *Adali v. Turkey* App no 38187/97 (2005)
- *Financial Times Ltd & Ors v. UK* App no. 821/03 (2009)
- *Goodwin v. the United Kingdom* App no. 28957/95 (2002)
- *Nordisk Film & TV A/S v. Denmark* App. no 40485/02 (2005)
- *Ressiot and Others v. France* App no 15054/07 and 15066/07 (2012)
- *Roemen and Schmit v Luxembourg* App No. 51772/99 (2003)
- *Sanoma Uitgevers BV v Netherlands* App no. 38224/03 (2010)
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- *Police v. Georgiades*, (1983) 2 CLR 33
- *Kontrollutvalget v. Jobansen* [1992] 1 L.N.R. 39
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14. TABLE OF PROVISIONS

Constitution of the Republic of Cyprus	
Article 15	<p>1. Everyone has the right to respect for his/her private and family life.</p> <p>2. There can be no interference on the exercise of this right except one in accordance with the law and necessary only in the interests of security of the Republic or the constitutional order or public security or public policy or public health or morals or the protection of rights and freedoms under the Constitution provided to every person or in the interest of transparency in public life or for purposes of taking measures against corruption in public life.</p>
Article 17	<p>1. Every person has the right to respect and safeguarding of the privacy of correspondence and any other communication of his/hers, so long as the communication is conducted through such means not prohibited by law.</p> <p>2. There shall be no interference with the exercise of this right unless it is permitted under the law in the following cases:</p> <p style="padding-left: 40px;">A. Persons who are in prison or detention.</p> <p style="padding-left: 40px;">B. Following a court order issued in accordance with the provisions of the law, at the request of the Attorney General, and the procedure is a measure that in a democratic society it is necessary in the interest of security of the Republic or the prevention, investigation or prosecution of the following serious criminal offenses:</p> <p style="padding-left: 80px;">(a) premeditated murder or manslaughter,</p> <p style="padding-left: 80px;">(b) trafficking in adult or juvenile persons and offenses related to child</p>

	<p>pornography,</p> <p>(c) marketing, supply, cultivation or production of narcotic drugs, psychotropic substances or dangerous drugs,</p> <p>(d) offenses related to currency or paper money of the Republic and</p> <p>(e) corruption offenses for which imprisonment of five years or more upon conviction is stipulated.</p> <p>C. Following a court order, issued in accordance with the law, for the investigation or prosecution of a serious criminal offense for which five years imprisonment or more upon conviction is stipulated, and the intervention concerns access to the relevant electronic communication data traffic and position and the related data necessary to identify the subscriber or user.</p>
<p>Article 19</p>	<p>1. Every person has the right to freedom of speech and expression in any form.</p> <p>2. This right includes freedom to hold opinions and receive and impart information and ideas without interference by any public authority and regardless of frontiers.</p> <p>3. The exercise of the rights provided in paragraphs 1 and 2 of this Article may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.</p> <p>4. Seizure of newspapers or other printed matter is not allowed without the written permission of the Attorney-General of the Republic, which must be confirmed by the decision of a competent court within a period not exceeding seventy-two hours, failing which the seizure shall be lifted.</p> <p>5. Nothing contained in this Article shall prevent the Republic from requiring the licensing of sound and vision broadcasting or cinema enterprises.</p>

Article 169	
<p>Cypriot Criminal Code (Chapter 154)</p>	
Article 135	<p>A public servant who publishes or communicates information or occurrences which he was informed of or document received because of his office, whose confidentiality he/she was obliged to respect, unless the person has an obligation to publish or disclose them, is guilty of a misdemeanor</p>
<p>Cypriot Law on Press (145/89)</p>	
Article 2	<p>"Publication" in terms of newspapers or other printed means, means the distribution, sale, as well as the wall-posting or issuing of the newspaper or other publication in the public place or any assembly or part accessible to the public.</p> <p>"Issue" in terms of newspapers or other printed means, means the printing of the newspaper or other publication.</p> <p>"Newspaper" means any publication with the intention of informing the public, published daily or in larger, but in any case regular, time intervals, up to a maximum / month limit, containing material of general political and social interest.</p> <p>"Cypriot journalist" means the citizen of the Republic or the foreigner whose</p>

	<p>main regular and paid professional activity is within a newspaper or newspapers that are published in the Republic and provides towards this newspaper or newspapers exclusively intellectual work as a manager, editor-in-chief, editor, commentator, caricaturist, cartoonist, press photographer, or corrector, engaging with the collection, editing, or revision of journalistic content. The term also includes correspondents of newspapers that are based within the Republic or abroad, as well as those, who, under the same conditions, work in news agencies, which operate in the Republic or in the writing and edition of news content for the broadcasting bulletin of the Cyprus Broadcasting Corporation and fall within the category of editors under the service of this Corporation, as well as the operators of the Press and Information Office and exercise journalistic activity.”</p> <p>“Foreign journalist” means a foreigner who is a journalist by profession and represents a foreign news agency, broadcasting or television station in the Republic or is an entrusted correspondent or envoy extraordinary of such organization.”</p>
<p>Article 3(2)</p>	<p>Specifically, the Press Council has the authority to:</p> <p>1- investigate complaints regarding the press and its function and to examine, in its own motion or following a complaint, accusations against newspapers and journalists of non-professional acts or behaviour, and decide upon them and indicate the appropriate remedial measures.</p> <p>2 - Issue a press card to Cypriot journalists, if satisfied by the production of the relevant certificate from the publisher and editor of the newspaper they (the applicants) are engaged in, or from the General Manager of the Cyprus Broadcasting Corporation, or from the Director of the Press and Information Office that the statutory requirements for this purpose are met.</p>
<p>Article 6(4)</p>	<p>A foreign journalist coming to the Republic for the exercise of his profession must, within one month, deliver his credentials to the Director of the Press and Information Office and apply for registration in the Register of Foreign Journalists.</p>

<p>Article 8</p>	<p>1. All journalists, Cypriot and foreign, have the right not to disclose their sources of information and to refuse to give evidence without being subject to prosecution for it.</p> <p>2. The only exception is for cases where a journalist publishes information about a criminal offense. It may then be required by the Court to consider the case, or pestilence investigator to reveal the source, provided that the court or the investigating judge be satisfied that there are cumulatively the following conditions:</p> <ul style="list-style-type: none"> • the information is clearly relevant to the criminal offense; • the information cannot be obtained by other means; • Overriding and compelling reasons of public interest require the disclosure of information.
<p>Amendment 84/I</p>	<ul style="list-style-type: none"> • Practicing the profession of a journalist, • Having main, regular, and remunerated employment in mass media operating or issued in Cyprus, • Providing the Press and Information Office with a letter from one's employer confirming one's journalistic capacity and employment at the relevant organization. The letter should state the name of the person concerned in Greek and English and the ID or passport number. • Providing a digital photo of oneself to the Press and Information Office

Journalistic Ethics Code	
Article 3	<p>The Committee receives, deals with and decides on complaints of alleged violations of this Code by a journalist and/or mass media. It also provides, at its discretion and in the spirit of this Code, interpretative guidance lines. The media and those working for them undertake to cooperate with the Commission in conducting its inquiries.</p> <p>Exceptionally, the Committee may hear the case <i>ex officio</i> which may amount to an infringement, given their importance and seriousness.</p> <p>The Committee's objective is to settle as soon as possible, any dispute which may entail a material breach of this Code. If no settlement is reached, the Committee examines the complaint and decides whether it violated the Code.</p> <p>The Committee is not entitled to impose any penalty or award compensation, or to deal with a complaint that is the subject of proceedings before a court or organ vested with that power.</p>
Article 14	<p>Professionals have a moral obligation to observe professional secrecy regarding the source of information obtained confidentially. Journalist is not obliged to reveal the source of his information. At the same time, it is the duty of the journalist to ensure that the sources of the information they provide is valid.</p>
Article 15	<p>In this Code, cases falling into the concern of public interest justifying derogation from the rule are the following:</p> <ul style="list-style-type: none"> a) Detection of crime or disclosure. b) Protection of public safety or health.

	<p>c) Protection of human rights.</p> <p>d) Preventing deception of the public as a result of acts or statements by individuals or organizations.</p>
<p>Legal Ethics Code Cyprus</p>	
<p>Article 13</p>	<p>The lawyer is the guardian of confidential information and data entrusted to him by the client. Ensuring confidentiality is a prerequisite to create confidence between the client and the lawyer.</p>
<p>The Combating Terrorism Act of 2010</p>	
<p>Article 5</p>	<p><i>(Terrorism Offences):</i></p> <p>A person who intentionally performs an act which, given its nature, may seriously damage any country or any international organization with a purpose;</p> <ul style="list-style-type: none"> - The serious intimidation of the public or a public portion or - Unjust coercion of public authorities or of an international organization to act

or abstain from any act or practice or

- Seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization

And this act constitutes-

(A) an offense listed in the Table of Annex I of this Act,

(B) an offense listed in the Table of Annex II of this Act,

(C) the manufacture or possession or acquisition or transfer or supply or use of firearms or radiological weapons or any explosive or other lethal device or nuclear or biological weapons or research and development of biological and chemical weapons,

(D) causing extensive destruction in-

(I) government or public facilities,

(Ii) public transport systems,

(Iii) infrastructure, including IT systems,

(Iv) facilities or property of consular or diplomatic missions,

(V) a fixed platform on the continental shelf,

(Vi) use of public space,

(Vii) Private property,

that may endanger human life or cause severe economic damage,

(E) intervention or disruption or interruption of the water supply, power, or other fundamental natural resource, the effect of which endangers human life,

commits a terrorist offense and, on conviction, is liable to life imprisonment.

Article 10	<p><i>(Refusal to Disclose Information):</i></p> <p>A person who holds any information which may help-</p> <p>(A) prevent the commission of a terrorism offense by another person or</p> <p>(B) ensure the arrest, prosecution, or conviction of another person for the commission of terrorist offenses and conceals such information from any member of the Police, is guilty of an offense and, on conviction, is liable to imprisonment not exceeding two years or to a fine not exceeding ten thousand euro (€ 10.000) or to both such penalties.</p>
Article 19	<p>Any witness in criminal proceedings concerning an offense provided for in this Law, is considered as a witness in need of assistance the provisions of the Witness Protection Law apply.</p>
<p>The Protection of Confidentiality of Private Communications (Interception and Access to Recorded Private Communication Content) Law of 1996</p>	
Article 3	<p>1) Except where specifically provided otherwise in this Act, any person who-</p> <p>(A) willfully intercepts or monitors or otherwise accesses or attempts to intercept or monitor, or in any way to access or cause or permit or authorize any other person to intercept or monitor or access or attempt to intercept or to attend or to</p>

	<p>access the content of any private communication; or</p> <p>(B) knowingly uses, attempts to use or cause or permit or authorize any other person to use or attempt to use any electronic, mechanical, electromagnetic, acoustic or other device or machine, for the purpose of interception or monitoring or access to the content of any private communication; or</p> <p>(C) willfully discloses or attempts to disclose to any other person the contents of any private communication, knowing or having reason to know that the information obtained by interception or monitoring or access private communications content; or</p> <p>(D) knowingly uses or attempts to use the content of any private communication, knowing or having reason to know that the information obtained by interception or monitoring or access private communications content,</p> <p>is guilty of an offense and on conviction is liable to imprisonment not exceeding five (5) years.</p>
<p>Article 8</p>	<p><i>(Issuance of a Judicial Warrant for Monitoring):</i></p> <p>(1) The Judge may issue a judicial warrant for monitoring, as requested in the application or with such modifications or subject to such conditions which authorize the monitoring of private communications if satisfied that based on the facts presented by the applicant-</p> <p>(A) There is reasonable suspicion or possibility that a person is committing, has committed or is likely to commit an offense</p> <p>(B) there is reasonable suspicion or possibility that this private communication is connected or is relevant to the offense</p> <p>(C) ordinary examination or investigative procedures have been tried and failed or reasonably appear not expected to succeed if tried or to be dangerous for the proper investigation of the offense or the urgency of the situation is such that it was not practical to conduct surveys or investigations into the offense using other procedures</p>

	<p>(D) there is a reasonable suspicion or possibility that the telecommunications device or machine with which, or part of it, or the place where private communication for which monitoring is requested will be held, is being used or is intended or expected to be used in connection with the commission of such offense or it is owned or is registered in the name of a person or commonly used by a person to which reference is made in subsection (1) (a) above;</p> <p>(E) the issuance of such a court order is in the interest of justice.</p> <p>(2) A judicial warrant issued under subsection (1) may contain such terms and conditions as the judge considers appropriate and it describes-</p> <p>(A) the identity of the person, if known, for which a monitoring of private communications is requested,</p> <p>(B) the nature and location, if known, from where it is intended to monitor private communications, which are identified by the Authority,</p> <p>(C) the type of private communication for which monitoring is requested and the specific offense to which it relates,</p> <p>(D) the manner in which it seeks to carry out the monitoring,</p> <p>(E) the institution or person who is responsible for monitoring and which is the authority or body or person with the permission of the Authority and on such conditions imposed by the Authority or the Chief of Police or the Director of Customs,</p> <p>(F) the period for which the authorization is granted, which contains an order whether the monitoring is terminated automatically or not when the described private communication has been received.</p> <p>(3) Judicial warrant issued under this section shall, upon request of the applicant, order the Authority or a person acting on the Authority's authorization and subject to such conditions imposed by the Authority, provide the applicant or the Chief of Police or Director of Customs, without delay, all necessary information, facilities and technical assistance for the implementation of the court order.</p> <p>(4) The court order may authorize entry into any premises specified therein for the purpose of installation, maintenance, use or removal of any telecommunication equipment, which is used for monitoring, compliance with the</p>
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	<p>provisions of any existing law.</p> <p>(5) No judicial warrant issued under this section does not authorize or approve monitor any private communication for a period longer than necessary, at the discretion of the judge, to achieve the objective of the authorization and, in any event, for a period not more than thirty days. Extensions of the court order may be given from time to time on application made in accordance with Article 7, and if the reasons described in subsection remain fulfilled (1). The time period of each extension is not greater than necessary, at the discretion of the judge, to achieve this objective and, in any event, not more than thirty days.</p>
<p>The Electronic Communications and Postal Services Law of 2004 (112 (I) / 2004)</p>	
<p>Article 98(A)</p>	<p>(1) Subject to subsection (1) of section 98, the provider of publicly available electronic communications service must take, if necessary in conjunction with the provider of a public communications network with respect to network security, the appropriate technical and organizational measures to safeguard security of its services. Taking account of the latest technical possibilities and cost of their implementation, these measures shall ensure a level of security appropriate to the risk presented.</p> <p>(2) Subject to the provisions of the Processing of Personal Data (Protection of Individuals) Laws, 2001 and 2003, the measures referred to in subsection (1) of this Article, shall at least:</p> <p>(A) ensure that access to personal data may only by authorized personnel for legally authorized purposes;</p> <p>(B) protect stored or transmitted personal data against accidental or unlawful destruction, accidental loss or alteration, and unauthorized or unlawful storage,</p>

	<p>processing, access or disclosure; and</p> <p>(C) ensure the application of a safety policy in relation to the processing of personal data</p> <p>It is provided that the Commissioner and the Commissioner for Personal Data Protection have the power to audit the measures taken by providers of publicly available electronic communications services and to issue recommendations about best practices concerning the level of security to be achieved by these measures.</p>
<p>Article 99</p>	<p>(1) Both the providers referred to in Article 98 (1), and their employees, shall take all appropriate technical and organizational measures to ensure the confidentiality of any communication carried out via an electronic communications network, the publicly available electronic communications services, and related traffic data.</p> <p>(2) No person, other those communicating with each other, are allowed to listen, eavesdrop, store, interfere and / or conduct any other form of interception of communications and related traffic data without the consent of the users concerned, except to the extent provided in subsection (3).</p> <p>(3) In the circumstances provided for by the law and with court permission, there can be interference of communications.</p> <p>(4) The provisions of subsection (2) shall not affect any legally authorized recording of communications and related traffic data in the context of lawful business practice for the purpose of securing evidence of a commercial transaction and / or any other business communication.</p> <p>(5) The storage of information, or gaining access to information already stored, in the terminal equipment of a subscriber or user is permitted only if the subscriber or user concerned has given his/her consent, based on clear and comprehensive information, in accordance with the provisions of the Processing of Personal Data (Protection of Individuals) Laws, 2001 and 2003, including for the purpose of processing.</p> <p>Any technical storage or access for the sole purpose of carrying out the transmission of a communication over an electronic communications network, or that is strictly necessary in order for the information society service provider</p>

	<p>which has been explicitly requested by the subscriber or user to provide that service, is not prevented by this law.⁷⁰</p>
<p>Retention of Telecommunications Data Aimed at Investigating Serious Criminal Offences Law (183(I)/2007)</p>	
<p>Article 4</p>	<p>(4) The judge may issue the order specified in subsection (1), as requested in the application or with such modifications or subject to such conditions, which can authorize access to data, if satisfied that based on the events submitted:</p> <p>(A) There is reasonable suspicion or probability, that a person is committing, has committed, or is likely to commit a serious criminal offense ·</p> <p>(B) there is reasonable suspicion or possibility that this data is linked or associated with a serious criminal offense.</p>
<p>Article 5</p>	<p>Any service provider, upon presentation of an issued court order issued or letter accompanied by the approval of the Attorney General of the Republic, in accordance with the provisions of Article 4 shall be obliged to immediately and without any undue delay, place at the disposal of the police magistrate all data in the order or in the letter, as appropriate.</p>

⁷⁰ The Electronic Communications and Postal Services Law of 2004 (112 (I) / 2004).

Article 12	The retention of data relating to the content of communication and the disclosure of such content is prohibited and no provision of this Law may be interpreted in a manner contrary to this prohibition.
Article 22	Nothing in this law shall affect or may be considered to affect the application of the provisions of the Protection of the Confidentiality of Private Communications (Interception) Law.

ELSA FINLAND

Contributors

National Coordinator

Elina Ryymin

National Researchers

Antti Pataila
Hanna Parviainen
Mirjami Ylinen
Petri Freundlich
Sini Ilves

National Linguistic Editors

Emma Kause
Esa Savolainen
Tytti-Maria Tanninen

National Academic Supervisor

Päivi Korpisaari
Professor of Communication and Information Law.
University of Helsinki

1. Introduction

Generally speaking, the rights of journalists and, hence, the right to protection of journalistic sources can be seen as non-problematic issues in Finland, especially if measured on legal actions taken. Indeed, the Finnish Supreme Court has only ruled on a few cases regarding the protection of journalistic sources and the issue has not been widely legislated.

In this report, we take a closer look at journalists' right to freedom of expression in Finland and especially to protection of their sources' anonymity. Firstly, the definition of a journalist is addressed and the applicable case law of the Finnish Supreme Court analysed. Secondly, the level of protection of the sources and the scope of legal and self-regulative mechanisms available to a journalist in order to protect his/her sources are examined. Finally, the status of whistle-blowers is also addressed in the report.

The Finnish legislation, or case-law, does not provide a definition either for a journalist or other media actors. Suomen Journalistiliitto (the Union of Journalists in Finland) defines a journalist as a person whose work includes a significant amount of journalistic work. Members of the Union are not limited only to traditional reporters but wide scope of actors working in the journalistic field are accepted. Essential, is the professional attitude towards journalism and publishing.

Even though, the Suomen Journalistiliitto excludes amateur writers, e.g. bloggers, from joining the Union, the level of protection does not differ between professionals and amateurs. The Finnish Constitution provides everyone the right to publish and receive information. Journalists do not hold special rights and, thus, there has not been pressure to explicitly define a journalist. Therefore, the term reporter's privilege is impractical as the privilege cannot be limited only to reporters.

2. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

2.1. Legislation

The right of the journalists not to be compelled to testify on their confidential sources – the so-called **reporter's privilege** – is a key element of freedom of expression in Finland. Freedom of expression is a guaranteed right in the Constitution of Finland, which highlights the importance

of reporter's privilege.¹ Chapter 2(12) of the Constitution of Finland states the following on freedom of expression:

*"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 laid down by an Act. --"*²

As one can read in section 12, freedom of expression does not only consist of the right to publicly say something, but also of the right to "disseminate and receive" information. The task of the media is usually considered to be to disseminate information on important matters in society. Without reporter's privilege, there could be the danger of a source not forwarding its information to media because of the fear of publicity. This way anonymous sources support the media's factual ability to exercise freedom of expression. Section 16 of the Finnish *Act on the Exercise of Freedom of Expression in Mass Media* states the following about confidentiality of sources and the right to anonymous expression:

*"The originator of a message provided to the public, the publisher and the broadcaster are entitled to maintain the confidentiality of the source of the information in the message. In addition, the publisher and the broadcaster are entitled to maintain the confidentiality of the identity of the originator of the message. Also a person who has become aware of the confidential information referred to in subsection (1) while in the service of the originator of the message, the publisher or the broadcaster is similarly entitled to maintain that confidentiality. Separate provisions apply to the duty to disclose confidential information referred to in subsection (1) in a pre-trial investigation or court proceedings."*³

In other words, it is a strong main rule that a publisher, broadcaster or journalist does not have to tell who is a confidential source. *Mörä* underlines how, contrary to many other countries, reporter's privilege does not only protect professional journalism, but also includes all the messages provided to the public. The act talks about an originator of a message, not a "journalist".⁴ As the law does not specifically define a "journalist", a direct answer to the question of how to clarify a "journalistic source" cannot be found. One could also point out that as every originator of a message provided to the public gets the same protection for sources, there is not even a need to give a separate definition for a "journalistic source".

Right to anonymous expression covers all sources that are used in a publication. *Tiilikka* talks about *technology neutrality*, which has been an important principle in making the Finnish legislation for reporter's privilege. All ways of communication are equally treated in the Finnish legislation. In Finland for example, web pages of a private person or a blog have reporter's privilege as

¹ Tuomas Mörä (edit), *'Lähdesuoja – normit, ideaalit ja käytännöt'* 4. (Communication Research Center CRC, University of Helsinki, March 2011) <http://www.helsinki.fi/crc/Julkaisut/Lahdesuoja_raportti.pdf> Accessed 27 February 2016 [Finnish]

² The Constitution of Finland. 1999/731. [Suomen perustuslaki]

³ Act on the Exercise of Freedom of Expression in Mass Media 2003/460. [Laki sananvapauden käyttämisestä joukkoviestinnässä]

⁴ Tuomas Mörä, *'Lähdesuoja ja luottamuspäätös'* in *'Lähdesuoja – normit, ideaalit ja käytännöt'* 7-8. (Communication Research Center CRC, University of Helsinki, March 2011) <http://www.helsinki.fi/crc/Julkaisut/Lahdesuoja_raportti.pdf. 19> Accessed 20 April 2016

much as professionally made newspapers. The key issue is that the message has to be “*provided to the public*”. In section 2 of chapter 1 of the *Act on the Exercise of Freedom of Expression in Mass Media* defines public as “*the group of freely determined message recipients*”.

Chapter 7 section 8 in *Criminal Investigation Act* tells with a reference to the *Code of Judicial Procedure* that reporter’s privilege can be taken away when there is a crime under investigation with a possible penalty of six years in prison. As can be seen in these sections – and which Tiilikka underlines – the right not to give a testimony covers only remaining silent about the personality of the source of information or the originator of the message.⁵ A person to whom reporter’s privilege applies can also refuse to show a document which includes information covered by reporter’s privilege. Otherwise, reporter’s privilege does not mean the right to remain silent. It is a judicial exception to the general duty to give testimony.⁶

Section 20 of Chapter 17 of the *Code of Judicial Procedure* states that message originator, publisher or broadcaster to which the *Act on the Exercise of Freedom of Expression in Mass Media* refers has the right not to testify on who “*had been the source of the information in the message or about who had prepared a message provided to the public*”.⁷ The court may however force a testimony if “*the prosecutor has brought charges for an offence for which the maximum sentence is imprisonment for at least six years*”. Testimony can also be forced if prosecution “*concerns violation of an obligation of confidentiality in a manner which according to law is punishable*”. The latter is possible only in court, not yet in criminal investigation. Often the case is about an information leak in public office.

2.2. Cases of the Supreme Court of Finland in relation to European Court of Human Rights

The Supreme Court case KKO 2004/30⁸ concerned a situation where an internet book had been written about a Finnish telecommunications company called Sonera. The internet book was written about Sonera’s disappeared billions, and there were allegations about the former CEO of Sonera. A publisher had then edited a book based on the text on the internet. A criminal investigation ensued about an alleged aggravated defamation. However, the CEO of the publishing company refused to disclose the identity of the writer of the internet text as well as their source of information to the police. The lower courts had ordered the CEO to disclose the source, but the Supreme Court came to the conclusion that the publisher does not have to answer a question that might end reveal their source. The main reason why the Supreme Court came to a different conclusion was that the law changed during the process. When the lower courts decided upon the case, the law in action was the *Act on the Freedom of the Press*. This act

⁵ Päivi Tiilikka. ‘*Sanavapaus ja lähdetsuoja Suomessa*’ in ‘*Lähdetsuoja – normit, ideaalit ja käytännöt*’ 19-20. (Communication Research Center CRC, University of Helsinki, March 2011)

<http://www.helsinki.fi/crc/julkaisut/Lahdesuoja_raportti.pdf. 19> Accessed 27 February 2016 [Finnish]

⁶ Criminal Investigation Act 2011/805. [Esitutkintalaki]

⁷ Code of Judicial Procedure 1734/4. [Oikeudenkäymiskaari]

⁸30 [2004] Supreme Court of Finland

gave reporter's privilege only to material that had been published in timely magazines. The *Act on the Exercise of Freedom of Expression in Mass Media* came into effect on 1.1.2004.

Even without the change in domestic law, the decision of the Finnish Supreme Court could have been in favour of reporter's privilege because of the policy of The European Court of Human Rights (ECtHR). The Supreme Court referred to cases of the ECtHR called *Goodwin v. The United Kingdom*⁹ and *Roeman and Scmit v. Luxembourg*.¹⁰ In the first case, the British Government had argued that reporter Mr. Goodwin (who had reported about plans to take a massive loan to help Tetra Ltd Company's economical situation) had to tell his source because there was a violation of confidentiality in Tetra Ltd Company. However, the ECHR constituted that the protection of journalistic sources is a key element of a democratic society. According to the Court, there was no proportionality in the sense of Article 10 in the European Human Rights Convention for a demand that the reporter should tell his source. In *Roeman and Scmit vs. Luxembourg*, there was question of a fine that a Luxembourgish minister had to pay due to tax fraud. That was confidential information under the law of Luxembourg, so a criminal investigation was carried about violation of confidentiality in the tax department. The reporters, however, refused to disclose the source and the ECtHR, again, constituted that reporter's privilege is an important part of a democratic society. The Court also underlined that the news article was about public interest. The Court did not find reasons why reporter's privilege should not hold.

ECHR case-law seems to give rather wide protection to reporter's privilege, as it considers the freedom of press a key element in a democratic society. Similarly, this can also be said about the Finnish Supreme Court. When it comes to the protection of sources, the ECtHR examines whether the taken national measures are in line with Article 10 of the European Convention on Human Rights. Their task is not to replace the national court. Even though confidentiality of sources is a strong principle, Article 10, however, makes limitations possible. In the practice of the ECtHR, there can be a "legitimate interference" when it comes to freedom of expression. But, because the freedom of expression is vitally important, the main rule should be weighing the freedom of expression higher than the contradicting government aims. There are three criteria: 1) The interference must be prescribed by law. 2) The interference must be aimed at protecting national security, territorial integrity, public safety, prevention of disorder or crime, protection of health, morals, reputation or rights of others, preventing the disclosure of information received in confidence or maintaining the authority and impartiality of the judiciary. 3) The interference must be necessary in a democratic society.¹¹ All of the three criteria must be fulfilled.

Reporter's privilege is a wide principle in both the Finnish and the ECHR case-law, as described above. Now, let's look at the restriction part. A crime with a possible penalty of six years of imprisonment, or a punishably illegal violation of obligation of confidentiality can give the court

⁹ *Goodwin vs. United Kingdom* [1996] ECHR 1996-II.

¹⁰ *Roemen and Schmit v. Luxembourg*, ECHR 2003.

¹¹ Monica Macovei, 'A Guide to the Implementation of Article 10' 29. (Council of Europe, January 2004). <[http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-02\(2004\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-02(2004).pdf)> Accessed 27 February 2016

a reason to break reporter's confidentiality of a journalistic source in Finland in order for the court to demand the reporter, publisher or broadcaster to disclose the source. At least criterion 1) seems to be fulfilled. The criterion of whether a prosecuted crime can theoretically end up in 6 years of imprisonment is very easy to look at *the Criminal Code*. Either it can or it cannot. Punishable illegal violation of obligation of confidentiality is maybe not as clear, because it is more a question of proof and interpretation of whether there has been such crime in a particular case or not. However, also in this case there has to be at least suspicion of violation that is prescribed in law. As whole, one could say that criterion 1) is fulfilled. The question of punishable illegal violation of confidentiality is also at the moment only theoretical since there is currently no case in which reporter's privilege would have been restricted on that basis. It can be underlined that reporter's privilege can be restricted this way only in court, not in criminal investigation, which is a stage where enough proof for starting a trial is often not found. Criterion 2) seems also to be fulfilled since there is obviously a question of prevention of a serious crime, if it can end up in imprisonment of 6 years. Illegal violation of obligation of confidentiality is also a reason accepted by the ECtHR to limit protection of the source, because the Court accepts *preventing the disclosure of information received in confidence* as a reason to limit freedom of expression. One could argue that criterion 3) would probably be fulfilled when it is question about prosecution for a crime that can give six years of imprisonment. It can be said to be necessary in a democratic society to make sure people obey the laws issued by the parliament elected by the people. The confidentiality criterion is maybe a bit more controversial, because in a democratic society it is also important that people, for example, get information on the actions of those holding positions of power. However, all in all, it seems that the Finnish legislation, in its very limited restrictions to confidentiality of journalistic sources, take well into consideration the ECHR criteria for legitimate interference. "

In the case of *Tillack v. Belgium*,¹² which was delivered in 2007, the ECtHR came to a conclusion that lawfulness or unlawfulness of journalistic sources cannot decide if the source has to be disclosed. A German journalist called Hans Martin Tillack, who worked in Brussels, was in the case suspected of bribing an official in European Anti-Fraud Office in order to get confidential documents, which he had used as sources in two articles. Tillack's home and workplace were searched by the Belgian authorities. The intervention was "*prescribed by law*" because it was allowed in the Belgian *Code of Criminal Procedure*. It had also legitimate aim of preventing disorder and crime. Tillack, however, stated in ECHR that Article 10 had been violated. The ECtHR saw that the searches made were not *necessary in a democratic society* underlining that the right of a journalist not to reveal his or her sources was not a mere privilege dependent on the lawfulness of the sources. The court saw that the aim of the investigation was to get to know the source and therefore concluded that the question was about reporter's privilege in the case. The court took into consideration that Tillack was never charged. "*Legitimate interference*" could not be based on rumors according to the ECtHR. Even in the light of this case one can say that the criteria for interference in Finnish law, for example offence giving at minimum six years of imprisonment, are rather strict. If there was a case against Finland in the ECtHR, one could assume that unclear

¹² *Tillack vs. Belgium* [2007] ECHR.

of the three criteria for “legitimate interference” would also be, whether or not interference is *necessary in democratic society*. One could also assume that if reporter’s privilege was taken away based on “*violation of an obligation of confidentiality in a manner which according to law is punishable*” the risk of a case like *Tillack vs. Belgium* would be high. Still, as long as there is no case everything is speculative.

Another ECtHR case was *Financial Times Limited & Others v. United Kingdom*,¹³ which gave strict criteria for “legitimate interference”. In the case, a business-document of a Belgian brewing company, Interbrew, was leaked to the media. The domestic courts had ordered the journalists to give the original leaked document to Interbrew in order to identify the source of information. The leak had been illegal so the British domestic courts saw the order as “*prescribed by law*”. However, the ECtHR saw that every case in question has to be looked at as whole and that there has to be “*overriding public interest*” in order to justify interference with Article 10. In comparison to this case against the UK, it can also be stated that even though Finnish legislation takes well into consideration the ECtHR’s criteria for legitimate interference it cannot always be fully known beforehand, even in the case of a crime defined in the *Criminal Code*, if the interference is necessary in democratic society according to the ECtHR. There is neither one deciding factor nor an exact definition for what an overriding public interest is. In *Financial Times Limited & Others v. United Kingdom* domestic courts had seen the leaker’s *mala fide* and plausible attempt to manipulate markets as justifications for Interbrew’s need to get the original leaked documents in order to identify the source. According to the ECtHR, *mala fide* of the source cannot, however, be the reason to disclosure of confidential sources, even though it is the responsibility of the journalist to make sure the source is reliable. Even though the journalists were not even demanded to give the name of the source, there was seen a “*chilling effect*” when journalists were supposed to assist in the process of figuring out who is the anonymous source. Because giving the document to Interbrew could with high probability lead to identification of the source, the ECtHR saw that there was violation of reporter’s privilege. The public interest of protection of sources was seen as more important than the interest of Interbrew.

The Finnish Supreme Court has also been strict when it comes to the chilling effect. In KKO 2009/88, the criteria for legitimate interference did not get fulfilled according to the Finnish Supreme Court.¹⁴ The CEO of the publishing company in KKO 2004/30 had shown the Supreme Court letters to strengthen his argument of reporter’s privilege in the case where he had the right to remain silent about a source as the publisher. The Supreme Court constituted that the publisher had presented the letters to the Supreme Court in order to support his right to remain silent about the source of the internet book – not to give this right away. The use of the letters as the proof of his reporter’s privilege was also acceptable because his constant claim of reporter’s privilege had not been successful in lower courts. Based on the letters, person S was prosecuted on the aggravated defamations against the former CEO of Sonera. The Supreme Court evaluated that the letters were to be used as proof of issues that were part of the

¹³ *Financial Times Limited & Others vs. United Kingdom* [2009]. The European Court of Human Rights.

¹⁴ KKO 2009:88 Supreme Court of Finland [Finnish]

publisher's right to remain silent about the source. The Supreme Court saw this as infringing publisher's right to remain silent about source in a manner that was not acceptable. Therefore the letters in question were not to be used as proof according Supreme Court.

This, very strong, Finnish principle of confidentiality of sources sometimes collides with another fundamental right in the European Convention of Human Rights, Article 8, *Right to Respect for Private and Family Life*. At least, there was a case *K.U. v. Finland*¹⁵ in which there had been a false homosexual dating announcement made about an under-aged boy. The publisher company of the announcement had however refused to give the IP address of the sender of the profile to the police because they saw it as violation of the Finnish Internet publishing legislation. They had the right to keep the IP address of the sender anonymous. The ECtHR saw that even though the publisher of internet services had the right to freedom of expression the legislator should have made it possible for courts to make a judgement between contradicting demands (This was before *Act on the Exercise of Freedom of Expression in Mass Media* was established.) *Tiilikka*¹⁶ underlines, how sometimes the legislation of today can lead to even absurd situations, for example a person who knows who is guilty to an illegal leak of information can gain a right not to testify about the person's identity by simply making the illegal leak of information public and by so doing gaining reporter's privilege. Nowadays in Finland, reporter's privilege cannot, according to *Tiilikka*, be broken even when investigating confidentiality crimes when leaking about patient registers, information of customers in social security, criminal investigation about a young suspect, investigations in forensic psychiatry or student counseling. *Tiilikka* sees however that if reporter's privilege would be worsened, this should only happen in the area of natural persons, not organizations.

2.3. Council of Europe - 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

One way of measuring the level of the Finnish protection for confidentiality of journalistic sources would be to see, how well it fulfills the standards of a recommendation made by the Council of Europe.¹⁷ The Council of Europe seems to have quite wide definitions for a journalist ("*any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication*") as well as for a source ("*any person who provides information to a journalist*"). In this sense, one could say that the Finnish legislation's "wide scope" fulfills the European standard or ideal when anybody who makes information public gets reporter's privilege. Also, anybody who has given information to the

¹⁵ *K.U. vs. Finland* [2002], ECHR.

¹⁶ Päivi Tiilikka. 'Sananvapaus ja lähdesuojat Suomessa' in 'Lähdesuojat – normit, ideat ja käytännöt' 29-30. (Communication Research Center CRC, University of Helsinki, March 2001)

<http://www.helsinki.fi/crc/julkaisut/Lahdesuojat_raportti.pdf, 19> Accessed 27 February 2016 [Finnish]

¹⁷ Council of Europe. *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.*

message receiver is understood as source. The right of non-disclosure of journalists is fulfilled because protection of sources is wide in Finland, as discussed above. The right of non-disclosure of other people working with journalists is relatively well-taken into consideration as well, because, for example, publishers have also reporter's privilege in Finland. Also, the wide source protection for every person that makes something public makes the protection of other professions better – when also taking into consideration that Finnish law gives reporter's privilege to all who work for the publisher. On the other hand, the Finnish law specifies so clearly those with reporter's privilege that it might be possible that some people in close relations with journalists do not get reporter's privilege. The right is so much the right of the messenger in Finland. Conditions for disclosure are quite exactly defined in the Finnish law.

3. Is there, in domestic law, a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

As *Tiilikka*¹⁸ underlines, in Finland, reporter's privilege is a journalist's, or other person's, who makes something public, right not to disclose his/her sources. It is not a right of a source. A journalist or any other person who has right to reporter's privilege does not have any obligation to disclose their source. If the journalist, however, tells the name of the source to the public via mass media and it is harmful to the source the journalist might be convicted for *Dissemination of information violating personal privacy*.¹⁹ According to the Finnish *Criminal Code* this crime is in question when a person “unlawfully (1) through the use of the mass media, or (2) otherwise by making available to many persons disseminates information, an insinuation or an image of the private life of another person, so that the act is conducive to causing that person damage or suffering, or subjecting that person to contempt”. The punishment for this crime is a fine or imprisonment of maximum of two years. However, if the question is about a person in business, politics, public office, public position or similar, and if the information might affect the evaluation of that person's activities in the position and dealing with the matter is also important to society, there is no *dissemination of information violating personal privacy*. Any leak that is made by a person holding a remarkable position in the society might for instance affect evaluation of the person's reliability in office as well and therefore be important to society.

Not even the self-regulation of journalists demand the journalist to always remain silent about the source, but instead they direct that the journalist should keep the identity of the source secret as it has been agreed. One can anyway state that it is a very strong main rule that the journalist has to remain silent about his or her source giving confidential information because this is usually written in the confidentiality agreement between the journalist and the source. It is very

¹⁸ Päivi Tiilikka. “*Sananvapaus ja lähdesuojat Suomessa*” in “*Lähdesuojat – normit, idealit ja käytännöt*” 21. (Communication Research Center CRC, University of Helsinki, March 2011)

<http://www.helsinki.fi/crc/julkaisut/Lahdesuojat_raportti.pdf. 19> Accessed 27 February 2016 [Finnish]

¹⁹ Criminal Code. 1889/39 [Rikoslaki]. ch 24, para 8.

exceptional that a journalist would be allowed to disclose the source but that could happen, for example, if the source had deliberately misled the journalist. The *Guidelines for Journalists* given by the Finnish self-regulating body, Council for Mass Media, state the following: “*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*”.²⁰ Violation of a confidentiality agreement can, of course, lead to civil sanctions, which is always the case when violating a contract. However, the clear and short answer is that there is no domestic law provision that prohibits a journalist from disclosing his/her sources.

4. Who is a “journalist” according to the national legislation? Is it, in your view, a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media actors? Is the protection of journalists’ sources extended to anyone else?

An explicit definition of a journalist is not specified clearly in the Finnish legislation or case-law. This separation between the two terms is not relevant because the Finnish legislation does not provide any special protection to journalists. All the rights and obligations of freedom of speech belong to everyone and therefore extra protection to journalists has not been seen relevant.

Section 2 Subsection 4 of Finnish Act on the Exercise of Freedom of Speech in Mass Media (in Finnish: *laki sananvapauden käytämisestä joukkoviestinnässä*) defines publication as *[a] printed matter, a data disc or some other text, sound or picture record produced by means of duplication, when provided to the public*.²¹

Publishing is providing publications and network messages other than programs to the reach of the public.²² Broadcasting means provision of programs to the public.²³

According to the rules of *Suomen journalistiliitto* (the Union of Journalists in Finland) (hereinafter: the UJF or the Union), a person can join the Union if their profession includes an essential amount of journalistic elements.²⁴ The applicant’s work must also be professional, which means

²⁰ Council for Mass Media. <http://www.jsn.fi/en/guidelines_for_journalists/> Accessed April 5 2016

²¹ Act on the Exercise of Freedom of Speech in Mass Media 13.6.2003/460 [*Laki sananvapauden käytämisestä joukkoviestinnässä*]

²² Act on the Exercise of Freedom of Speech in Mass Media Section 2 Subsection 7

²³ Act on the Exercise of Freedom of Speech in Mass Media Section 2 Subsection 8

²⁴ <<http://www.journalistiliitto.fi/liitto/tietoa-jasenistamme/ammatti-yhdistaa/>> accessed February 28 2016 [Finnish]

that a significant portion of the applicant's income must derive from the journalistic work. In their internet site, the UJF lists journalists (print press, radio, broadcast, Internet); photographers and cameramen; graphic designers; editorial managers; publicists and, information officers; freelance journalists and communications entrepreneurs; publishing editors; translators and journalist students, teachers and researchers as eligible professions. The list is not exclusive, and other professions are allowed to join the Union as well, as long as the work meets the requirement for professional journalistic work.

Therefore, the UJF excludes other media actors, such as bloggers and other amateur writers whose writing can be seen as a hobby or unprofessional without income gaining purpose, from becoming union members. The Union does not control if the applicant is professional or not, the level of professionalism is left to the applicant to evaluate. On the other hand, the UJF's annual fee was in 2015 1.4 percent of the member's gross income if they work in the sector that is covered by a collective agreement (print media, publishing, broadcasting) and 1.0 percent if the member is a freelancer or an entrepreneur and does not belong to the unemployment fund.²⁵ Some journalists may not join the Union because of the rate of the annual fee is rather high.

According to the Guidelines for Journalists, a journalist is mainly responsible to the public: the readers, the listeners and the viewers, who have the right to the information of what happens in the society.²⁶ In this sense, a journalist is a delivery person between the events in the world and the interested public.

Even though a journalist is not an exclusive term to describe a specific group of people of certain education or profession, it has some qualifications that need to add up in order to call oneself journalist. An implicit definition of a journalist could be described as a person who works in the field of media and publication and mainly fulfils journalistic tasks, which can vary from news to reports and public announcements. Journalist is a person whose work's purpose is to give the public revised and impartial information concerning local and global events.

5. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

The Finnish Constitution's (*Suomen perustuslaki*) Section 12 guarantees everyone's right to freedom of expression. Freedom of expression includes one's right to express, publish and receive information, opinions and other messages without sensory.²⁷ This is the foundation to which journalists base their right to publish articles and the Guidelines for Journalists build on.

²⁵ The UJF website <<http://www.journalistiliitto.fi>>, accessed March 29 2016

²⁶ Article 1 of the Guidelines for Journalists, (Operative from 1 January 2014), <<http://www.journalistiliitto.fi/english/ground-rules/guidelines/>> accessed February 28 2016

²⁷ Finnish Constitution 11.6.1999/731 [*Suomen perustuslaki*]

The Council for Mass Media (in Finnish: *Julkisen sanan neuvosto*) (later: the CMM) is a self-regulatory committee in Finland which is founded in 1968 by journalists and publishers who work in the mass media. The purpose of the CMM is to maintain good professional practice and defend the freedom of expression and right of publication.²⁸ The CMM does not execute legal jurisdiction, but it gives recommendations and guidelines which bind media actors who have been affiliated with the CMM. The major media houses in Finland are members of the CMM and, therefore, the CMM's decisions have binding effect among the journalists and publishers.²⁹

Julkisen sanan neuvoston kannatusyhdistys ry. (CMM's Relief Association) is founded by the same parties as CMM in order to finance CMM's activity. The Relief Association's purpose is to take care of the CMM's finance as well as prepare and approve Guidelines for Journalists. The Guidelines for Journalists (later: the Guideline) are established in order to maintain good professional journalistic practice among the journalists. In the preamble of the Guideline the purpose of the Guideline is defined as follows:

Freedom of speech is the foundation of a democratic society. Good journalistic practice is based on the public's right to have access to facts and opinions.

The aim of these guidelines is to support the responsible use of freedom of speech in mass communication and encourage discourse on professional ethics.

These guidelines concern all journalistic work. They have been drafted specifically for the purpose of self-regulation. The guidelines are not intended to be used as grounds for criminal liability or damages.³⁰

The Guidelines for Journalists is a self-regulatory mechanism to maintain good professional journalistic practise. The Guideline does not instruct that a journalist must reveal their sources of information. When referring to the work of others, the source must be included, but in the case of independent journalistic research or interview there is no obligation in the Guideline to give away the source.

Article 14 of the Guideline states, that a journalist has the right and obligation to hide the identity of the information source, if the source asks to stay anonymous. The journalist and the source can together agree on the extent to which the source's identity stays hidden. In the second Paragraph of Article 14, the Guideline states that if the revealed information concerns

²⁸ The Basic Agreement 1 §, The Council for Mass Media, <http://www.jsn.fi/en/Council_for_Mass_Media/basic-agreement/> accessed February 28 2016

²⁹ "Ketkä ovat JSN:n takana?", <<http://www.jsn.fi/jsn/jsn/>> accessed February 28 2016

³⁰ Guidelines for Journalists, (Operative from 1 January 2014), <<http://www.journalistiliitto.fi/in-english/ground-rules/guidelines/>> accessed February 28 2016

social matters, which may cause remarkable negative publicity, the journalist should reveal the audience, how the reliability of the source and the information was confirmed.

Article 11 of the Guideline instructs that the audience should be able to distinguish the facts from opinions. This means that the commentary section should be separated from the facts of the case and journalist must keep their own opinions apart from the source's views.

Self-regulation through the Guideline is the ethical guideline for professional journalist to comply. Self-regulation supports the public's trust towards the credibility of the press.³¹ Self-regulation reduces the need for regulation through legislation, if the media operatives act to maintain high ethical standards. Even though self-regulations are not directly applicable in the court of law, high ethical standards prevent journalists from publishing information that breaches the ethical code.

Section 16 of Finnish Act on the Exercise of Freedom of Speech in Mass Media (*laki sananvapauden käyttämisestä joukkoviestinnässä*) concludes following:

The originator of a message provided to the public, the publisher and the broadcaster are entitled to maintain the confidentiality of the source of the information in the message.

According to the same Section, the publisher or broadcaster has the right to hide the originator's identity as well; in case it is needed. This is described as a right that one can follow, but hiding the source is not compulsory.

On the other hand, Section 8 of Chapter 24 of the Finnish Criminal Code describes the distribution of private life violation. A person, who, for example, through mass media, violates a person's right to private life by revealing a piece of information, an insinuation, or a picture which causes damage, suffering or contempt toward its target, shall be sentenced from distribution of private life violation to a fine.³² If the revelation of the source's identity could compromise their safety, security, or otherwise put them to undesirable position, the constituent elements of the offence may be fulfilled.

The Guideline has no executive power in criminal or civil cases,³³ but the right for non-disclosure is upheld in the court of law as well. The Code of Judicial Procedure is a general-purpose law that enacts the conduct in civil procedure and in the applicable parts of criminal procedure as well. Section 20 of Chapter 17 gives the journalists and publishers the right not to expose their source in the court of law. As an exception, the court has the right to force to disclose the source if the crime that is being prosecuted allows a maximum penalty of at least six

³¹ Miklós Haraszti: *The Media Self-Regulation Guidebook*, p. 11

³² The Criminal Code, Section 24, Section 8, 39/1889 [*Rikoslaki*]

³³ The Preamble of the Guidelines for the Journalists (Operative from 1 January 2014), <<http://www.journalistiliitto.fi/in-english/ground-rules/guidelines/>> accessed February 28 2016 &

Act on the Exercise of Freedom of Speech in Mass Media 13.6.2003/730 [*Laki sananvapaudesta joukkoviestinnässä*]

years of in prison. If a journalist or a publicist refuses to disclose their source, they must provide grounds for their refusal.³⁴

Finnish legislation knows no obligation to conceal the identity of the journalistic source. In case the sources' right to privacy is violated, the journalist or the publicist can be held liable to reimburse the source for the damages caused by the disclosure. This outcome is highly unlikely because there is no case-law to be found on this subject.

6. In the respective national legislation, are the limits of non-disclosure of the information in line with the principles of the Recommendation No R (2000) 7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

1. Background

1.1 Recommendation No R (2000) 7

Recommendation No R (2000) 7 (later: "the Recommendation") was adopted by the Committee of Ministers on March 8 2000 during the 701st meeting of the Ministers' Deputies.³⁵ According to Article 15.*b* of the Statute of the Council of Europe (later: "the Statute"), a recommendation is one of the forms that the conclusions of the Committee may take.³⁶ Despite not being legally binding, the recommendations are considered powerful instruments in the interaction between the Committee and the governments.³⁷ Article 15.*b* of the Statute allows the Committee to request information from the governments of the member states to supervise their actions regarding the recommendations.

³⁴ The Code of Judicial Procedure, Section 17 Section 23, 1.1.1734/4 [*Oikeudenkäymiskaari*]

³⁵ 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.

³⁶ Statute of the Council of Europe, 5.V.1949, Art. 15.*b*.

³⁷ Council of Europe, *Committee of Ministers* (the official website of the Committee of Ministers) <http://www.coe.int/t/cm/aboutCM_en.asp/> accessed 22 February 2016.

2. Right to non-disclosure

2.1. The Principles

The Recommendation provides seven principles that concern the right of journalists not to disclose their sources of information. The third principle, on which this article is going to concentrate, is titled *Limits to the right of non-disclosure*. The principle is divided into two paragraphs.

2.3 Limits to the Right of Non-Disclosure

Paragraph *a* begins with a reference to Paragraph 2 of Article 10 of the European Convention of Human Rights (later: “the Convention”). According to Paragraph *a*, the right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10(2). This emphasises the Recommendation’s role as a tool for enforcing the implementation of the Convention and specifying its contents.

Article 10(2) allows restrictions to the right of journalists regarding the interests of *national security, territorial integrity or public safety*. Furthermore, a restriction can be justified for the *prevention of disorder or crime, protection of health or morals and protection of the reputation or rights of others*. A restriction may as well take place in the interest of *preventing the disclosure of information received in confidence or maintaining the authority and impartiality of the judiciary*.³⁸

An overall prerequisite for all the restrictions is that they must be *prescribed by law* and be *necessary in a democratic society*. Paragraph *a* also refers to the importance and pre-eminence of non-disclosure that derives from the case law of the European Court of Human Rights (later: “the Court”). This way, it accentuates the interaction between *law in books* and *law in action* in the implementation of the Convention in the member states.

2.3 Criteria for Disclosure

Paragraph *b* introduces more specific criteria, under which disclosure of information may be regarded necessary. According to Paragraph *b*, Article (*i.*), reasonable alternative measures to the disclosure have to be either *non-existent or exhausted by the persons or public authorities seeking disclosure*. Article (*ii.*) concretizes the situations in which the legitimate interest in the disclosure can outweigh the public interest in non-disclosure.

Firstly, an *overriding requirement* for the need of disclosure has to be proved; secondly, the circumstances have to be of a *sufficiently vital and serious nature*; and thirdly, the disclosure has to be

³⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950. Art. 10(2).

justified by a *pressing social need*. Article (ii.) also reminds that while member states do have a certain *margin of appreciation*, they are also bound by the practice of the Court.

The last Paragraph, *c*, contains a clause according to which the above-mentioned requirements should be applied at *any stages* of proceedings where disclosure might be invoked. It underlines the overall seriousness of situations in which a disclosure can possibly take place.

3. Situation in Finland

3.1 Implementation of Article 10(2) of the Convention

In Finland, the principal legal source that ensures the implementation of Article 10(2) of the Convention is the Act on the Exercise of Freedom of Expression in Mass Media (2003/460) (later: “the Freedom of Expression Act”).³⁹ Freedom of speech is also a fundamental right guaranteed by the Constitution of Finland (later: “the Constitution”) in Section 12. The Constitution and special legislation are meant to interact with each other. The broad formulations of the Constitution leave space for more specific legislation, the interpretation of which is, in turn, linked to the principle of legal interpretation in light of fundamental and human rights.⁴⁰

The protection of sources is not explicitly mentioned in the Constitution, but it is still regarded as a pre-condition to fully enjoy freedom of expression. Section 16 of the Freedom of Expression Act regulates the confidentiality of sources and the right to anonymous expression. The first Paragraph guarantees the right to *maintain the confidentiality of the source of the information in the message* to the originator of the message, the publisher and the broadcaster. Further in the Paragraph, the right is extended to some other persons who have obtained confidential information.

3.2 Possibilities of Disclosure in Practice

According to Subsection (3) of Section 16, *separate provisions apply to the duty to disclose confidential information referred to in Subsection (1) in a pre-trial investigation or court proceedings*. The disclosure of sources is thus limited to two occasions: court proceedings and pre-trial investigations. Furthermore, the disclosure of sources in a pre-trial investigation can be invoked on a more limited basis in respect to disclosure during a court proceeding. In the preliminary works of the Freedom of Expression Act, the legislator has explicitly expressed that the possibility of

³⁹ 460/2003 (Act on the Exercise of Freedom of Expression in Mass Media) 2003 [Laki sananvapauden käyttämisestä joukkoviestinnässä].

⁴⁰ Päivi Tiilikka, *Journalistin Sananvapaus* (1st edn, Sanoma Pro Oy 2008) 22 [Finnish].

disclosure should be limited to these occasions only.⁴¹ Preliminary works have quite a big significance in the Finnish system and are often referred to in the practice of the courts.

The Finnish case-law regarding the disclosure is somewhat limited.⁴² There have been only three cases that have reached the Finnish High Court. In KKO:2010:88, the Court ruled that the journalist and the editor-in-chief of a magazine programme in the television were guilty of defamation. In the programme, the journalist had brought up claims regarding three persons who had previously been suspected of ties to terrorism. The claim was that these three persons were involved in a group financing a terrorist organisation abroad. The identity of the persons could be recognized from the programme, while the information leading to said claims had been obtained from eight anonymous sources. In its conclusion, the Court ruled the journalist and the editor-in-chief of the programme guilty of defamation, but did not call for a disclosure of sources.

The cases KKO:2004:30 and KKO:2010:88 are connected to the same chain of events. "A" was the managing director of a publishing company that had published a book containing delicate information. The book had been published anonymously and the sources of information of the author remained unknown. In the first case, the question was whether A had the right to remain silent when answering certain questions during a criminal investigation would have lead to revealing the author of the book. The Court stated that A had the right to remain silent, when answering the questions presented by the authorities would have or could have lead to the revelation of confidential information.

The second case concentrated on two letters that A had submitted to the Finnish High Court in order to show that he had the right to remain silence in the circumstances described above. The public prosecutor had appealed to these letters as a ground for A's obligation to reveal information regarding the book. The Court ruled that the letters belonged to the sphere of A's right to remain silent and stated that they could not be used as evidence by the prosecutor.

According to the current legislation, disclosure can only be invoked when the maximum penalty of the crime in question is at least six years in prison.⁴³ Furthermore, disclosure can occur when the information itself has been obtained through a breach of the obligation to maintain secrecy. The latter option is possible only in court proceedings, not in a pre-trial investigation.

3.3 Conclusion

⁴¹ Preparatory materials for 460/2003 (Act on the Exercise of Freedom of Expression in Mass Media), para 17. [HE 54/2002 Hallituksen esitys Eduskunnalle laiksi sananvapauden käyttämisestä joukkoviestinnässä ja eräksi siihen liittyviksi laeiksi].

⁴² Relevant case law of the Finnish High Court: KKO:2004:30, KKO:2009:88, KKO:2010:88.

⁴³ 4/1734 (Code of Judicial Procedure) 1734 [Oikeudenkäymiskaari] ch 17 section 24(4).

Returning to the questions set at the beginning of this article, it is fair to say that in the Finnish system, disclosure of information has been limited to exceptional circumstances. Until today, a demand to disclose information identifying a source has never had success in national courts, and there are few cases dealing with the question overall.⁴⁴ This suggests that alternative measures are preferred, and until now they have always had the prevalence in the practice of public authorities.

7. In the Recommendation No R (2000) 7 the following principles should be respected when the necessity of disclosure is stated: absence of reasonable alternative measures, outweighing legitimate interest (protection of human life, prevention of major crime, defense of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the disclosure outweigh the interest in the non-disclosure?

1. Freedom of Speech

1.1 Protection of Sources as a Part of Freedom of Speech

As with most human rights, the content of freedom of speech cannot be determined with precision. To a certain extent, the content of the right is always open to interpretations and has to be considered individually in each case. Previous case-law has a central role in defining the significance of the right.⁴⁵ This applies also to the protection of sources: the possibility of disclosure does exist, but the conditions are limited.

In the *Goodwin* case,⁴⁶ the Court has established that the protection of journalistic sources is one of the fundamental elements of the right guaranteed in Article 10 of the Convention. In the same ruling, the Court stated that disclosure of sources, should it occur, has to be justified by *an overriding requirement in the public interest*. The conditions for restrictions are listed in Article 10(2), which will now be examined in more detail. As mentioned before, the Finnish courts have had a restrictive approach regarding the possibility of disclosure. It seems clear that disclosure can be successfully invoked only in the most serious of cases.

2. Restrictions Provided by Article 10(2) of the Convention

⁴⁴ Valtteri Niiranen, Petteri Sotamaa, Päivi Tiilikka, *Sananvapauslaki, tulkinta ja käytäntö* (1st edn, Sanoma Pro Oy 2013) 124 [Finnish].

⁴⁵ Päivi Tiilikka, *Journalistin Sananvapaus* (1st edn, Sanoma Pro Oy 2008) 19 [Finnish].

⁴⁶ *Goodwin v. the United Kingdom* [judgment of 27 March 1996] European Court of Human Rights.

2.1 Meeting the Criteria

Article 10(2) of the Convention reads as follows:

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.

Thus, when applying the article to the question of disclosure of sources, the basic criteria have to be met: the restriction has to be prescribed by law and be necessary in a democratic society. In addition, the restriction has to serve to protect some of the interests named in the paragraph. These interests can be divided into three categories.⁴⁷

2.2 Interests Justifying Disclosure

Many of the criteria that may justify a restriction to freedom of speech are related to the concept of *public interest*. This is the case of protecting national security and territorial integrity, as well as public safety. The prevention of disorder and crime and the protection of health or morals can also be added to this group. In practice, public interest is the ground most often used.⁴⁸

The second category is formed by criteria that may function as grounds for restrictions in the name of *individual interests*. In case of journalism and source protection, it seems natural that the individual interest would often be connected to the protection of privacy, honour and reputation. In the Finnish legal context, this may result in an unsuccessful call for disclosure, since the prerequisite for allowing disclosure is the possible penalty of at least six years in prison. According to the Finnish legislation, the maximum penalty for aggravated defamation is two years in prison.⁴⁹

The third group of interests has to do with public authorities: the focus is on *maintaining the authority and impartiality of the judiciary*. These kind of grounds have not been used to justify the disclosure of journalistic sources in domestic courts.

The European Court of Human Rights has examined the restrictions to freedom of speech in several cases. In *Ernst and Others v. Belgium*, the Court came to the conclusion that the searches

⁴⁷ Päivi Tiilikka, *Journalistin Sananvapaus* (1st edn, Sanoma Pro Oy 2008) 61 [Finnish].

⁴⁸ *ibid* 62.

⁴⁹ 19.12.1889/39 (The Criminal Code of Finland) 1889 [Rikoslaki] ch 24 section 10.

and seizures that had been conducted at the offices of a public broadcasting company and in homes of some of its journalists constituted a breach of the journalists' freedom of expression and violated their right to privacy.⁵⁰ The Court admitted that the interferences, which had been committed by the Belgian judicial authorities, were prescribed by law and that their intention had been to maintain the authority and impartiality of the judiciary. The purpose of the interferences was to identify the police officers or the members of the Belgian judiciary who had been leaking confidential information. However, according to the Court the wide scale of the researches was not proportionate comparing to the fact that none of the journalists had been accused of writing articles that contained confidential information. The Court also asked whether alternative and less invasive measures could have been taken to identify the right persons among the authorities. Finally, the Court stated that the action of the Belgian authorities had not been *reasonably proportionated to the legitimate aims pursued*, and that the rights and freedoms of the journalists had been violated.

In *Roemen and Schmit v. Luxembourg*,⁵¹ the Court evaluated the justification of the research of a journalist's home and office in the light of the principle of an *overriding requirement in the public interest*. In the case, a journalist had reported that a Minister had been convicted of tax evasion. Later on, a criminal investigation was opened to identify the person who had leaked the information to the journalist. During the investigation, a research was ordered at the journalist's workplace and home, as well as at the office of his lawyer. The Court examined the colliding interests of the parties. On one hand, the research had been prescribed by law and had pursued a legitimate aim, that of *maintaining the public order and preventing crime*. On the other, the article revealing confidential information had discussed a matter of *general interest*. Finally, the Court concluded that the measures taken had been disproportionate and had violated the journalist's right to freedom of expression.

2.3 Conclusion

To sum, the concept of *public interest* seems dominant when seeking for a justification to disclose information. Freedom of expression and protection of sources as one of its components are powerful rights that are enforced on both European and domestic level. Between different motives to justify restrictions, public interest seems to be the most powerful one.

The threshold for disclosure has been set on quite a high level in Finnish courts; the argumentation of the courts follows the practice of the European Court of Human Rights, emphasising the importance of free public discussion. Furthermore, in the preparatory materials of the Freedom of Expression act the possibility of disclosure in court proceedings is limited to the so called *key witnesses*. The significance of the information that could be obtained through

⁵⁰*Ernst and Others v. Belgium* [judgment of 15 July 2003] European Court of Human Rights.

⁵¹ *Roemen and Schmit v. Luxembourg* [judgment of 25 February 2003] European Court of Human Rights.

disclosure has to be crucial in regard to solving the case. Also, the importance of solving that particular case should outweigh the general need of journalists to protect their sources.⁵²

8. In Light of the Case Law of the European Court of Human Rights, How do National Courts Apply the Respective Laws With Regard to the Right to Protect Sources? In Particular, How do They Balance the Different Interests at Stake?

8.1. General Overview of the Finnish Court System

Firstly, it is important to briefly explain the court system in Finland in order to better understand the case-law. According to the Constitution of Finland, Finland has two separate lines of courts, general courts and general administrative courts.⁵³ The highest judicial authority belongs to the Supreme Court and the Supreme Administrative Court, in their respective fields. All the case-law related to this question comes from the general courts which exist in three levels; district courts, courts of appeal and the Supreme Court.⁵⁴ The Supreme Court of Finland is the highest judicial body and the court of final instance in the field of civil, commercial and criminal cases.⁵⁵ The decisions of the Supreme Court are frequently used by lower courts as precedents and therefore have legal importance. However, the Finnish legal system is not very strict when it comes to precedents. They are definitely a source of law but they are not considered strictly or absolutely binding as such.⁵⁶ This is the result of the idea of judicial independence: judges are legally bound only by law and not by decisions of higher courts. However, in practice, lower courts follow the decisions of higher courts and particularly of the Supreme Court.⁵⁷

8.2. General overview of the Case-Law

The Finnish case-law concerning the protection of journalistic sources is not very extensive. There are only few Supreme Court cases in Finland on the subject and the same goes for the appellate level. All the cases in which the protection of journalistic sources has been taken into consideration, the main proceedings have concerned defamation or aggravated defamation

⁵² Preparatory materials for 460/2003 (Act on the Exercise of Freedom of Expression in Mass Media) [HE 54/2002 Hallituksen esitys Eduskunnalle laiksi sananvapauden käyttämisestä joukkoviestinnässä ja eräiksi siihen liittyviksi laeiksi].

⁵³ The Constitution of Finland 11.6.1999/731, 98–99 § [Perustuslaki].

⁵⁴ Ibid.

⁵⁵ It should be mentioned that the literal translation from Finnish to English is “in dispute- and criminal matters” but the (unofficial) English translation published by the Ministry of Justice uses “civil, commercial and criminal matters”. The distinction is not very important in practice but perhaps the English translation is more precise than the original Finnish wording of the paragraph.

⁵⁶ J. Virolainen & P. Martikainen, *Tuomion perusteleminen*, Talentum Media 2010, pp. 397–403.

⁵⁷ Ibid.

which are criminalised in the Finnish Criminal Code.⁵⁸ The maximum punishment for aggravated defamation is imprisonment of two years. The severity of the maximum punishment is important because there is a clear distinction in the applicable procedural rules governing investigations and court proceedings depending on the severity of the punishment. Only in a case where for the crime under investigation or as the subject of a trial the maximum punishment is at least six years in prison, the protection of journalistic sources can be broken.⁵⁹ An exception to this rule can only be made if the information is obtained from someone who has unlawfully disclosed this information.⁶⁰ This exception applies to court proceedings only; the parliament specifically excluded the investigation phase from the scope of application.⁶¹

The low number of cases dealing with the issue of journalistic sources could perhaps be explained by the fact that the law in Finland so clearly limits the breaking of the confidentiality to very serious crimes only. The most common criminal proceedings that are associated with media would be defamation and other similar crimes. In court proceedings concerning these types of crimes, the protection can seldom be broken and in investigation phase, never.⁶²

8.3. Sonera book- litigation

Quite possibly the most important case in Finland concerning protection of journalistic sources is a Finnish Supreme Court case from 2004.⁶³ The case deals with an article that was published on the internet by an unknown writer titled 'Minne hävisivät Soneran rahat?' (Where did Sonera's money disappear?). The applicant (A) was a CEO of a publishing company that was publishing a book based on this anonymous writing. The anonymous writing led to a criminal investigation on aggravated defamation and A was heard as a witness because it was assumed that he knew the author of the anonymous Internet article. What is noteworthy in this case is that both the District Court and the court of appeal ordered A to disclose the source.⁶⁴ The district court focused on the exact wording of the Finnish legislation stating that the right to refuse to disclose a source only applies to mass media such as magazines and radio and not to books and other media that is not published periodically but only once.

The court of appeal came to the same conclusion as the district court concerning the protection of sources. Further, the court of appeal also referred to Article 10 of the European Convention on Human Rights. The court weighed the interests in the case in accordance with article 10(2), eventually concluding that public interest and the severity of the crime outweigh the interest of freedom of speech.

⁵⁸Rikoslaki 19.12.1889, 24 luku 9–10 §.

⁵⁹Code of Judicial Procedure 31.12.1734, 17:20 [Oikeudenkäymiskaari]; Criminal Investigation Act 22.7.2011/805, 7:8 [Esitutkintalaki].

⁶⁰Code of Judicial Procedure 31.12.1734, 17:20 [Oikeudenkäymiskaari]

⁶¹Päivi Tiilikka: *Journalistin Sananvapaus*, Talentum 2008, p. 37.

⁶²Ibid., pp. 36–37

⁶³KKO 2004:30 Finnish Supreme Court [Finnish]

⁶⁴District court of Helsinki 3.3.2003 [Finnish]; The Court of Appeal of Helsinki 12.6.2003 [Finnish].

The case then advanced to the Supreme Court. It should firstly be noted that the Finnish legislation changed during the process. The new 'Act on the Exercise of Freedom of Expression in Mass Media' entered into force on January 1st 2004.⁶⁵ Because of this, the Supreme Court didn't directly assess the interpretation of the law given by the courts of lower instance.⁶⁶ Legislation, which was in effect while the case was being determined in lower instances referred specifically to periodically printed media as well as radio and cable broadcasting. The new legislation removed such reference and now covers essentially all media. What the Supreme Court did, and quite rightly so, was to state that limiting the protection of sources only to certain kinds of publications was problematic in the light of Finnish Constitution (section 12, freedom of speech) and the ECHR (art. 10). The Supreme Court also stressed the importance of the protection of sources in guaranteeing the freedom of speech.⁶⁷ Here, the Supreme Court particularly took into account the case-law of the European Court of Human Rights (ECtHR) in which the protection of journalistic sources has been highlighted. In *Roemen and Schmit* the Court stated that the “[f]reedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. The protection of journalistic sources is one of the cornerstones of freedom of the press.”⁶⁸ Though, the ECtHR cases in question did not deal with the similar publication as in the case at hand (and although article 10(2) allows some derogations to national authorities), the Supreme Court held that nothing in article 10 could be read as allowing different treatment of different types of publications.

In the end, the Supreme Court returned the case to the district court because it was not clear whether A could answer the questions by the police without revealing the writer of the book or the source for the information contained in the book. This case demonstrates clearly that the Supreme Court of Finland uses the settled case-law of the ECtHR and judging by the low number of cases after this case, lower courts have also adopted the same approach. Of course, it should be kept in mind that the applicable legislation changed during the proceedings. It would have been interesting to see whether the decision of the Supreme Court would have been the same with the old and less clear legislation.

8.4. Case-law after KKO 2004:30

Subsequent case-law does not generally deal with the breaking of the protection of sources. There are still two noteworthy Supreme Court cases after KKO 2004:30. The first one deals

⁶⁵Act on the Exercise of Freedom of Expression in Mass Media 13.6.2003/460, 25 § [Laki sananvapauden käyttämisestä joukkoviestinnässä.]

⁶⁶KKO 2004:30 in *KKO:n ratkaisut kommentein 2004:I*, Talentum.

⁶⁷KKO 2004:30, para 11 Finnish Supreme Court [Finnish]. See also: *Goodwin v. the UK*, § 39, no. 17488/90, ECHR 1996-II; *Roemen and Schmit v. Luxembourg*, § 46, no. 51772/99, ECHR 2003.

⁶⁸*Roemen and Schmit v. Luxembourg*, § 46.

with the aftermath of the case KKO 2004:30.⁶⁹ In the case KKO 2004:30, A had provided the Supreme Court with two letters as evidence that he has the right to refuse to testify based on the protection of sources. In the discovery phase the letters were delivered to the National Bureau of Investigation (KRP).⁷⁰ The prosecutor later brought charges against a third person for defamation using the aforementioned letters as evidence. The question in the case is whether the letters can be used as evidence since this would circumvent the right of protection of sources. The problem in this case is that the Finnish legislation is relatively silent on what may or may not be used as evidence and the practice is mostly based on the precedents of the Supreme Court.⁷¹ The District Court decided that the letters can't be used as evidence. It based the decision on the fact that the letters were sent to a person who has the right not to disclose the source and therefore using the letters would in fact mean violating this right. The prosecutor appealed the decision and the court of appeal reversed it. It justified this on the basis that A had not been obligated to disclose the letters to the Supreme Court and by voluntarily doing so the letters could be used as evidence. The Supreme Court took the same position as the District Court and reversed the decision of the Court of Appeal. It stated that the letters would be used to testify on matters that A has right not to testify and this would not be acceptable. The problem with this case was that the Supreme Court did not provide much guidance on how to weigh different interests at stake. So even though the Court came to the right (in my opinion) conclusion in favor of freedom of speech, the case didn't necessarily provide much guidance for the lower courts for the future.⁷²

The second case, a Supreme Court case from 2010, proves that even though the sources of a journalist are protected, by refusing to name their sources, journalists may open themselves up to defamation charges.⁷³ The case concerned a television programme that claimed that three named persons were part of a group that funded terrorism abroad. The information was almost completely based on interviews of different persons who the journalists refused to identify. Here the Supreme Court stated that by publishing this information and refusing to disclose their sources, the journalists had accepted the risk that they can't prove that they have good faith reasons to trust the information. Further the claims and citations presented in the programme didn't convincingly show that the information was based on nothing but assumptions nor was it likely that the sources were independent of each other. The Court upheld the sentence for defamation. This case presents a problem with the protection of journalistic sources on one hand and right to privacy on the other. It is quite clear that the right to protection of sources mustn't mean that media or journalists can make any claims they wish and then plea the right to protect sources. It is equally true that the threshold for prosecuting journalists must be quite high, otherwise it could prevent the use of secret sources and thus hinder freedom of speech. In this case the Supreme Court weighed the credibility of the claims and of the witnesses that were

⁶⁹KKO 2009:88 Finnish Supreme Court [Finnish]

⁷⁰National Bureau of Investigation (Keskusrikospoliisi in Finnish) is a national unit of the Finnish Police that functions in the whole country and generally deals with more serious crimes.

⁷¹Ibid. Para 10.

⁷²Jyrki Virolainen: KKO 2009:88 in *KKO:n ratkaisut kommentein II 2009*. Talentum 2010. pp. 242-244.

⁷³KKO 2010:88 Finnish Supreme Court [Finnish]

quoted on the program. It was also mentioned in the judgement that the persons were not identified by the sources but were connected to the accusations by the journalists. This means that it is unlikely that the verdict would have been any different even if the sources had been disclosed.

8.5. Conclusions

The body of case-law concerning the protection of journalistic sources in Finland is rather thin. This could be seen as a positive aspect. The most likely reason for this is that the case-law of the Supreme Court is quite clear and on the other hand that the legislation is drafted in a way that leaves very little room for interpretation. This can clearly be seen as an achievement of the new legislation that entered into force from the beginning of 2004. The legislation and the courts clearly give priority to the right to protect sources to a great extent; meaning unless the case concerns a particularly serious crime.

9. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interception of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

9.1 General background

Journalists' right to protect their sources of information is guaranteed by the Act on the Exercise of Freedom of Expression in Mass Media 460/2003. It receives interpretative support from the Constitution of Finland (731/1999).⁷⁴ Still as a result of the development of information

⁷⁴ Constitution of Finland (731/1999) Section 10 - The right to privacy

Everyone's private life, honour and the sanctity of the home are guaranteed. More detailed provisions on the protection of personal data are laid down by an Act. (subsection 1)

The secrecy of correspondence, telephony and other confidential communications is inviolable. (subsection 2)

Measures encroaching on the sanctity of the home, and which are necessary for the purpose of guaranteeing basic rights and liberties or for the investigation of crime, may be laid down by an Act. In addition, provisions concerning limitations of the secrecy of communications which are necessary in the investigation of crimes that jeopardise the security of the individual or society or the sanctity of the home, at trials and security checks, as well as during the deprivation of liberty may be laid down by an Act. (subsection 3)

technology inter alia the public authorities increasingly use electronic surveillance to gather information.⁷⁵ Annually, approximately 2,500 permits are granted by the Finnish district courts to the police and to the customs to intercept telecommunication and to monitor traffic data.⁷⁶ The use of electronic surveillance is widely acknowledged. It is stated in the Criminal Law Convention on Corruption that the state parties are “required to adopt measures which will facilitate the gathering of evidence” -- this provision imposes an obligation on the Parties to permit the use of “special investigative techniques”, which includes “the use of under-cover agents, wire-tapping, bugging, interception of telecommunications, access to computer systems and so on”.⁷⁷

The acts concerning preliminary investigation mainly regulate the use of electronic surveillance and other coercive means. Thereby two acts are important; the Coercive Measures Act (806/2011) and the Police Act (872/2011) which both entered into force on 1 January 2014. These two laws are complimented by the Act on the Exercise of Freedom of Expression in Mass Media and the Code of Judicial Procedure (4/1734). The 2011 Coercive Measures Act replaced its predecessoring act which had been in force since 1995. The motion to reform came from the Constitutional Law Committee as it stated that the legislation concerning electronic surveillance is poorly applicable and the need for major reshaping is partly due to technical development.⁷⁸ In addition, in a statement issued also by the Constitutional Law Committee it was addressed that the operative law imposes problems on application and interpretation.⁷⁹ The Legal Affairs Committee in turn stated that there is a need for better surveillance on the use of coercive measures⁸⁰ and for better protection of the rights of objects.⁸¹ The reform also aimed at better protection of civil and human rights and to eliminate the use of complex and aged language and to provide clearer legislation.⁸² The objectives of the renewed Coercive Measures Act are to tighten the criteria of commencing a search especially in those situations where the object in

⁷⁵ National Police Board's report (2013)

https://www.intermin.fi/download/51803_selvitys_poliisin_tiedonhankinnasta_ja_sen_valvonnasta_vuonna_2013.pdf?573273c5e74ed288, page 5 (accessed 22 February 2016, available only in Finnish)

⁷⁶ Johanna Niemi and Virve-Maria de Godzinsky, *Telepakkokeinojen oikeussuojajärjestelmä (Oikeuspoliittisen tutkimuslaitoksen tutkimuksia 2009)*, page 48 (available only in Finnish)

⁷⁷ Explanatory Report to the Criminal Law Convention on Corruption, available here:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=exercising> (accessed 28 February 2016)

⁷⁸ Legal Affairs Committee's report 6/2005 vp, available here:

<https://www.eduskunta.fi/FI/vaski/sivut/trip.aspx?triptype=ValtiopaivaAsiakirjat&docid=lavl+6/2005#LAUSUNTO> (accessed 28 February 2016, available only in Finnish)

⁷⁹ Legal Affairs Committee's report 6/2005 vp

⁸⁰ Legal Affairs Committee's report 7/2004 vp, available here:

<https://www.eduskunta.fi/FI/Vaski/sivut/trip.aspx?triptype=ValtiopaivaAsiakirjat&docid=lavl+7/2004> (accessed 28 February 2016, available only in Finnish)

⁸¹ Government's bill 222/2010 vp

⁸² Government's bill 222/2010 vp

search is supposed to remain under an obligation to maintain secrecy⁸³ and to improve cooperation between the preliminary investigation officers and the prosecutor.⁸⁴

9.2 Legislation

The Coercive Measures Act enables the use of coercive means and covert coercive means to gather information on a suspect. When applying these means the authorities must follow the principles of proportionality (sec 2), minimum intervention (sec 3) and sensitivity (sec 4).⁸⁵ The so-called "ordinary" coercive means – meaning non-covert coercive means – are enacted in chapters 2 to 9 of the Coercive Measures Act. These coercive means include: apprehension, arrest, remand, restriction of contacts, travel ban, confiscation for security, confiscation and copying of a document, search, cordoning off the site or the object of an investigation. The application of covert coercive means is enacted in chapter 10 of the Coercive Measures Act. The scope of application of covert coercive means is specified in sector 1 of this chapter. Therefore, covert coercive means include: telecommunication interception, the obtaining of data other than through telecommunications interception, traffic data monitoring, the obtaining of base station data, extended surveillance, covert collection of intelligence, technical surveillance (on-site interception, technical observation, technical monitoring and technical surveillance of a device), the obtaining of data for the identification of a network address or a terminal end device, covert activity, pseudo-purchase, the use of covert human intelligence sources and controlled delivery. Covert coercive means may be used in criminal investigation in secret from their subjects.⁸⁶

The jurisdiction to decide over the application of coercive means is divided between several authorities. The jurisdiction to rule on the application of most of the means lies with the district courts, however in those situations where the matter does not brook delay, an official with the power of arrest may decide on the use of certain surveillance methods.⁸⁷ The remainder of the decision-making jurisdiction lies either with the chief of the National Bureau of Investigation, or of the Security Intelligence Service or of a police department, or with an official with the power of arrest especially trained in covert collection of intelligence and appointed to this task.⁸⁸ When a court grants an interception permit it must simultaneously set the time limit on the duration of the interception, which is usually a month, and describe the telecommunications terminal equipment under interception in the permit.

According to sector 2 of chapter 10 of the Coercive Measures Act, a general prerequisite for the use of covert coercive measures is that their use may be assumed to produce information needed

⁸³ Government's bill 222/2010 vp

⁸⁴ Government's bill 222/2010 vp

⁸⁵ The Coercive Measures Act chapter 1

⁸⁶ The Coercive Measures Act 10:1.

⁸⁷ The Coercive Measures Act 10:9,1 10:20.1 10:22.1, 10:24.1

⁸⁸ The Coercive Measures Act 10:15

to clarify an offence. In addition to this, it is required from the use of telecommunications interception, the obtaining of data other than through telecommunications interception, extended surveillance, on-site interception, technical observation, technical monitoring of a person, technical surveillance of a device, covert activity, pseudo-purchase, the use of covert human intelligence sources and controlled delivery that the chosen covert means can be assumed to be of particularly important significance in the clarification of an offence. Measure-specific prerequisites also apply.

The highest threshold of application is adopted with covert activity, pseudo-purchase and on-site interception in domestic premises. The use of these means requires that they *are necessary for the clarification of an offence*. According to Government Bill 22/2010, “necessity” is to be interpreted in a way that the preliminary investigation authority must be able to show that it is not possible to solve the crime using other coercive measures or preliminary investigation methods or that it would require a fundamentally greater amount of means or that the crime solving process would be delayed without the use of these “necessary” means. Finally, in subsection 3 (of section 2 of chapter 10) it is enacted that the use of covert coercive measures shall be terminated before the end of the period designated in the permit, if the purpose of their use has been achieved or the prerequisites for their use no longer exist.

The only rules which explicitly concern the journalists’ special position are rules which deal with the use of search in certain premises and the prohibition of confiscation and copying connected to people who, according to legislation, either have the obligation or the right to remain silent in a specific matter. In the Coercive Measures Act, there is a differentiation made between a general search of a domicile and a special search of a domicile. *A general search of a domicile* refers to a search of the premises which has the protection of domiciliary peace. *A special search of a domicile* refers to a search of premises in which it may be assumed that the object of the search would reveal information in respect of which a person referred to in chapter 17, section 20, subsection 1 of the Code of Judicial Procedure may refuse to testify in court proceedings in respect of which, on the basis of Chapter 7, section 3 of the Coercive Measures Act no confiscation or copying of a document may be directed.⁸⁹ According to the Constitutional Law Committee people referred to in the chapter include for example lawyers, doctors and journalists.⁹⁰ A general, or a special, search of premises may be conducted in an area occupied by a suspect in an offence under two conditions. First, if there is reason to suspect that an offence has been committed and that the most severe punishment enacted for the offence is imprisonment for at least six months, or if the matter being investigated is circumstances connected to the imposition of a corporate fine; and secondly, if it can be assumed that the search will disclose in connection with the offence under investigation an object, property, document, information or a

⁸⁹ The Coercive Measures Act 8:1 point 3

⁹⁰ The Constitutional Law Committee’s report 66/2010 vp, available here:
<https://www.eduskunta.fi/FI/vaski/sivut/trip.aspx?riiotype=ValtiopaivaAsiakirjat&docid=pevl+66/2010>
(accessed 28 February 2016, available only in Finnish)

circumstance that may be of significance in the investigation of the offence.⁹¹ A search representative shall be appointed by a court for a special search of a domicile in order to ensure that confiscation or copying is not directed at information referred to in subsection 3 of section 1.⁹²

The prohibition of confiscation and copying connected to people who have the obligation or the right to remain silent is also enacted in the Coercive Measures Act. According to section 3 of chapter 7, a document may not be confiscated or copied to be used as evidence if it can be assumed to contain material on which a journalist may refuse to testify. The document must also be in the possession of journalists or in the possession of a person in who has the obligation or the right to remain silent regarding the matter. In subsection 3 it is provided that a document may be confiscated or copied if the person may be required to testify on the basis of Chapter 17, section 20, subsection 1 of the Code of Judicial Procedure or if he or she may be required to respond to a question on the basis of section 20, subsection 2 of said code and the maximum punishment for the offence under investigation is imprisonment for at least six years.

9.3 Finnish legislation in the light of the ECHR case-law

The right to confidential communication has been the subject of several cases at the European Court of Human Rights. In cases dealing with journalists' right to protect their sources of information, the ECHR has laid down certain preconditions for the use of coercive means. Firstly, the applicable legislation enabling the use of coercive means must be accessible, i.e. citizens must be able to obtain information about the circumstances in which communications may be intercepted. According to ECtHR case-law, the requirements of "accessibility and foreseeability are satisfied by the knowledge of the criteria".⁹³ Also, according to the ECtHR a rule is considered "foreseeable" if it is "formulated with sufficient precision to enable any individual - if need be with appropriate advice - to regulate his conduct". With regard to secret surveillance measures, the Court emphasised that the "law" had to be particularly detailed.⁹⁴ It is also stated by the ECtHR that "tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a 'law' that is particularly precise. It is essential to have clear, detailed rules on the subject".⁹⁵ The ECtHR links the expression "in accordance with the law" to the criterion of foreseeability, referring to the "quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and compatible with the rule of law".⁹⁶ It is correspondingly stated by the ECtHR that

⁹¹ The Coercive Measures Act 8:2

⁹² The Coercive Measures Act 8:7

⁹³ *Liberty and Others v. The United Kingdom* 58243/00 para 15

⁹⁴ ECtHR *Amann v. Switzerland* 27798/95 para 56, see also *Malone v United Kingdom* 8691/79 para 66

⁹⁵ ECtHR *Amann v. Switzerland* 27798/95 para 56

⁹⁶ *Kopp v. Switzerland* 23224/94 para 55, see also *Malone v. The United Kingdom* 8691/79 para 67 and *Telegraaf Media Nederland Landelijke Media B.V. and Others v. Netherlands* 39315/06 para 90

the requirement of foreseeability is to be interpreted to mean that “the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence”.⁹⁷

The Parliamentary Ombudsman has criticised the criteria of being relatively broad and leaving wide discretion to decisions makers.⁹⁸ For example, telecommunication interception may be used “when there are grounds to suspect a person” of a certain crime.⁹⁹ The Parliamentary Ombudsman considers the threshold very low.¹⁰⁰ Respectively a special search of a domicile may be conducted if “there is reason to suspect that an offence has been committed”.¹⁰¹ The prerequisite of an “assumption” that the method will provide information in order to clarify an offence leaves wide discretion. The Finnish Institute of Criminology and Legal Policy has addressed that the reasoning given by the police and the customs in their interception permit applications has in general been of poor quality. In one third of the applications taken into consideration in the Institute’s research, the concrete reasoning was unclear and did not meet the quality requirements settled in the Supreme Court’s judgment KKO 2007:7.¹⁰² The Supreme Court has emphasised that it is insufficient if a district court refers only to information received from the civil servant. The court itself has to look into the facts and take care of a suspect’s legal protection.¹⁰³ The importance of looking into the facts was also stressed in the Supreme Court’s judgment KKO 2009:54. In this case, the permit on the use of technical interception was repealed. The applications were processed too rapidly and in most cases the decision was made within as a short amount of time as a day. The cursory processing can be considered to be in conflict with the requirement of detailed reasoning.

The rules are made more complex by the fact that it is unclear which of the lists are exhaustive. In the government bill HE 22/2010 vp, regarding the coercive measures act, the list of cases in which the use of telecommunication interception is allowed is deemed exhaustive.¹⁰⁴ With regard to other coercive measures there is no mention in the bill if lists are exhaustive or not.

9.4 Conclusion

⁹⁷ *Malone v. United Kingdom* 8691/79 para 67, see also *Kennedy v. The United Kingdom* 26839/05 para 140

⁹⁸ Parliamentary Ombudsman’s annual report (2011), available here: <http://www.oikeusasiamies.fi/dman/Document.phx%3FdocumentId%3Dxb16012102203265>, page 99 (accessed 22 February 2016, available only in Finnish)

⁹⁹ The Coercive Measures Act 10:3

¹⁰⁰ Parliamentary Ombudsman’s annual report (2011), page 99

¹⁰¹ Coercive Measures Act 8:2.1

¹⁰² Johanna Niemi and Virve-Maria de Godzinsky, *Telepakkokeinojen oikeussuojajärjestelmä* (Oikeuspoliittisen tutkimuslaitoksen tutkimuksia 2009), page 83 (available only in Finnish)

¹⁰³ Supreme Courts judgement KKO 2007:7 available here: <http://www.finlex.fi/fi/oikeus/kko/kko/2007/20070007> (available only in Finnish)

¹⁰⁴ Government’s bill 222/2010 vp, page 122 (available only in Finnish)

To date, there is no case law in Finland concerning the use of electronic surveillance or anti-terrorism laws in order to identify journalists' sources of information. Some case law exists on the obligation of journalists to disclose their sources but no case law exists specifically on the use of any coercive means or covert coercive means applied in order to identify journalists' sources. There are no statistics on which objectives have been attempted to reach with the use of coercive means.

Prior to the Coercive Measures Act reformation, it was stated by the Legal Affairs Committee and also stated in Government Bill 222/2010 vp that the legislation concerning preliminary investigation or court proceedings was complex, the norms concerning electronic surveillance were poorly applicable and the operative law caused problems in application and interpretation. The Parliamentary Ombudsman has criticized the norms of leaving too much space for discretion. Finally, the processing of applications has been criticized by the Finnish Institute of Criminology and Legal Policy. In this respect the foreseeability requirement has not been fulfilled. Nevertheless, journalists' right to protect their sources of can be considered to be enforced effectively. This may be the explanation why the question has not arisen in any Finnish court.

10. Can journalists rely on the encryption and anonymity online to protect themselves and their sources against surveillance?

10.1 Legislation

The right to privacy and confidential communication are strongly protected in Finland and the provisions addressing the right to privacy are laid down in The Constitution of Finland (731/1999). According to section 10 “[e]veryone's private life, honor and the sanctity of the home are guaranteed”. The secrecy of correspondence, telephony and other confidential communications is inviolable.”¹⁰⁵ Those provisions which concern the necessary limitation of secrecy of communications in crime investigation at trials and security checks, as well as during the deprivation of liberty, that threaten the security of the individual or society or the sanctity of the home must be laid down by an Act. For such a limitative provision to be enforced, concrete suspicion of a crime is required.¹⁰⁶

The Act on the Exercise of Freedom of Expression in Mass Media (460/2003) similarly provides protection on confidential communication. According to section 16: “[t]he originator of a

¹⁰⁵ The Constitution of Finland (731/1999) section 10, subsections 1 and 2

¹⁰⁶ Guidelines for developing Finnish legislation on conducting intelligence. A report of the Working Group (2015), available here: http://www.defmin.fi/files/3016/Suomalaisen_tiedustelulainsaadannon_suuntaviivoja.pdf, page 104 (accessed 20 February 2016, available only in Finnish)

message provided to the public, the publisher and the broadcaster are entitled to maintain the confidentiality of the source of the information in the message.” This means that the publisher, the broadcaster or a person who has become aware of the confidential information while in the service of the originator of the message, the publisher or the broadcaster, are entitled to maintain the confidentiality of the identity of the originator of the message.

These rules apply to both traditional and electronic communication. The duty to disclose confidential information in a pre-trial investigation or court proceedings is regulated separately. The Information Society Code (917/2014) in turn, which entered into force on January 1 2015, aims at ensuring the confidentiality of electronic communication and the protection of privacy.¹⁰⁷ The Code provides special protection for journalists' sources against corporate or association subscribers; according to section 151, an automatic search shall not be targeted nor traffic data shall be searched nor manually processed in order to find data on the originator of a specific message provided to the public, on a publisher or on a broadcaster.

An attempt at message interception is penalised in Finnish criminal law. According to the Criminal Code of Finland (38/1889) a person who unlawfully opens a letter or another closed communication addressed to another or hacks into the contents of an electronic or other technically recorded message which is protected from outsiders, or obtains information on the contents of a telephone call, telegram, transmission of text, images or data, or another comparable telemessage transmitted by telecommunications or on the transmission or reception of such a message shall be sentenced for *message interception* to a fine penalty or to imprisonment for at maximum two years.¹⁰⁸ The punishment for aggravated message interception is imprisonment for at most three years.¹⁰⁹ Finally, the Finnish Communications Regulatory Authority (Viestintävirasto) and The Finnish Data Protection Ombudsman (Tietosuojavaltuutettu) also supervise the right to confidential communication.

There is no legislation preventing journalists from using encryption to secure communication and to protect their sources of information.

10.2 ECtHR and Finnish case-law

The ECtHR case-law concerning journalist' and their sources' right to anonymity and encrypted communication online is not very extensive. In case *Telegraaf Media Nederland Landelijke Media B.V. and Others v. Netherlands* (39315/06), the ECtHR was of the opinion that the telephone tapping and surveillance of two journalists by the Netherlands security and intelligence services lacked a sufficient legal basis. The law did not provide adequate safeguards and “relevant and sufficient” reasons for the interference have not been given and therefore there had been a

¹⁰⁷ Information Society Code (917/2014) sec 1

¹⁰⁸ Criminal Code of Finland (38/1889) chapter 38, section 3

¹⁰⁹ Criminal Code of Finland (38/1889) chapter 38, section 4

violation of Articles 8 and 10 of the Convention.¹¹⁰ In *Goodwin v. The United Kingdom* (17488/90), the ECtHR ruled by a vote of eleven to seven that an imposition in a disclosure order which required a journalist to reveal the identity of a source violated the right to freedom of expression under Article 10 of the European Convention on Human Rights.¹¹¹ In *Sanoma Uitgevers B. V. v. The Netherlands* (38224/03), the ECtHR found that an order for a compulsory surrender of journalistic material containing information which could identify journalistic sources constitutes in itself an interference with the applicant company's freedom to receive and impart information under Article 10.1 §. However, case-law has not dealt with online protection itself.

No Finnish case-law exists, either concerning journalists' or their sources of information's right to confidential communication and anonymity online. There are no cases concerning attempts by a public authority to interfere in journalists' right to encryption and anonymity online. Since the case law is absent it can be argued that journalists' right to anonymity and encryption online has not been severely violated in Finland.

10.3 New intelligence initiative

Currently, there is no legislation regarding intelligence activity in Finland. In December 2013, the Ministry of Defence set up a working group with the objective to improve the national intelligence legislation, which, in September 2015, led to the Ministry of Justice to set its own working group in order to investigate and prepare a possible amendment of the Constitution.¹¹² This is due to a statement in the Ministry of Defence's working group report that it is not possible to approve the initiative without amending section 10 of the Constitution - which guarantees the right to privacy and the right to confidential communication. The amendment would be necessary because national security is not listed in subsection 3 of section 10 of the Constitution as one of the acceptable grounds of restricting confidential communication.¹¹³ In October 2015, the Ministry of the Interior placed an initiative to adopt intelligence legislation. Because of possible amendments of the Constitution, the initiative could have a great impact on

¹¹⁰ *Telegraaf Media Nederland Landelijke Media B.V. and Others v. Netherlands* (39315/06) para 82 and 132

¹¹¹ *Goodwin v. The United Kingdom* (17488/90) para 46

¹¹² Ministry of Justice's resolution (submitted 28.9.2015) available here: <http://www.oikeusministerio.fi/material/attachments/om/valmisteilla/lakihankkeet/kansainvalinenprosessioikeu/OY7fsDIMX/asettamispaatos.pdf> (accessed 27 February 2016, available only in Finnish)

¹¹³ Constitution of Finland (731/1999) Section 10 - The right to privacy

Measures encroaching on the sanctity of the home, and which are necessary for the purpose of guaranteeing basic rights and liberties or for the investigation of crime, may be laid down by an Act. In addition, provisions concerning limitations of the secrecy of communications which are necessary in the investigation of crimes that jeopardise the security of the individual or society or the sanctity of the home, at trials and security checks, as well as during the deprivation of liberty may be laid down by an Act. (subsection 3)

the Finnish judicial system and on journalists' right to protect their sources. According to the Ministry of the Interior, the objective of the initiative is to improve the level of national security by legislating civilian intelligence. The prospective bill would expand the Finnish Security Intelligence Services' (Suojelupoliisi) powers to gather information by means of person intelligence, data system and telecommunications intelligence.¹¹⁴

The initiative has invoked criticism from various parties. The Ministry of Transport and Communication left a dissenting opinion in which the Ministry stated that the means of internet surveillance defined in the initiative are ineffective in relation to the intended purposes and also harmful to business life and confidential communication¹¹⁵. Anyhow, the Ministry of Transport and Communications stresses that it is important to improve the scope of competency of national armed forces in intelligence activity and agrees it to be reasonable to improve person and data system intelligence against foreign states¹¹⁶. The Ministry of Transport and Communication also approves the expansion in police's powers so that it can be ensured that the police is capable of managing their tasks¹¹⁷. Furthermore, the Ministry suggests that Finland should actively promote international co-operation, especially in the European Union, in order to safeguard the right to confidential communication¹¹⁸. According to the Ministry of Defence's report, state authorities' and interest groups' experts have expressed their concern that for example, the internet intelligence suggested in the initiative would introduce a drastic transition in the Finnish judicial system and could lead to a decline in the trust of internet users. Intelligence should not result in limiting the journalists' right to protect their sources of information.¹¹⁹ The Federation of the Finnish Media Industry, Finnmedia (Viestinnän Keskusliitto), The Union of Journalists in Finland (UJF) (Suomen Journalistiliitto) and the Council for Mass Media (Julkisen sanan neuvosto) have also expressed their concerns about the reform.¹²⁰ These organisations have argued that the initiative's working group has not examined the initiative in the light of journalists' right to protect their sources of information and that

¹¹⁴ Ministry of the Interior's resolution (submitted 1.10.2015), available here:
http://www.intermin.fi/download/62772_tiedustelulainsaadanto_asettamispaatos_01102015.pdf?6e3780742d02d388 page 2 (accessed 27 February 2016, available only in Finnish)

¹¹⁵ Guidelines for developing Finnish legislation on conducting intelligence. A report of the Working Group (2015) page 110

¹¹⁶ Guidelines for developing Finnish legislation on conducting intelligence. A report of the Working Group (2015) page 110-111

¹¹⁷ Guidelines for developing Finnish legislation on conducting intelligence. A report of the Working Group (2015) page 117

¹¹⁸ Guidelines for developing Finnish legislation on conducting intelligence. A report of the Working Group (2015) page 113

¹¹⁹ Guidelines for developing Finnish legislation on conducting intelligence. A report of the Working Group (2015) page 104

¹²⁰ Press release of The Union of Journalists in Finland (UJF), available here:
<http://www.journalistiliitto.fi/site/assets/files/7838/verkkovalvontalausunto.pdf> (accessed 28 February 2016)

there is a need for better instruments in the prospective bill in order to secure the journalists' special position.¹²¹ It is stressed in the UJF statement that due to the changes proposed by the working group, it is possible (author's emphasis) that a source's identity may be revealed to public authorities¹²². The organizations have also criticized the Ministry of the Interior over the fact that while the Ministry has studied the initiative in the light of right to privacy they have not studied it in the light of freedom of expression which is protected by section 12 of the Constitution which in turn is equivalent to Article 10 of the ECHR.¹²³ It remains to be seen what the final wording of the bill will turn out to be, similar to its impact on the Finnish judicial system.

10.4 Conclusion

The right to confidential communication is protected by the Act on the Exercise of Freedom of Expression in Mass Media and by the Constitution effectively. All restrictions to this right must be laid down by an Act. There is no case-law regarding a public authority attempting to unlawfully interfere in journalists' or their sources' right to encryption and anonymity online. Correspondingly, there is no ECtHR nor Finnish case-law regarding journalists' or their sources' right to anonymity and to encrypted communication online. With regard to all of these facts, it appears that the right to confidential communication enjoys extensive protection and respect in Finland.

It is challenging to estimate the full impact and significance of the initiative on legislating intelligence and confidential communication. Should the initiative lead to amending section 10 of the Constitution, this might result in broader impact on the Finnish judicial system and on the respect over journalists' right to anonymity. The Ministry of Defence's working group report has invoked interesting discussion on the matter and on how Finland should place itself within the international context considering the protection of confidential communication.

¹²¹ Press release of Finmmedia, available here: <http://www.vkl.fi/ajankohtaista/tiedotteet/media> (accessed 28 February 2016, available only in Finnish)

[ala_muistuttaa_lahdesuojan_vaatimuksista_verkkoalvonnan_saantelyssa.6240.news](#) (accessed 28 February 2016, available only in Finnish)

¹²² Press release of The Union of Journalists in Finland (UJF), available here: <http://www.journalistiliitto.fi/site/assets/files/7838/verkkoalvontalausunto.pdf>, page 1 (accessed 28 February 2016, available only in Finnish)

¹²³ The Constitution of Finland (731/1999) Section 12 - Freedom of expression and right of 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.

11. Are whistle-blowers explicitly protected under law protecting journalistic sources? Is there another practice protecting whistle-blowers? Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

For the time being, whistle-blowers are guaranteed virtually no legal protection in Finland. According to research conducted by Transparency International, in 2013, there are also no official channels for whistle-blowers to use, no dedicated authorities to investigate the allegations made by whistle-blowers, no means of providing compensation for retribution nor specific penalties for retributions against them.¹²⁴ However, retributions against whistle-blowers may of course result in penalties depending on the form of retribution, but these laws are not directly connected to whistle-blowing.

According to the 2010 OECD report on the implementation of the OECD Anti-Bribery Convention in Finland, the Finnish authorities rely on some existing level of witness protection and the ability of unfairly dismissed employees to gain restitution through labor laws.¹²⁵ In the 2010 OECD report, the examiners recommended for Finland to introduce adequate mechanisms for the protection of whistle-blowers and also, once such mechanisms would have been made available, to subsequently raise awareness on these mechanisms. Unfortunately, this has not yielded anything concrete. In the follow-up report in 2013 it was noted that although having been discussed, the Finnish government had not adopted any rules to implement the OECD recommendation.¹²⁶ The OECD Working Group on Bribery last addressed the lack of development in a statement released on 24 February 2016.¹²⁷

The EU Anti-Corruption report notes the same as the OECD reports: The Finnish authorities rely on witness protection and labour laws. However, the report also points out that witness protection only provides a limited form of protection and labour laws are only of help should

¹²⁴Whistleblowing in Europe – Legal protection for whistle-blowers in the EU. Transparency International 2013. Retrieved at <https://issuu.com/transparencyinternational/docs/2013_whistleblowingineurope_en> (5.5.2016)

¹²⁵Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Finland, OECD October 2010. Retrieved at <<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Finlandphase3reportEN.pdf>> (5.5.2016)

¹²⁶Finland: Follow-up to the Phase 3 Report & Recommendations, OECD January 2013. Retrieved at <<http://www.oecd.org/daf/anti-bribery/FinlandPhase3WrittenFollowUpReportEN.pdf>>(5.5.2016)

¹²⁷Statement of the OECD Working Group on Bribery on Finland's limited implementation of the Anti-Bribery Convention, 24.2.2016. Retrieved at <<http://www.oecd.org/corruption/public-statement-on-finland-s-lack-of-implementation-of-the-anti-bribery-convention-2016.htm>>(5.5.2016)

the retribution be connected to a dismissal.¹²⁸ It is also noted in the EU report that several international organisations as well as non-governmental organizations (NGOs) have encouraged Finland to set up a protection regime for whistle-blowers.

Thus far, these recommendations have not resulted in any concrete action in Finland. Finland remains one of the few countries in Europe where there is virtually no legislation on the subject. It was highlighted in the 2014 report of the Committee on Ethics of State Civil Servants that the Council of Europe has issued several recommendations on whistle-blower protection and that those recommendations should be followed by Finland in order to ensure that wrongdoings are exposed.¹²⁹

12. Conclusions

Generally, this report did not find many problems with the protection of journalistic sources in Finland. The Finnish legislation and case-law is rather well-aligned with different recommendations, and the case-law of the European Court of Human Rights. The protection of journalistic sources is regulated very little in Finland, at least in comparison to most other jurisdictions. The protection of journalistic sources applies to everyone who provides information to the public, and is not dependent on the status or the profession of that person. This means that a professional journalist does not enjoy any particular privileges compared to, for example, an amateur blogger. Finnish journalists have also self-regulatory guidelines that address the protection of sources; however, these are not legally binding in the sense that they could be applied in courts.

Breaching the protection of sources has been limited to very particular set of cases in Finland. For this reason, there are few court cases dealing with this issue. Also, it is clear that in the few cases where protection of sources has been an issue, the attempts to breach it haven't been successful. The Finnish legislation is generally well in line with the Recommendation No R (2000) 7 and alternative means are preferred in criminal investigations and court procedures. However, a new intelligence legislation is being prepared in Finland and it still remains to be seen how this affects the protection of journalistic sources.

One field in which the Finnish legislation is incompatible with the recommendations of the Council of Europe, OECD etc. is the protection of whistle-blowers. Finnish legislation doesn't

¹²⁸ANNEX: Finland to the EU Anti-Corruption Report. Brussels, 3.2.2014 COM(2014) 38, Annex 26. Retrieved at <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_finland_chapter_en.pdf>

¹²⁹Valtion virkamiesseettisen toimikunnan raportti 3/2014. Valtiovarainministeriö helmikuu 2014, p. 44. Retrieved at <http://vm.fi/documents/10623/1107479/Valtion_virkamiesseettisen_toimikunnan_raportti_3_2014.pdf/ab866e15-a9af-456d-aca4-99b7b1c2e340>

provide any additional protection to whistle-blowers. This makes Finland one of the few countries in Europe that lack such protection.

In conclusion, the freedom of expression is quite well valued and protected in Finland. There remain certain problematic areas (such as whistle-blower protection) and some questions on future development. However, during the compilation process of this report, our research group found there to be no major issues in the sphere of freedom of expression and it is unlikely that there would be drastic changes to this in the near future.

13. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

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14. Table of provisions

Provisions in native language	Corresponding translation
<p>Suomen Perustuslaki 731/1999</p> <p>12 § Sananvapaus ja julkisuus</p> <p>Jokaisella on sananvapaus. Sananvapauteen sisältyy oikeus ilmaista, julkistaa ja vastaanottaa tietoja, mielipiteitä ja muita viestejä kenenkään ennakolta estämättä. Tarkempia säännöksiä sananvapauden käyttämisestä annetaan lailla. Lailla voidaan säätää kuvaohjelmia koskevia lasten suojelemiseksi välttämättömiä rajoituksia.</p> <p>Viranomaisen hallussa olevat asiakirjat ja muut tallenteet ovat julkisia, jollei niiden julkisuutta ole välttämättömien syiden vuoksi lailla erikseen rajoitettu. Jokaisella on oikeus saada tieto julkisesta asiakirjasta ja tallenteesta.</p> <p>9 luku Lainkäyttö</p> <p>98 § Tuomioistuimet</p> <p>Yleisiä tuomioistuimia ovat korkein oikeus,</p>	<p>The Constitution of Finland 731/1999</p> <p>Section 12 - Freedom of expression and right of access to information</p> <p>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 laid down by an Act. Provisions on restrictions relating to pictorial programmes that are necessary for the protection of children may be laid down by an Act.</p> <p>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.</p> <p>Chapter 9 - Administration of justice</p> <p>Section 98 - Courts of law</p> <p>The Supreme Court, the Courts of Appeal and the District Courts are the general</p>

<p>hovioukudet ja käräjäoukudet.</p> <p>Yleisiä hallintotuomioistuimia ovat korkein hallinto-oukeus ja alueelliset hallintoukudet.</p> <p>Tuomiovaltaa erikseen määrättyillä toimialoilla käyttävistä erityistuomioistuinten säädetään lailla.</p> <p>Satunnaisten tuomioistuinten asettaminen on kielletty.</p> <p>99 § Ylimpien tuomioistuinten tehtävät</p> <p>Ylintä tuomiovaltaa riita- ja rikosasioissa käyttää korkein oukeus sekä hallintolainkäyttöasioissa korkein hallintoukeus.</p> <p>Ylimmät tuomioistuimet valvovat lainkäyttöä omalla toimialallaan. Ne voivat tehdä valtioneuvostolle esityksiä lainsäädäntötoimeen ryhtymisestä.</p> <p>Laki sananvapauden käyttämisestä joukkoviestinnässä (460/2003)</p> <p>16 § Lähdesuoja ja oukeus anonyymiin ilmaisuun</p> <p>Yleisön saataville toimitetun viestin laatijalla sekä julkaisijalla ja ohjelmatoiminnan harjoittajalla on oukeus olla ilmaisematta, kuka on antanut viestin sisältämät tiedot.</p>	<p>courts of law.</p> <p>The Supreme Administrative Court and the regional Administrative Courts are the general courts of administrative law.</p> <p>Provisions on special courts of law, administering justice in specifically defined fields, are laid down by an Act.</p> <p>Provisional courts shall not be established.</p> <p>Section 99 - Duties of the Supreme Court and the Supreme Administrative Court</p> <p>Justice in civil, commercial and criminal matters is in the final instance administered by the Supreme Court. Justice in administrative matters is in the final instance administered by the Supreme Administrative Court.</p> <p>The highest courts supervise the administration of justice in their own fields of competence. They may submit proposals to the Government for the initiation of legislative action.</p> <p>Act on the Exercise of Freedom of Expression in Mass Media (460/2003)</p> <p>Section 16 - Confidentiality of sources and right to anonymous expression</p> <p>The originator of a message provided to the public, the publisher and the broadcaster are entitled to maintain the confidentiality of the source of the information in the message. In addition, the publisher and the broadcaster are entitled to maintain the</p>
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<p>Julkaisijalla ja ohjelmatoiminnan harjoittajalla on lisäksi oikeus olla ilmaisematta viestin laatijan henkilöllisyyttä.</p> <p>Edellä 1 momentissa tarkoitettu oikeus on myös sillä, joka on saanut mainituista seikoista tiedon ollessaan viestin laatijan taikka julkaisijan tai ohjelmatoiminnan harjoittajan palveluksessa.</p> <p>Velvollisuudesta ilmaista 1 momentissa tarkoitettu tieto esituskinnassa tai oikeudenkäynnissä säädetään erikseen.</p> <p>Rikoslaki 39/1889</p> <p>24 luku Yksityisyyden, rauhan ja kunnian loukkaamisesta (531/2000)</p> <p>8 § (13.12.2013/879)</p> <p>Yksityiselämää loukkaava tiedon levittäminen</p> <p>Joka oikeudettomasti</p> <p>1) joukkotiedotusvälinettä käyttämällä tai</p> <p>2) muuten toimittamalla lukuisten ihmisten saataville esittää toisen yksityiselämästä tiedon, vihjauksen tai kuvan siten, että teko on omiaan aiheuttamaan vahinkoa tai kärsimystä loukatulle taikka häneen kohdistuvaa halveksuntaa, on tuomittava yksityiselämää loukkaavasta tiedon levittämisestä sakkoon.</p>	<p>confidentiality of the identity of the originator of the message.</p> <p>Also a person who has become aware of the confidential information referred to in subsection (1) while in the service of the originator of the message, the publisher or the broadcaster is similarly entitled to maintain that confidentiality.</p> <p>Separate provisions apply to the duty to disclose confidential information referred to in subsection (1) in a pre-trial investigation or court proceedings.</p> <p>The Criminal Code of Finland 39/1889</p> <p>Chapter 24 - Offences against privacy, public peace and personal reputation (531/2000)</p> <p>Section 8 – Dissemination of information violating personal privacy (879/2013)</p> <p>(1) A person who unlawfully.</p> <p>(1) through the use of the mass media, or</p> <p>(2) otherwise by making available to many persons disseminates information, an insinuation or an image of the private life of another person, so that the act is conducive to causing that person damage or suffering, or subjecting that person to contempt, shall be sentenced for dissemination of information violating personal privacy to a fine.</p> <p>(2) The spreading of information, an insinuation or an image of the private life of</p>
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Yksityiselämää loukkaavana tiedon levittämisenä ei pidetä sellaisen yksityiselämää koskevan tiedon, vihjauksen tai kuvan esittämistä politiikassa, elinkeinoelämässä tai julkisessa virassa tai tehtävässä taikka näihin rinnastettavassa tehtävässä toimivasta, joka voi vaikuttaa tämän toiminnan arviointiin mainitussa tehtävässä, jos esittäminen on tarpeen yhteiskunnallisesti merkittävän asian käsittelemiseksi.

Yksityiselämää loukkaavana tiedon levittämisenä ei myöskään pidetä yleiseltä kannalta merkittävän asian käsittelemiseksi esitettyä ilmaisua, jos sen esittäminen, huomioon ottaen sen sisältö, toisten oikeudet ja muut olosuhteet, ei selvästi ylitä sitä, mitä voidaan pitää hyväksyttävänä.

9 § (13.12.2013/879) Kunnianloukkaus

Joka

1) esittää toisesta valheellisen tiedon tai vihjauksen siten, että teko on omiaan aiheuttamaan vahinkoa tai kärsimystä loukatulle taikka häneen kohdistuvaa halveksuntaa, taikka

2) muuten kuin 1 kohdassa tarkoitetulla tavalla halventaa toista, on tuomittava kunnianloukkauksesta sakkoon.

Kunnianloukkauksesta tuomitaan myös se, joka esittää kuolleesta henkilöstä valheellisen tiedon tai vihjauksen siten, että teko on omiaan aiheuttamaan kärsimystä ihmiselle, jolle vainaja oli erityisen läheinen.

Edellä 1 momentin 2 kohdassa tarkoitettuna

a person in politics, business, public office or public position, or in a comparable position, does not constitute dissemination of information violating personal privacy, if it may affect the evaluation of that person's activities in the position in question and if it is necessary for purposes of dealing with a matter of importance to society.

(3) Presentation of an expression in the consideration of a matter of general importance shall also not be considered dissemination of information violating personal privacy if its presentation, taking into consideration its contents, the rights of others and the other circumstances, does not clearly exceed what can be deemed acceptable.

Section 9 - Defamation (879/2013)

(1) A person who

(1) spreads false information or a false insinuation of another person so that the act is conducive to causing damage or suffering to that person, or subjecting that person to contempt, or

(2) disparages another in a manner other than referred to in paragraph (1) shall be sentenced for defamation to a fine.

(2) Also a person who spreads false information or a false insinuation about a deceased person, so that the act is conducive to causing suffering to a person

<p>kunnianloukkauksena ei pidetä arvostelua, joka kohdistuu toisen menettelyyn politiikassa, elinkeinoelämässä, julkisessa virassa tai tehtävässä, tieteessä, taiteessa taikka näihin rinnastettavassa julkisessa toiminnassa ja joka ei selvästi ylitä sitä, mitä voidaan pitää hyväksyttävänä.</p> <p>Kunnianloukkauksena ei myöskään pidetä yleiseltä kannalta merkittävän asian käsittelemiseksi esitettyä ilmaisua, jos sen esittäminen, huomioon ottaen sen sisältö, toisten oikeudet ja muut olosuhteet, ei selvästi ylitä sitä, mitä voidaan pitää hyväksyttävänä.</p> <p>10 § (13.12.2013/879) Törkeä kunnianloukkaus</p> <p>Jos 9 §:n 1 momentissa tarkoitettussa kunnianloukkauksessa aiheutetaan suurta kärsimystä tai erityisen suurta vahinkoa ja rikos on myös kokonaisuutena arvostellen törkeä, rikoksentekeijä on tuomittava törkeästä kunnianloukkauksesta sakkoon tai vankeuteen enintään kahdeksi vuodeksi.</p> <p>38 luku (21.4.1995/578) Tieto- ja viestintärikoksista</p> <p>3 § (10.4.2015/368)</p> <p>Viestintäsalaisuuden loukkaus</p>	<p>to whom the deceased was particularly close, shall be sentenced for defamation.</p> <p>(3) Criticism that is directed at a person's activities in politics, business, public office, public position, science, art or in comparable public activity and that does not obviously exceed the limits of propriety does not constitute defamation referred to in subsection 1(2).</p> <p>(4) Presentation of an expression in the consideration of a matter of general importance shall also not be considered defamation if its presentation, taking into consideration its contents, the rights of others and the other circumstances, does not clearly exceed what can be deemed acceptable.</p> <p>Section 10 - Aggravated defamation (879/2013)</p> <p>If, in the defamation referred to in section 9(1), considerable suffering or particularly significant damage is caused and the defamation is aggravated also when assessed as a whole, the offender shall be sentenced for aggravated defamation to a fine or to imprisonment for at most two years.</p> <p>Chapter 38. Data and communications offences (578/1995)</p> <p>Section 3 - Message interception (368/2015)</p> <p>(1) A person who unlawfully</p>
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<p>Joka oikeudettomasti</p> <p>1) avaa toiselle osoitetun kirjeen tai muun suljetun viestin taikka suojauksen murtaen hankkii tiedon sähköisesti tai muulla vastaavalla teknisellä keinolla tallennetusta, ulkopuoliselta suojatusta viestistä taikka</p> <p>2) hankkii tiedon televerkossa tai tietojärjestelmässä välitettävänä olevan puhelun, sähkeen, tekstin-, kuvan- tai datasiirron taikka muun vastaavan televiestin sisällöstä taikka tällaisen viestin lähettämisestä tai vastaanottamisesta, on tuomittava viestintäsalaisuuden loukkauksesta sakkoon tai vankeuteen enintään kahdeksi vuodeksi.</p> <p>Yritys on rangaistava.</p> <p>4 § (21.4.1995/578) Törkeä viestintäsalaisuuden loukkaus</p> <p>Jos viestintäsalaisuuden loukkauksessa</p> <p>1) rikoksenteekijä käyttää rikoksen tekemisessä hyväksi asemaansa sähköisen viestinnän tietosuojalaissa (516/2004) tarkoitetun teleyrityksen palveluksessa tai muuta erityistä luottamusasemaansa, (16.6.2004/517)</p> <p>2) rikoksenteekijä käyttää rikoksen tekemistä varten suunniteltua tai muunnettua tietojenkäsittelyohjelmaa tai teknistä erikoislaitetta tai rikos muuten tehdään erityisen suunnitelmallisesti taikka</p> <p>3) rikoksen kohteena oleva viesti on sisällöltään erityisen luottamuksellinen</p>	<p>(1) opens a letter or another closed communication addressed to another or by hacking obtains information on the contents of an electronic or other technically recorded message which is protected from outsiders, or</p> <p>(2) obtains information on the contents of a telephone call, telegram, transmission of text, images or data, or another comparable telemessage transmitted by telecommunications or an information system or on the transmission or reception of such a message shall be sentenced for message interception to a fine or to imprisonment for at most two years.</p> <p>(2) An attempt is punishable.</p> <p>Section 4 - Aggravated message interception (578/1995)</p> <p>(1) If in the message interception</p> <p>(1) the offender commits the offence by making use of his or her position in the service of a telecommunications company, as referred in the Act on the Protection of Electronic Messages (516/2004) or his or her other special position of trust, (517/2004)</p> <p>(2) the offender commits the offence by making use of a computer program or special technical device designed or altered for such purpose, or otherwise especially methodically, or</p> <p>(3) the message that is the object of the offence has an especially confidential content or the act constitutes a grave</p>
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<p>taikka teko huomattavasti loukkaa yksityisyyden suojaa</p> <p>ja viestintäsalaisuuden loukkaus on myös kokonaisuutena arvostellen törkeä, rikoksentehtyjä on tuomittava törkeästä viestintäsalaisuuden loukkauksesta vankeuteen enintään kolmeksi vuodeksi.</p> <p>Yritys on rangaistava.</p> <p>Oikeudenkäymiskaari (4/1734)</p> <p>17 luku (12.6.2015/732) Todistelusta</p> <p>20 § (12.6.2015/732)</p> <p>Sananvapauden käyttämisestä joukkoviestinnässä annetussa laissa (460/2003) tarkoitettu yleisön saataville toimitetun viestin laatija taikka julkaisija tai ohjelmatoiminnan harjoittaja saa kieltäytyä todistamasta siitä, kuka on antanut viestin perusteena olevat tiedot tai laatinut yleisön saataville toimitetun viestin.</p> <p>Tuomioistuimien voi velvoittaa 1 momentissa tarkoitettua henkilön todistamaan, jos syyttäjä ajaa syytettyä rikoksesta, josta säädetty ankara rangaistus on vähintään kuusi vuotta vankeutta tai joka koskee salassapitovelvollisuuden rikkomista rangaistavaksi säädetyllä tavalla.</p> <p>Esitutkintalaki (805/2011)</p>	<p>violation of the protection of privacy.</p> <p>and the message interception is aggravated also when assessed as a whole, the offender shall be sentenced for aggravated message interception to imprisonment for at most three years.</p> <p>(2) An attempt is punishable.</p> <p>Code of Judicial Procedure (4/1734)</p> <p>Chapter 17 - Evidence (732/2015)</p> <p>Section 20</p> <p>(1) The originator of a message provided to the public, the publisher or the broadcaster referred to in the Act on the Exercise of Freedom of Expression in Mass Media (460/2003) may refuse to testify about who had been the source of the information in the message or about who had prepared a message provided to the public.</p> <p>(2) The court may oblige a person referred to in subsection 1 to testify if the prosecutor has brought charges for an offence for which the maximum sentence is imprisonment for at least six years or that concerns violation of an obligation of confidentiality in a manner which according to law is punishable.</p> <p>Criminal Investigation Act (805/2011)</p>
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<p>7 luku Kuulustelut</p> <p>8 § (12.6.2015/736) Todistajan ilmaisuvelvollisuus ja kieltäytyminen todistamasta</p> <p>Todistajan on totuudenmukaisesti ja mitään salaamatta ilmaistava, mitä hän tietää tutkittavasta asiasta. Jos hän kuitenkin olisi tutkittavaa rikosta koskevassa oikeudenkäynnissä oikeudenkäymiskaaren 17 luvun 10–14 §:n, 16–21 §:n taikka 22 §:n 1 ja 2 momentin nojalla oikeutettu tai velvollinen kieltäytymään todistamasta, hän on vastaavasti oikeutettu tai velvollinen siihen myös esitutkinnassa.</p> <p>Sen estämättä, mitä 1 momentissa säädetään todistajan oikeudesta tai velvollisuudesta kieltäytyä todistamasta, todistaja on kuitenkin velvollinen todistamaan, jos:</p> <p>1) oikeudenkäymiskaaren 17 luvun 11 §:n 2 tai 3 momentissa, 12 §:n 1 tai 2 momentissa, 13 §:n 1 tai 3 momentissa, 14 §:n 1 momentissa taikka 16 §:n 1 momentissa tarkoitettu henkilö, jonka hyväksi salassapitovelvollisuus on säädetty, suostuu todistamiseen;</p> <p>2) tutkittavana on rikos, josta säädetty ankarin rangaistus on vähintään kuusi vuotta vankeutta, taikka tällaisen rikoksen yritys tai osallisuus siihen, ja tuomioistuimien voisi tutkittavaa rikosta koskevassa oikeudenkäynnissä velvoittaa todistamaan oikeudenkäymiskaaren 17 luvun 12 §:n 3 momentin, 13 §:n 2 tai 3 momentin, 14 §:n 2 momentin taikka 20 §:n 2 momentin nojalla;</p> <p>3) tutkittavana on rikos, josta oikeudenkäymiskaaren 17 luvun 9 §:n 3 momentin nojalla tuomioistuimissa ei olisi</p>	<p>Chapter 7 – Questioning</p> <p>Section 8 – The obligation of a witness to provide evidence and refusal to testify (736/2015)</p> <p>(1) A witness shall truthfully and without concealment state what he or she knows in the matter under investigation. However, if he or she would have the right or the obligation in the criminal proceedings concerning the matter to refuse to testify, in accordance with Chapter 17, sections 10 – 14, 16 – 21 or 22(1) or 22(2) of the Code of Judicial Procedure, he or she has said right or obligation also in the criminal investigation.</p> <p>(2) Notwithstanding what is provided in subsection 1 on the right or obligation of a witness to refuse to testify, a witness is required to testify if:</p> <p>(1) the person in whose benefit the secrecy obligation has been provided, as referred to in Chapter 17, section 11(2) or 11(3), section 12(1) or 12(2), section 13(1) or 13(3), section 14(1) or section 16(1) of the Code of Judicial Procedure, consents to the testimony;</p> <p>(2) the offence under investigation is punishable with a maximum of imprisonment for at least six years, or attempt of or participation in such an offence, and in criminal proceedings concerning the offence the court could require testimony in accordance with Chapter 17, section 12(3), section 13(2) or 13(3), section 14(2) or section 20(2) of the Code of Judicial Procedure;</p>
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oikeutta tai velvollisuutta kieltäytyä todistamasta, eikä todistaja ole mainitun luvun 20 §:n 1 momentissa tarkoitettu henkilö.

Todistaja on velvollinen myös esittämään hallussaan olevan, esitutkinnan kannalta merkityksellisen asiakirjan tai muun todistusaineiston, jos se voitaisiin pakkokeinoin luvun 1 §:n mukaan takavarikoida eikä takavarikoimiselle ole mainitun luvun 3 §:ssä säädettyä estettä.

Todistajaan, joka on epäiltyyn oikeudenkäymiskaaren 17 luvun 17 §:n 1 momentissa tarkoitettussa suhteessa, ei sovelleta, mitä tämän pykälän 2 ja 3 momentissa säädetään.

Tietoyhteiskuntakaari (917/2014)

1 § Lain tavoitteet

Lain tavoitteena on edistää sähköisen viestinnän palvelujen tarjontaa ja käyttöä sekä varmistaa, että viestintäverkkoja ja viestintäpalveluja on kohtuullisin ehdoin jokaisen saatavilla koko maassa. Lain tavoitteena on lisäksi turvata radiotaajuuksien tehokas ja häiriötön käyttö sekä edistää kilpailua ja varmistaa, että viestintäverkot ja -palvelut ovat teknisesti kehittyneitä, laadultaan hyviä, toimintavarmoja ja turvallisia sekä hinnaltaan edullisia. Lain tavoitteena on myös turvata sähköisen viestinnän luottamuksellisuuden ja yksityisyyden

(3) the offence under investigation is one in which, in accordance with Chapter 17, section 9(3), the witness does not have the right or obligation to refuse to testify in court, and the witness is not a person referred to in section 20(1) of said Chapter.

(3) A witness is also required to produce a document or other evidence in his or her possession that is of significance for the criminal investigation, if it could be confiscated in accordance with Chapter 7, section 1 of the Coercive Measures Act and there are no bars to confiscation as provided in section 3 of said Chapter.

(2) What is provided in subsections 2 and 3 of this section do not apply to a witness who is related to the suspect in the manner referred to in Chapter 17, section 17(1) of the Code of Judicial Procedure.

Information Society Code (917/2014)

Section 1 Objectives of the Act

The objective of the Act is to foster the supply and use of electronic communications services and to ensure that everyone across Finland has access to communications networks and services at reasonable conditions. A further objective of the Act is to secure the efficient and interference-free use of radio frequencies, to foster competition, and to ensure that communications networks and services are technologically advanced, of high quality, reliable, safe, and inexpensive. This Act also aims to ensure the confidentiality of electronic communication and the

suojan toteutuminen.

protection of privacy.

(All original texts and translations are retrieved from www.finlex.fi)

ELSA GEORGIA

Contributors

National Coordinator

Tamta Megrelishvili

National Academic Coordinator

Tinatin Ramishvili

National Researchers

Nana Edisherashvili

Darejan Ozmanovi

Ketevan Mchedlishvili

Ana Ghambashidze

Ani Mikiashvili

Nino Vashakmadze

Sophiko Chikhladze

Shorena Kokorashvili

Tamar Kapanadze

Mari Molashvili

Natia Mindadze

Mariam Tsereteli

National Linguistic Editors

Irakli Gobadze

Mariam Khundadze

Inga Beridze

Tea Iremadze

National Academic Supervisor

Ketevan Buadze

Introduction

The Georgian government signed international agreements and entered national legislation into force, which means that the government is strong enough to govern the “new nation”. However, some progress was made during 2011 in media regulation and ownership transparency, but the state’s influence over the broadcast media remains a concern.

Georgia became the member of the European Convention of Human Rights in 1989, which means that the government is responsible to protect not only rights written in national legislation but the ones, protected by the convention as–well. Case–law of the European Court of Human Rights is to assist judges, prosecutors and lawyers to take account of the requirements of the convention when interpreting Codes and or related legislation.

At an individual level, freedom of expression is key to the development, dignity and fulfillment of every person. At a national level, freedom of expression is necessary for good governing system and therefore for economic and social progress. For all these reasons, the Georgian community has recognised the freedom of expression and the freedom of information as some of the most important human rights.

In the following document, we—as national researchers are going to provide you with the information about how Georgian society meets international standards and protects the freedom of expression on the national level.

1. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

The Constitution of Georgia

On the 24th of August, 1995, the Georgian government entered the Georgian constitution into force. This was the very first step from which the country recognised the general principles of international law including the freedom of speech and the values most of the countries with a democratic social order, economic freedom, a rule of law based social states share.

Only the individual who is fully aware of the rights she/he can be considered as an active member of the society. Each of us has the right to receive and impart the information and the right mentioned above cannot be limited because of the content of spreading information.

The legal definition of the freedom of expression can be found in Article 24 as well as in Article 19 of the constitution that reads as follows – “everyone has the right to freedom of speech, thought, conscience, religion and belief. The persecution of a person on the account of her/his speech, thought, religion or belief as well as the compulsion to express her/his opinion about them shall be impermissible.”

By taking into consideration the fact that article 24 is more general and expresses the idea of receiving and spreading the information, on the other hand, article 19 concretely defines the kind of information and beliefs that can be imparted or received.

The second paragraph of article 24 focuses on the protection of mass media, specifically: “mass media shall be free. The censorship shall be impermissible.” Mass media companies cannot be the victim of subjective discrimination, meaning and only one company cannot be allowed to spread specific information.

It is clear that the violation of rights because of the content of spreading information would be considered as discrimination. It is logical that when the right to impart the information is limited because of the contest that may negatively effect on society’s attitude towards government is a direct discrimination, because making detraction against thing, based on category which thing is perceived to belong rather than on individual merit is the clear example of direct discrimination. As law defines–“mentioned constitutional laws are thought to be the negative kind of human rights that protect her /his right not to express and spread information, thoughts, even facts according to a literature. So journalistic right to keep silence and not to divulge professional secret, even a source of information as the source of information is also protected under the law. He/she can use any means of dissemination of information.”

Constitutional law is the highest ranking legal instrument which provides a general regulation of the freedom of expression that are specified by the law of Georgia on the freedom of expression. The law gives a legal definition of “media” meaning “a print or electronic means of mass communication, including Internet.”

Law of Georgia on Mass Communication

One of the most important legal act concerning the topic is the Law of Georgia on mass communication. The law aims to prevent society from receiving incorrect information and journalists while spreading news.

Article 21 states: “a journalist is the person, who collects, creates, edits and prepares materials to publish it in any means of mass communication. Therefore, he/she has some conformable persuasion or represents journalists’ registered membership.”

According to the second paragraph of the article– regulating rules must follow the principles determined by the international federation of journalists:

1. To search, receive and impart information.
2. To enter in any establishment to accomplish her/his professional duty.
3. To record and write information by any means.
4. To attend and actively broadcast mass events, etc.

The aforementioned definition is considered to be less complete. The vast majority of lawyers talks about the importance of concretizing and specifying it. It is worth mentioning that the law doesn't consist enough regulations for the police to and other enforcement officials to identify a journalist.

Code of Conduct for Public Broadcasting

Georgian public broadcaster established conduct standards in the Code of Conduct for Public Broadcasting According to the regulations, a journalist should be restrained and well-informed, his/her imparted information must be exhaustive and informational, facts and thoughts must be balanced, every thought and speech of any human must be broadcasted impartially.

A source is the most important point of a journalistic activity so it follows that protecting its confidentiality is in the spotlight. A journalist has the right not to disclose the source of information. According to observed media standards, a journalist is obliged to preserve the information about information's personality in case the source would deliver the information provided that his/her personality would be secreted. For his/her part, the journalist is obliged to keep "the promise" even if it is problematic for him/her. The source of the professional

Information is protected by the absolute privilege and no one has the power to demand to disclose it. During the litigation about the restriction on freedom of speech and expression, a defendant should not be obliged to betray the source of the confidential information. Even disclosure of confidential information is impermissible without the owner's consent or the court decision. The court only can demand to disclose the part of confidential information under its reasonable decision if the necessity of disclosure and it is proved with evidence. The disclosed information should be used only for the determined purpose.

Georgian Charter of Journalistic Ethics

Next to the above-mentioned legislation of Georgian, the Georgian charter of journalistic ethics, as the agreement between the journalists, is another instrument for protecting journalistic rights. Article 6 defines: "journalists have a moral responsibility not to disclose confidential sources." This principle is the right and the obligation for journalist to keep and protect confidential information and its source at the same time.

2. Is there, in domestic law, a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

Civil Code

The Civil Code of 1997 is one of the main achievements of the Country. This Act provides for civil liability forms of information, which is not true, violates the honor and dignity. The Code also provides for the dissemination of information obtained as a result of property or non-property damage compensation rules.

Civil Code, Article 18, paragraph 2 of this norm is thought incomplete disclosure of information about a person in such a way that the public the wrong impression according to research or fact, but this fact is not sufficient to establish liability, as it is necessary, in the form of publication of the information is incomplete contribute to a person's honor, dignity or business reputation. So, if you look at the harm, you will not be the person who cannot be held responsible for driving the information. Honour, dignity, business reputation of a person on the dissemination, containing an allegation of infringement of them by law or morality, wicked actions committed. There are some cases when incorrect information can result in a person's honour and dignity, the fact that the information may be already known to the public and therefore it is impossible to do any additional damage.

Civil Code, Article 18, paragraph 3 of this Article shall provide the list with the question arises whether the journalist responsible for accuracy when it essentially a public interest in connection with the public or the person has been released the information. The Supreme Court's Civil Chamber made an important explanation of speech and expression, as well as freedom of the press. The Supreme Court decision explains the expression of a democratic society and one of the fundamental basis for the development and self-fulfillment of the conditions for personal, so democracy society of freedom of expression can be restricted only rarely may prove to be necessary. The scope of such necessity is even more reduced when it comes to freedom of the press, freedom of the press as the very high cost of a democratic society and its limitations important explanations. There is the Strasbourg court's important explanation about human rights and fundamental freedoms. This practice is consistent with the standards established by the Ministry of Law, speech and freedom of expression.”

The Criminal Code: Article 154 of the journalist's professional activities hindering¹ and Criminal procedure code

According to the Criminal Procedure Code, the Criminal Procedure Code only partially recognizes the principle of confidentiality of sources. Article. 95 paragraph 2, “the court has the right to witness the obligation to release the journalists, if they have undertaken not to disclose the name of the author or the source of information and publication of content.” It turns out that the source of this information, the court grants a journalist. In fact, for this right, the journalist filed a motion to appeal to the court; otherwise he would be obliged to give evidence in the body. The law does not specify what criteria should be granted or not granted the privilege of confidentiality of journalists' sources. This means that in this case the Court's very wide discretionary powers are granted. It is also quite clear how to prove the journalist, whether it has to fulfill its obligation to keep confidential information from the source. Since the Code of Criminal Procedure, “the press and other mass media about” the law is taken much later, during the conflict of laws, it is given precedence over a. unfortunately, this important problem posed to “press and other media about the” law of the right to privacy enshrined in the full source-to-use.² The Criminal Code provides punishment for disclosure of secret information by a person who was responsible for this situation, or that the information is, in this situation, he won.... This article does not specify the disclosure of a journalist's exclusion, but it is clear the intention of the legislator with the flexibility, in order not to become necessary to list all the professions.

Article 157. Personal or family secrets, personal information or personal data in violation of life

In this article, the first, 2nd or 3rd part of the action Committed by a person, by position, professional activity or other circumstances, who has the duty to protect this secret or committing such action under use – of the act committed by a person, by position, professional activity or other circumstances, has the duty to protect this secret or committing such action under use – Punishable by imprisonment for a term of four to seven years, position or the right to operate from up to three years or without it.

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¹ *Criminal Code of Georgia*, the Parliament of Georgia, document number 2287, 22/07/1999, Georgia. <<https://matsne.gov.ge/ka/document/view/16426>> accessed 25 July 2016 [Georgian].

² *The Georgian Criminal Procedure Code*, the Parliament of Georgia, document number 1772 09/10/2009, Georgia, <<https://matsne.gov.ge/ka/document/view/90034>> accessed 25 July 2016 [Georgian].

Article 157. Personal or family secrets, personal information or personal data in violation of life

4. In this article, the first, second or third part of the action Committed by a person, by position, professional activity or other circumstances, who has the duty to protect this secret or committing such action under use - of the act committed by a person, by position, professional activity or other circumstances, has the duty to protect this secret or committing such action under use is punishable by imprisonment for a term of four to seven years, position or the right to operate from up to three years or without it.

Charter of speech and freedom of expression

Any professional journalist's rights and obligations arising from the right of the public to be informed about events and opinions. The Charter is based on the Council of Europe's "European Convention on Human Rights and Fundamental Freedoms" Article 10 of the Convention and the "International Federation of Journalists" by the "declaration of principles of conduct of Journalists." These principles of the code of conduct for journalists, who, transmit and disseminate information and comments on current events. Of the media to recognise and acknowledge the following principles of responsibility and commitment to this responsibility. Of legislation, the professional competence of their colleagues and discuss the possibility of the government or other force of any form of interference in the exercise of powers. Article 6 of the Charter, according to the journalist's moral obligation not to disclose information obtained in confidential source.

The topic involves sites of high public interest, but the fact that vast majority of society is interested, trust or distrust does not change the content of this article.

In confidence obtained reveal the source of information is unacceptable. Journalism Ethics also calls upon the media, special caution illegally obtained secret information on the video, even if the state authorities take over legacy and protect it depicted people, both as victims and perpetrators anonymity.

The Charter was created to ensure that the work of journalists have been regulated in accordance with the law. The Charter is self-regulating, it is not included in any kind of punitive measure, since it is contrary to the principle of self-regulation. In the case of a journalist violates the Charter of any principle, the Ethics Council shall meet and review all cases, hear the applicant and the defendant's position, and then decides whether the journalist had violated the Charter of the norm:

Article 8 of the Charter according to Subparagraph the Board of Ethics: "P" review proceedings in accordance with the Charter of ethical violations related statements;

Human Rights and the Fundamental Freedoms Convention

This regulation, Human Rights and the Fundamental Freedoms Convention, aims to defend human rights was signed in Rome in 1950.

Article 10³ regulates the freedom of expression: Everyone has the right to freedom of expression. This article includes freedom to have opinions and to receive and spread information and ideas without the interference of authority and regardless of the state's borders. International transparency according to Georgia's published data: in the last year and a half in terms of media pluralism in Georgia has significantly improved and there are no cases of pressure and violence. But still, before the 2012 parliamentary elections was a case of Violence, abuse, pressure against journalists that has remained uninvestigated. Violation of journalist's rights and the lack of qualifications is a major problem when evaluating the state of the media named in the Ombudsman's annual reports. In 2013, the Public Defender's Office that studied cases, showed the results that the performance of illegal acts, including 2012 cases (pre-election period) by law enforcement agencies, had the right qualifications of the cases. However, as the report says, observance of the cases of violent activities, show that the investigative authorities are reluctant to act under Article 154 of the Criminal Code, regarding to evaluate actions such as the injury intentionally caused to health, beating or hooliganism.

The recommendation of the minister committee of European Union includes the right of the member states' journalist's not to disclose their sources of information. (Adopted by the European Committee on 8 March 2000 by the Ministers' Deputies) created for common purpose, for the unity of the member state's goals, common interests and ideals. This recommendation takes account of the obligations. Member states have the obligation to protect journalists' right of expression, which is guaranteed by Article 10. Recommendation highlights the fact that freedom of expression is the foundation of a democratic society and its progress, as well as each individual's development (freedom of expression Declaration of 1982) Recommendation recognises the necessity of the journalist's freedom and the protection of their sources for the development of the society. Aforementioned document protects not only journalists' right to transmit information but public's right to receive information— as well .journalists' sources and this is the main expression of their Recommendation defines the terms: “Journalist”, “information”, “source”. “Journalist” is a natural or legal person who is regularly or professionally spreading the information for the public. “Information” is any fact which is reflected in written, audio or imaging means. “Source” is the person who gives the information to the journalist.

Media freedom, professionalism and pluralism to raise the European Union and the Council of Europe project “Media freedom, professionalism and pluralism improvement” aims to increase

³Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 4 November 1950, Rome, <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 25 July 2016 [English].

the professionalism and responsibility of the media, regulators and the public broadcaster's independence broadcaster strengthening.⁴

- Professionalism among journalists, responsibility and ethics towards the strengthening of respect for journalists' rights and professional codes of ethics and continuing to raise awareness;
- The education and training to improve the quality of individual rights and duties of journalists;
- Media coverage of minority groups and professional activities related to the strengthening of intolerance and hate speech;
- Broadcast regulators and the public broadcaster's independence continued support; media reports and other means in accordance with Article 24 of the Law, a journalist is obliged to protect the privacy of the persons providing the information. If the source is anonymous journalist's responsibility, then, of course, no one can oblige him to disclose this information.

Since the Code of Criminal Procedure, “the press and other mass media about” the law is taken much later, during the conflict of laws, it is given precedence over a. unfortunately, this important problem posed to “press and other mass media about the” law of the right to privacy enshrined in the full source—to-use.⁵

Media Development Fund—date: 23 Dec 2015

The courts should take into account the public interest in the case of journalists.

On December 22, the OSCE Representative on Freedom of the Mijatovic Austrian court's decision, under which the owner of the online information portal to 2 000 euros to pay for shelter in the center of unauthorized entry. Mijatovic's view, this decision may influence the media's ability to effectively take up the high public interest in the events.

“Journalists must be able to cover the high public interest in the issues of undue restriction or without fear of punishment. The use of private property rights to punish the journalists who are covering the topics of discussion of high public interest, not justified” – said Mijatovic.

⁴ *Recommendation No. R (2000) 7*, Committee of Ministers, 8 March 2000, <<https://wed.coe.int/ViewDoc.jsp?Ref=Rec%282000%297&Language=lanEnglish&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>> accessed 25 July 2016 [English].

⁵ *Law of Georgia about Press and other mass media*, The Supreme Council of the Republic of Georgia, 10/08/1991, Georgia, (Dead Law), <<https://matsne.gov.ge/ka/document/view/32548>> accessed 25 July 2016 [Georgian].

In October 2014, the news portal online Dossier—'s journalists tried to visit refugees in asylum centers, including the preparation of the material living conditions. Once the owner has the right to enter the territory of the journalists refused, they were invited to the asylum seekers.

December decision of the Regional Court, said that journalists entering the building neither the owner, nor the refugee agency had no permission, thus violating their right to ownership.⁶

In the past two years, central and local government representatives to the regional media to put pressure on more than 15 cases were reported. "Transparency International – Georgia" continues to express the position of the cases on which it was possible to verify the information.

We believe that the tendency of harassment of journalists in the past year. If trends continue, the regional media significantly obstructed in the upcoming parliamentary elections in the proper coverage.

Regional media and journalists working in the regions of the facts of pressure on "Transparency International – Georgia" information in the media on the basis of the information collected. Employees also interviewed several representatives of the regional media. Naturally, this does not allow us to express the scale of the investigation or pressure on journalists for them to interfere in the activities of all facts. However, the following cases show that some of public figures do not specify the role of independent media.

Adjara: "Transparency International – Georgia" in several cases of interference in journalistic activities.

On September 1, 2015, visited the winery in the Public Broadcast of the Ministry of Agriculture officers verbally and physically abused.

Broadcaster, journalist during an interview with a representative of the Ministry of agreeing. Suknishvili Mirza explained that the journalist was drunk. Information about the fact that the journalist was drunk rejected the broadcaster's news department, Shorena Glonti. According to him, journalists, cameramen and reporters Samkharauli Bureau conducted an examination on the same day on alcohol, according to which none of them were under the influence of alcohol. The television at the request of the Prosecutor's Office to investigate the incident. Order of the Chairman of the Government, the disciplinary commission of inquiry before the end of Agriculture Deputy Minister Avtandil Meskhidze suspended.

⁶ *The Media Development Foundation (MDF)*, Post in 23 December 2015, Georgia, <http://www.mdfgeorgia.ge/geo/view_news/419> accessed 25 July 2016 [Georgian].

On September 30, the public broadcaster was carried away in the car of a stranger. Nino Commerce informed the relevant authorities about the kidnapping of a television. After several hours of questioning in Kobuleti police, journalist was demanded to change his testimony. On August 25, 2015, members of the Town Council of Kobuleti Iveri Gugunava newspaper “newspaper” “Free Democrats’ supported for the accused. Council members cited “the newspaper” by commercial orders within the “Free Democrats” party newspaper spread named.

In 2014, a journalist of the region to put pressure on the most prominent cases of the Supreme Council Medea Vasadze connected. “TV-25” Jaba Ananidze Medea Vasadze threatened him with the outcome, which is June 8, Ananidze copyright film “Top Comfort” aired. The film was about the costs incurred by the deputies of the Supreme Council.

Broadcast material later, the MP called the journalist and threatened. “TV-25” where the audio recording of the MP, media Vasadzis threats clearly heard their Web site disclosed.

Shortly after the Facebook page was created with the journalist Jaba Ananidze private life and dignity of photo and video material from being uploaded. “TV-25”, Director General of the Surnamidze demanding an investigation, the police on June 12 and addressed to the social network created to identify the authors of the page. Journalist pressure further, Medea Vasadze from the position of non-governmental organizations and journalists demanded.⁷

3. Who is a “journalist” according to the national legislation? Is it in your view a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media actors? Is the protection of journalists’ sources extended to anyone else?

There is not a strict definition of a Journalist in the national legislation. Journalist does not differ from the other citizen, who can get any desired information. The profession of journalist should be differed from the other person by the law. Despite, the first article of law of Georgia on Freedom of speech and Expression says that, “professional secret – the secret of confession, information disclosed to a member of Parliament, a member of the High Council of an Autonomous Republic, a doctor, journalist, human rights defender, or advocate with regard to their professional activity, as well as information of professional value, which became known to a person under the condition of privacy protection in relation to carrying out his/her professional duties and the disclosure of which may damage the person’s professional reputation; information, which does not contain any personal data, a state or trade secret, as well as

⁷*Transparency International – Georgia*, Post in 13 October 2015, Georgia. <<http://www.transparency.ge/node/5580>> accessed 25 July 2016 [Georgian].

information on an administrative body shall not be a professional secret”⁸, but there is not mentioned who is a journalist and what is the difference between him/her and the other citizen who can get confidential, public or professional information, without any “knowledge of journalism” and spread it through the media. Under the Journalism ethic code, which contains duties of the Journalist and is based on the article 10 of the convention of human rights and the declaration of principles on the conduct of journalists. All the duties, which journalists have to fulfill, are mentioned in this code, but, there is no definition who is a journalist. By law, it is a person, which works in Media, get and spread information, and makes comments about the current issues⁹. In spite of the fact, that there is no strict definition of a Journalist under the Georgian legislation, there is a statement in the law of Georgia On Assemblies and Demonstrations, that during Assembly and Demonstration, there must be a safe area for journalist, in order, for him/her to make his/her job in a proper way, but at that time journalist have to have some sign for the identification. It is another statement, what they mean in this sign.

There is mentioned, that the legislation of Georgia shall determine the responsibility for unlawfully obstructing journalists in their professional activities¹⁰. There is not strict definition, what is the sign for identification, or permission, by which he/she could implement its work.

Getting and spreading information by a journalist is linked to a duty freedom of speech and expression of a person.

By the decision of a supreme court, freedom of speech is a fundamental right in a democratic society, it is essential or development and realisation of yourself, and it is the reason why there is only a few examples of necessity of the restriction of the right of expression. Such necessity is reduced, when it relates to the freedom of press. The practice of the European court of human

⁸Article 1(n), Law of Georgia on Freedom of Speech and Expression, the Parliament of Georgia, 24/06/2004, Georgia. <<https://matsne.gov.ge/ka/document/view/33208?impose=translateEn>> accessed 25 July 2016 [English].

⁹Preamble, Code of Ethic, The SPJ Code of Ethics is voluntarily embraced by thousands of journalists, regardless of place or platform, and is widely used in newsrooms and classrooms as a guide for ethical behavior. The code is intended not as a set of “rules” but as a resource for ethical decision-making. It is not — nor can it be under the First Amendment — legally enforceable. The present version of the code was adopted by the 1996 SPJ National Convention, <<https://www.spj.org/pdf/ethicscode.pdf>> accessed 25 July 2016 [English].

¹⁰Article 2(4), Law of Georgia, On Assemblies and Demonstration, The Parliament of Georgia, 12/06/1997, Georgia, <<https://matsne.gov.ge/ka/document/view/31678?impose=translateEn>> accessed 25 July 2016 [English].

rights says that, the freedom of press has a high value for democratic society and restriction needs especial justification.¹¹

The journalists protect this value during their work. Firstly, they have to protect honor and dignity. It is under a question there should be a strict definition of a journalist and what connection is to the sources, which journalists use during the freedom of expression. A journalist has a right to protect the source of the information and not mention the person, by whom he/she got the confidential information. The confidentiality of the source is the main guarantee of the journalist's activity. Sometimes it is possible to be different motives for making information confidential, or maybe an applicant by his/her profession or the position in government does not want exposing himself/herself.

4. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

A journalist has a right not to disclose sources. Which means that legislation doesn't contain any article about ability to request to disclose, which means that if a journalist doesn't want to name the source none of governmental body or authority has the right to request disclosure.

Only self-regulatory mechanism that exists in Georgia is the Charter of journalistic ethics. More specifically this is a non-governmental organisation founded by journalists and the one, which wrote the charter, but it does not say anything about the source of information, request to disclose. To sum everything up concerning the issue, law does not regulate the topic, which is because of the fact that there is no necessity of limiting the right not to disclose.

In the dictionary, journalist is explained as a literate, and not as selfless person who is constantly under threat. Therefore, this fact signifies the importance of the protection provided by government, respective authorities and legal norms based on self-regulating mechanisms.

On the 17th of January 2009, the European Court of Human Rights took into the consideration the case: *Ramishvili and Kokhreidze V. Georgia*¹². The circumstances of the case were represented in the following way: Shalva Ramishvili and Davit Kokhreidze were the founders of the independent media group "MEDIA KOMPANIA" that included channel "TV-202". The abovementioned channel was supposed to air a programme with political elements. Based on the

¹¹ *Decision #56-1278-1298-2011*, Georgian supreme court, 20/02/2012, Georgia, <<http://www.supremecourt.ge/files/upload-file/pdf/1278-1298-2011.pdf>> accessed 25 July 2016 [Georgian].

¹² *Press Country Profile, Georgia*, European Court of Human Rights, Kast Updated July 2016. <http://www.echr.coe.int/Documents/CP_Georgia_ENG.pdf> accessed 25 July 2016 [English].

circumstances of the case, after contacting Mr. Ramishvili, one of the parliamentarians asked him to block the transmission of the firm. In return, Mr. Ramishvili requested payment of 10 000 USD (American dollars). Shalva Ramishvili and Davit Kokhreidze were arrested at the arranged meeting place for alleged use of bribery. Ministry brought criminal proceedings against the applicant on suspicion of extortion. Other ambivalent circumstances of the case are connected to the detention and conditions they were kept in. However, already existing facts makes it unambiguous that we face direct interference into political transmissions as well as an investigative journalism.

One of the main principles of democracy is positive and negative duties that governmental bodies have, meaning that governmental authorities is obliged to provide protection of journalist, without violating one's rights (Positive). Moreover, they should not contravene rights of journalists themselves (Negative). Then it is vague and arguable where the line between prescribed governmental norms and infringement of these norms is. What are the legal tools that protect journalistic sources if government openly violates the law?

According to the Criminal Procedure Code of Georgia,¹³ journalist is not obliged to be a witness in a case, if it has connection to his professional activity.¹⁴

Simultaneously, we have to admit the fact, that journalist is not obliged to indicate a source of information, while giving testimony at the specific case¹⁵. Criminal Procedure Code also indicates that testimony is considered inadmissible, when there is no sign of source of information. Although, this case is connected to one's professional activity, in the case of journalist; testimony can be used as indirect evidence. Despite the importance of the evidence, inexistence of indications about source of information creates the barrier in solving this case.

Information gathered during journalistic activity can be considered as a professional secret. There is a separate chapter concerning the protection of commercial or professional secret. Moreover, Article 11 of the code states that disclosure of information without acceptance of the source, gives the opportunity to request and claim any kind of compensation.

Beside respective legal norms, journalists are constantly trying to use, so called, self-regulating mechanisms in order to protect their own rights. Charter of Journalistic Ethics is one of the

¹³ Article 50(1), The Georgian Criminal Procedure Code, the Parliament of Georgia, document number 1772 09/10/2009, Georgia, <<https://matsne.gov.ge/ka/document/view/90034>> accessed 25 July 2016 [Georgian].

¹⁴ *Commentary on the Criminal Procedure Code of Georgia, Article 50*, Tumanishvili G., Tbilisi, 2015.

¹⁵ Article 143(7d), *The Georgian Criminal Procedure Code*, the Parliament of Georgia, document number 1772 09/10/2009, Georgia, <<https://matsne.gov.ge/ka/document/view/90034>> accessed 25 July 2016 [Georgian].

most effective mechanisms, which is based on European Convention of Human Rights, Article 10.¹⁶

It consist of preamble, main part and transitional provisions. In the preamble,¹⁷ it is stated that, journalists recognise and protect universally recognized human rights and supreme human values, which means that they are responsible for the protecting them while reporting. According to the act, journalist takes responsibility to spread information, even if the source of information is not mentioned. At the same time, information has to be truthful. In the case of spreading inaccurate information, one should correct it in a trustworthy manner.

5. In the respective national legislation are the limits of non–disclosure of the information in line with the principles of the Recommendation No R (2000) 7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

According to the Constitution of Georgia, there are no restrictions on freedom of speech and expression if it does not violate the rights of others. Under the Constitution, the restriction can be realised to protect national security, territorial integrity or public safety, for the prevention of crime, protection of the rights and dignity of others, for preventing disclosure of the information, which is received as confidential or for ensuring the independence and impartiality of the judiciary.¹⁸

¹⁶1.” 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”

¹⁷*Convention for the Protection of Human Rights and Fundamental Freedoms*, Council of Europe, 4 November 1950, Rome, <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 25 July 2016 [English].

¹⁸ *Article 24*, Constitution of Georgia, the Parliament of Georgian Republic, 28/08/1995, Georgia, <<https://matsne.gov.ge/ka/document/view/30346?impose=translateEn>> accessed 25 July 2016 [English].

Besides the Constitution, in our country the freedom of expression and the rights of others private space is protected by the Civil Code,¹⁹ the law on “Freedom of Speech and Expression”²⁰ and even The Criminal Code.²¹

According to the Article 3(2(d)) of the law on “Freedom of Speech and Expression,” freedom of expression includes the right of journalists to protect the source of information.²² By Article 11(1) of the same law, a secret source is protected by absolute privilege and no one has the right to demand disclosure of the source.²³ According to Article 12(3) of the same law, inviolability of private life and the protection of personal information may not be restricted freedom of expression, when there is importance of knowing some kind of information, which is necessary in democratic country for fulfilling public self-governance.²⁴

Obliging the journalist to reveal the source of information, is the violation of its freedom of expression. Interfering the freedom of expression illegally, performs an offense under Article 153 of the Georgian Criminal Code. Likewise, illegally hindering professional activities of journalists violates Article 154 of the Criminal Code. Consequently, if someone forces a journalist to spread the above information, it is possible for such action includes the signs of crime.²⁵ According to Article 158 of the Criminal Code, it is prohibited the use or distribution of illegal recordings of private communication. It is clear from the text, that the private communication records to use or dissemination is prohibited not in any case, but only when it illegally.²⁶ In order to define the legal spread of the issue, must look through the Broadcasting Code of Conduct for each

¹⁹ *Civil Code of Georgia*, the Parliament of Georgia, 26/06/1997, Georgia, <<https://matsne.gov.ge/ka/document/view/31702?impose=original>> accessed 25 July 2016 [Georgian].

²⁰ *Law of Georgia on Freedom of Speech and Expression*, the Parliament of Georgia, 24/06/2004, Georgia. <<https://matsne.gov.ge/ka/document/view/33208?impose=translateEn>> accessed 25 July 2016 [English].

²¹ *Criminal Code of Georgia*, the Parliament of Georgia, 22/07/1999, Georgia. <<https://matsne.gov.ge/ka/document/view/16426>> accessed 25 July 2016 [Georgian].

²² *Article 3(2(d))*, Law of Georgia on Freedom of Speech and Expression, the Parliament of Georgia, 24/06/2004, Georgia. <<https://matsne.gov.ge/ka/document/view/33208?impose=translateEn>> accessed 25 July 2016 [English].

²³ *Article 11(1)*, Law of Georgia on Freedom of Speech and Expression, the Parliament of Georgia, 24/06/2004, Georgia. <<https://matsne.gov.ge/ka/document/view/33208?impose=translateEn>> accessed 25 July 2016 [English].

²⁴ *Article 12(3)*, Law of Georgia on Freedom of Speech and Expression, the Parliament of Georgia, 24/06/2004, Georgia. <<https://matsne.gov.ge/ka/document/view/33208?impose=translateEn>> accessed 25 July 2016 [English].

²⁵ *Article 153, Article 154, Criminal Code of Georgia*, the Parliament of Georgia, document number 2287, 22/07/1999, Georgia. <<https://matsne.gov.ge/ka/document/view/16426>> accessed 25 July 2016 [Georgian].

²⁶ *Article 158, Criminal Code of Georgia*, the Parliament of Georgia, document number 2287, 22/07/1999, Georgia. <<https://matsne.gov.ge/ka/document/view/16426>> accessed 25 July 2016 [Georgian].

television and radio stations, which is adopted on the basis of the Article 2(h13) of the Broadcasting Law.²⁷

According to Article 18(2) of the Georgian Civil Code, A person has the right to demand through the court the retraction of information that defames its honour, dignity, privacy, personal inviolability or business reputation, if this information distributor does not prove that they are true.²⁸ The same rule applies to the incomplete publication, if it violates a person's honour, dignity or business reputation.²⁹ Thus, liability of the journalists should be brought in two cases:

- 1) If diffused information is incorrect – If it is determined that the information is correct, no responsibility will be raised.
- 2) If diffused information is incomplete – It is necessary, that incomplete information abases the person's honor, dignity or business reputation cause.³⁰

It should be noted, that if there will be no caused harm, needless speaking about the liability of spreading information.³¹

Consequently, it can be said, that our national legislation is in line with the Recommendation No R (2000) 7 while discussing this question.

6. According to the “Convention for the Protection of Human Rights and Fundamental Freedoms,” Each Human rights are reserved which has been reflected in many countries legislation among them is Georgia.

The law on “Freedom of Speech and Expression” stipulates, that the source of professional secrecy is protected by an absolute privilege³² and no one has the right to request to disclose such information.³³

²⁷ *Article 2(b13)*, Broadcasting Law, the Parliament of Georgia, 23/12/2004, Georgia, <<https://matsne.gov.ge/ka/document/view/32866?impose=original>> accessed 25 July 2016 [Georgian].

²⁸ *Article 18(2)*, Civil Code of Georgia, the Parliament of Georgia, 26/06/1997, Georgia, <<https://matsne.gov.ge/ka/document/view/31702?impose=original>> accessed 25 July 2016 [Georgian].

²⁹Ibid.

³⁰Ibid.

³¹Ibid.

³²*Article 3(2(a)), Article 4(1)*, Law of Georgia on Freedom of Speech and Expression, the Parliament of Georgia, 24/06/2004, Georgia. <<https://matsne.gov.ge/ka/document/view/33208?impose=translateEn>> accessed 25 July 2016 [English].

According to the Georgian Criminal Procedure Code, the journalist is not obliged to be a witness in connection with the information, which is received during professional activities.³⁴

The journalist is not authorised to reveal the source of information neither the police, nor the prosecutor's office nor the security service request. An exception is the case when there is adequate demand by the court. According to the Article 11(2) of the law on “Freedom of Speech and Expression”, it is impermissible to disclosure secret information even the permission of its owner without reasoned decision of the court.³⁵

Article 12 of the law on “Freedom of Speech and Expression” specifies a responsibility for the disclosure of a secret. According to this Article, “person shall be responsible only for the disclosure of a secret, protecting the confidentiality of which is either his/her official duty or the result of a civil agreement, and whose disclosure creates obvious, direct and essential danger for benefits protected by law.”³⁶ Also, Article 12 of the law on “Freedom of Speech and Expression” stipulates that “A person shall be released from responsibility if a secret has been disclosed for the purpose of protecting the legitimate interests of society, and if the benefits protected exceed the damage caused.”³⁷ Article 12(3) of the law on “Freedom of Speech and Expression” states that the freedom of expression, in relation to events, the knowledge of which is necessary for a person in order to execute public self-government in a democratic state may not be restricted for the purpose of personal life immunity and personal data protection.³⁸ Article 12 of the law on “Freedom of Speech and Expression” allows individuals to demand reimbursement for property and non-property (moral) damages caused by the violation of rights protected under this article.³⁹

³³Article 11(1), Law of Georgia on Freedom of Speech and Expression, the Parliament of Georgia, 24/06/2004, Georgia. <<https://matsne.gov.ge/ka/document/view/33208?impose=translateEn>> accessed 25 July 2016 [English].

³⁴Article 50(1(t)), The Georgian Criminal Procedure Code, the Parliament of Georgia, document number 1772 09/10/2009, Georgia, <<https://matsne.gov.ge/ka/document/view/90034>> accessed 25 July 2016 [Georgian].

³⁵Article 11(2), Law of Georgia on Freedom of Speech and Expression, the Parliament of Georgia, 24/06/2004, Georgia. <<https://matsne.gov.ge/ka/document/view/33208?impose=translateEn>> accessed 25 July 2016 [English].

³⁶Article 12(1), Law of Georgia on Freedom of Speech and Expression, the Parliament of Georgia, 24/06/2004, Georgia. <<https://matsne.gov.ge/ka/document/view/33208?impose=translateEn>> accessed 25 July 2016 [English].

³⁷Article 12(2), Law of Georgia on Freedom of Speech and Expression, the Parliament of Georgia, 24/06/2004, Georgia. <<https://matsne.gov.ge/ka/document/view/33208?impose=translateEn>> accessed 25 July 2016 [English].

³⁸Article 12(3), Law of Georgia on Freedom of Speech and Expression, the Parliament of Georgia, 24/06/2004, Georgia. <<https://matsne.gov.ge/ka/document/view/33208?impose=translateEn>> accessed 25 July 2016 [English].

³⁹Article 12(4), Law of Georgia on Freedom of Speech and Expression, the Parliament of Georgia, 24/06/2004, Georgia. <<https://matsne.gov.ge/ka/document/view/33208?impose=translateEn>> accessed 25 July 2016 [English].

In particular, Article 24 of the Constitution of Georgia⁴⁰ of the provisions on freedom of expression and Article 10 of the European Convention on Human Rights are similar with its content. Both these Articles are the main guarantors of freedom of speech, freedom of expression and free media in our country. However, Article 19 of the Constitution contain provision to protect the rights and values of the other people.

The international organisation “Article 19” estimates, that the law on “Freedom of Speech and Expression” is one of the most progressive step forward in Georgian legislation to protect freedom of expression in the country. According to their estimates, the law on “Freedom of Speech and Expression” establishes a high standard of freedom of expression, which is in line with the best international practices.⁴¹

Consequently, Georgian legislation meets the claims of the “Convention for the Protection of Human Rights and Fundamental Freedoms,” and the Recommendation No R (2000) 7 while reviewing freedom of speech and expression in our country.

7. In the light of the case law of the European Court of Human Rights how do national courts apply the respective laws with regard to the rights to protect sources? In particular, how do they balance the different interests at stake?

On the factsheet of the European court of human rights on Article 10⁴² of the European convention of Human Rights– Protection of journalistic sources. In the factsheet the court repeatedly emphasized the value of Article 10 of the convention and listed cases regarding this article.

“Protection of journalistic sources is one of the basic conditions for press freedom. ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public–watchdog role of the press may be

⁴⁰ *Constitution of Georgia*, the Parliament of Georgian Republic, 28/08/1995, Georgia, <<https://matsne.gov.ge/ka/document/view/30346?impose=translateEn>> accessed 25 July 2016 [English].

⁴¹ *Guide to the Law of Georgia on Freedom of speech and expression*, ARTICLE 19, April 2005, London, <<https://www.article19.org/data/files/pdfs/analysis/georgia-foe-guide-april-2005.pdf>> accessed 25 July 2016 [English].

⁴² *Protection of journalistic sources*, European Court of Human Rights, January 2016, <http://www.echr.coe.int/Documents/FS_Journalistic_sources_ENG.pdf> accessed 25 July 2016 [English].

undermined, and the ability of the press to provide accurate and reliable information be adversely affected.”⁴³

Georgian legislative system does not consist enough cases related to the topic. One of the most important fact (was not sued in the court) for the practice was against Rustavi 2. The channel broadcasted covert recordings without permission and journalists did not name the journalistic source.

Most of the authorities declared that the channel did not have a permission of not telling the name of a person who sent those recordings to the channel.

Similar case was sued in the European court of human rights *Goodwin v. the United Kingdom* – This case concerned a disclosure order imposed on a journalist (working for *The Engineer*) requiring him to reveal the identity of his source of information on a company’s confidential corporate plan. The applicant, a trainee journalist with *The Engineer* magazine, received information regarding the financial status of a company. The information was given by telephone from a source who wished to remain anonymous and appeared to come from a confidential corporate plan, one copy of which had gone missing. The company obtained orders preventing the applicant from disclosing the confidential information and for delivery up and, under s 10 Contempt of Court Act 1981, an order compelling the applicant to divulge the identity of his source. The applicant appealed unsuccessfully to the Court of Appeal and House of Lords. He refused to disclose his source and was fined £5,000 for contempt. He complained of a violation of Article 10 of the Convention.⁴⁴

The only important decision related to the topic was made by the constitutional court of Georgia *Akaki Gogichaishvili V. The Parliament of Georgia*⁴⁵ subject of the case was constitutionality of the second paragraph of article 18 of the civil code of Georgia and paragraph 1 of article 20 of The Law of Georgia “On the other means of press and Mass Information” in terms of paragraph 2 of article 19 of the constitution of Georgia.

The applicant was requiring that journalist must have been obliged to assert the truth of even the belief or an opinion he was spreading through a television.

⁴³*Goodwin v. the United Kingdom*, § 39, European Court of Human Rights, (Application no. 17488/90), judgment of 27 March 1996, Strasbourg, <[http://hudoc.echr.coe.int/eng?i%3D001-57974#{"itemid":\["001-57974"\]}](http://hudoc.echr.coe.int/eng?i%3D001-57974#{)> accessed 25 July 2016 [English].

⁴⁴*Goodwin v. the United Kingdom*, European Court of Human Rights, (Application no. 17488/90), judgment of 27 March 1996, Strasbourg, <[http://hudoc.echr.coe.int/eng?i%3D001-57974#{"itemid":\["001-57974"\]}](http://hudoc.echr.coe.int/eng?i%3D001-57974#{)> accessed 25 July 2016 [English].

⁴⁵*Citizen Akaki Gogichaishvili V. the Parliament of Georgia*, Constitutional Court of Georgia, 11 March 2004, Case number N2/1/241, Georgia, <<http://www.constcourt.ge/en/legal-acts/judgments/citizen-akaki-gogichaishvili-v-the-parliament-of-georgia-234.page>> accessed 25 July 2016 [English].

As an expert of the case – Konstantine Korkelia defined journalist cannot be obliged to assert anything except information. **Every person is free in having as well as expressing his/her own beliefs or opinion towards any case and it cannot be limited for the journalists.**⁴⁶ Otherwise it would be an example of discrimination. It is worth mentioning that if a journalist had been obliged to declare that what he is saying—meaning the opinion is based on information he has, he would not have a right of disclosure of a source.

The resolute part of the judgment reads as follows: Articles 20 of the civil code as well as the Law of Georgia “On the other means of press and Mass Information” are not in the collision of paragraph 2 of article 19⁴⁷ of the constitution of Georgia.

8. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists’ sources of information? Are the national law provisions?

Georgian Legislation has two familiar ways in the field of secret investigative activities, in particular, telephone conservation surveillance/recording and interception of communication channels. The first one is provided in The Criminal Procedure Code of Georgia (Article XVI¹) and another one in the law of “Electronic Communications” (Article 83).

According to The Criminal Procedure Code of Georgia the following covert investigative actions are allowed (Article 143¹(1)):

The phone conservation eavesdropping and recording Interception and recording of the communication channels (communication facilities, computer networks, wired communications and with joining stations facilities) the computer system (directly or remotely) and for this purpose a computer system with an appropriate software to install;

Postal and telegraphic transfer (other than diplomatic) control; Hidden video and audio recording, cinema and photography; Electronic tracking with technical devices, which usage does not endanger human life, health and the environment. According to The Criminal Code of Georgia following investigative actions are allowed.

⁴⁶Ibid.

⁴⁷“No one shall have the right to enter a place of residence and other possessions against the will of possessors, nor conduct a search unless there is a court decision or urgent necessity provided for by law.”

When the case concerns investigating procedures according to Article 143²(Child trafficking) and Article 143³of (Using services of victims (person affected by) of human trafficking) Criminal Code of Georgia, If the action is necessary for a legitimate aim in a democratic society – the national security or public safety, for the prevention of disorder or crime was committed on order to avoid the country's economic well-being of the interests or the rights and freedoms of others.

There is a need for a democratic society, if it is carried out due to a pressing social need and is a suitable and proportionate means of achieving a legitimate aim.

Hidden investigation can be carried out only when with other means of investigation substantial evidence is impossible to obtain or requires unreasonably great effort. Undercover investigation limits (intensity) must be proportionate to the legitimate aim. Toward clergyman, a lawyer, a doctor, a journalist and a person with immunity, covert investigative actions are permitted only in cases when gaining the secret information is not in accordance with their religious or professional activities. Toward state-political officials, judges and immune persons the hidden investigative actions can be carried out in the case of there is commitment by the Supreme Court, the Prosecutor General or his deputy motivated motion.

Since November, 2014, there has been added the Law on “Electronic Communications” to Article 83, which establishes the Criminal Code by adding a secret investigative cases.

According to Article 83:

The competent state bodies with special rights for the hidden investigative operations are allowed:

To have technical ability to gain information from communication within the physical lines and their connections from mail servers' bases, station from the equipment, communication networks and communication with other connections to the information in real time and the purpose of communication in the media, if necessary, being free of charge in order to deploy lawful overcome management system and other relevant equipment and software products. To obtain further information on real-time measures carried out directly by the competent authority, on the basis of a court ruling or a prosecutor;

To copy the dates from the communication channel of the identification data and a copy of their 2-year term only in this case, the information from the communication channels/computer system for removing and fixing further covert investigation carried out by the competent authority of the duplicate data from banks, on the basis of a court ruling or a prosecutor;

Technical aspects of real-time delivery of the information architecture and the interfaces are defined by the State Security Service on the basis of the appropriate act.

The specific definitions of the fight against terrorism law are provided as at Georgian Law of the fight against terrorism as well as the Criminal Code, which defines what is considered as an act of terrorism, terrorist activities and the basic principles in the fight against it:

Article 1

b) Terrorist Act- explosion, arson, use of a weapon or the actions that make up the human loss of life, significant property damage or other serious consequence, undermines public safety, significant political or economic interest, and is committed to intimidate the population or authority in order to influence;

According to the anti-terrorism law (Article 3)

The basic principles of the fight against terrorism in Georgia:

- a. Legality;
- b. Respect and protection of the rights and freedom of individuals and legal entities
- c. Combating terrorism the priority of human life and Health
- d. Preventive measures for the implementation of priority
- e. Legal, political, socio-economic, propaganda, information and other complex use
- f. To negotiate with terrorists in order to avoid expected results out of terroristic crimes
- g. United management of the participated forces in counterterrorist operations and recourses
- h. Divulgence impermissibility of counterterrorist operation tactics and technical means, as well as the operation of the membership of appearance;
- i. Inevitability of punishment for terrorist activity

According to the information mentioned above, criteria for using electronic surveillance and anti-terrorism laws are accessible, precise, and foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions. As for further cases, there are particular Articles if they are in accordance with Constitution of Georgia and are being discussed in the Constitutional Court.

The norms mentioned above explains what the main aspects while discussing criteria in the field of electronic surveillance and anti-terrorism law are.

According to the office of the personal data protection inspector, in their annual 2015 report, they have clearly stated how data must be processed:

- . It must be fairly and lawfully, without prejudice to person's dignity
- . For specific, clearly defined purpose
- . Adequately and proportionately to the purpose of the processing
- . Data must be stored for definite term
- . Illegally collected data must be deleted or destroyed.

Although having such statements, mentioned above, the main problem still remains identification proper grounds and presenting legal arguments for owning the data or for otherwise utilization of such data. In addition to this, there are agencies in public sector, collecting personal dates with oral or written agreement between the organisation and the citizen, using the information collected from them, in a proper way and after concrete period of time are being destroyed.

What is more, accessibility to the collected information always varies depending on which sector a citizen tries to access. There is the case when a citizen applied to the Inspector and asked for response action; the citizen stated that one of the microfinance organisations checked his/her data in the database without his/her consent. During examination of the case it was established that the microfinance organization had citizen's consent on data processing on the basis of loan agreement, within the scope of loan relations. Though, upon expiry of debt relations the microfinance organisation once again checked the information about the person in the database without his/her consent, for the purpose of offering a new credit product. During examination of the complaint the Inspector identified that the microfinance organisation acted beyond the authorisation granted by the citizen and violated the law while checking individual's data, as the organization had no relevant grounds for data processing – namely, the consent. The law of Georgia on Personal Data Protection defines the consent of a data subject as “free consent of a data subject, after receiving relevant information, on his/her data processing for a specific purpose, expressed orally, through telecommunication or other relevant means, which can clearly indicate the will of a data subject”. In order for the data subject to be properly informed about the purpose of the consent on data processing and its out- Grounds and Principles of Data Processing 12 comes, it is important that he/she receives clear and specific information about the purpose of data processing before such data subject expresses his/her will. The will expressed upon receipt of such information can be used as the ground for data processing.

During examination of this case it was also identified that this organization made citizen's information readily accessible without any prior mechanism of checking legal grounds.

In addition, current legislation does not establish any specific regulations with financial institutions, including protection of customers' right.

9. Can journalists rely on encryption and anonymity online to protect themselves and their sources against surveillance?

Confidentiality of sources means the right of journalists not to name the person who provided the information to him/her. Confidentiality is an important guarantee of the journalist's activity. Gathering information about different spheres of public life, of course, a journalist based on various sources, some of which do not wish to disclose their identity. Sometimes it is important for the public to get information from them. There are cases when the source of information is the state of the body, or even a representative of the Institute, whose action – disclose any information you provide – has a variety of reasons.

To get information based on the Anonymous source is particularly effective journalistic investigation. This right is gaining an importance in our country, where in the circumstances of total violence of administrative bodies, without warranty of anonymity and privacy of information source they does not agree to provide information.⁴⁸

Journalists' unions all over the world recognize an exceptional remedy of the sources of information. Identical rules in force are in Georgia as well. For example, the Charter, Article 6, “the journalist's moral obligation not to disclose confidential source of information.”⁴⁹

The Charter explains that “In considering this article appeared, there are journalists who are constantly appealing to confidential sources, which is why they have low confidence. Confidential source must be connected to the high public interest in the information carrier. But the public's trust and distrust does not change the content of this article: It is not allowed to reveal the source of confidential information.”

The Charter is valid in Georgia since December 2009, in the same year was enacted another legal guarantee for protecting the information – “Code of Conduct.” According to this document “To ensure accuracy, the broadcaster must identify the source of information. Based on an

⁴⁸*Media and law*, Zurab Adeishvili, Year 2004, Tbilisi.

⁴⁹ Article 6, “Georgian Journalists Ethical Charter”, 25/02/2010, Georgia, <http://mediasabcho.blogspot.com/2010/02/blog-post_25.html> accessed 25 July 2016 [Georgian].

unnamed source of information covering the case, the broadcaster must clearly indicate that the source is anonymous.”⁵⁰

The “Code of Conduct for Public Broadcasting” is enacted since 2006 the 5th chapter of it dedicated to the protection standards of confidential information, extraction of them and represents further recommendations for the anonymous source of information about the importance and necessity of protection.

According to this document:

- Sources anonymity protection is one of the valuable elements of freedom of Information and the journalist's professional duty;
- Journalist, usually, do not use anonymous sources, if there is other opportunity to get the open information sources;
- The use of anonymous sources is only justified if the information is reliable and valuable and cannot be distributed in any other way;
- Privacy violation is allowed only in cases when it serves the legitimate interests of the public, for example, when the information relates to the preparation of the crime. In such cases, the journalist is obliged to inform the relevant authorities about the impending crime;
- The disclosure of the confidential source, also, is justified when the issue is the protection of state interests. The need can be established only when the country's constitutional order is in real danger;
- Source, which did not require anonymity, has to be nominated;
- Transfer of information provided by an anonymous source should be noted that the source is anonymous;

⁵⁰Article 14(2), “Broadcasters Code of Conduct”, Georgian National Communications Commission Resolution N2, 12/03/2009, Georgia, <http://www.gncc.ge/files/7060_7177_303673_Code%20of%20Conduct.pdf> accessed 25 July 2016 [Georgian].

- For journalists it is allowed only a confidential source of information, whom they trust to. However, despite the reliability of the source, it has to be verify the authenticity of the information;
- If the information provided by an anonymous source contains serious allegations , in this case, must be disclosed by an anonymous source, only the details, on which will be agree source itself;
- An anonymous respondent should be protected by all means. It has to be disguising his/her voice and image as well. It is prohibited to show details, such as, for example, the number of car, house and others.⁵¹

There are cases when the information is valuable and covered the respondent's use is justified, but journalists must take into account the fact that the source of such information could mislead the public because the aim of that kind of source always is not to tell objective truth.

From aforesaid its natural to think that information security safeguards are a tool in the realisation of freedom of expression, by Georgian law – freedom of expression means unacceptability of censorship, editorial independence and pluralism, the right of journalists to protect the source of information and make editorial decisions based on their own conscience.⁵²

As a rule such a large area for the source spreading is the Internet, these crimes are aware as “cybercrime” the key regulatory International document for the cyber crime issues is Council of Europe’s **Convention on Cybercrime**, 2001, which was ratified by Georgia in 2012. This document defines the unlawful acts committed in cyberspace, which is in charge of punishing the revelation of the Member States. In addition, the Convention obliges member states to set up national cybercrime and the specialized straggle units, which will also 24/7 international contact point authorities.

In Georgia, cybercrime punishment is regulated by the Criminal Code (CC) XXXV chapter, under which criminal responsibility in cyberspace committed the following acts: a computer

⁵¹Chapter 5, Article 14(2), “Broadcasters Code of Conduct”, Georgian National Communications Commission Resolution N2, 12/03/2009, Georgia, <http://www.gncc.ge/files/7060_7177_303673_Code%20of%20Conduct.pdf> accessed 25 July 2016 [Georgian].

⁵²Article 3(2(d)), Law of Georgia on Freedom of Speech and Expression, the Parliament of Georgia, 24/06/2004, Georgia. <<https://matsne.gov.ge/ka/document/view/33208?impose=translateEn>> accessed 25 July 2016 [English].

system against unauthorized access (Section 284), computer data and / or computer system for illegal use of computer data and / or Computer system encroachment.⁵³

Article 284 – Unauthorised access to computer system

1. Unauthorised access to computer system, shall be punished by a fine or corrective labour for up to two years, or by imprisonment for the same term.
2. The same act:
 - a. Committed by a group with preliminary agreement;
 - b. committed using an official position;
 - c. committed repeatedly;
 - d. That has resulted in substantial damage, shall be punished by a fine or corrective labour for up to two years, or by imprisonment for a term of two to five years.

Note:

1. A computer system is any mechanism or a group of inter-connected mechanisms that automatically processes data (including personal computers, any equipment with a microprocessor, also a mobile phone) by means of software.
2. Computer data are any information displayed in any form that can be processed in the computer system, including software that ensures the operation of the computer system.
3. Unauthorised shall mean illegal, also those cases when the owner of the right has not, directly or indirectly, transferred the right to the person committing the act.
4. For the purposes of this chapter 'substantial' shall mean damage exceeding GEL 2 000.
5. For the act specified in this article, a legal person shall be punished by a fine, with deprivation of the right to carry out a particular activity or by liquidation and a fine.⁵⁴

Law of Georgia No 292 of 5 May 2000 – LHG I, No 18, 15.5.2000, Article 45

Law of Georgia No 458 of 30 June 2000 – LHG I, No 27, 17.7.2000, Article 83

Law of Georgia No 2937 of 28 April 2006 – LHG I, No 14, 15.5.2006, Article 90

⁵³ *Legislation on Cybercrime and the General Policy*, Ministry of Internal Affairs <<http://police.ge/ge/projects/kiberdanashauli/kanonmdebloba-kiber-danashaulze-da-zogadi-politika>> accessed 25 July 2016 [Georgian].

⁵⁴ *Article 284*, Criminal Code of Georgia, the Parliament of Georgia, document number 2287, 22/07/1999, Georgia. <<https://matsne.gov.ge/ka/document/view/16426>> accessed 25 July 2016 [Georgian].

Law of Georgia No 5940 of 19 March 2008 – LHG I, No 8, 28.3.2008, Article 47

Law of Georgia No 3619 of 24 September 2010 – LHG I, No 51, 29.9.2010, Article 332

Article 285 – Illegal use of computer data and/or computer system

1. Unauthorised making, storage, sale, dissemination of software and/or other equipment, also of a password, access code to the computer system or of other similar data or provision of access to the above in any other way for the purpose of committing the offence defined in this Chapter and by Articles 158 or 159 of this Code, – shall be punished by a fine or corrective labour for up to two years and/or by imprisonment for up to three years.
2. The act defined in paragraph 1 of this article:
 - a. committed by a group with preliminary agreement;
 - b. committed using an official position;
 - c. committed repeatedly;
 - d. that has resulted in substantial damage, – shall be punished by a fine or corrective labour for up to two years, and/or by imprisonment for a term of three to six years.

Note:

For the act specified in this article, a legal person shall be punished by a fine, with deprivation of the right to carry out a particular activity or by liquidation and a fine.

Law of Georgia No 458 of 30 June 2000 – LHG I, No 27, 17.7.2000, Article 83

Law of Georgia No 3619 of 24 September 2010 – LHG I, No 51, 29.9.2010, Article 332

Law of Georgia No 2378 of 2 May 2014 – web-site, 16.5.2014⁵⁵

Article 286 – Unauthorized handling of computer data and/or computer systems

⁵⁵Article 285, Criminal Code of Georgia, the Parliament of Georgia, document number 2287, 22/07/1999, Georgia. <<https://matsne.gov.ge/ka/document/view/16426>> accessed 25 July 2016 [Georgian].

1. Unauthorised damage, deletion, replacement or concealment of computer data, – shall be punished by a fine, or corrective labour for up to two years and/or by imprisonment for the same term.
2. The act defined in paragraph 1 of this article, also unauthorized insertion or transfer of computer data that has resulted in considerable and intentional disruption of the operation of a computer system, – shall be punished by a fine or corrective labour for up to two years and/or by imprisonment for up to three years.
3. An act defined in paragraph 1 or 2 of this article:
 - a. committed by a group with preliminary agreement;
 - b. committed using an official position;
 - c. committed repeatedly;
 - d. that has resulted in substantial damage, – shall be punished by a fine or corrective labour for up to two years, or by imprisonment for a term of three to five years. Note: For committing an act specified in this article, a legal person shall be punished by a fine, with deprivation of the right to carry out a particular activity or by liquidation and a fine.

Law of Georgia No 458 of 30 June 2000 – LHG I, No 27, 17.7.2000, Article 83

Law of Georgia No 2937 of 28 April 2006 – LHG I, No 14, 15.5.2006, Article 90

Law of Georgia No 3619 of 24 September 2010 – LHG I, No 51, 29.9.2010, Article 332.⁵⁶

“In addition, in 2012 it was adopted a law on “Information Security”, which sets standards for information security in the general public and the private sector. (But it must be mentioned that in the third paragraph of the third article of the law, according to which “3. This law does not apply to media, publishing houses and editorial offices, scientific, educational, religious and social organizations and political parties, regardless of their importance to the defense of the country or and / or economic security, state authority and / or the maintenance of public life “⁵⁷) based on the legislative decree, the president approved “ Critical information systems’ list of subjects.“ At this stage, the list includes only those State institutions, which proper functioning are vital for Georgia.

In May 2013, the President signed the agreement on cyber security strategy for 2013–2015, which in the field of cyber security is the main policy–making document. The strategy has a plan

⁵⁶Article 286, Criminal Code of Georgia, the Parliament of Georgia, document number 2287, 22/07/1999, Georgia. <<https://matsne.gov.ge/ka/document/view/16426>> accessed 25 July 2016 [Georgian].

⁵⁷ Law of Georgia on Information Security, the Parliament of Georgia, 05/06/2012, Georgia, <<http://dea.gov.ge/uploads/InfoSec%20Law%20ENG.pdf>> accessed 25 July 2016 [Georgian].

of action, where in details is planned the measures of the future, as well as state institutions, which are directly responsible for the Action Plan commitments.

To accomplish this, existence guarantee of privacy we can considered as a mechanism for realization of freedom expression. according the law of Georgia freedom of expression means unacceptability of censorship, editorial independence and pluralism, the right of journalists to protect the source of information and make editorial decisions based on their own conscience.⁵⁸

10. Are whistle-blowers explicitly protected under law protecting journalistic sources? Is there another practice protecting whistle-blowers? Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

The guaranties of legal protection of whistle-blower, addressee or any sources information are provided by the constitution article 24.1 that states freedom of information along with freedom of expression.

According to the Article 24.1 “Everyone has the right to freely receive and impart information, to express and impart his/her opinion orally, in writing or by in any other means.”

In fact, this article protects accessibility of information. In some cases, the source of information can be considered as a person who spreads information or as the information itself. Respective constitutional norm implies that the freedom of press means recognition of confidentiality of information and protection of the source of information.

The guaranties of legal protection of whistle-blower or sources of specific information are also provided by articles 11 and 12 of “Law Georgia on freedom of speech and expression.”

11.1 “The source of a professional secret merit absolute protection and restricts demand of its disclosure. No one is authorised to disclose the source of confidential information during court proceedings on the limitation of the right of freedom of speech and expression. No one is permitted to disclose confidential information except with the consent of its owner or pursuant to a reasoned court decision in cases prescribed by law. A court has a power to request disclosure only of the part of confidential information that is proved to be necessary. Article 12 is repressive, as confidential information received through disclosure proceedings can only be used for the purpose for which it was disclosed.

⁵⁸ Legislation on Cybercrime and the General Policy, Ministry of Internal Affairs <<http://police.ge/ge/projects/kiberdanashauli/kanonmdbloba-kiber-danashaulze-da-zogadi-politika>> accessed 25 July 2016 [Georgian].

12.1 “A person is liable only October or the disclosure of secrets to which one is related by contract or in accordance with one’s official position about the disclosure that creates a direct and substantial danger to values protected by la October w. In case of violation of these rights, a person can demand compensation of material and moral damages. The stance of the criminal law concerning the legal protection of whistle-blowers and sources of information is implicitly important. It October would be useful to use article 153, stating that a person who is illegally prevented from receiving or spreading the information, must be punished with respective sanction.

The legal definition of article 154 protects journalist's rights to spread the information that has an interest of the vast majority of people. Aforementioned norm does not give us the definition of a whistle-blower; otherwise this must have been the only legal safeguard (as a norm) for a whistle-blower. Legal norms related to a whistle – blowers can be found in Georgian legislation, specifically – “Law of Georgia on Conflict of Interests and Corruption on Public Service.”⁵⁹

In 2012, the Public Service hall of the country presented a draft of the law on the protection of whistle- blowers, however, this initiative didn't succeed in as for the “Law of Georgia on Conflict of Interests and Corruption on Public Service.”

Chapter 5 of the law defines a meaning of a 'whistle- blower ', and his/her rights and duties as well.

Article 20: “It is prohibited to intimidate, oppress or threat a whistle-blower in discriminatory ways. The whistle-blower may not be subject to disciplinary or administrative procedures, civil action or prosecution or be held responsible otherwise for the circumstances related to the acts of the whistleblowing, until the end of the investigation. It is also forbidden to worsen the conditions of the agreements, license and grant and to release or temporarily release from the job, derangement of legal relationships, until proving the untruthfulness of the information provided by whistleblowing.”

This law implies a definition of an anonymous whistle-blowers. According to third paragraph of article 3 –”It is prohibited to intimidate, oppress or threat a whistleblower in discriminatory ways.” according to the 2nd part of this article– “Disciplinary, civil, administrative and criminal procedures are not related to the conditions of whistleblowing of the exposed person.” **and this article protects whistle-blowers from not only from the private sector but from a public as well.**

⁵⁹*Comments of the constitution of Georgia*, Zoidze Besarion, Tbilisi, 2014, P.252.

The aforementioned draft law contains important topics; on the other hand, it doesn't share all important principles of international legislation. According to the law "the exposed person can serve as the bases for the imposition of civil, administrative or criminal responsibility, it should refer the case to the competent authorities. The judgment about the complaint is an administrative act. The entry into force of the administrative act, as well as the execution and its appeal is regulated under Georgian Administrative Legislation. The judgment shall not be based on the circumstances, facts, evidence and arguments, which were not judged substantially during the examination of the complaint. "

It is worth mentioning that Georgian legal definition of whistle-blower is different from the definitions that are given in the legislation of other countries. Whistle-Blower is not only the person who "gives away" somebody, but means – To inform the public institution which examines the complaints against the public official (exposed) about the infractions of the law or the rules of due conduct of the public employees, which caused harm to public interests or reputation of public institutions. That was the main reason of represented draft document—to make Georgian legislation harmonized with international one.

Draft document was written by foreign experts and was represented by Public service hall. Before started working on the document experts held a monitoring for collecting enough information for analyzing existing environment. Changes in document was made in 2015, October 2.

The purposes of this changes are:

- to make the stable monitoring system which implies the declaration property of Officials
- to make the bureau accredit able to have the right of monitoring , which approves the accuracy of the discussed information

11. Conclusion

To sum up all the information analysed above, we can say without any ounce of hesitation that Georgia has harmonized legislation with EU standards, but the fact that our country is not reach for law—cases concerning the topic doesn't mean that journalist rights are fully protected. Violence and harassment aimed at journalists are still happening. On several regions of Georgia government cannot even protect rights recognized by national and international legislation.

It is also worth mentioning that our government cannot effectively control protection of the right on the territories of Abkhazia and South Ossetia which are under Russian control. There is little media presence in tiny South Ossetia. Local authorities operate a television station, although most programming is rebroadcast from Russia. Media sector including print sector is not independent. Serbian travel journalist Viktor Lazić was detained in September 2011 on a charge of crossing the border illegally, having entered South Ossetia from Georgia proper. In Abkhazia, local population has access to both Russian and Abkhazian television content; Georgian stations are only available via satellite. Abkhazia's residents have access to Georgian and Turkish radio, and the territory is home to several private print media outlets. Overall, media ownership and coverage is dominated by local authorities. (Source: Freedom House—an independent watchdog organization dedicated to the expansion of freedom and democracy around the world.)

There so much country should do freedom of expression, receiving and spreading the information to be protected. This is the part of an effective governing system, this is the part of a country with democratic social order, economic freedom and a rule-of-law based social values.

12. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

12.1. Legislation

- Law of Georgia on Conflict of Interests and Corruption on Public Service
- Criminal Procedure Code of Georgia
- Civil Code of Georgia
- Law of Georgia, on Freedom of speech and Expression
- Journalism ethic code
- Law of Georgia on assemblies and demonstration

12.2. Case–Law

- *CITIZEN GOGICHAISHVILI V. THE PARLIAMENT OF GEORGIA*, judgment of 11 MARCH, 2004, Case number N2/1/241.
- Goodwin v. the United Kingdom, judgment of 27 March 1996, § 39.
- Ramishvili and Kokhreidze V. Georgia, judgment of 27 January 2009, §64.

12.3. Books and articles

- Tumanishvili G., Commentary on the Criminal Procedure Code of Georgia, Tbilisi, 2015.
- Natia Kapanadze, What's the difference between professional and legal guarantees for the protection of the sources of information? Tbilisi, 2016.
- B.Zoidze, Commentary on the constitution of Georgia, Tbilisi, 2014.

12.4. Internet sources

- http://www.echr.coe.int/Documents/CP_Georgia_ENG.pdf
- <http://qartia.org.ge/charter/>
- <https://matsne.gov.ge/ka/document/view/16426>
- <https://matsne.gov.ge/ka/document/view/90034>
- <https://matsne.gov.ge/ka/document/view/1208370https://matsne.gov.ge/ka/document/view/1208370>
- <https://wcd.coe.int/ViewDoc.jsp?Ref=Rec%282000%297&Language=lanEnglish&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>

- <https://wcd.coe.int/ViewDoc.jsp?Ref=Rec%282000%297&Language=lanEnglish&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>
- <https://matsne.gov.ge/ka/document/view/32548><https://matsne.gov.ge/ka/document/view/32548>
- http://www.mdfgeorgia.ge/geo/view_news/419
- http://www.mdfgeorgia.ge/geo/view_news/419
- <http://www.transparency.ge/node/5580>
- <http://www.transparency.ge/node/5580>
- <http://constcourt.ge/en/legal-acts/judgments/citizen-akaki-gogichaishvili-v-the-parliament-of-georgia-234.page>

13. Table of Provisions

Provisions in native language	Corresponding translation
<p>საქართველოს კონსტიტუცია, მუხლი 19:</p> <p>1. ყოველ ადამიანს აქვს სიტყვის , აზრის , სინდისის , აღმსარებლობისა და რწმენის თავისუფლება .</p> <p>2. დაუშვებელია ადამიანის დევნა სიტყვის , აზრის , აღმსარებლობის ან რწმენის გამო , აგრეთვე მისი იძულება გამოთქვას თავისი შეხედულება მათ შესახებ .</p> <p>3. დაუშვებელია ამ მუხლში ჩამოთვლილ თავისუფლებათა შეზღუდვა , თუ მათი გამოვლინება არ ლახავს სხვათა უფლებებს.</p>	<p>The Constitution of Georgia, Article 19:</p> <p>1. Everyone has the right to freedom of speech, thought, conscience, religion, and belief.</p> <p>2. No one shall be persecuted because of his/her speech, thought, religion or belief, or be compelled to express his/her opinion about them.</p> <p>3. Freedoms listed in this article may not be restricted unless expression thereof infringes on the rights of others.</p>
<p>საქართველოს კონსტიტუცია, მუხლი 24:</p> <p>1. ყოველ ადამიანს აქვს უფლება თავისუფლად მიიღოს და გაავრცელოს ინფორმაცია , გამოთქვას და გაავრცელოს თავისი აზრი ზეპირად , წერილობით ან სხვაგვარი საშუალებით .</p> <p>2. მასობრივი ინფორმაციის საშუალებები თავისუფალია . ცენზურა დაუშვებელია .</p> <p>3. სახელმწიფოს ან ცალკეულ პირებს არა აქვთ მასობრივი ინფორმაციის ან მისი გავრცელების საშუალებათა მონოპოლიზაციის უფლება .</p> <p>4. ამ მუხლის პირველ და მეორე პუნქტებში ჩამოთვლილ უფლებათა განხორციელება შესაძლებელია კანონით შეიზღუდოს ისეთი პირობებით , რომლებიც აუცილებელია დემოკრატიულ საზოგადოებაში სახელმწიფო</p>	<p>The Constitution of Georgia, Article 24</p> <p>1. Everyone shall be free to receive and disseminate information, to express and disseminate his/her opinion orally, in writing, or otherwise.</p> <p>2. Mass media shall be free. Censorship shall be inadmissible.</p> <p>3. Neither the State nor particular individuals shall have the right to monopolize mass media or the means of dissemination of information.</p> <p>4. Exercise of rights listed in the first and second paragraphs of this article may be restricted by law, to the extent and insofar as is necessary in a democratic society, in order to guarantee state security, territorial integrity or public safety, to prevent crime, to safeguard rights and dignity of others, to prevent the disclosure of information acknowledged as confidential, or to ensure the independence and impartiality of justice.</p>

<p>უშიშროების , ტერიტორიული მთლიანობის ან საზოგადოებრივი უსაფრთხოების უზრუნველსაყოფად , დანაშაულის თავიდან ასაცილებლად , სხვათა უფლებებისა და ღირსების დასაცავად , კონფიდენციალურად აღიარებული ინფორმაციის გამჟღავნების თავიდან ასაცილებლად ან სასამართლოს დამოუკიდებლობისა და მიუკერძოებლობის უზრუნველსაყოფად .</p>	
<p>საქართველოს სისხლის სამართლის კოდექსი, მუხლი 153: სიტყვის თავისუფლების ანდა ინფორმაციის მიღების ან გავრცელების უფლების განხორციელებისათვის უკანონოდ ხელის შეშლა, რამაც მნიშვნელოვანი ზიანი გამოიწვია, ანდა ჩადენილი სამსახურებრივი მდგომარეობის გამოყენებით, – ისჯება ჯარიმით ან გამასწორებელი სამუშაოთი ვადით ერთ წლამდე ანდა თავისუფლების აღკვეთით ვადით ორ წლამდე, თანამდებობის დაკავების ან საქმიანობის უფლების ჩამორთმევით ვადით სამ წლამდე ან უამისოდ.</p>	<p>Criminal Code of Georgia, Article 153: Freedom of speech or the right to impart or receive information for the implementation of illegal interference, causing substantial damage, or committed using official position, - Punishable by a fine or corrective labor for up to one year or a prison term of up to two years, a position or the right to work from up to three years or without it.</p>
<p>საქართველოს სისხლის სამართლის კოდექსი, მუხლი 154: 1. ჟურნალისტისათვის პროფესიულ საქმიანობაში უკანონოდ ხელის შეშლა, ესე იგი მისი იძულება, გაავრცელოს ინფორმაცია ან თავი შეიკავოს მისი გავრცელებისაგან, – ისჯება ჯარიმით ან საზოგადოებისათვის სასარგებლო შრომით ვადით ას ოციდან ას ორმოც</p>	<p>The Criminal Code of Georgia, Article 154: 1. journalistic activities illegal interference, forcing him to impart information or to refrain from its dissemination - Punishable by a fine or community service for a period of one hundred twenty to one hundred and forty hours, or corrective labor for up to two years. 2. The same action committed by using threat of violence or official position, - Punishable by a fine or imprisonment for</p>

<p>საათამდე ანდა გამასწორებელი სამუშაოთი ვადით ორ წლამდე. 2. იგივე ქმედება, ჩადენილი ძალადობის მუქარით ან სამსახურებრივი მდგომარეობის გამოყენებით, – ისჯება ჯარიმით ან თავისუფლების აღკვეთით ვადით ორ წლამდე, თანამდებობის დაკავების ან საქმიანობის უფლების ჩამორთმევით ვადით სამ წლამდე ან უამისოდ.</p>	<p>up to two years, deprivation of the right to occupy a position or activity for up to three years or without it.</p>
<p>საქართველოს სისხლის სამართლის კოდექსი, მუხლი 158: 1. კერძო საუბრის უნებართვო ჩაწერა ან მიყურადება, აგრეთვე კომპიუტერულ სისტემაში ან სისტემიდან კერძო კომუნიკაციისას გადაცემული კომპიუტერული მონაცემის ან ამგვარი მონაცემის მატარებელი ელექტრომაგნიტური ტალღების უნებართვო მოპოვება ტექნიკური საშუალების გამოყენებით ან კერძო კომუნიკაციის ჩანაწერის, ტექნიკური საშუალებით მოპოვებული ინფორმაციის ან კომპიუტერული მონაცემის უკანონოდ შენახვა</p>	<p>The Criminal Code of Georgia, Article 158: Unauthorized recording or eavesdropping on a private conversation, as well as a computer system or computer data transmitted from the system to the private communication of such data to unauthorized mining train of electromagnetic waves by using technical means or private communication records, computer data or technical information obtained through the illegal possession</p>
<p>საქართველოს სისხლის სამართლის კოდექსი, მუხლი 284: 1. კომპიუტერულ სისტემაში უნებართვო შეღწევა, – ისჯება ჯარიმით ან გამასწორებელი სამუშაოთი ვადით ორ წლამდე ანდა თავისუფლების აღკვეთით იმავე ვადით. 2. იგივე ქმედება: ა) წინასწარი შეთანხმებით ჯგუფის მიერ; ბ) სამსახურებრივი მდგომარეობის</p>	<p>The Criminal Code of Georgia Article 284: 1. The computer system against unauthorized access, - Punishable by fine or by corrective labor for up to two years or imprisonment for the same period. 2. The same action: A) by a group; B) using official position; C) repeatedly; D) causing substantial damage, - Punishable by fine or by corrective labor for up to two years or a prison term of</p>

<p>გამოყენებით; გ) არაერთგზის; დ) რამაც მნიშვნელოვანი ზიანი გამოიწვია, – ისჯება ჯარიმით ან გამასწორებელი სამუშაოთი ვადით ორ წლამდე ანდა თავისუფლების აღკვეთით ვადით ორიდან ხუთ წლამდე.</p> <p>შენიშვნა:</p> <ol style="list-style-type: none"> 1. კომპიუტერული სისტემა არის ნებისმიერი მექანიზმი ან ერთმანეთთან დაკავშირებულ მექანიზმთა ჯგუფი, რომელიც პროგრამის მეშვეობით, ავტომატურად ამუშავებს მონაცემებს (მათ შორის, პერსონალური კომპიუტერი, ნებისმიერი მოწყობილობა მიკროპროცესორით, აგრეთვე მობილური ტელეფონი). 2. კომპიუტერული მონაცემი არის კომპიუტერულ სისტემაში დამუშავებისათვის ხელსაყრელი ნებისმიერი ფორმით გამოსახული ინფორმაცია, მათ შორის, პროგრამა, რომელიც უზრუნველყოფს კომპიუტერული სისტემის ფუნქციონირებას. 3. უნებართვო გულისხმობს უკანონოს, აგრეთვე იმ შემთხვევას, როდესაც უფლების მფლობელს პირდაპირ ან არაპირდაპირ არ გადაუცია უფლება ქმედების ჩამდენი პირისათვის. 4. ამ თავში მნიშვნელოვნად ითვლება 2000 ლარზე მეტი ოდენობის ზიანი. 5. ამ მუხლით გათვალისწინებული ქმედებისათვის იურიდიული პირი ისჯება ჯარიმით, საქმიანობის უფლების ჩამორთმევით ან 	<p>two to five years.</p> <p>Note:</p> <ol style="list-style-type: none"> 1. The computer system is any mechanism or mechanisms linked together a group that through the program, to automatically process data (including personal computers, any device with microprocessor, as well as mobile phone). 2. Computer data in a computer system is suitable for processing image information in any form, including a program that provides computer system. 3. Illegal means illegal, as well as a case of the right holder, directly or indirectly, had not communicated to the person committing the act is made. 4. This section is considered to be significantly more than the 2000 amount of damage. 5. This article shall conduct a legal entity shall be punished by a fine, deprivation of the right to work or liquidation and fine.
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<p>ლიკვიდაციით და ჯარიმით.</p>	
<p>საქართველოს სისხლის სამართლის კოდექსი, მუხლი 285:</p> <p>1. კომპიუტერული პროგრამის ან/და სხვა მოწყობილობის, აგრეთვე კომპიუტერულ სისტემაში შეღწევისათვის საჭირო პაროლის, დაშვების კოდის ან სხვა მსგავსი მონაცემის უნებართვო დამზადება, შენახვა, გაყიდვა, გავრცელება ან ხელმისაწვდომობის სხვაგვარი უზრუნველყოფა ამ თავითა და ამ კოდექსის 158-ე ან 159-ე მუხლით გათვალისწინებული დანაშაულის ჩადენის მიზნით, –</p> <p>ისჯება ჯარიმით ან გამასწორებელი სამუშაოთი ვადით ორ წლამდე ან/და თავისუფლების აღკვეთით ვადით სამ წლამდე.</p> <p>2. ამ მუხლის პირველი ნაწილით გათვალისწინებული ქმედება:</p> <p>ა) წინასწარი შეთანხმებით ჯგუფის მიერ;</p> <p>ბ) სამსახურებრივი მდგომარეობის გამოყენებით;</p> <p>გ) არაერთგზის;</p> <p>დ) რამაც მნიშვნელოვანი ზიანი გამოიწვია, –</p> <p>ისჯება ჯარიმით ან გამასწორებელი სამუშაოთი ვადით ორ წლამდე ან/და თავისუფლების აღკვეთით ვადით სამიდან ექვს წლამდე.</p> <p>შენიშვნა:</p> <p>ამ მუხლით გათვალისწინებული ქმედებისათვის იურიდიული პირი ისჯება ჯარიმით, საქმიანობის უფლების ჩამორთმევით ან ლიკვიდაციით და ჯარიმით.</p>	<p>The Criminal Code of Georgia Article 285:</p> <p>1. A computer program and / or other device, as well as a computer system to access the required password, access code, or similar data to unauthorized manufacture, storage, sale, or distribution of the provision of this chapter and the article 158 or 159 of the Criminal the purpose of committing - Punishable by a fine or corrective labor for up to two years and / or imprisonment for up to three years.</p> <p>2. The first part of the action:</p> <p>A) by a group;</p> <p>B) using official position;</p> <p>C) repeatedly;</p> <p>D) causing substantial damage, - Punishable by a fine or corrective labor for up to two years and / or a prison term of three to six years.</p> <p>Note:</p> <p>This article shall conduct a legal entity shall be punished by a fine, deprivation of the right to work or liquidation and fine.</p>
<p>საქართველოს სისხლის სამართლის</p>	<p>The Criminal Code of Georgia Article</p>

<p>კოდექსი, მუხლი 286:</p> <p>1. კომპიუტერული მონაცემის უნებართვო დაზიანება, წაშლა, შეცვლა ან დაფარვა, – ისჯება ჯარიმით ან გამასწორებელი სამუშაოთი ვადით ორ წლამდე ან/და თავისუფლების აღკვეთით იმავე ვადით.</p> <p>2. ამ მუხლის პირველი ნაწილით გათვალისწინებული ქმედება, აგრეთვე კომპიუტერული მონაცემის უნებართვო ჩასმა ან გადაცემა, რამაც კომპიუტერული სისტემის ფუნქციონირების განზრახ მნიშვნელოვანი შეფერხება გამოიწვია, – ისჯება ჯარიმით ან გამასწორებელი სამუშაოთი ვადით ორ წლამდე ან/და თავისუფლების აღკვეთით ვადით სამ წლამდე.</p> <p>3. ამ მუხლის პირველი ან მე-2 ნაწილით გათვალისწინებული ქმედება:</p> <p>ა) წინასწარი შეთანხმებით ჯგუფის მიერ;</p> <p>ბ) სამსახურებრივი მდგომარეობის გამოყენებით;</p> <p>გ) არაერთგზის;</p> <p>დ) რამაც მნიშვნელოვანი ზიანი გამოიწვია, – ისჯება ჯარიმით ან გამასწორებელი სამუშაოთი ვადით ორ წლამდე ანდა თავისუფლების აღკვეთით ვადით სამიდან ხუთ წლამდე.</p> <p>შენიშვნა:</p> <p>ამ მუხლით გათვალისწინებული ქმედებისათვის იურიდიული პირი ისჯება ჯარიმით, საქმიანობის უფლების ჩამორთმევით ან</p>	<p>286:</p> <p>1. The computer data against unauthorized damage, delete, or change the cover - Punishable by a fine or corrective labor for up to two years and / or imprisonment for the same period.</p> <p>2. The first part of the action, as well as computer data or unauthorized insertion of the program, causing the computer system to function deliberately caused significant delays, - Punishable by a fine or corrective labor for up to two years and / or imprisonment for up to three years.</p> <p>3. The provisions of Article 2 or part of the action:</p> <p>A) by a group;</p> <p>B) using official position;</p> <p>C) repeatedly;</p> <p>D) causing substantial damage, - Punishable by fine or by corrective labor for up to two years or a prison term of three to five years.</p> <p>Note:</p> <p>Under this article are legal entity shall be punished by a fine, deprivation of the right to work or liquidation and fine.</p>
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<p>ლიკვიდაციით და ჯარიმით.</p>	
<p>საქართველოს სისხლის სამართლის საპროცესო კოდექსი, მუხლი 50: 1. მოწმედ დაკითხვისა და საქმისათვის მნიშვნელობის მქონე ინფორმაციის შემცველი საგნის, დოკუმენტის, ნივთიერების ან სხვა ობიექტის გადაცემის ვალდებულება არ ეკისრება: თ) ჟურნალისტს – პროფესიული საქმიანობისას მიღებულ ინფორმაციასთან დაკავშირებით;</p>	<p>The Criminal Procedure Code of Georgia, Article 50: 1. The witness interrogation and investigation of important information in the object, document, or other object to the substance of the program, is not required: t) a journalist - a professional operation of the information;</p>
<p>საქართველოს კანონი სიტყვისა და გამოხატვის თავისუფლების შესახებ, მუხლი 1: ო) პროფესიული საიდუმლოება – აღსარების საიდუმლოება, პარლამენტის წევრის, ავტონომიური რესპუბლიკის უმაღლესი საბჭოს წევრის, ექიმის, ჟურნალისტის, უფლებადამცველის, დამცველის პროფესიულ საქმიანობასთან დაკავშირებით მათთვის განდობილი ინფორმაცია, აგრეთვე პროფესიული ფასეულობის მქონე ინფორმაცია, რომელიც პირისათვის ცნობილი გახდა კონფიდენციალურობის დაცვის პირობით, მის მიერ პროფესიული მოვალეობის შესრულებასთან დაკავშირებით და რომლის გამჟღავნებამ შეიძლება ზიანი მიაყენოს პირის პროფესიულ რეპუტაციას. ინფორმაცია, რომელიც არ შეიცავს პერსონალურ მონაცემებს, სახელმწიფო ან კომერციულ საიდუმლოებას, აგრეთვე ადმინისტრაციული ორგანოს შესახებ ინფორმაცია არ არის პროფესიული საიდუმლოება;</p>	<p>Law of Georgia On Freedom of Speech and Expression, Article 1: n) professional secret – the secret of confession, information disclosed to a member of Parliament, a member of the High Council of an Autonomous Republic, a doctor, journalist, human rights defender, or advocate with regard to their professional activity, as well as information of professional value, which became known to a person under the condition of privacy protection in relation to carrying out his/her professional duties and the disclosure of which may damage the person's professional reputation; information, which does not contain any personal data, a state or trade secret, as well as information on an administrative body shall not be a professional secret;</p>

<p>საქართველოს კანონი სიტყვისა და გამოხატვის თავისუფლების შესახებ, მუხლი 3: 2. ყველას, ადმინისტრაციული ორგანოს გარდა, აქვს გამოხატვის თავისუფლება, რაც გულისხმობს: დ) ცენზურის დაუშვებლობას, მედიის სარედაქციო დამოუკიდებლობასა და პლურალიზმს, ჟურნალისტის უფლებას, დაიცვას ინფორმაციის წყაროს საიდუმლოება და საკუთარი სინდისის შესაბამისად მიიღოს სარედაქციო გადაწყვეტილებები;</p>	<p>Law of Georgia On Freedom of Speech and Expression, Article 3: 2. Everyone, except an administrative body, shall have the freedom of expression, which shall imply: d) unacceptability of censorship, editorial independence and pluralism of the media, the right of a journalist to protect the secret of information source and to make editorial decisions based on his/her conscience</p>
<p>საქართველოს კანონი სიტყვისა და გამოხატვის თავისუფლების შესახებ, მუხლი 4: 1. აზრი დაცულია აბსოლუტური პრივილეგიით</p>	<p>Law of Georgia On Freedom of Speech and Expression, Article 4: 1. Thought shall be protected by an absolute privilege.</p>
<p>საქართველოს კანონი სიტყვისა და გამოხატვის თავისუფლების შესახებ, მუხლი 12: 1. პირი პასუხს აგებს მხოლოდ იმ საიდუმლოების გამხელისათვის, რომლის დაცვაც მას ევალება სამსახურებრივად ან სამოქალაქო გარიგებით და რომლის გამხელა აშკარა, პირდაპირ და არსებით საფრთხეს უქმნის კანონით დაცულ სიკეთებს. 2. პირი თავისუფლდება პასუხისმგებლობისაგან, თუ საიდუმლოების გამხელა მიზნად ისახავდა საზოგადოების კანონიერი ინტერესების დაცვას და დაცული სიკეთე აღემატება მიყენებულ ზიანს. 3. კერძო ცხოვრების ხელშეუხებლობისა და</p>	<p>Law of Georgia On Freedom of Speech and Expression, Article 12: 1. A person shall be responsible only for the disclosure of a secret, protecting the confidentiality of which is either his/her official duty or the result of a civil agreement, and whose disclosure creates obvious, direct and essential danger for benefits protected by law. 2. A person shall be released from responsibility if a secret has been disclosed for the purpose of protecting the legitimate interests of society, and if the benefits protected exceed the damage caused. 3. The freedom of expression, in relation to events, the knowledge of which is necessary for a person in order to execute public self-government in a democratic state may not be restricted for the purpose of personal life immunity and personal</p>

<p>პერსონალური მონაცემების დაცვის მოტივით არ შეიძლება შეიზღუდოს გამოხატვის თავისუფლება იმ მოვლენასთან დაკავშირებით, რომლის ცოდნაც აუცილებელია ადამიანისათვის დემოკრატიულ სახელმწიფოში საზოგადოებრივი თვითმმართველობის განსახორციელებლად.</p> <p>4. პირს შეუძლია მოითხოვოს ამ მუხლის პირველი და მე-2 პუნქტებით დაცული უფლებების ხელყოფით მიყენებული ქონებრივი და არაქონებრივი (მორალური) ზიანის ანაზღაურება.</p>	<p>data protection.</p> <p>4. A person may demand reimbursement for property and non-property (moral) damages caused by the violation of rights protected under the first and second paragraphs of this article.</p>
<p>საქართველოს კანონი სიტყვისა და გამოხატვის თავისუფლების შესახებ, მუხლი 11:</p> <p>1. პროფესიული საიდუმლოების წყარო დაცულია აბსოლუტური პრივილეგიით და არავის არ აქვს უფლება, მოითხოვოს ამ წყაროს გამხელა. სიტყვის თავისუფლების შეზღუდვის შესახებ სასამართლო დავისას მოპასუხეს არ შეიძლება დაეკისროს კონფიდენციალური ინფორმაციის წყაროს გამხელის ვალდებულება.</p> <p>2. დაუშვებელია კონფიდენციალური ინფორმაციის გამხელა თვით მისი მფლობელის თანხმობის ან კანონით გათვალისწინებულ შემთხვევებში სასამართლოს დასაბუთებული გადაწყვეტილების გარეშე.</p>	<p>Law of Georgia On Freedom of Speech and Expression, Article 11:</p> <p>1. The sources of professional secrets shall be protected by an absolute privilege, and nobody shall have the right to require disclosure of the source. In litigation on the restriction of the freedom of speech, the respondent shall not be obliged to disclose the source of confidential information.</p> <p>2. Disclosure of confidential information without the consent of its owner or, in cases determined by the law, without a grounded decision of the court, shall be unacceptable.</p>

<p>საქართველოს სამოქალაქო კოდექსი, მუხლი 18:</p> <p>2. პირს უფლება აქვს სასამართლოს მეშვეობით, კანონით დადგენილი წესით დაიცვას საკუთარი პატივი, ღირსება, პირადი ცხოვრების საიდუმლოება, პირადი ხელშეუხებლობა ან საქმიანი რეპუტაცია შელახვისაგან.</p>	<p>Civil Code of Georgia, Article 18:</p> <p>2. A person has the right to court, according to the law to protect their honor, dignity, privacy, personal integrity or reputation it.</p>
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ELSA GERMANY

Contributors

National Coordinator

Gertrud Bohler

National Researcher

Annika Lintz

Julia-Katharina Horn

Katinka von Rhein

Larissa Balluff

Lennart Thoms

National Linguistic Editor

Robert Vierling

National Academic Supervisor

Prof. Dr. Lauber-Rönsberg (TU Dresden)

1. Does the National Legislation Provide (explicit or otherwise) Protection of the Right of the Journalists not to Disclose their Source of Information? What Type of Legislation Provides this Protection? How Exactly is this Protection Construed in National Law?

The right of journalists not to disclose their sources is one of the main principles of the freedom of the press. In addition to the freedom of expression and the related freedom of information, the freedom of the press is explicitly stated in the German legislation in Article 5 *Grundgesetz* (German Constitution). According to Article 5 I 2 GG¹ the freedom of the press and the freedom of reporting by broadcasters and film are guaranteed. Thereby the state is obliged to protect the freedom of the press and to ensure its existence.

The freedom of the press is likewise included in the European Convention on Human Rights (ECHR) under Article 10. It offers journalists the right of keeping secret where they got their information from.² This is a prerequisite for the freedom of the press and not only a privilege of journalists. Domestically, the ECHR develops binding effect only on the basis of and within the limits of the law under Article 59 II GG with its application command. With its functions of orientation and guidance, it is supposed to fit as gently as possible into the existing national legal system and to serve as an interpretation guide.³ Despite of the content-related congruence of Article 5 II GG and Article 10 ECHR,⁴ Article 10 ECHR does not grant constitutional rank via Article 1 II GG or Article 25 GG in the hierarchy of legal source.⁵ In Germany, the ECHR is subordinated under the constitutional law on the level of ordinary federal statutes.⁶ This is the reason why it can be applied in German courts like any other law.⁷

As a matter of principle, the main task of the press is to ensure the formation of a public opinion.⁸ On the one hand side, journalists are supposed to be free of control of public authorities (passive function). On the other hand side they should also be encouraged in their task to conduct truthful reporting and critical statements (active function).⁹ This is only possible

¹ GG = *Grundgesetz* (German Constitution).

² Jens Meyer-Ladewig, *Europäische Menschenrechtskonvention* (3rd edn, CH Beck 2011) EMRK Artikel 10, I. 39 [German].

³ Hannes Radthe, *Parteiverbote unter dem Grundgesetz und der EMRK* (Deutscher Bundestag, Wissenschaftliche Dienste, 02/2013), <<https://www.bundestag.de/blob/193480/e1c02208cc129970754653b8053ac1fc/partieverbote-data.pdf>> accessed 18 April 2016 [German].

⁴ Otto Teplitzky/Karl-Nikolaus Peifer, Wolfgang B. Schünemann, *Großkommentar – Gesetz gegen unlauteren Wettbewerb* (2nd edn, De Gryter 2013), Book I, Introduction §§ 1- 13, 65 [German].

⁵ Theodor Maunz/ Günter Dürig, Roman Herzog, *Grundgesetz Kommentar* (53rd edn, CH Beck 2009) Art. 1 II GG I. 41 [German].

⁶ BVerfGE 82, 106 (114).

⁷ Dirk Ehlers, *Europäische Grundrechte und Grundfreiheiten* (3rd edn, De Gryter Lehrbuch 2009) 31 [German].

⁸ Jens Meyer-Ladewig, *Europäische Menschenrechtskonvention* (3rd edn, CH Beck 2011) EMRK Artikel 10, I. 31 [German].

⁹ Gerhard Schricker, *Verlagsrecht* (3rd edn, CH Beck 2001) I. 106 [German].

in a democratic and constitutional state and with democratically elected legislature. Throughout its creation of a critical point of view the press plays an active role in the opinion making process of the society.¹⁰ Responsible citizens are irreplaceable for a democracy, which means the freedom of the press in turn guarantees democracy. To sum it up, without source protection informants might be discouraged to help the press in informing the public on matters of public interest to fulfil its role as “public watchdog”.¹¹

Specifically, the protection is guaranteed in Germany as follows: The freedom of the press under Article 5 I 2 GG does not name the subject of the fundamental right, but the scope of protection-usually, fundamental rights guarantee the right to defend oneself against the state. But according to consistent case-law of the *Bundesverfassungsgericht* (German Constitutional Court), Article 5 I 2 GG even guarantees an individual right. Therefore any natural or legal person can be entitled of this fundamental right. Excluded, however, are corporate bodies under public law, but not public service broadcasters.¹² Following this approach, the protection is valid for everyone and it does not restrict it to journalists, certainly not during their professional activity.

Beyond the freedom of expression, the freedom of the press protects press products, and the institution of a free press.¹³ Press in the (compared to the understanding of the constitution) restrictive formal understanding of the ECHR means only published printed works. Press products include all certain and to the dissemination suitable printed matter, not only periodically but also uniquely printed works.¹⁴ On personal and institutional level, the activities of those who are involved in the process of production and distribution of periodical press products, so especially professional journalists, publishers and editors, but also those involved directly in manufacture and sales of publications.¹⁵

Moreover, the scope of protection of Article 5 I 2 GG overcomes the delimitations by media types and is therefore open to forms of communication that cannot be classified in the frame of traditional media categories (press, television, radio, film). This applies in particular for the Internet-based media, if due to the narrow concept using of "broadcast" (within the meaning of "radio") and television in Article 10 I 3 ECHR (unlike the prevailing understanding of the Article 5 I 2 GG) which are not assigned with the freedom of broadcasting.¹⁶

¹⁰ Udo Branahl/ Patrick Donges, *Warum Medien wichtig sind: Funktionen in der Demokratie* (Informationen zur politischen Bildung, Massenmedien, 309/2010)

¹¹ <<http://www.bpb.de/izpb/7492/warum-medien-wichtig-sind-funktionen-in-der-demokratie?p=all>> accessed 18 April 2016 [German].

¹² Volker Epping/ Christian Hillgruber, Franz Schemmer, *Beck'scher Online-Kommentar Grundgesetz* (27th edn, CH Beck 2015) Art. 5 GG II. 38-41 [German].

¹³ BVerfGE 85, 1 (13).

¹⁴ Theodor Maunz/ Günter Dürig, Roman Herzog, *Grundgesetz Kommentar* (53rd edn, CH Beck 2009) Art. 5 I, II I. 132 [German].

¹⁵ Hubert Gersdorf/ Boris P. Paal, Matthias Cornils, *Beck'scher Online-Kommentar Informations- und Medienrecht* (11th edn, CH Beck 2016), Art. 10 EMRK I. 23 [German].

¹⁶ *Ibid.*, I. 22.

The protection ranges here from the provision of information to the dissemination of news and opinions.¹⁷ In Germany, the freedom of the press is based on the access to information and the opportunity to inform the addressees of important events.¹⁸ Therefore, part of the freedom of the press is a certain protection of the confidential relationship between the press and private informants. It is indispensable, since the press cannot do its work without this source of information through private communications, which in turn only flows productively when the informant can rely on the principle that the editorial confidentiality is maintained.¹⁹ This means that the basis for the information gathering is a relationship of trust between the press and informants, which is therefore covered by the freedom of the press.²⁰

An intervention is present in particular in the prevention of free information gathering, the interception of telecommunications by journalists or searches of editorial offices.

In a democratic society the protection of journalistic sources is of great significance for the freedom of the press. Demands to a journalist, to specify his sources, as well as searches of his home or his workplace to determine such a source, transgress his right of freedom of expression under Article 10 of the European Convention of Human Rights or rather Article 5 GG. They are only justified if there is an overriding public interest.²¹ There is no explicit legal definition for journalistic sources.

But in general you could say, that an informant is someone who gives (secret) information to another.²²

Such interference could, however, may be justified. This would be the case, as far as a general law, the protection of minors or laws precluding the protection of honour are up against the freedom of the press. For example, the freedom of the press in media products that glorify hatred and violence could be restricted in favour of the protection of minors. The protection of personal honour is guaranteed with the general right of personality under Article 2 I GG. It is particularly significant in testimony offenses, written in §§²³ 185 II. *Strafgesetzbuch* (Criminal Code). The concrete determination in general law is controversial (special legal theory, balancing theory, mixed special legal consideration doctrine). Usually it has to be measured by the mixed special legal consideration doctrine. The justification by a general law is the most important barrier. However, the presence alone is not enough for a legitimate restriction, decisive is the proportionality. Regarding the adequacy, the restrictive law itself has to be interpreted also in the

17 BVerfGE 20, 162 (175).

18 BVerfGE 91, 125 (134).

19 Neue Juristische Wochenschrift, , Zur Frage der Verfassungsmäßigkeit von Durchsuchungen in Presseräumen' (NJW CH Beck 1966) 1603 [German]

20 BVerfGE 36, 193 (176); BVerfGE 64, 108 (115).

21 EGMR, 14. 9. 2010, 38224/03; NJW-RR 2011, 1266.

22 <http://www.oxforddictionaries.com/de/definition/englisch/informant>

23 In Germany the terms article and § are used side by side. The constitution and the constitutions of the federal states are using the term article, whereas in domestic law § are used.

context of fundamental rights.²⁴ All in all, it is important to examine and consider the predominant interest in each individual case.

Furthermore, with the ban on censorship in Article 5 III GG control by the state is prohibited before publication. Exceptions are permitted only in favour of the protection of minors.

Moreover, the national legislation provides explicit protection of the right of the journalists not to disclose their sources with the right to refuse to testify, which is written in § 53 I 1 No. 5 *Strafprozessordnung* (Code of Criminal Procedure) as well as in § 383 I No. 5 *Zivilprozessordnung* (Code of Civil Procedure). The right to refuse to give evidence for press stuff protects journalistic sources and the anonymity of informants.²⁵ Protection from inspection or monitoring is additionally provided by § 20u *Bundeskriminalamtsgesetz/BKAG* (federal law about the criminal police office)²⁶ as well as § 3b G10 *Gesetz zur Beschränkung des Brief-, Post- und Fernmeldegeheimnisses/ Artikel 10-Gesetz* (law limiting the mail, post and telecommunications).

In conclusion, the national legislation in Germany protects the right of journalists not to disclose their source of information with high priority. It is a main principle in our democracy to protect the freedom of the press as well as the freedom of expression. Therefore it is construed as a fundamental right in the German Constitution under Article 5 GG.

Nevertheless, there is always a balancing process to be made between the freedom of expression of the journalist – including the protection of his source - and the overwhelming public interest in individual cases.

2. Is there in Domestic Law a Provision that Prohibits a Journalist from Disclosing his/her Sources? How Exactly is this Prohibition Construed in National Law? What is the Sanction?

The research is indispensable and information in image and graphics are to examine and reproduce faithfully. Their meaning must not be distorted nor falsified by editing, headline or caption and unconfirmed reports, rumours and assumptions are to be made recognizable as such.

The requirements vary depending on the severity of the feared interference with individual rights (the heavier the higher care needs) and also a potential time pressure of the press has to be considered (the more current the topic, the less possible for due diligence). Also, a balance of interests should always be carefully and comprehensively carried out. Often the question of whether a present consent to a photo, which is spread is actually effective or would be in demand here again (verification), in this regard, plays a major role. Furthermore, one should

²⁴ Hubert Gersdorf/ Boris P. Paal, Stefan Söder, 'Beck'scher Online-Kommentar Informations- und Medienrecht' (11th edn, CH Beck 2016), § 823 BGB I. 111 [German].

²⁵ VG Lüneburg, Beschluss vom 02.06.2014 - 5 A 154/13

²⁶ <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/04/rs20160420_1bvr096609.html> accessed 6th May 2016 [German].

always be careful to distinguish clearly between its own opinions and actual messages and to distinguish between advertising and editorial content (separation rule).

Among the rights of third parties, which must be followed in reporting, belongs especially the general right of personality under Article 2 I GG. What is needed is a balance between the fundamental rights of freedom of expression and freedom of the press on the one hand and the general right on the other hand side. The following applies: the greater the public interest in an event, the more likely the consideration is carried out in favour of the freedom of expression and the freedom of the press.

In domestic law in Germany there is no exact provision that prohibits a journalist to disclose his source. In contrary, as we can see it is especially protected.

Even though there is a critical point with the publication of illegally procured information. The illegal procurement of information cannot be generally justified by the pursued research purposes. Although in the interpretation and application of the relevant prohibitions the weight of the freedom of expression has to be considered.²⁷ According to Article 5 I GG, only the publication of information from generally accessible sources is allowed.

The distribution of illegally obtained information, however, is within the scope of protection under Article 5 I GG included.²⁸ Whether it is permissible in a particular case must be determined by comprehensive evaluation of interests. The importance of the fundamental right of the freedom of expression rises in significance as more it is contributing to the intellectual struggle of opinions in the public fundamentally affecting.²⁹

Sometimes it is still reported on the contents of secret documents - for example the documents that can be found on special websites. These documents were on the Internet already available to everyone before journalists made it a topic. In borderline cases like these, journalists must carefully outweigh what weighs more - the claim of the state to secrecy or the claim of the public to information. The relevance is usually present when grievances of considerable weight are revealed by the publication. Prior to release, this will be carefully checked by broadcasters and publishing houses.³⁰ In cases where the publisher obtains illegally procured information by fraud, with the intention to use it against the deceived person, the publication has to remain undone in principle.

The only exception is when the importance of information for informing the public and for the public opinion clearly outweighs the disadvantages, which bring the breach of law for the concerned person and for the legal system.³¹

27 EGMR, 24.02.2015, 21830/09.

28 BVerfG NJW 1984, 1741 (1743).

29 Hubert Gersdorf/ Boris P. Paal, Stefan Söder, 'Beck'scher Online-Kommentar Informations- und Medienrecht' (11th edn, CH Beck 2016) BGB § 823 BGB I. 220 [German].

30 'Grenzen der Berichterstattung' (Westdeutscher Rundfunk 2016), <http://www1.wdr.de/unternehmen/der-wdr/medienrecht_infotext100.pdf> accessed 18 April 2016 [German].

31 NJW 1984, 1741, 'Schutz der Redaktionsarbeit durch die Vertraulichkeit der Pressefreiheit' [German].

In general, neither the freedom of expression nor the freedom of the press allow illegal procurement of information. However, the dissemination of illegally obtained information is covered by the freedom of speech is then inadmissible if disclosure of information with other purpose or fulfil inadmissible intervene in private legal interests. The press cannot rely on the justification to assert legitimate interests pursuant to § 193 StGB for a breach of the journalistic duty of care. A particular care is to be noted when it comes to a tentative reporting. The criminal presumption of innocence until proven guilty does not apply to the press. On the one hand, a suspicion reporting can violate the general personal right. The press must therefore weigh up the public interest in information and the interests of the person concerned and make it clear in their reports that it is only a suspicion. On the other hand the spread of rumours that affect privacy is not permitted.³² Supports the medium as part of his research exclusively on own resources, the journalistic due diligence has to be considered in particular. Journalists need to exploit all available resources in order to provide comfort on the veracity of the limits of the possible and feasible. Relying on rumours is not enough.³³

In Germany, everyone has the so-called "law of the spoken word". In practice this means that each can decide whether his statements can be published verbatim, that may be quoted. A secret recording of conversations is prohibited by § 201 StGB. Even the secret eavesdropping is as an invasion of the general right not allowed. Private conversations that not everyone should hear shall not be cited publicly unasked. Everything said is basically intended for the listener. Only if someone is directed to a plurality of persons or a journalist who identifies as such, one may quote what was said.³⁴

But what happens if the authorization is refused or confidentiality had been agreed? Then you can only publish the information obtained when there is a public interest in them (balancing process). Furthermore, one should not disclose the identity of the interviewee nor reflect his words. And you will not be able to call him as a witness in any court disputes. This is called an "exclusionary rule".

Next to the protection of the spoken and written word, there are a few more rights, the press has to take into account: firstly the protection of anonymity under §§ 202a, 203 StGB, secondly the protection of reputation and honour under § 823 II with §§ 185 ll. StGB; § 187a StGB, § 189 StGB, thirdly breach of trust in the Foreign Office, violation of professional secrecy and a specific duty of confidentiality § 353a, b StGB, fourthly the right on the own picture under §§ 22-24 *Kunsturhebergesetz* (German law regulating art and copyright questions) as well as the moral

32 Christoph Hauschka/ Klaus Moosmeier/ Thomas Lösler, 'Corporate Compliance – Handbuch der Haftungsvermeidung in Unternehmen' (3rd edn. CH Beck 2016) § 57 Compliance im Presse- und Verlagswesen, § 57 ll. 30 [German].

33 Renate Damm/ Klaus Rehbock, 'Widerruf, Unterlassung und Schadensersatz in den Medien' (3rd edn. CH Beck 2008) l. 675 [German].

34 Kurt Haag/ Geigel, 'Der Haftpflichtprozess mit Einschluss des materiellen Haftpflichtrechts' (27th edn. CH Beck 2015) l. 67-72 [German].

rights under §§ 12-14 *Urhebergesetz* (copyright law). Nevertheless there are no criminal provisions in the German criminal code which punish violation of professional secrecy, confidential information and/or private information and in principle applicable to journalists who violate their duty to protect his/her sources.

Next to the law, for German journalists there is a Press Code. In numeral 5 states that the press maintains professional secrecy, makes use of the privilege to refuse to give evidence and do not abandon informants without their explicit agreement.³⁵ At the whole Press Code there are no sanctions normalized. However, the creator of the Press Code, the Press Council, has several boards of complaint. With them it is a matter of voluntary self-regulation for reviews of articles, interviews, photos, etc. In a pledge the majority of all publishers confess to the Press Code and the sanctions of the Press Council.³⁶ The sanctions imposed by the board sanctions are the following: The public reprimand is the toughest sanction of the complaints commissions. She must be published by the editors in their next issues. For the protection of those affected, the complaint may also be non-publicly pronounced. Second strongest measure is disapproval. The Press Council recommends the publication, but it is not mandatory. Furthermore, the Press Council can issue a notice to a relevant editorial.³⁷ The German Law provides no provisions in Labour Law which may apply a disciplinary sanction for breaching the secrecy of journalistic sources.

To sum it up, in domestic law there are several provisions that restrict a journalists rights. There is a thin line between the freedom of the journalist and the protection of the affected person. The prohibition starts where rights of others are touched. Furthermore there are also non-legal rules concerning the work of journalist in the press code.

3. Who is a “Journalist” According to the National Legislation? Is it in your View a Restricted Definition for the Purpose of the Protection of Journalistic Sources? What is the Scope of Protection of other Media Actors? Is the Protection of Journalists’ Sources Extended to Anyone Else?

In Germany, Article 5 GG deals with the protection of the freedom of press. Article 5 Section 1 Sentence 1 guarantees everyone the freedom of speech. This is specified in S. 2. There is no censure, S. 3. A journalist is part of the press. Therefore, Article. 5 also protects journalists. The *Grundgesetz* (German Constitution) does not define “press”³⁸, although it does mention it several

³⁵ Trägerverein des Deutschen Presserats e.V., *Pressekodex* (presserat, – 2016) <<http://www.presserat.de/pressekodex/pressekodex/>> accessed June 02 2016 [German].

³⁶ Trägerverein des Deutschen Presserats e.V., *Pressekodex* (presserat, – 2016) <<http://www.presserat.de/presserat/selbstverpflichtungserklaerung/>> accessed June 02 2016 [German].

³⁷ Trägerverein des Deutschen Presserats e.V., *Pressekodex* (presserat, – 2016) <<http://www.presserat.de/pressekodex/uebersicht-der-ruegen/>> accessed June 02 2016 [German].

³⁸ Reinhart Ricker, Johannes Weberling, *Handbuch des Presserechts* (6th edn, CH Beck 2012) 2 [German].

times in Articles 5 and 75. Neither does the constitution define “journalist”. Journalists are part of press. Press is defined as all printed matter³⁹ made for publication, no matter if they are published periodically or only once.⁴⁰ There is no need for publication to the public, the printed matter can also only be published among a certain group of people.⁴¹ The freedom of press is a special case of the freedom of information because it is not only about the access to information from publicly accessible sources but also about privately researched sources and observances.⁴² However, there is no right to information. This can only be granted in state legislation.⁴³

The protection of the press is valued highly because the press will only be able to publish independently if the access to sources is provided without restrictions. An informant will only offer information if assured that he or she can rely on confidentiality.⁴⁴

The trade union „*Deutscher Journalisten Verband*“ (DJV) has established certain criteria defining the term “journalist”.⁴⁵ One needs to fulfil these criteria to become a member of the union.

To be a journalist one needs to work full-time as an employee or a freelancer for media such as print media or broadcasting.⁴⁶ Moreover, one has to research and work on information, which is supposed to be spread for information, opinion and entertainment.⁴⁷ The person has to select and choose the information to be published.⁴⁸

To conclude, according to German law everyone writing or working in media could label himself or herself a journalist. Therefore, the term journalist is not restricted but rather extensive so that many people are protected. There is no special protection exclusively for journalists but for press only.

As the German Law of Press is based on national and state legislation, both have to be considered when answering the question.⁴⁹

³⁹ For a definition: *Landespressegesetze* (State legislation regarding press), eg § 7 I Landespressegesetz North Rhine-Westphalia.

⁴⁰ Federal Constitutional Court of Germany Report Volume 20 [1962] 176 [German]; Bodo Pieroth, Bernhard Schlink, Thorsten Kingreen, Ralf Poscher, *Grundrechte Staatsrecht II* (29th edn, CF Müller 2013) para 611 [German].

⁴¹ *ibid.*

⁴² *ibid* para 616.

⁴³ *ibid.*

⁴⁴ Federal Constitutional Court of Germany Report Volume 20 [1962] 176 [German]; Federal Court of Germany Report Volume 36 [1989] 1 [German].

⁴⁵ DJV Guidelines to admission <<https://www.djv.de/en/startseite/profil/mitglied-werden/aufnahmerichtlinien.html>> accessed 3 June 2016 [German].

⁴⁶ *ibid.* bullet point 1 <<https://www.djv.de/en/startseite/profil/mitglied-werden/aufnahmerichtlinien.html>> accessed 3 June 2016, 7:24 [German].

⁴⁷ *Ibid.* bullet point 2 <https://www.djv.de/en/startseite/profil/mitglied-werden/aufnahmerichtlinien.html> accessed 3 June 2016 [German].

⁴⁸ *Ibid* [German].

⁴⁹ Ricker, Weberling, *Handbuch des Presserechts* 3.

4. What are the Legal Safeguards for the Protection of Journalistic Sources? How are the Laws Implemented? How are the Legal Safeguards Combined with Self-Regulatory Mechanisms?

There are several laws in Germany dealing with media to be considered in relation to this question. The media can only support the formation of a public opinion if they can offer reliable information.⁵⁰

In every German state, there are *Landespressegesetze* (state legislation concerning press), eg *Landespressegesetz North Rhine-Westphalia (LPresseG NRW)*. Those laws mainly focus on the right of the press to be informed by administration about topics they need to be informed about to fulfil their task of informing the public.

However, they do not only focus on the protection of journalistic sources but also on the right to reply to every person concerned in published works or the liability of publishers. According to the law, editors and publishers are even liable for negligence when publishing wrong facts.⁵¹

The freedom of information is a fundamental human right recognised both at federal and national level.⁵²

There are several legal safeguards. Among these are the right to refuse to give evidence, restrictions for (legal) searches and “confiscation” in media companies, limits to “lawful interception” and enlargement to multimedia.⁵³

In Germany everyone has the right to refuse to testify according to § 53 I StPO under special conditions. As the German Supreme Court pointed out the press area is under high protection concerning private information and the informant will only offer information if assured that he or she can rely on the keeping of the confidentiality of the legal department.⁵⁴ It is a special law for people whose profession swears them to secrecy, § 53 I No. 5 StPO. According to this law, you have to be a member of a profession that prepares, makes or distributes print media, film reports or other media made for teaching or forming of opinion. Then you can refuse to tell who offered information and other job related documents as long as they are made for the editorial

⁵⁰ Ernst Fricke, *Recht für Journalisten: Presse – Rundfunk – Neue Medien* (1st edn, UVK Verlagsgesellschaft 2010) 78 [German].

⁵¹ §§ 21f. LPresseG NRW.

⁵² There is state and national legislation regarding the freedom of information (*Informationsfreiheitsgesetz* of Germany and *Informationsfreiheitsgesetz* of North Rhine-Westphalia). They are only valid between people and national administration.

⁵³ Benjamin Bröcker; *Redaktionsgeheimnis und Quellenschutz in Frankreich und Deutschland* *Schriftenreihe zum internationalen Einheitsrecht und zur Rechtsvergleichung* Band 48, (1st edn, Verlag Dr Kovac 2015) 45ff [German].

⁵⁴ Federal Constitutional Court of Germany Report Volume 20 [1962] 176 [German]; Federal Court of Germany Report Volume 36 [1989] 1.

part of the media. You must not refuse evidence if there is investigation regarding a crime⁵⁵ or if the national security or the state is endangered (as long as there is no other way of solving the crime)⁵⁶. You must also not refuse to give evidence if the prosecution investigates a crime regarding sexual self-determination⁵⁷ or money laundering⁵⁸. However, there is a re-exception for journalists, which protects the informant nevertheless.

Identical laws can be found in § 383 I No. 5 ZPO (German code of civil procedure) and in § 102 I No. 4 AO (German tax code). These laws can also be applied in “*Fachgerichten*” (specialised tribunals) because of the reference rules in §§ 46 ArbGG (German Labour Court Law), 98 VwGO (Administrative Court Procedures Code), 84 I FGO (German Tax Law Code), 118 I SGG (Social Security Code) and 15 I FGG (Jurisdiction over non-contentious matters). There, the right to refuse evidence is a guaranteed privilege.⁵⁹

A problem is that this law’s wording does not include protection of data, eg in a cloud, as this is not explicitly stated in the concerning laws.⁶⁰ The state can request disclosure of the sources, e.g. the prosecution during a criminal procedure. As shown above, the right to refuse evidence can be found in all laws regarding trial. Obviously, the parties to a trial can always ask for disclosure of the sources of a journalist. However, the journalist then has the right to refuse to testify. This right is voluntary and the journalist can refrain from making use of it.⁶¹

The German term “*Redaktionsgeheimnis*” sums up all these measures for which there is no exact translation but it can be described as the confidentiality of the editorial department.

In general, it means that there are legal safeguards, which protect journalists and their sources by limiting the state’s/government’s/courts’ possibilities of interfering and forcing the journalists to reveal their sources.

Moreover, there are restrictions for (legal) searches and “confiscation” in media companies.

As those restrictions are part of the constitutionally guaranteed freedom of press, they can be found in both constitutional and non-constitutional law.⁶²

Regarding the German constitution, legal searches and confiscation are very strong interference in the basic rights such as Article 5 of the concerned persons.⁶³ This protection adds to the right

⁵⁵ § 53 II Nr. 1 StPO.

⁵⁶ *ibid.*

⁵⁷ § 53 II Nr. 1 StPO.

⁵⁸ § 53 II Nr. 3 StPO.

⁵⁹ Bröcker, *Redaktionsgeheimnis und Quellenschutz in Frankreich und Deutschland* 46.

⁶⁰ Cf laws mentioned in section before.

⁶¹ Fricke, *Recht für Journalisten: Presse – Rundfunk – Neue Medien* 92.

⁶² Bröcker, *Redaktionsgeheimnis und Quellenschutz in Frankreich und Deutschland* 69.

⁶³ Bröcker, *Redaktionsgeheimnis und Quellenschutz in Frankreich und Deutschland* 69.

to refuse evidence because the press is protected from the state searching its editorial department for information to avoid the application of the right to refuse evidence. The constitutional court has created some kind of accessoriness⁶⁴ between the two rights.⁶⁵

Legal searches and confiscation cannot be conducted with the main purpose of discovering an informant because this would mean an evasion of § 97 V StPO.⁶⁶

There are also several limits to “lawful interception”. Both, Article 5 I 2 and Article 10 I GG are Concerned. The constitutional court ruled that media could rely on both protections. It stressed that especially a journalist’s source is protected because the press cannot work without the trust and security of its informants.⁶⁷ The state cannot employ arbitrary surveillance of Telecommunication. Nevertheless, no general privilege exists regarding criminal prosecution.⁶⁸

So, Surveillance via telecommunication can be more easily employed than giving oral evidence or Searching rooms. The reason is that data of telecommunication is not in the hands of the journalists but of the media companies.⁶⁹ Moreover, the legal barriers for surveillance of telecommunication are in general much higher.⁷⁰ In addition, § 193 StGB protects the legitimate interest regarding the voicing of opinions.

This is also mentioned in § 824 II BGB. § 193 expresses the so-called “*erlaubtes Risiko*” (risk that is permitted) meaning that statements are not even considered as unlawful if it is proved later that they are not untrue if their truth could not be proved at the point of release.⁷¹ When publishing such insecure information, the press has to meet a certain standard of care and they have to prove a legitimate interest in court.⁷² This is proved to court if the interest of the offender outweighs the interest of the person concerned.⁷³ Thus, the press cannot be held liable.⁷⁴

According to § 312 StPO you have the right of appeal against an unfavourable ruling.⁷⁵ In general trials are public.⁷⁶ However, a person can request an exclusion of the public according to

⁶⁴ *ibid* 70.

⁶⁵ *ibid* 70.

⁶⁶ Bröcker, Redaktionsgeheimnis und Quellenschutz in Frankreich und Deutschland 71.

⁶⁷ Federal Constitutional Court of Germany Report Volume 100 [1999] 313 [German].

⁶⁸ Federal Constitutional Court of Germany Report Volume 107 [2003] 322 [German].

⁶⁹ *Ibid* 332.

⁷⁰ § 100a StPO; Bröcker, Redaktionsgeheimnis und Quellenschutz in Frankreich und Deutschland 118.

⁷¹ Fricke, Recht für Journalisten: Presse – Rundfunk – Neue Medien 80.

⁷² Fricke, Recht für Journalisten: Presse – Rundfunk – Neue Medien 80.

⁷³ Brian Valerius, Beck'scher Online Kommentar StGB, (30th edn, Bernd von Heintschel-Heinegg, CH Beck 2015) § 193 I 11 [German].

⁷⁴ Fricke, Recht für Journalisten: Presse – Rundfunk – Neue Medien 80.

⁷⁵ Carsten Paul Karlsruher Kommentar zur Strafprozessordnung (7th edn, Rolf Hannich, CH Beck 2013) § 312 para 1ff [German].

§ 172 GVG (German Judicature Act) if his interest outweighs the right of the public to be informed, eg if the freedom of a witness is endangered.⁷⁷ Journalist can make use of this right.

Moreover, the enlargement of press to multimedia needs to be considered.⁷⁸ The above-mentioned legal safeguards have to be applied to multimedia and maybe even changed. This is difficult with regard to blogs⁷⁹, Internet platforms of media companies⁸⁰ and cloud computing⁸¹. It has to be defined if the users should be considered as informants.

According to the states' legislation regarding press, there is no organisation in which membership is mandatory as a professional journalist.⁸² However, there are several organisations on a voluntary basis such as "*Deutscher Journalisten-Verband*" (German Federation of Journalists)⁸³

As a self-regulatory mechanism, members of the media industry found the association "*Deutscher Presserat*" (German Press Council).⁸⁴ Its actions are not legally binding.⁸⁵

They have a self-regulatory mechanism: the *Pressekodex*⁸⁶ (German Codex of Press). This voluntary measurement compels journalists to keep their sources secret. Number 5 Pressekodex deals with the protection of informants. The press does not disclose information about informants if they do not agree. Number 5.1 regulates exceptions such as the protection of the state:

"Should an informant stipulate, as a condition for the use of his/her report, that he/she remain unrecognisable or not endangered as the source, this is to be respected. Confidentiality can be non-binding only if the information concerns a 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."⁸⁷

76 *ibid.*

77 § 172 Nr. 1a GVG; Thomas Fischer *Karlsruher Kommentar zur Strafprozessordnung* Einleitung para 66ff.

78 Bröcker, *Redaktionsgeheimnis und Quellenschutz in Frankreich und Deutschland* 141.

79 *ibid* 142 ff.

80 *ibid* 152ff.

81 *ibid* 160ff.

82 § 1 III LPressG NRW.

83 <<https://www.djv.de/startseite/profil/der-djv/information-in-english.html>> accessed 17 April 2016.

84 <<http://www.presserat.de/presserat/>> accessed 10 April 2016 [German].

85 Fricke, *Recht für Journalisten: Presse – Rundfunk – Neue Medien* 84.

86 <<http://www.presserat.de/pressekodex/pressekodex/>> accessed 17 April 2016 [German].

87 Guideline 5.1 German Press Codex <<http://www.presserat.de/pressekodex/pressekodex/>> accessed 17 April 2016.

The reasons for confidentiality not being binding are the same as in § 53 II StPO.⁸⁸ Everyone can complain about a certain press release or other actions concerning media to the *Presserat*.⁸⁹ After a complaint, the *Presserat* has certain ways of imposing sanctions although none of them are legally binding.⁹⁰

To sum it up, journalists should look for consent from the *Presserat* if they want to disclose a source in accordance with Number 5.1 *Pressekodex*. However, there are no criminal consequences when disclosing information as the right to refuse evidence is voluntary meaning that the journalist can choose freely to disclose information.⁹¹

All in all, there are several legal safeguards in German law for the protection of journalistic sources. As described above, the freedom of speech and press are valued highly in Germany. That is why the laws are strictly implemented. The protection of sources is supported by the codex of the *Presserat*, which also values the protection very highly with respect to the importance of undisclosed sources for the free press. Therefore, journalists in Germany have both a legal right and a voluntary duty not to disclose their sources.

5. In the Respective National Legislation are the Limits of Non-Disclosure of the Information in Line with the Principles of the Recommendation No R (2000) 7? What are the Procedures Applied? Is the Disclosure Limited to Exceptional Circumstances, Taking Into Consideration Vital Public or Individual Interests at Stake? Do the Authorities First Search for and Apply Alternative Measures, which Adequately Protect their Respective Rights and Interests and at the Same Time are Less Intrusive with Regard to the Right of Journalists Not to Disclose Information?

5.1. Principles of the Recommendation No. R (2000) 7

In the Recommendation No. R (2000) 7 there are many important points mentioned concerning the journalistic right not to disclose their source of information. It is disputable if and to what extent the limits of non-disclosure in the German legislation are in line with the following principles.

⁸⁸ cf fn 14ff.

⁸⁹ Fricke, *Recht für Journalisten: Presse – Rundfunk – Neue Medien* 85.

⁹⁰ *ibid* 85.

⁹¹ Senge *Karlsruher, Kommentar zur Strafprozessordnung* (7th edn, CH Beck 2013) § 53 StPO Para 7 [German].

5.1.1. Principle 1: Right of Non-Disclosure of Journalists

Journalists should have the right not to disclose a source of information. Their rights must be in line with Article 10 EMRK (Convention for the Protection of Human Rights and Fundamental Freedoms). According to this Article everyone generally has the right to express his or her opinion, but there are also duties and responsibilities. If there is no restriction due to very special circumstances, such as a danger to the public safety, the freedom of expression has to be ensured by the authorities.

As it was already shown in the previous questions, this is realized in the German legislation (especially Article 5 GG, in which the freedom of expression and the freedom of the press are guaranteed).

5.1.2. Principle 2: Right of Non-Disclosure of other People

People acquiring knowledge of information identifying a source due to their professional relationships with journalists should be protected by all the principles mentioned here in the same way as journalists are protected.

This principle is put into practice in the German legislation as well.⁹²

5.1.3. Principle 3: Limits to the Right of Non-Disclosure

There must not be any other limitation to the right of journalists not to disclose a source than those manifested in Article 10, paragraph 2 EMRK. Authorities should only be allowed to order a disclosure when there are very serious circumstances in which the public interest in the disclosure outweighs the interest of the single journalist who does not want to disclose a source of information.

In the German Constitution (Article 5, paragraph 2 GG) there are some restrictions to the freedom of expression mentioned: the regulations of general law, the protection of the youth and the personal honor. Each of these aspects can be interpreted as part of Article 10, paragraph 2 of the Convention as well. This Article allows restrictions to the right of non-disclosure, which is implemented in the freedom of expression, due to legal rules.⁹³ The personal honor, that is protected in Article 5 GG, can also be found in Article 10 EMRK, there it is called „protection of the reputation or rights of others“. The last restriction that is mentioned in Article 5 GG is the protection of the youth. This is not particularly mentioned in Article 10 EMRK, but it can be included in the „protection of morals“, which Article 10 explicitly demands.

All the limitation to the journalistic right not to disclose a source of information that exist in the German legislation can be interpreted as part of Article 10, paragraph 2 EMRK. The restrictions that are mentioned in Article 5 GG are in every point similar or at least comparable to those

⁹² This is not explained here, since it was ascertained due to the previous questions.

⁹³ Article 10, Paragraph 2 EMRK: as are prescribed by law.

named in Article 10 EMRK. The third principle of the Recommendation No. R (2000) 7 is consequently followed.

5.1.4. Principle 4: Alternative Evidence to Journalists' Sources

Within legal proceedings against a journalist due to a supposed violation of another person's honor or reputation authorities must not be allowed to require the disclosure of information identifying a source by the journalist in order to find out whether their allegation is true or not. The Federal Constitutional Court of Germany decided that searching and confiscation are not permissible if their main aim is to disclose the identity of the informant⁹⁴ (there will be more details about this judgment in question 7). This decision points out that journalists do not have to disclose information identifying a source, even if they are suspected of having done something that is forbidden.

5.1.5. Principle 5: Conditions Concerning Disclosures

There are several conditions concerning disclosures of information mentioned: first of all only people or public authorities having a direct legitimate interest in the disclosure of information should be allowed to induce it. Secondly before requesting such a disclosure the authorities would have to inform the journalists of their right of non-disclosing a source, but also of the limits that are set to this right. Furthermore, any sanction against a journalist due to the non-disclosure of a source has to be declared within a proceeding in which the journalist has a chance to explain his or her point of view. Article 6 EMRK serves as a rule here, its principles should be followed. Once the sanction is imposed the journalist should have the right to make another judicial authority check the decision.

5.1.6. Principle 6: Interception of Communication, Surveillance and Judicial Search and Seizure

Several measures should not be practiced if they intend to elude the journalistic right not to disclose information identifying a source: Interception or surveillance orders concerning communication of journalists, their employers or any other of their contacts and search or seizure orders in their private or business rooms. Even if information identifying a source has been received in a correct way, the authorities should take measures in order to prevent the use of this information during proceedings. It may only be used if the disclosure of information identifying a source would be justified in accordance to principle 3 of this Recommendation No. R (2000) 7. Therefore one of the cases named under 5.1.3. Would have to be given.

Article 10 EMRK deals with this topic as well: Private or business rooms of journalists may only be searched if there is an outweighing legitimate interest.⁹⁵

⁹⁴ NJW 2007, 1117.

⁹⁵ NJW 2008, 2565.

In Germany the authorities are generally not allowed to confiscate any object that is kept by an editorial office according to §97 paragraph 5 StPO.⁹⁶ This law protects any kind of medium, for example written documents, but also pictures and illustrations. Searching of private or business rooms are in general inadmissible if their aim is to find out anything about the informant.⁹⁷

5.1.7. Principle 7: Protection Against Self-Incrimination

Journalists should be protected from self-incrimination in criminal proceedings, so that they cannot be punished in any way for not disclosing a source.

As it was already mentioned the German law guarantees that every journalist has the right to refuse to testify⁹⁸ in order not to incriminate himself or herself by not disclosing information identifying a source. This right has been confirmed and invigorated by the Federal Constitutional Court.⁹⁹ Like this journalists are protected from being punished due to non-disclosure of information identifying a source. The last principle of the Recommendation No. R (2000) 7 is accordingly realized in the German legislation as well.

5.2. The Procedures Applied

There are some procedures applied in order to protect the journalistic right of non-disclosure of sources and information.

One important point is the fact that Article 5 of the German Constitution guarantees the freedom of the press. Like that journalists have the chance to sue for their rights if they think these rights are not respected. Another protective mechanism is the right to refuse to testify according to §97 paragraph 1 Nr. 5 StPO, which was already mentioned. These rules that have been set by the legislator secure the right of journalists not to disclose their source of information.

5.3. The Limitation of the Possibility to Request Disclosure to Exceptional Circumstances

The authorities' options to force journalists to disclose information identifying a source should be limited to exceptional circumstances. Therefor vital public or individual interests should be taken into consideration in order to define in which case and under which particular

⁹⁶ Compare as well: Löffler, Martin/ Wenzel, Karl Egbert/ Sedelmeier, Klaus (Hrsg.): Presserecht: Kommentar, 6. edition, München 2015, page 1127.

⁹⁷ Compare: Roxin, Klaus/ Schünemann, Bernd: Strafverfahrensrecht: ein Studienbuch, 28. edition, München 2014, §35.

⁹⁸ §53 paragraph 1 Nr. 5 StPO, § 383 paragraph 1 Nr. 5 ZPO and § 102 paragraph I Ziffer 4 AO.

⁹⁹ NJW 1990, 525.

circumstances such a restriction of the journalistic right not to disclose their sources might be allowed.

In Germany journalists generally have the right to refuse to testify according to §53 paragraph 1 no. 5 StPO. Only in exceptional situations a journalist can be forced to disclose his or her source¹⁰⁰, for example if this information is absolutely necessary to illuminate a crime.

The most important principle here is the concept of necessity. In order to decide whether a disclosure is necessary or not, a judge should analyzed several aspects: It has to be found out whether disclosure is truly necessary due to the absence of any less intrusive measure, for example alternative investigative measures that can lead to the same result. Secondly it has to be ascertained that the information that is provided will really be relevant for the case. Furthermore the measures that are taken have to be adequate; their aim should be to reduce any damage and to find a good balance between the interests of all the people involved in the respective case.

The requirements of ordering a disclosure of information according to §53 StPO¹⁰¹ are extremely high: only in very special cases the right to refuse to testify may be restricted. This might happen when the journalist's testimony is necessary to illuminate a crime or when the object of the investigation is something really grave, for example treason or money laundering. Even in these situations journalists are still allowed not to disclose information identifying their informant. Like that authorities can only make a journalist disclose such information under particular circumstances.

It is important to point out that in Germany a judge as part of the judiciary is bound to law and order due to the constitution¹⁰², he or she accordingly has to respect all the rules including §53 StPO. The police and the prosecution, that are criminal authorities as well, are also bound to all the rules. They are part of the executive that is mentioned in Article 20 paragraph 3 GG as well.

5.4. Application of Less Intrusive Measures

Authorities should first search for and apply alternative measures which protect their respective rights and interests in the same way and at the same time are less intrusive concerning the right of journalists not to disclose information.

In Germany the authorities have to first try other things before restricting journalistic rights. §97 paragraph 5 StPO for example, that was already mentioned here, forbids the authorities to confiscate any medium belonging to a journalist's work as long as what he or she is doing is included by the right to refuse to testify.

¹⁰⁰ According to §53 paragraph 2 StPO.

¹⁰¹ Paragraph 1 Nr. 5 guarantees a general right to refuse to testify, in paragraph 2 there are cases mentioned in which a disclosure might though be ordered.

¹⁰² Article 20 paragraph 3 GG.

To conclude, all the seven points of the Recommendation No R (2000) 7 are put into practice in the German legislation, which is consequently in line with the principles mentioned and postulated here. There are several protective mechanisms in order to make sure that journalists cannot be forced to disclose information identifying their source. The most important principle is the concept of necessity, which is realized in §53 StPO. Journalists have the right to refuse to testify, which may only be circumvented under very special criteria. The judges (judiciary), the police and the prosecution (both are part of the executive) are bound to this law according to the constitution.

6. In the *Recommendation No R (2000) 7* the Following Principles Should Be Respected When the Necessity of Disclosure is Stated: Absence of Reasonable Alternative Measures, Outweighing Legitimate Interest (Protection of Human Life, prevention of major crime, defense of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the disclosure outweigh the interest in the non-disclosure?

These two main ideas have to be considered: There must not be any other reasonable alternative measure. Accordingly we need a situation in which it is not possible to handle a problem by using a less intrusive measure than forcing a journalist to disclose information identifying his or her source. Secondly there must be an outweighing legitimate interest in the disclosure. The journalistic right not to publish information identifying a source is very important, but there might be a case in which something else is even more important and has to be protected. It is disputable which criteria must be given in order to affirm an outweighing legitimate interest in the disclosure.

In Germany there are situations in which the authorities have more options to make the journalists disclose information identifying their sources. This might happen especially within the topic of inner safety.

6.1. Change of the BKAG (Federal Criminal Police Office Law) in 2009

One important point concerning the journalistic right not to disclose a source is the change of the BKAG, which has taken place a few years ago.

6.1.1. Function of the BKA

The BKA (Federal Criminal Police Office of Germany) is responsible for preventing or illuminating crimes that have an extensive or international meaning. Therefore the BKA collects and analyses information and data in cooperation with the respective law enforcement agency.¹⁰³

6.1.2. Change of the BKAG

In 2009 the BKAG (Federal Criminal Police Office Law) has been significantly changed: Since that point, the BKA is allowed to force journalists to disclose information identifying their source when they think there might be a terroristic danger. Of course the right to refuse to testify in general still exists, but journalists can be punished for not disclosing their source when they are writing about terrorism. Many people, especially those working as journalists, criticized the change of this law as an offence to the freedom of the press.¹⁰⁴

In that case the disclosure of information might help to prevent terrorism, which can be labelled as a major crime, since terrorists usually try to kill people or at least to harm them. The protection of human life is that important, so it possibly outweighs the interest in non-disclosure in certain situations. The outweighing legitimate interest can accordingly be given when a journalist writes about terroristic danger. This is one of the most important points at the moment, since terrorism is currently that present in Europe.

6.2. Case „Cicero“

In general there are certain tensions between safety and freedom, in this special case the freedom of the press.¹⁰⁵ For example in 2005 the editorial offices of the German magazine “Cicero” and the private apartment of one journalist working there were searched after the journalist had quoted from confidential documents of the Federal Criminal Police Office concerning a conjectural terrorist.¹⁰⁶ The police wanted to find out how the journalist got to know about this confidential document. In that case the authorities decided that the public safety was more important than the rights of the journalists affected by this measure.

6.3. Other Crimes for which a Disclosure is Possible

As it was explained in 5.3., there are certain crimes for which a disclosure might be possible. These crimes are listed in §53 paragraph 2 StPO. Some of them are peace betrayal, endangering the democratic rule of law, treason or endangering the exterior safety.¹⁰⁷ All of these crimes can

¹⁰³ Beck'scher Online-Kommentar StPO/Krauß RiStBV Rn. 1.

¹⁰⁴ Hans-Jürger Jakobs: Staat macht Journalisten zu Hilfspolizisten, in: Süddeutsche Zeitung, 17. Mai 2010.

¹⁰⁵ Dieter Kugelmann: Pressefreiheit ohne Informantenschutz?, in: Zeitschrift für Rechtspolitik (ZRP) 2005, 260.

¹⁰⁶ Dieter Kugelmann: Pressefreiheit ohne Informantenschutz?, in: ZRP 2005, 260.

¹⁰⁷ §53 paragraph 2 Nr. 1.

be called major crimes, since their aim is to endanger the inner or exterior safety, that are both vital to a peaceful way of living for the people. Furthermore the prevention of such a crime might in many cases protect human life, which is a very important criteria to justify an outweighing legitimate interest in the disclosure of information.

Another type of crime that might lead to a disclosure is a criminal act against the sexual self-determination of a person.¹⁰⁸ This is a very important individual right, so in such a situation there might be an outweighing legitimate interest in the disclosure as well.

According to §53 paragraph 2 no. 3 StPO money laundering may cause a disclosure as well. In these situations the person usually embezzled very much money, so the public interest in this case is reasonable, since everyone benefits from a state that has enough money to fulfil all the obligations.

Again the concept of necessity is a really important criteria to find out whether a journalist can be forced to disclose information identifying a source or not. Even if there is an outweighing legitimate interest, the authorities still have to think about alternative measures that are less intrusive before they are allowed to order a disclosure. This principle is fixed in §53 paragraph 2 StPO as well.

All in all it can be noticed that the absence of reasonable alternative measures and an outweighing legitimate interest in the disclosure of journalistic sources may be affirmed when there is one of the crimes mentioned in 6.3. that has been committed and that can only be illuminated with this special information. This can be the case within the topics inner and exterior safety, for example when a journalist is writing about a terroristic danger. In some situations the public interest in preventing major crimes and saving lives might outweigh the interest of the journalist in concealing the identity of his informant.

Regarding all the aspects mentioned here the German law is in line with the Recommendation No. R (2000) 7.

7. In the Light of the Case Law of the European Court of Human Rights how Do National Courts Apply the Respective Laws with Regard to the Right to Protect Sources? In Particular, How Do They Balance the Different Interests at Stake?

Journalistic freedom has been a cornerstone of German democracy ever since the creation of the Federal Republic of Germany in 1949. Article 5 of the German constitution (German: *Grundgesetz* or *GG*) protects the freedom of information and guarantees the freedom of the press. Furthermore, journalistic sources profit from the protection of the privacy of correspondence, post and telecommunication as guaranteed in Article 10 of the constitution.

¹⁰⁸ According to §53 paragraph 2 Nr.2.

German courts have traditionally upheld the rights of journalists, especially with regards to confidentiality. A case that is very important in the context of this question is the so-called “Cicero judgement”, from the 27th of February of 2007.¹⁰⁹

The facts of the case were as follows: The political magazine CICERO published an article about a prominent terrorist, which included a confidential report by the Federal Criminal Police Office (*Bundeskriminalamt* or “*BKA*”). The local state prosecution in Potsdam, where CICERO was based, launched an investigation with regards to “betrayal of secrets” (*Gebimmisverrat*) according to § 353b of the Criminal Code (*Strafgesetzbuch* or *StGB*). The journalist who wrote the offending article was charged with aiding and abetting in the crime. The local court allowed the newspaper’s offices to be searched and any evidence to be confiscated.

In the CICERO case, the German Federal Supreme Court (*Bundesverfassungsgericht* or *BVerfG*) ruled that it is unconstitutional to search or confiscate the property of members of the press in order to obtain information that may identify of their sources.¹¹⁰ According to the Court, any journalist has the right to protect the identity of its source even from their own firm.¹¹¹ Furthermore the BVerfG ruled, that if a source commits a criminal act according to § 353b StGB by revealing confidential information to a journalist, the act of publishing this information does not constitute aiding and abetting according to German Criminal Law.¹¹²

In 2012, the German legislation added the paragraph 3a to § 353b, which ensures that journalists, amongst others, cannot be prosecuted for rendering aid for betrayal of secrets, if the aid is limited to accepting, interpreting and publishing the information in question.

As a result, journalist can now publish confidential information from sources without having to fear prosecution, which also makes it impossible to search or confiscate their property with regards to this information.

109 BVerfG, Urteil v. 27.02.2007, Az. 1 BvR 538/06, 1 BvR 2045/06

110 BVerfG Urteil v. 27.02.2007, Az. 1 BvR 538/06, 1 BvR 2045/06, official Summary

111 BVerfG, Urteil v. 27.02.2007, Az. 1 BvR 538/06, 1 BvR 2045/06, Nr 27

112 BVerfG, Urteil v. 27.02.2007, Az. 1 BvR 538/06, 1 BvR 2045/06, official Summary

8. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, and foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

Under the German constitution, Article 10 guarantees the privacy of correspondence, post and telecommunication is. However, this privacy can be limited by law. If the limitation of privacy in question is required for the “protection of the democratic order or the preservation of the Federation or one of its States”, invasions into the privacy of an individual can be conducted without the affected person’s knowledge.

Right to Deny Testimony According to § 53 StPO

Journalists enjoy a special protection under German law, which is centred around is the journalist’s right not to give testimony as guaranteed in § 53 StPO. Under this statute, certain professions are not required to give witness in criminal proceedings. The list includes members of parliament, (medical) doctors, clerics as well as defence attorneys and notaries public, amongst others. The special status is owed to the significant public roles these professions have in society, which requires absolute trust in their confidentiality by the public.¹¹³ As a result, their right to confidentiality is generally considered more important than the state’s interest in the establishment of truth.¹¹⁴ With regards to journalists, the special public interest in having a well-functioning, trustworthy press means that the journalists cannot even

It should be noted, that § 53 I No. 5 StPO does not explicitly mention “journalists” as the protected group. Instead, the statute’s effect extends to “all individuals who, as part of their profession, were or are involved in the creation or distribution any forms of media intended for the information of the public.”¹¹⁵ This definition of “creation or distribution” also includes the acquisition of the relevant information as well as journalistic research.¹¹⁶ The right not to give testimony extends to the Name of the informant as well as any facts, which might help with the discovery of his identity.¹¹⁷

113 Ludwig Hennemann, *Pressefreiheit und Zeugnisverweigerungsrecht* (Dunker &Humboldt, 1978) 97 [German]

114 Federal Court of Justice (Bundesgerichtshof/ BGH) StB 8/13 - Beschluss vom 18. Februar 2014 (the judgement speaks only of attorneys, however the reference to § 53 StPO also covers journalists and other professions)

115 See § 53 StPO

116 Dr. Jürgen Peter Graf, *Beck’scher Online-Kommentar StPO* (C.H. Beck, 2016) § 53 StPO Rn. 28 [German]

117 Dr. Jürgen Peter Graf, *Beck’scher Online-Kommentar StPO* (C.H. Beck, 2016) § 53 StPO Rn. 30 [German]

§ 164 a states that any investigative action by the prosecution is invalid if it targets a person protected by § 53 StPO and it is likely that the investigation will reveal information about which the person would be allowed to refuse testimony. Additionally, all information acquired in this way must immediately be deleted. The fact that this information was acquired must be recorded, as well as the act of deletion.

Apart from these “basic” legal protections, there are more specific statutes regarding electronic surveillance of telecommunications as well as search and seizure operations, respectively:

Electronic Surveillance

Surveillance of telecommunications is regulated according to articles 100a and following of the Code of Criminal Procedure (*Strafprozessordnung* or *StPO*). Apart from general requirements for surveillance of telecommunications, the article also contains a comprehensive list of offenses that permit such surveillance.

According to § 100a StPO section I, surveillance is possible, if:

- There is a suspicion that the target of the investigation committed or is planning to commit an offense as stated in the article, or has prepared for one of the listed offenses by committing another offense.
- the criminal act in question is especially severe
- investigating the case or determining the location of the suspect would be impossible otherwise

Section II of the article contains a list of all offenses that qualify for surveillance. These include such crimes as murder and manslaughter, high treason, genocide and crimes against humanity, crimes against sexual self-determination or personal freedom, as well as different forms of organized crime. Additionally, a number of economic crimes, tax avoidance as well as assisting in illegal immigration do qualify for surveillance.

The court may order the surveillance only on written motion by the prosecution. The motion automatically fails if the court does not confirm it within three days. Surveillance may only be ordered for a term of no more than three months, however the deadline can be extended if the results of the surveillance show that original requirements for the decision persist.

All providers of telecommunications must assist the court and the prosecution with the surveillance and supply relevant information. Finally it is stated in § 100a StPO section 3, that all surveillance action according to § 100a StPO must be reported annually to the Federal Office of Justice (*Bundesamt für Justiz* or *BfJ*).

The Office is required to publish a list of the number of investigations that were ordered.

Search and Seizure

All articles referring to search and seizure actions against journalists refer back to the wording of § 53 I No. 5. § 97 V StPO prohibits the seizure of all written correspondence and storage devices

for data, video, or sound relevant to the prosecution of a criminal case, which are in the possession of a journalist or their respective publishing house or broadcasting company. This protection covers the same objects as the journalist's right to deny testimony.¹¹⁸

It should be noted however, that § 97 V StPO only mentions information in the journalist's personal possession. Data which is stored in any form of online storage medium, such as clouds, is not explicitly protected. In 2012, the then Federal Commissioner for Data Protection and Freedom of Information, Peter Schaar, advised journalists not to store confidential information online.¹¹⁹

The German law provisions are easily accessible, as they can be found within the regular Code of Criminal Procedure.

§ 100a StPO is written in a precise way and the article contains a comprehensive list of all offenses and felonies, which may lead the court to allow a surveillance action. These requirements of § 100a StPO are easy to research even by a layman, with only little introduction to the area of law. Therefore, the likelihood of surveillance action being requested can be recognized. It should be noted, however, that the ultimate decision lies with the overseeing judge, which result in a certain amount of uncertainty. In case the legitimacy of a surveillance action is questionable, it is easy for outside parties to point out any inconsistencies with the law. This ensures that there is little abuse or misinterpretation by the responsible agencies.

§ 97 StPO, which details journalistic protection from search and seizure operations, is slightly more complex, as it includes references to definitions made in other parts of the law. Still, all cases in which an individual journalist may be exempted from this protection are clearly stated in the article. § 160a II clearly states, that the interest of the prosecution will usually lose to the interests of a journalist targeted by possible surveillance, unless the investigation concerns a particularly severe offense. This highlights the special protection afforded to journalist by German law and ensures that few journalists will become the target of criminal investigations.

As a result of these extensive privileges, journalists can rest assured that they are safe from seizure and surveillance unless there is clear evidence of criminal activities.

9. Can Journalists Rely on Encryption and Anonymity Online to Protect Themselves and Their Sources Against Surveillance?

In the conventional world, it is understood that almost all daily activities are done anonymously. In the use of electronic procedures, for example the Internet, this rule is reversed. An activity leaves electronic traces that can be allocated under certain circumstances and with a certain

118 Dr. Jürgen Peter Graf, Beck'scher Online-Kommentar StPO (C.H. Beck, 2016) § 97 StPO Rn. 19 [German]
119 <https://www.taz.de/Unsicherer-Informantenschutz/15068088/> also
[https://www.teletrust.de/startseite/pressemeldung/?tx_ttnews\[tt_news\]=564&cHash=4613815145db85ab49f9863ad8204a84](https://www.teletrust.de/startseite/pressemeldung/?tx_ttnews[tt_news]=564&cHash=4613815145db85ab49f9863ad8204a84)

effort. To avoid the loss of informational self-determination, it must be legally and technically possible to leave no mark on the use of electronic procedures, i.e. to act anonymously or pseudonymously.¹²⁰

For this reason journalists cannot rely in general on encryption and anonymity online to protect themselves and their sources against surveillance. The current providers offer different types of encryption therefore it is of decisive significance for the journalist to investigate which one of them offers the best encryption for his specific needs. Furthermore they have to differentiate between using an e-mail program and surfing the Internet.

9.1. Internet

Basically, the inventory data, traffic data and content data of internet users are protected by the right to informational self-determination and the telecommunications secrecy under Article 10 I Grundgesetz.¹²¹ Fundamental rights entitled are all individuals and domestic legal persons, who are involved in the writing or using telecommunications mediated communication process.¹²² This fundamental right, however, does not guarantee anonymity on the Internet.

When communicating on the Internet an IP address is automatically passed. This is required so that the user can ever receive the desired website. Normally requests to pages are stored with a time stamp. But not only thereby users are leaving tracks on the Internet. Also by careless behaviour they leave their marks, and with technical tricks much information can be collected through this.

A so-called proxy can conceal the true identity. A user sends a request in this case not directly on the server you want, but to a proxy, the communication then leads to the server. It sends the request, receives the response and then forwards them to the user. The degree of anonymity is different: While a normal Web Proxy Internet provider passes usually only disguises the IP address of the sender and all other information (such as the browser identification), anonymization proxies go considerably further and conceal also other information. A so-called anonymizer may obscure the own steps on the Internet. There are some very fundamentally different approaches and qualities of anonymity.¹²³

120 Heinrich A. Wolff/Stefan Brink, Moritz Karg, Beck'scher Online Kommentar Datenschutzrecht (14th edn, Beck 2016) BDSG Anlage, 44 [German].

121 Wolfgang Kilian/Benno Heussen, Thilo Weichert, Computerrechts-Handbuch (26th edn, Beck 2008) Telekommunikation und Internet, I. 31 [German].

122 Horst Dreier, Georg Hermes, Grundgesetz Kommentar (3 edn, Mohr Siebeck 2013) 1164 [German].

123 Besim Karadeniz, Anonymität im Internet (netplanet, 1998 – 2016) <<http://www.netplanet.org/sicherheit/anonym.shtml>> accessed April 13 2016 [German].

9.2. E-Mail

In Germany there are two different online mailing options. On the one hand the usually used e-mail and on the other hand de-mail. De-mail is a system based on e-mail technology, but with a technically separated communication medium for reliable, confidential, usually detectable communication on the Internet.

There are different protection mechanisms to secure a usually used e-mail, for one thing encryption. Without any protection mechanism an e-mail is less safe than a normal postcard.¹²⁴ It is either possible to encrypt the carriage of an e-mail or the e-mail itself. Nowadays all major email providers usually offer a transport encryption. Thereby the transportation of the e-mail is encrypted.¹²⁵ If this transport is however cracked the content of e-mail is easy to read. Therefore some e-mail providers offer end-to-end-encryption (asymmetric encryption). This method does not depend on the encryption of transportation. Instead the e-mail is encrypted with diverse keys of the sender and recipient. Every user has two different keys, a public and a private key. The private key of the sender and the public key of the recipient encrypt the e-mail. Only the recipient is able to open the e-mail afterwards with his private key. Thereby the email is unusable for others when intercepted on the way.¹²⁶ Yet end-to-end-encryption is merely optional. Furthermore it needs to be installed by the user and is not generally included by the e-mail program.¹²⁷

The legal requirements of the de-mail law provides in accordance with § 5 III a De-Mail-Gesetz (de-mail law) an appropriate transport encryption. However, the state-accredited provider decrypt de-mails in between in order to examine for spam or malware. Thus everybody with an access to the servers of the provider has the possibility to trap those sensitive messages.¹²⁸

Since the aforementioned criticism in the opinion of the Conference of Data Protection Commissioners of the Federation and the Countries regarding the encryption within the communications networks of the federal and state governments' only end-to-end-encryption considers the necessary requirements for the protection of communication.¹²⁹ This suggests that

124 Matthias Bergt, Schutz Personenbezogener Daten bei der E-Mail-Bestätigung von Online Bestellungen in NJW (2011) 3752, 3753 [German].

125 Urs Mansmann, E-Mail-Provider Stellen auf Transportverschlüsselung um (heise online, March 30 2014) <<http://www.heise.de/newsticker/meldung/E-Mail-Provider-stellen-auf-Transportverschlueselung-um-2157950.html>> accessed April 13 2016 [German].

126 Michael Schmidl, IT-Recht von A – Z: Accessprovider bis Zwischenspeicherung (2nd edn, Beck 2014) 23 [German].

127 Mansmann, E-Mail-Provider Stellen auf Transportverschlüsselung um (heise online, March 30 2014) <<http://www.heise.de/newsticker/meldung/E-Mail-Provider-stellen-auf-Transportverschlueselung-um-2157950.html>> accessed April 13 2016 [German].

128 Bergt, Schutz Personenbezogener Daten bei der E-Mail-Bestätigung von Online Bestellungen in NJW (2011) 3752, 3753 [German].

129 Wolff/Brink, Karg, Beck'scher Online Kommentar Datenschutzrecht (14th edn, Beck 2016) BDSG Anlage, l. 45b [German].

for those who want to protect their communication an end-to-end encryption is of great importance.

State authorities may come to the communication data of individuals over the operator under certain requisites. Therefore the right of personal privacy in the telecommunications sector (telecommunications secrecy) needs to be limited. Individual wiretaps must be approved judicially in each individual case, are always limited in time and the recorded data may only be made within the framework of the investigation within the interception measure was notified.¹³⁰

However the legal requirements for data transmission on the Internet are disregarded on masse. Partially will forgo any encryption or unsafe encryption methods are used.¹³¹ Accordingly, users should investigate each provider's encryption technology.

9.3. Conclusion

To conclude, if a journalist does not want to rely on the protection of the Internet in general or any program there is the possibility to anonymise and encrypt appearance and communication on the Internet by himself. However for this thorough knowledge of it is required. Any particular legal framework about anonymity and encryption on the Internet to protect journalists and their sources does not exist in Germany.

In the end it is not possible to simply turn of the risks of the Internet, there is only the possibility to minimize them.¹³² At least police and secret service are not allowed to easy read along. Encryption prohibitions, which enable reading especially for police and secret service were discussed at length in Germany and rejected for good reasons.¹³³

10. Are Whistle-blowers Explicitly Protected Under Law Protecting Journalistic Sources? Is There Another Practice Protecting Whistle-blowers? Is the Legislation Prohibiting Authorities and Companies from Identifying Whistle-blowers?

As understood in Germany whistleblowing is the process of issuing evidence by employees of a company, which point to irregularities in the company or the violation of a code of conduct. The disclosure can be carried out to the public, public authorities, or to the company itself.¹³⁴

130 Karadeniz, Anonymität im Internet (netplanet, 1998 – 2016) <<http://www.netplanet.org/sicherheit/anonym.shtml>> accessed April 13 2016 [German].

131 Bergt, Verschlüsselung nach dem Stand der Technik als rechtliche Verpflichtung in CR (2014) 726, 730 [German].

132 Kilian/Heussen, Weichert, Computerrechts-Handbuch (26th edn, Beck 2008) Grundlagen Datenschutz, Datensicherheit und Kommunikationssicherheit, I. 2 [German].

133 Kilian/Heussen, Weichert, Computerrechts-Handbuch (26th edn, Beck 2008) Systemdatenschutz, I. 9 [German].

¹³⁴ Schmidl, IT-Recht von A – Z: Accessprovider bis Zwischenspeicherung (2nd edn, Beck 2014) 289 [German].

Germany has no specific legislation on protecting whistle-blowers.¹³⁵ Though whistle-blowers are protected by different solution, which are reflected in the law in diverse ways.

10.1. Protection Under Law Protecting Journalistic Sources

There is no law in Germany, which protects whistle-blowers explicitly under law protecting journalistic sources. Nevertheless a whistle-blower's anonymity is protected indirectly by article 5 I 2 Grundgesetz, if they are journalistic sources. Furthermore the journalist has a right to refuse to give evidence referred to § 53 I 1 no. 5 Strafprozessordnung and § 383 I no. 5 Zivilprozessordnung.¹³⁶

10.2. Protection Under Labour Law

The labour law has various regulations. Generally employees and public officers are obligated to good conduct and discretion against their employer. A different behaviour would be contrary to duty. Nevertheless they are exceptionally allowed to contact public authorities in special occasions. Therefore the law or jurisdiction needs exclusion:¹³⁷

- Employees and public officers are allowed to contact the responsible public authorities if their employer does not react sufficiently on the protection of his labours (§ 17 II 1 Arbeitsschutzgesetz (Act on the Implementation of Measures of Occupational));
 - Employees are entitled to report offenses from their professional surroundings as long as they do not raise knowingly or recklessly false allegation;¹³⁸
 - Public officers are only allowed to report offenses against supervisors or collegians if they have attempted all reasonable measures for an internal clarification;¹³⁹
 - Public officers may only call on the media at most serious violations of top legal and constitutional values, or after exhausting all other remedies;¹⁴⁰
 - Whether private workers are allowed to go to the press is still unclear.¹⁴¹
- Labour Law also protects employees and public officers after whistle blowing:

¹³⁵ COM(2014) 38 final Annex 5 (Germany to the EU Anti-Corruption Report) 2014, 4.

¹³⁶ Wolff/Brink, Marie-Theres Tinnefeld/Benedikt Buchner, Beck'scher Online Kommentar Datenschutzrecht, (14th edn, Beck 2016) Medien, I. 36 [German].

¹³⁷ Andrei Király, *Whistleblower in Deutschland und Großbritannien – Lehren aus dem Fall Heinisch* in RdA (2012) 236, 236 [German]; Király, *Der Rechtliche Schutz von Whistleblowern* in ZRP (2011) 146, 146 [German].

¹³⁸ BVerfG, *Zeugenaussagen Gegen Arbeitgeber Kein Kündigungsgrund* in NJW (2001) 3474, 3476 [German].

¹³⁹ BVerwG, *Wissentlich Unwahre oder Leichtfertige Erstattung einer Strafanzeige Gegen Vorgesetzten* in NJW (2001) 3280, 3280 [German].

¹⁴⁰ BVerfG, *Verfassungsmäßigkeit des § 353b StGB; Voraussetzungen des Rechts von Beamten und Öffentlichen Angestellten auf Unterrichtung der Öffentlichkeit über Verfassungswidriges Handeln ihrer Behörde – Fall Pätsch* in NJW (1970) 1498, 1501 [German].

¹⁴¹ Király, *Der Rechtliche Schutz von Whistleblowern* in ZRP (2011) 146, 146 [German].

- Employees are protected by the general ban on disciplinary treatment (Germ.: “Maßregelungsverbot”) in accordance with § 612a Bürgerliches Gesetzbuch. This prohibits discrimination on the basis of a permissible exercise of rights.
- For public officers the duty of care of the employer and disciplinary procedures are relevant. These exclude arbitrary disciplinary measures and retributive personnel decisions. The duty of care is regulated in § 78 Bundesbeamtengesetz (federal public officers law) and § 45 Beamtenstatusgesetz (public officers status law). The disciplinary procedures are regulated in § 45 Bundesdisziplinargesetz (federal disciplinary law) and the various federal state laws.

Nevertheless employees and public officers meet the substantive burden of proof.¹⁴² If the repressions are however cleverly disguised, for instance by advancing plausible reasons for disciplinary procedures or informal retributions are exercised, the protection functionality is virtually ineffective.¹⁴³

10.3. Protection of the Whistle-blowers Identity

To circumvent the restrictive viewing or the modest effectiveness of ban on disciplinary treatments, the whistle-blower can try to conceal his identity in the professional environment. The whistle-blower is most secure when not even the addressee knows his identity. However this may jeopardise the investigation of grievances because the addressee does not trust an unknown informant. Above all feedback options would be missing. Therefore whistle-blowers often disclose their identity and demand confidential treatment.¹⁴⁴ Nevertheless there are some statues protecting the identity of whistle-blowers.

- Authorities may appeal to the whistle-blower confidentiality, since the data protection and confidential information and inspection of files titles of the concerned withdraw regularly. This is settled in § 19 IV 1 no. 1 Bundesdatenschutzgesetz (federal data protection act), § 29 II Verwaltungsverfahrensgesetz (administrative procedure law), § 99 I 2 Verwaltungsgerichtsordnung (administrative court procedures code).¹⁴⁵
- The problem arises when the whistle-blower is about to act as a witness. The witness identity can only be concealed in criminal proceedings, if he is in danger to life, limb or liberty (§ 68 III 1 Strafprozessordnung). Under very restrictive

¹⁴² BAG, *Kündigung als Verbot gegen Benachteiligungsverbot* in NZA (1988) 18, 19 [German]; BAG, *Unwirksamkeit einer Kündigung vor Erfüllung der Wartezeit bei Diskriminierung wegen Herkunftsbedingter Kultureller Überzeugungen* in NJOZ (2004) 1258, 1265 [German]; Ferdinand O. Kopp/Wolf-Rüdiger Schenke, *Verwaltungsgerichtsordnung Kommentar* (16th edn, Beck 2015) § 108 I. 13 [German].

¹⁴³ Király, *Der Rechtliche Schutz von Whistleblowern* in ZRP (2011) 146, 146 f. [German].

¹⁴⁴ Király, *Der Rechtliche Schutz von Whistleblowern* in ZRP (2011) 146, 147 [German].

¹⁴⁵ BVerwG, *Anspruch auf Benennung des Informanten* in NJW (1992) 451, 452 [German]; BVerwG, *Informantenschutz im Luftsicherheitsrecht* in NVwZ (2010) 1493, 1494 [German]; Király, *Der Rechtliche Schutz von Whistleblowern* in ZRP (2011) 146, 147 [German].

conditions authorities can also explicitly guarantee sensitivity for this case (§ 158 StPO; guideline on the use of informants and police informers, Appendix D to Richtlinie für das Strafverfahren und das Bußgeldverfahren (Directive for criminal procedures and fines)).¹⁴⁶

- Media can conceal the identity of their informants readily by constantly prior jurisprudence of the Constitutional Court. This comes within the scope of the press and broadcasting freedom from article 5 I 2 Grundgesetz.¹⁴⁷ Furthermore the protection is also procedurally protected by § 383 I Nr. 5 Zivilprozessordnung, §§ 53 I 2, 97 V 1, 100c VI 1 Strafprozessordnung.¹⁴⁸

Still the concealment of the whistle-blowers identity settles his weak legal position only limited.¹⁴⁹

10.4. Protection of Identification from Authorities and Companies

The legislation prohibits authorities and companies from identifying whistle-blowers only by article 5 I 2 Grundgesetz. However this prohibition relies only to journalistic sources. Therefore authorities and companies are allowed to use other sources, because in Germany there is no specific legislation protecting whistle-blowers in such a case.¹⁵⁰

10.5. Aim of the Politics

On April 30 2014 the Committee of Ministers of the Council of Europe adopted the Recommendation CM/Rec(2014)7. For this they have developed 29 principles that strengthen the position of whistle-blowers.¹⁵¹ Since most member States of the Council of Europe did not have comprehensive regulations for the protection of whistle-blowers, they want to encourage member States to put in place such regulations. Compared to the meaning of the Recommendation Germany already has an arrangement of various normative, institutional and judicial elements which, together, provide a comprehensive and coherent whole. It is questionable, whether all requirements of the Recommendation are implemented in German law.

- The material scope (principle 1-2) is already protected by the previous implementation of the protection of whistle-blowers into German law.

¹⁴⁶ Király, Der Rechtliche Schutz von Whistleblowern in ZRP (2011) 146, 147 [German].

¹⁴⁷ BVerfG, *Spiegel-Teilurteil* in NJW (1966) 1603, 1604 ff. [German]; BVerfG *Auskunft über Telefonverbindungsdaten von Journalisten an Strafverfolgungsbehörden* in NJW (2003) 1787, 1793 [German]; BVerfG, *Durchsuchung und Beschlagnahme im Ermittlungsverfahren gegen Presseangehörige – CICERO* in NJW (2007) 1117, 1118 [German].

¹⁴⁸ Király, Der Rechtliche Schutz von Whistleblowern in ZRP (2011) 146, 147 [German].

¹⁴⁹ Király, Whistleblower in Deutschland und Großbritannien – Lehren aus dem Fall Heinisch in RdA (2012) 236, 240 [German].

¹⁵⁰ COM(2014) 38 final Annex 5 (Germany to the EU Anti-Corruption Report) 2014, 4.

¹⁵¹ Recommendation CM/Rec(2014)7 adopted by the Committee of Ministers of the Council of Europe (Protection of Whistleblowers) 2014, 6-10.

- The aim of the personal scope (principle 3-6) is that all personal groups are covered by the protection. As it is clear from the protection areas set out above, this is the case. Special rules regarding matters of state do not exist.
- The normative framework (Principle 7-11) should represent a comprehensive approach that helps simplify the reporting and disclosure.
- The principles 12-17 demand a promotion of channels for reporting and disclosure. Clear channels should be put in place for public interest reporting and disclosures and recourse to them should be facilitated through appropriate measures. Internal reporting and analysis of the reports is to be funded. The state has not adopted such a channel. Nonetheless some public authorities and companies voluntarily offer hotlines, websites or ombudsman to their employees. In addition, in Germany there is a whistle blowing system under the name Business Keeper Monitoring System. This system allows the anonymous complaint of maladministration in electronic form. However, only a few federal states use this technology.¹⁵²
- From principle 18 confidentiality is required, which includes the identity as well as it guarantees a due process. This is as shown secured within the opportunity.
- The principles 19-20 regulate acting on reporting and disclosure. There is desired a quick review and editing of the allegations. For internal reporting, the whistleblower shall be informed about the further procedure.
- Protection against retaliation is required by the principles 21-26. That applies to employer's general ban on disciplinary treatment and the duty of care by government agencies (see above).
- The advice, awareness and assessment are demanded by principle 27-29. It is desired that the development of the national framework should be encouraged. Furthermore confidential advice and access to information should be provided, when it comes to a report on a public interest. To ensure this regularly a review by the national authorities should take place. There are no helpdesks in Germany. (Potential) whistle-blower can catch up on their legal status only by lawyers or on Internet sites like <http://www.whistleblower-net.de/>. The extent to which a periodic review of the protection of whistle-blowers takes place is unknown.

Accordingly the implementation of the Recommendation CM/Rec(2014)7 has not been carried out deliberately in Germany. Nevertheless, the regulations are partly consistent with the desired. Not all politicians in Germany are pleased by the legal situation of whistle-blowers. These results from the fact that there were various legislative initiatives announced in Germany, for example of three federal ministries in year 2008¹⁵³, the bundestag fraction DIE LINKE in year 2011¹⁵⁴,

¹⁵² COM(2014) 38 final Annex 5 (Germany to the EU Anti-Corruption Report) 2014, 4-5.

¹⁵³ Committee printed matter 16(10)849 (Proposal for a legally binding nature of the informant protection for workers in the Civil Code) 2008 [Vorschlag für eine gesetzliche Verankerung des Informantenschutzes für Arbeitnehmer im Bürgerlichen Gesetzbuch].

¹⁵⁴ Bundestag printed matter 17/6492 (Proposal) 2011 [Antrag].

the bundestag fraction SPD in year 2012¹⁵⁵ and the bundestag fraction BÜNDNIS 90/DIE GRÜNEN in year 2012¹⁵⁶. However, not even since the Recommendation CM/Rec(2014)7 has been released, nothing was changed in the legal status of whistle-blowers previously.

10.6. Conclusion

Although in Germany there is no law protecting whistle-blowers explicitly under law protecting journalistic sources, there are in the different parts of the German legislative mechanisms to protect them. Compared with the Recommendation CM/Rec(2014)7 and the various German legislative initiatives is still room up to strengthen the protection of whistle-blowers.

¹⁵⁵ Bundestag printed matter 17/8567 (Proposal) 2012 [Antrag].

¹⁵⁶ Bundestag printed matter 17/9782 (Proposal) 2012 [Antrag].

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12. Table of Provisions

Provisions in native language	Corresponding translation
<p><u>Art. 2, Grundgesetz</u></p> <p><u>Freie Entfaltung der Persönlichkeit, körperliche Unversehrthe</u></p> <p>(1) Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.</p> <p>(2) Jeder hat das Recht auf Leben und körperliche Unversehrtheit. Die Freiheit der Person ist unverletzlich. In diese Rechte darf nur auf Grund eines Gesetzes eingegriffen werden.</p>	<p><u>Article 2 , German Constitution</u></p> <p><u>Personal freedoms</u></p> <p>(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.</p> <p>(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.</p>
<p><u>Art. 5, Grundgesetz</u></p> <p><u>Meinungsfreiheit</u></p> <p>(1) Jeder hat das Recht, seine Meinung in Wort, Schrift und Bild frei zu äußern und zu verbreiten und sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten. Die Pressefreiheit und die Freiheit der Berichterstattung durch Rundfunk und Film werden gewährleistet.</p>	<p><u>Art. 5, German Constitution</u></p> <p><u>Freedom of expression, arts and sciences</u></p> <p>(1) Every person shall have the right freely to express and disseminate his opinions 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</p>

<p>Eine Zensur findet nicht statt.</p> <p>(2) Diese Rechte finden ihre Schranken in den Vorschriften der allgemeinen Gesetze, den gesetzlichen Bestimmungen zum Schutze der Jugend und in dem Recht der persönlichen Ehre.</p> <p>(3) Kunst und Wissenschaft, Forschung und Lehre sind frei. Die Freiheit der Lehre entbindet nicht von der Treue zur Verfassung.</p>	<p>no censorship.</p> <p>(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.</p> <p>(3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.</p>
<p><u>Artikel 10, Grundgesetz</u></p> <p><u>Brief-, Post- und Fernmeldegeheimnis</u></p> <p>(1) Das Briefgeheimnis sowie das Post- und Fernmeldegeheimnis sind unverletzlich.</p> <p>(2) Beschränkungen dürfen nur auf Grund eines Gesetzes angeordnet werden. Dient die Beschränkung dem Schutze der freiheitlichen demokratischen Grundordnung oder des Bestandes oder der Sicherung des Bundes oder eines Landes, so kann das Gesetz bestimmen, daß sie dem Betroffenen nicht mitgeteilt wird und daß an die Stelle des Rechtsweges die Nachprüfung durch von der Volksvertretung bestellte Organe und Hilfsorgane tritt.</p>	<p><u>Article 10, German Constitution</u> <u>Privacy of correspondence, posts and telecommunications</u></p> <p>(1) The privacy of correspondence, posts and telecommunications shall be inviolable.</p> <p>(2) Restrictions may be ordered only pursuant to a law. If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a Land, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.</p>

<p><u>§ 612a Bürgerliches Gesetzbuch</u></p> <p><u>Maßregelungsverbot</u></p> <p>Der Arbeitgeber darf einen Arbeitnehmer bei einer Vereinbarung oder einer Maßnahme nicht benachteiligen, weil der Arbeitnehmer in zulässiger Weise seine Rechte ausübt.</p>	<p><u>§ 612a, German Civil Code</u> <u>Prohibition of victimisation</u></p> <p>The employer may not discriminate against an employee in an agreement or a measure because that employee exercises his rights in a permissible way.</p>
<p><u>§ 98, Verwaltungsgerichtsordnung</u> <u>Vorschriften über die Beweisaufnahme</u></p> <p>Soweit dieses Gesetz nicht abweichende Vorschriften enthält, sind auf die Beweisaufnahme §§ 358 bis 444 und 450 bis 494 der Zivilprozeßordnung entsprechend anzuwenden.</p>	<p><u>§ 98, Code of Administrative Court Procedure</u></p> <p>Unless this Act contains any derogatory provisions, sections 358 to 444 and 450 to 494 the Code of Civil Procedure shall apply <i>mutatis mutandis</i> to the taking of evidence.</p>
<p><u>§ 99 Verwaltungsgerichtsordnung</u></p> <p>(1) Behörden sind zur Vorlage von Urkunden oder Akten, zur Übermittlung elektronischer Dokumente und zu Auskünften verpflichtet. Wenn das Bekanntwerden des Inhalts dieser Urkunden, Akten, elektronischen Dokumente oder dieser Auskünfte dem Wohl des Bundes oder eines Landes Nachteile bereiten würde oder wenn die Vorgänge nach einem Gesetz</p>	<p><u>§ 99 Code of Administrative Court Procedure</u></p> <p>(1) Authorities shall be obliged to submit certificates or files, to transmit electronic documents and provide information. If the knowledge of the content of these certificates, files, electronic documents or this information would prove disadvantageous to the interests of the Federation or of a <i>Land</i>, or if the events</p>

oder ihrem Wesen nach geheim gehalten werden müssen, kann die zuständige oberste Aufsichtsbehörde die Vorlage von Urkunden oder Akten, die Übermittlung der elektronischen Dokumente und die Erteilung der Auskünfte verweigern.

(2) Auf Antrag eines Beteiligten stellt das Oberverwaltungsgericht ohne mündliche Verhandlung durch Beschluss fest, ob die Verweigerung der Vorlage der Urkunden oder Akten, der Übermittlung der elektronischen Dokumente oder der Erteilung von Auskünften rechtmäßig ist. Verweigert eine oberste Bundesbehörde die Vorlage, Übermittlung oder Auskunft mit der Begründung, das Bekanntwerden des Inhalts der Urkunden, der Akten, der elektronischen Dokumente oder der Auskünfte würde dem Wohl des Bundes Nachteile bereiten, entscheidet das Bundesverwaltungsgericht; Gleiches gilt, wenn das Bundesverwaltungsgericht nach § 50 für die Hauptsache zuständig ist. Der Antrag ist bei dem für die Hauptsache zuständigen Gericht zu stellen. Dieses gibt den Antrag und die Hauptsacheakten an den nach § 189 zuständigen Spruchkörper ab. Die oberste Aufsichtsbehörde hat die nach Absatz 1 Satz 2 verweigerten Urkunden oder Akten auf Aufforderung dieses Spruchkörpers vorzulegen, die elektronischen Dokumente zu übermitteln oder die verweigerten Auskünfte zu erteilen. Sie ist zu diesem Verfahren beizuladen. Das Verfahren unterliegt den Vorschriften des materiellen Geheimnisses. Können diese nicht eingehalten werden oder macht die zuständige Aufsichtsbehörde geltend, dass besondere Gründe der Geheimhaltung oder des Geheimnisses der Übergabe der Urkunden oder Akten oder der Übermittlung der elektronischen Dokumente an das Gericht entgegenstehen, wird die Vorlage oder Übermittlung nach Satz 5 dadurch bewirkt, dass die Urkunden, Akten oder elektronischen Dokumente dem Gericht

must be kept strictly secret in accordance with a statute or due to their essence, the competent supreme supervisory authority may refuse the submission of certificates or files, the transmission of the electronic documents and the provision of information.

(2) On request by a party concerned, the Higher Administrative Court shall find by order without an oral hearing whether the refusal to submit certificates or files, to transmit the electronic documents or to provide information is lawful. If a supreme federal authority refuses the submission, transmission or information on grounds that the interests of the Federation would be impaired were the content of the certificates or files, of the electronic documents and the information to become known, the Federal Administrative Court shall decide; the same shall apply if the Federal Administrative Court has jurisdiction for the main case in accordance with section 50. The application shall be filed with the court which has jurisdiction for the main case. The latter shall assign the application and the main case files to the adjudication bodies with jurisdiction in accordance with section 189. The supreme supervisory authority shall submit the certificates or files refused in accordance with subsection 1, second sentence on request by this panel of judges, transmit the electronic documents or provide the refused information. It shall be subpoenaed to these proceedings. The proceedings shall be subject to the provisions of substantive classification of information. If these cannot be complied with, or if the competent supervisory authority claims that special reasons of confidentiality or classification of information oppose the submission of the certificates or files or the transmission of the electronic documents to the court, the submission or transmission shall be effected in accordance with the fifth sentence by the certificates, files or electronic documents being made available to the court

<p>in von der obersten Aufsichtsbehörde bestimmten Räumlichkeiten zur Verfügung gestellt werden. Für die nach Satz 5 vorgelegten Akten, elektronischen Dokumente und für die gemäß Satz 8 geltend gemachten besonderen Gründe gilt § 100 nicht. Die Mitglieder des Gerichts sind zur Geheimhaltung verpflichtet; die Entscheidungsgründe dürfen Art und Inhalt der geheim gehaltenen Urkunden, Akten, elektronischen Dokumente und Auskünfte nicht erkennen lassen. Für das nichtrichterliche Personal gelten die Regelungen des personellen Geheimschutzes. Soweit nicht das Bundesverwaltungsgericht entschieden hat, kann der Beschluss selbständig mit der Beschwerde angefochten werden. Über die Beschwerde gegen den Beschluss eines Oberverwaltungsgerichts entscheidet das Bundesverwaltungsgericht. Für das Beschwerdeverfahren gelten die Sätze 4 bis 11 sinngemäß.</p>	<p>on premises designated by the supreme supervisory authority. Section 100 shall not apply to the files and electronic documents submitted in accordance with the fifth sentence, and to the special reasons claimed in accordance with the eighth sentence. The members of the court shall be obliged to maintain confidentiality; the grounds for the decision may not provide an indication of the nature and content of the secret certificates, files, documents and information. The regulations of the classification of information for staff shall apply to the non-judicial staff. Unless the Federal Administrative Court has ruled, the order may be independently challenged with a complaint. The Federal Administrative Court shall rule on the complaint against the order of a Higher Administrative Court. The fourth and eleventh sentences shall apply <i>mutatis mutandis</i> to the complaint proceedings.</p>
<p><u>§ 193, Strafgesetzbuch</u></p> <p><u>Wahrnehmung berechtigter Interessen</u></p> <p>Tadelnde Urteile über wissenschaftliche, künstlerische oder gewerbliche Leistungen, desgleichen Äußerungen, welche zur Ausführung oder Verteidigung von Rechten oder zur Wahrnehmung berechtigter Interessen gemacht werden, sowie Vorhaltungen und Rügen der Vorgesetzten gegen ihre Untergebenen, dienstliche Anzeigen oder Urteile von seiten eines Beamten und ähnliche Fälle sind nur insofern strafbar, als das Vorhandensein einer Beleidigung aus der Form der Äußerung oder</p>	<p><u>§193. German Criminal Code</u></p> <p><u>Fair comment; defence</u></p> <p>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</p>

<p>aus den Umständen, unter welchen sie geschah, hervorgeht.</p>	<p>which it was made.</p>
<p><u>§ 201, Strafgesetzbuch</u></p> <p><u>Verletzung der Vertraulichkeit des Wortes</u></p> <p>(1) Mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe wird bestraft, wer unbefugt</p> <p>1. das nichtöffentlich gesprochene Wort eines anderen auf einen Tonträger aufnimmt oder</p> <p>2. eine so hergestellte Aufnahme gebraucht oder einem Dritten zugänglich macht.</p> <p>(2) Ebenso wird bestraft, wer unbefugt</p> <p>1. das nicht zu seiner Kenntnis bestimmte nichtöffentlich gesprochene Wort eines anderen mit einem Abhörgerät abhört oder</p>	<p><u>§201, German Criminal Code</u></p> <p><u>Violation of the privacy of the spoken word</u></p> <p>(1) Whosoever unlawfully</p> <p>1. makes an audio recording of the privately spoken words of another; or</p> <p>2. uses, or makes a recording thus produced accessible to a third party,</p> <p>shall be liable to imprisonment not exceeding three years or a fine.</p> <p>(2) Whosoever unlawfully</p> <p>1. overhears with an eavesdropping device the privately spoken words of another not intended for his attention; or</p>

<p>2. das nach Absatz 1 Nr. 1 aufgenommene oder nach Absatz 2 Nr. 1 abgehörte nichtöffentlich gesprochene Wort eines anderen im Wortlaut oder seinem wesentlichen Inhalt nach öffentlich mitteilt.</p> <p>Die Tat nach Satz 1 Nr. 2 ist nur strafbar, wenn die öffentliche Mitteilung geeignet ist, berechnigte Interessen eines anderen zu beeinträchtigen. Sie ist nicht rechtswidrig, wenn die öffentliche Mitteilung zur Wahrnehmung überragender öffentlicher Interessen gemacht wird.</p> <p>(3) Mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe wird bestraft, wer als Amtsträger oder als für den öffentlichen Dienst besonders Verpflichteter die Vertraulichkeit des Wortes verletzt (Absätze 1 und 2).</p> <p>(4) Der Versuch ist strafbar.</p> <p>(5) Die Tonträger und Abhörgeräte, die der Täter oder Teilnehmer verwendet hat, können eingezogen werden. § 74a ist anzuwenden.</p>	<p>2. publicly communicates, verbatim or the essential content of, the privately spoken words of another 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.</p> <p>(3) Whosoever, as a public official or a person entrusted with special public service functions violates the privacy of the spoken word (subsections (1) and (2) above) shall be liable to imprisonment not exceeding five years or a fine.</p> <p>(4) The attempt shall be punishable.</p> <p>(5) The audio recording media and eavesdropping devices which the principal or secondary participant used may be subject to a deprivation order. Section 74a shall apply.</p>
<p><u>§ 353b, Strafgesetzbuch</u> <u>Verletzung des Dienstgeheimnisses und einer besonderen Geheimhaltungspflicht</u></p>	<p><u>§ 353b, German Criminal Code</u> <u>Breach of official secrets and special duties of confidentiality</u></p>

<p>(1) Wer ein Geheimnis, das ihm als</p> <ol style="list-style-type: none"> 1. Amtsträger, 2. für den öffentlichen Dienst besonders Verpflichteten oder 3. Person, die Aufgaben oder Befugnisse nach dem Personalvertretungsrecht wahrnimmt, <p>anvertraut worden oder sonst bekanntgeworden ist, unbefugt offenbart und dadurch wichtige öffentliche Interessen gefährdet, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft. Hat der Täter durch die Tat fahrlässig wichtige öffentliche Interessen gefährdet, so wird er mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bestraft.</p>	<p>(1) Whosoever unlawfully discloses a secret which has been confided or become known to him in his capacity as</p> <ol style="list-style-type: none"> 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 <p>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.</p>
<p>(2) Wer, abgesehen von den Fällen des Absatzes 1, unbefugt einen Gegenstand oder eine Nachricht, zu deren Geheimhaltung er</p> <ol style="list-style-type: none"> 1. auf Grund des Beschlusses eines Gesetzgebungsorgans des Bundes oder eines Landes oder eines seiner Ausschüsse verpflichtet ist oder 2. von einer anderen amtlichen Stelle unter Hinweis auf die Strafbarkeit der Verletzung der Geheimhaltungspflicht 	<p>(2) Whosoever other than in cases under subsection (1) above unlawfully allows an object or information to come to the attention of another or makes it publicly known</p> <ol style="list-style-type: none"> 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,

<p>förmlich verpflichtet worden ist,</p> <p>an einen anderen gelangen läßt oder öffentlich bekanntmacht und dadurch wichtige öffentliche Interessen gefährdet, wird mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe bestraft.</p> <p>(3) Der Versuch ist strafbar.</p> <p>(3a) Beihilfehandlungen einer in § 53 Absatz 1 Satz 1 Nummer 5 der Strafprozessordnung genannten Person sind nicht rechtswidrig, wenn sie sich auf die Entgegennahme, Auswertung oder Veröffentlichung des Geheimnisses oder des Gegenstandes oder der Nachricht, zu deren Geheimhaltung eine besondere Verpflichtung besteht, beschränken.</p> <p>(4) Die Tat wird nur mit Ermächtigung verfolgt. Die Ermächtigung wird erteilt</p> <p>1. von dem Präsidenten des Gesetzgebungsorgans</p> <p>a) in den Fällen des Absatzes 1, wenn dem Täter das Geheimnis während seiner Tätigkeit bei einem oder für ein Gesetzgebungsorgan des Bundes oder eines Landes bekanntgeworden ist,</p> <p>b) in den Fällen des Absatzes 2 Nr. 1;</p>	<p>and thereby causes a danger to important public interests shall be liable to imprisonment not exceeding three years or a fine.</p> <p>(3) The attempt shall be punishable.</p> <p>(3a) Acts of aiding by a person listed under section 53(1) 1st sentence No 5 of the Code of Criminal Procedure 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.</p> <p>(4) The offence may only be prosecuted upon authorisation. The authorisation shall be granted</p> <p>1. by the president of the legislative body</p> <p>(a) in cases under subsection (1) above if the secret became known to the offender during his service in or for a legislative body of the Federation or a state;</p> <p>(b) in cases under subsection (2) No 1 above;</p>
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<p>2. von der obersten Bundesbehörde</p> <p>a) in den Fällen des Absatzes 1, wenn dem Täter das Geheimnis während seiner Tätigkeit sonst bei einer oder für eine Behörde oder bei einer anderen amtlichen Stelle des Bundes oder für eine solche Stelle bekanntgeworden ist,</p> <p>b) in den Fällen des Absatzes 2 Nr. 2, wenn der Täter von einer amtlichen Stelle des Bundes verpflichtet worden ist;</p> <p>3. von der obersten Landesbehörde in allen übrigen Fällen der Absätze 1 und 2 Nr. 2.</p>	<p>2. by the highest Federal public authority:</p> <p>(a) in cases under subsection (1) above if the secret became known to the offender during his service in or for a public authority or in another official agency of the Federation or for such an agency;</p> <p>(b) in cases under subsection (2) No 2 above if the offender was under put under obligation by an official agency of the Federation;</p> <p>3. by the highest state public authority in all other cases under subsections (1) and (2) No 2 above.</p>
<p><u>§ 53 Strafprozessordnung</u> <u>Auskunftsverweigerungsrecht</u></p> <p>(1) Jeder Zeuge kann die Auskunft auf solche Fragen verweigern, deren Beantwortung ihm selbst oder einem der in § 52 Abs. 1 bezeichneten Angehörigen die Gefahr zuziehen würde, wegen einer Straftat oder</p>	<p><u>§ 53 Code of Criminal Procedure</u> <u>[Right to Refuse Testimony on Professional Grounds]</u></p> <p>(1) The following persons may also refuse to testify:</p> <p>1. clergymen, concerning the information that was entrusted to them or became known to</p>

<p>einer Ordnungswidrigkeit verfolgt zu werden.</p> <p>(2) Der Zeuge ist über sein Recht zur Verweigerung der Auskunft zu belehren.</p>	<p>them in their capacity as spiritual advisers;</p> <p>2. defence counsel of the accused, concerning the information that was entrusted to them or became known to them in this capacity;</p> <p>3. attorneys, patent attorneys, notaries, certified public accountants, sworn auditors, tax consultants and tax representatives, doctors, dentists, psychological psychotherapists, psychotherapists specializing in the treatment of children and juveniles, pharmacists and midwives, concerning the information that was entrusted to them or became known to them in this capacity. In this respect other members of a Bar Association shall be deemed to be attorneys;</p> <p>3a. members or representatives of a recognized counselling agency pursuant to sections 3 and 8 of the Act on Pregnancies in Conflict Situations, concerning the information that was entrusted to them or became known to them in this capacity;</p> <p>3b. drugs dependency counsellors in a counselling agency recognized or set up by an authority, a body, an institution or a foundation under public law, concerning the information that was entrusted to them or became known to them in this capacity;</p> <p>4. members of the Federal Parliament, of the Federal Convention, of the European Parliament from the Federal Republic of Germany or of a <i>Land</i> parliament, concerning persons who have confided certain facts to them in their capacity as members of these bodies, or to whom they have confided facts in this particular capacity, as well as concerning the facts themselves;</p> <p>5. individuals who are or have been professionally involved in the preparation,</p>
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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.

The persons named in number 5 of the first sentence may refuse to testify concerning the author or contributor of comments and documents, or concerning any other informant or the information communicated to them 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.

(2) The persons designated in subsection (1), first sentence, numbers 2 to 3b, may not refuse to testify if they have been released from their obligation of secrecy. The right of the persons named in subsection (1), first sentence, number 5, to refuse to testify concerning the content of materials which they have produced themselves and matters which have received their professional attention shall lapse if the testimony is required to assist in clearing up a felony, or if the object of the investigation is

1. a crime against peace and of endangering the democratic state based on the rule of law, or of treason and of endangering external security (sections 80a, 85, 87, 88, 95, also in conjunction with sections 97b, 97a, 98 to 100a of the Criminal Code),

2. a crime against sexual self-determination pursuant to sections 174 to 176 and section

	<p>179 of the Criminal Code, or</p> <p>3. money-laundering or concealment of unlawfully acquired assets pursuant to section 261 subsections (1) to (4) of the Criminal Code,</p> <p>and an enquiry into the facts and circumstances or an investigation as to the whereabouts of the accused would otherwise offer no prospect of success or be much more difficult. The witness may refuse to testify even in such cases, however, where testimony would result in disclosure of the identity of the author or contributor of comments and documents, or of any other informant, or of the information communicated to him in his professional capacity pursuant to subsection (1), first sentence, number 5, or of the content of such communication.</p>
<p><u>§ 68 Strafprozessordnung</u></p> <p><u>Vernehmung zur Person; Beschränkung von Angaben, Zeugenschutz</u></p> <p>(1) Die Vernehmung beginnt damit, dass der Zeuge über Vornamen, Nachnamen, Geburtsnamen, Alter, Beruf und Wohnort befragt wird. Ein Zeuge, der Wahrnehmungen in amtlicher Eigenschaft gemacht hat, kann statt des Wohnortes den Dienstort angeben.</p> <p>(2) Einem Zeugen soll zudem gestattet</p>	<p><u>§ 68 Strafprozessordnung</u></p> <p><u>Examination as to Witness' Identity</u></p> <p>(1) The hearing shall begin with the witness being asked to state his first name, last name, name at birth, age, occupation and place of residence. A witness who has made observations in his official capacity may state his place of work instead of his place of residence.</p> <p>(2) A witness shall furthermore be permitted</p>

werden, statt des Wohnortes seinen Geschäfts- oder Dienstort oder eine andere ladungsfähige Anschrift anzugeben, wenn ein begründeter Anlass zu der Besorgnis besteht, dass durch die Angabe des Wohnortes Rechtsgüter des Zeugen oder einer anderen Person gefährdet werden oder dass auf Zeugen oder eine andere Person in unlauterer Weise eingewirkt werden wird. In der Hauptverhandlung soll der Vorsitzende dem Zeugen bei Vorliegen der Voraussetzungen des Satzes 1 gestatten, seinen Wohnort nicht anzugeben.

(3) Besteht ein begründeter Anlass zu der Besorgnis, dass durch die Offenbarung der Identität oder des Wohn- oder Aufenthaltsortes des Zeugen Leben, Leib oder Freiheit des Zeugen oder einer anderen Person gefährdet wird, so kann ihm gestattet werden, Angaben zur Person nicht oder nur über eine frühere Identität zu machen. Er hat jedoch in der Hauptverhandlung auf Befragen anzugeben, in welcher Eigenschaft ihm die Tatsachen, die er bekundet, bekannt geworden sind.

(4) Liegen Anhaltspunkte dafür vor, dass die Voraussetzungen der Absätze 2 oder 3 vorliegen, ist der Zeuge auf die dort vorgesehenen Befugnisse hinzuweisen. Im Fall des Absatzes 2 soll der Zeuge bei der Benennung einer ladungsfähigen Anschrift unterstützt werden. Die Unterlagen, die die Feststellung des Wohnortes oder der Identität des Zeugen gewährleisten, werden bei der Staatsanwaltschaft verwahrt. Zu den Akten sind sie erst zu nehmen, wenn die Besorgnis der Gefährdung entfällt.

(5) Die Absätze 2 bis 4 gelten auch nach Abschluss der Zeugenvernehmung. Soweit dem Zeugen gestattet wurde, Daten nicht anzugeben, ist bei Auskünften aus und Einsichtnahmen in Akten sicherzustellen,

to state his business address or place of work or another address at which documents can be served instead of stating his place of residence if there is well-founded reason to fear that legally protected interests of the witness or of another person might be endangered or that witnesses or another person might be improperly influenced by the witness stating his place of residence. If the conditions set out in the first sentence obtain at the main hearing, the presiding judge shall permit the witness not to state his place of residence.

(3) If there is well-founded reason to fear that revealing the identity or the place of residence or whereabouts of the witness would endanger the witness' or another person's life, limb or liberty, the witness may be permitted not to provide personal identification data or to provide such data only in respect of an earlier identity. However, if so asked at the main hearing, he shall be required to state in what capacity the facts he is indicating became known to him.

(4) If there are sufficient indications that the conditions set out in subsections (2) or (3) obtain, the witness is to be advised of the rights provided thereunder. In the case of subsection (2), the witness shall be assisted in specifying an address at which documents can be served. Documents establishing the witness' place of residence or identity shall be kept by the public prosecution office. They shall only be included in the files when the fear of danger ceases.

(5) Subsections (2) to (4) shall also apply after conclusion of the examination of the witness. Insofar as the witness was permitted not to provide data, it must be ensured in the course of provision of information from or inspection of files that this data is not made known to other persons, unless a danger within the meaning of subsections (2) and (3)

<p>dass diese Daten anderen Personen nicht bekannt werden, es sei denn, dass eine Gefährdung im Sinne der Absätze 2 und 3 ausgeschlossen erscheint.</p>	<p>appears to be ruled out.</p>
<p><u>§ 97 Strafprozessordnung</u></p> <p><u>Beschlagnahmeverbot</u></p> <p>(1) Der Beschlagnahme unterliegen nicht</p> <p>1. schriftliche Mitteilungen zwischen dem Beschuldigten und den Personen, die nach § 52 oder § 53 Abs. 1 Satz 1 Nr. 1 bis 3b das Zeugnis verweigern dürfen;</p> <p>2. Aufzeichnungen, welche die in § 53 Abs. 1 Satz 1 Nr. 1 bis 3b Genannten über die ihnen vom Beschuldigten anvertrauten Mitteilungen oder über andere Umstände gemacht haben, auf die sich das Zeugnisverweigerungsrecht erstreckt;</p> <p>3. andere Gegenstände einschließlich der ärztlichen Untersuchungsbefunde, auf die sich das Zeugnisverweigerungsrecht der in § 53 Abs. 1 Satz 1 Nr. 1 bis 3b Genannten erstreckt.</p>	<p><u>§ 97 Strafprozessordnung</u> <u>Objects Not Subject to Seizure</u></p> <p>(1) The following objects shall not be subject to seizure:</p> <p>1. written correspondence between the accused and the persons who, according to Section 52 or Section 53 subsection (1), first sentence, numbers 1 to 3b, may refuse to testify;</p> <p>2. notes made by the persons specified in Section 53 subsection (1), first sentence, numbers 1 to 3b, concerning confidential information entrusted to them by the accused or concerning other circumstances covered by the right of refusal to testify;</p> <p>3. other objects, including the findings of medical examinations, which are covered by the right of the persons mentioned in Section 53 subsection (1), first sentence, numbers 1 to 3b, to refuse to testify.</p>

<p>(2) Diese Beschränkungen gelten nur, wenn die Gegenstände im Gewahrsam der zur Verweigerung des Zeugnisses Berechtigten sind, es sei denn, es handelt sich um eine elektronische Gesundheitskarte im Sinne des § 291a des Fünften Buches Sozialgesetzbuch. Der Beschlagnahme unterliegen auch nicht Gegenstände, auf die sich das Zeugnisverweigerungsrecht der Ärzte, Zahnärzte, Psychologischen Psychotherapeuten, Kinder- und Jugendlichenpsychotherapeuten, Apotheker und Hebammen erstreckt, wenn sie im Gewahrsam einer Krankenanstalt oder eines Dienstleisters, der für die Genannten personenbezogene Daten erhebt, verarbeitet oder nutzt, sind, sowie Gegenstände, auf die sich das Zeugnisverweigerungsrecht der in § 53 Abs. 1 Satz 1 Nr. 3a und 3b genannten Personen erstreckt, wenn sie im Gewahrsam der in dieser Vorschrift bezeichneten Beratungsstelle sind. Die Beschränkungen der Beschlagnahme gelten nicht, wenn bestimmte Tatsachen den Verdacht begründen, dass die zeugnisverweigerungsberechtigte Person an der Tat oder an einer Datenhehlerei, Begünstigung, Strafvereitelung oder Hehlerei beteiligt ist, oder wenn es sich um Gegenstände handelt, die durch eine Straftat hervorgebracht oder zur Begehung einer Straftat gebraucht oder bestimmt sind oder die aus einer Straftat herrühren.</p> <p>(3) Die Absätze 1 und 2 sind entsprechend anzuwenden, soweit die Hilfspersonen (§ 53a) der in § 53 Abs. 1 Satz 1 Nr. 1 bis 3b Genannten das Zeugnis verweigern dürfen.</p> <p>(4) Soweit das Zeugnisverweigerungsrecht der in § 53 Abs. 1 Satz 1 Nr. 4 genannten Personen reicht, ist die Beschlagnahme von Gegenständen unzulässig. Dieser Beschlagnahmeschutz erstreckt sich auch auf Gegenstände, die von den in § 53 Abs. 1 Satz</p>	<p>(2) These restrictions shall apply only if these objects are in the custody of a person entitled to refuse to testify unless the object concerned is an electronic health card as defined in section 291a of Part Five of the Social Code. Objects covered by the right of physicians, dentists, psychological psychotherapists, psychotherapists specializing in the treatment of children and juveniles, pharmacists and midwives to refuse to testify shall not be subject to seizure either if they are in the custody of a hospital or a service provider which collects, processes or uses personal data for the persons listed, nor shall objects to which the right of the persons mentioned in Section 53 subsection (1), first sentence, numbers 3a and 3b, to refuse to testify extends, be subject to seizure if they are in the custody of the counselling agency referred to in that provision. 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, or in accessoryship after the fact, obstruction of justice or handling stolen goods, 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.</p> <p>(3) Insofar as the assistants (Section 53a) of the persons mentioned in Section 53a subsection (1), first sentence, numbers 1 to 3b, have a right to refuse to testify, subsections (1) and (2) shall apply <i>mutatis mutandis</i>.</p> <p>(4) The seizure of objects shall be inadmissible insofar as they are covered by the right of the persons mentioned in Section 53 subsection (1), first sentence, number 4, to refuse to testify. This protection from seizure shall also</p>
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<p>1 Nr. 4 genannten Personen ihren Hilfspersonen (§ 53a) anvertraut sind. Satz 1 gilt entsprechend, soweit die Hilfspersonen (§ 53a) der in § 53 Abs. 1 Satz 1 Nr. 4 genannten Personen das Zeugnis verweigern dürften.</p> <p>(5) Soweit das Zeugnisverweigerungsrecht der in § 53 Abs. 1 Satz 1 Nr. 5 genannten Personen reicht, ist die Beschlagnahme von Schriftstücken, Ton-, Bild- und Datenträgern, Abbildungen und anderen Darstellungen, die sich im Gewahrsam dieser Personen oder der Redaktion, des Verlages, der Druckerei oder der Rundfunkanstalt befinden, unzulässig. Absatz 2 Satz 3 und § 160a Abs. 4 Satz 2 gelten entsprechend, die Beteiligungsregelung in Absatz 2 Satz 3 jedoch nur dann, wenn die bestimmten Tatsachen einen dringenden Verdacht der Beteiligung begründen; die Beschlagnahme ist jedoch auch in diesen Fällen nur zulässig, wenn sie unter Berücksichtigung der Grundrechte aus Artikel 5 Abs. 1 Satz 2 des Grundgesetzes nicht außer Verhältnis zur Bedeutung der Sache steht und die Erforschung des Sachverhaltes oder die Ermittlung des Aufenthaltsortes des Täters auf andere Weise aussichtslos oder wesentlich erschwert wäre.</p>	<p>extend to objects which the persons mentioned in Section 53 subsection (1), first sentence, number 4, have entrusted to their assistants (Section 53a). The first sentence shall apply <i>mutatis mutandis</i> insofar as the assistants (Section 53a) of the persons mentioned in Section 53 subsection (1), first sentence, number 4, have a right to refuse to testify.</p> <p>(5) The seizure of documents, sound, image and data media, illustrations and other images in the custody of persons referred to in Section 53 subsection (1), first sentence, number 5, 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. Subsection (2), third sentence, and Section 160a subsection (4), second sentence, shall apply <i>mutatis mutandis</i>, the participation provision of subsection (2), third sentence, however, only 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.</p>
<p><u>§ 100c Strafprozessordnung</u> <u>Akustische Wohnraumüberwachung</u></p>	<p><u>§ 100c Strafprozessordnung</u> <u>Measures Implemented Without the Knowledge of the Person Concerned</u></p>

<p>(1) Auch ohne Wissen der Betroffenen darf das in einer Wohnung nichtöffentlich gesprochene Wort mit technischen Mitteln abgehört und aufgezeichnet werden, wenn</p> <ol style="list-style-type: none"> 1. bestimmte Tatsachen den Verdacht begründen, dass jemand als Täter oder Teilnehmer eine in Absatz 2 bezeichnete besonders schwere Straftat begangen oder in Fällen, in denen der Versuch strafbar ist, zu begehen versucht hat, 2. die Tat auch im Einzelfall besonders schwer wiegt, 3. auf Grund tatsächlicher Anhaltspunkte anzunehmen ist, dass durch die Überwachung Äußerungen des Beschuldigten erfasst werden, die für die Erforschung des Sachverhalts oder die Ermittlung des Aufenthaltsortes eines Mitbeschuldigten von Bedeutung sind, und 4. die Erforschung des Sachverhalts oder die Ermittlung des Aufenthaltsortes eines Mitbeschuldigten auf andere Weise unverhältnismäßig erschwert oder aussichtslos wäre. <p>(2) Besonders schwere Straftaten im Sinne des Absatzes 1 Nr. 1 sind:</p>	<p>(1) Private speech on private premises may be intercepted and recorded using technical means also without the knowledge of the person concerned if</p> <ol style="list-style-type: none"> 1. certain facts give rise to the suspicion that a person, either as perpetrator or as inciter or accessory, has committed a particularly serious criminal offence referred to in subsection (2) or, in cases where there is criminal liability for attempt, has attempted to commit such an offence; and 2. the offence is one of particular gravity in the individual case as well; and 3. on the basis of factual indications it may be assumed that the surveillance will result in the recording of statements by the accused which would be of significance in establishing the facts or determining the whereabouts of a co-accused; and 4. other means of establishing the facts or determining a co-accused's whereabouts would be disproportionately more difficult or offer no prospect of success. <p>(2) Particularly serious criminal offences for the purposes of subsection (1), number 1, shall be:</p>
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<p>1. aus dem Strafgesetzbuch:</p> <p>a) Straftaten des Friedensverrats, des Hochverrats und der Gefährdung des demokratischen Rechtsstaates sowie des Landesverrats und der Gefährdung der äußeren Sicherheit nach den §§ <u>80</u>, <u>81</u>, <u>82</u>, <u>89a</u>, <u>89c</u> Absatz 1 bis 4, nach den §§ <u>94</u>, <u>95</u> Abs. 3 und § <u>96</u> Abs. 1, jeweils auch in Verbindung mit § <u>97b</u>, sowie nach den §§ <u>97a</u>, <u>98</u> Abs. 1 Satz 2, § <u>99</u> Abs. 2 und den §§ <u>100</u>, <u>100a</u> Abs. 4,</p> <p>b) Bildung krimineller Vereinigungen nach § <u>129</u> Abs. 1 in Verbindung mit Abs. 4 Halbsatz 2 und Bildung terroristischer Vereinigungen nach § <u>129a</u> Abs. 1, 2, 4, 5 Satz 1 Alternative 1, jeweils auch in Verbindung mit § <u>129b</u> Abs. 1,</p> <p>c) Geld- und Wertzeichenfälschung nach den §§ <u>146</u> und <u>151</u>, jeweils auch in Verbindung mit § <u>152</u>, sowie nach § <u>152a</u> Abs. 3 und § <u>152b</u> Abs. 1 bis 4,</p> <p>d) Straftaten gegen die sexuelle Selbstbestimmung in den Fällen des § <u>176a</u> Abs. 2 Nr. 2 oder Abs. 3, § <u>177</u> Abs. 2 Nr. 2 oder § <u>179</u> Abs. 5 Nr. 2,</p>	<p>1. pursuant to the Criminal Code:</p> <p>a) crimes against peace, high treason, endangering the democratic state based on the rule of law, treason, and endangering external security pursuant to sections 80, 81, 82, 89a, pursuant to section 94, section 95 subsection (3) and section 96 subsection (1), in each case also in conjunction with section 97b, as well as pursuant to section 97a, section 98 subsection (1), second sentence, section 99 subsection (2), section 100 and section 100a subsection (4);</p> <p>b) formation of criminal groups pursuant to section 129 subsection (1) in conjunction with subsection (4), second part of the sentence, and formation of terrorist groups pursuant to section 129a subsections (1), (2), (4) and subsection (5) first sentence, first alternative, in each case also in conjunction with section 129b subsection (1);</p> <p>c) counterfeiting money and official stamps pursuant to sections 146 and 151, in each case also in conjunction with section 152, as well as pursuant to section 152a subsection (3) and section 152b subsections (1) to (4);</p> <p>d) crimes against sexual self-determination in the cases referred to in section 176a subsection (2), number 2, or subsection (3), section 177 subsection (2), number 2, or section 179 subsection (5), number 2;</p>
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<p>e) Verbreitung, Erwerb und Besitz kinderpornografischer Schriften in den Fällen des § 184b Absatz 2,</p> <p>f) Mord und Totschlag nach den §§ <u>211</u>, <u>212</u>,</p> <p>g) Straftaten gegen die persönliche Freiheit in den Fällen der §§ <u>234</u>, <u>234a</u> Abs. 1, 2, §§ <u>239a</u>, <u>239b</u> und Menschenhandel zum Zweck der sexuellen Ausbeutung und zum Zweck der Ausbeutung der Arbeitskraft nach § <u>232</u> Abs. 3, Abs. 4 oder Abs. 5, § <u>233</u> Abs. 3, jeweils soweit es sich um Verbrechen handelt,</p> <p>h) Bandendiebstahl nach § <u>244</u> Abs. 1 Nr. 2 und schwerer Bandendiebstahl nach § <u>244a</u>,</p> <p>i) schwerer Raub und Raub mit Todesfolge nach § <u>250</u> Abs. 1 oder Abs. 2, § <u>251</u>,</p> <p>j) räuberische Erpressung nach § <u>255</u> und besonders schwerer Fall einer Erpressung nach § <u>253</u> unter den in § <u>253</u> Abs. 4 Satz 2 genannten Voraussetzungen,</p>	<p>e) distribution, acquisition and possession of pornographic writings involving children in the cases referred to in section 184b subsection (3);</p> <p>f) murder and manslaughter pursuant to sections 211 and 212;</p> <p>g) crimes against personal liberty pursuant to section 234, section 234a subsections (1) and (2), sections 239a and 239b, and trafficking in human beings for the purpose of sexual exploitation and for the purpose of exploitation of labour pursuant to section 232 subsection (3), subsection (4) or subsection (5), section 233 subsection (3), in each case to the extent that it concerns a felony;</p> <p>h) gang theft pursuant to section 244 subsection (1), number 2, and aggravated gang theft pursuant to section 244a;</p> <p>i) aggravated robbery and robbery resulting in death pursuant to section 250 subsection (1) or subsection (2), section 251;</p> <p>j) extortion resembling robbery pursuant to section 255 and a particularly serious case of extortion pursuant to section 253 under the conditions set out in section 253 subsection (4), second sentence;</p> <p>k) commercial handling of stolen goods or gang handling of stolen goods or commercial</p>
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<p>k) gewerbsmäßige Hehlerei, Bandenhehlerei und gewerbsmäßige Bandenhehlerei nach den §§ <u>260</u>, <u>260a</u>,</p> <p>l) besonders schwerer Fall der Geldwäsche, Verschleierung unrechtmäßig erlangter Vermögenswerte nach § <u>261</u> unter den in § <u>261</u> Abs. 4 Satz 2 genannten Voraussetzungen, beruht die Strafbarkeit darauf, dass die Strafflosigkeit nach § <u>261</u> Absatz 9 Satz 2 gemäß § <u>261</u> Absatz 9 Satz 3 ausgeschlossen ist, jedoch nur dann, wenn der Gegenstand aus einer der in den Nummern 1 bis 7 genannten besonders schweren Straftaten herrührt,</p> <p>m) besonders schwerer Fall der Bestechlichkeit und Bestechung nach § <u>335</u> Abs. 1 unter den in § <u>335</u> Abs. 2 Nr. 1 bis 3 genannten Voraussetzungen,</p> <p>2. aus dem Asylgesetz:</p> <p>a) Verleitung zur missbräuchlichen Asylantragstellung nach § <u>84</u> Abs. 3,</p> <p>b) gewerbs- und bandenmäßige Verleitung zur missbräuchlichen</p>	<p>gang handling of stolen goods pursuant to sections 260 and 260a;</p> <p>l) a particularly serious case of money laundering or concealment of unlawfully acquired assets pursuant to section 261 under the conditions set out in section 261 subsection (4), second sentence;</p> <p>m) a particularly serious case of taking and offering bribes pursuant to section 335 subsection (1) under the conditions set out in section 335 subsection (2), numbers 1 to 3;</p> <p>2. pursuant to the Asylum Procedure Act:</p> <p>a) inducing an abusive application for asylum pursuant to section 84 subsection (3);</p> <p>b) commercial or gang inducement of an abusive application for asylum pursuant to section 84a subsection (1);</p>
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<p>Asylantragstellung nach § <u>84a</u> Abs. 1,</p> <p>3. aus dem Aufenthaltsgesetz:</p> <p>a) Einschleusen von Ausländern nach § <u>26</u> Abs. 2,</p> <p>b) Einschleusen mit Todesfolge oder gewerbs- und bandenmäßiges Einschleusen nach § <u>27</u>,</p> <p>4. aus dem Betäubungsmittelgesetz:</p> <p>a) besonders schwerer Fall einer Straftat nach § <u>29</u> Abs. 1 Satz 1 Nr. 1, 5, 6, 10, 11 oder 13, Abs. 3 unter der in § <u>29</u> Abs. 3 Satz 2 Nr. 1 genannten Voraussetzung,</p> <p>b) eine Straftat nach den §§ <u>29a</u>, <u>30</u> Abs. 1 Nr. 1, 2, 4, § <u>30a</u>,</p> <p>5. aus dem Gesetz über die Kontrolle von Kriegswaffen:</p> <p>a) eine Straftat nach § 19 Abs. 2 oder § 20 Abs. 1, jeweils auch in Verbindung mit § 21,</p>	<p>3. pursuant to the Residence Act:</p> <p>a) smuggling of aliens pursuant to section 96 subsection (2);</p> <p>b) smuggling resulting in death and commercial and gang smuggling pursuant to section 97;</p> <p>4. pursuant to the Narcotics Act:</p> <p>a) a particularly serious case of a criminal offence pursuant to section 29 subsection (1), first sentence, numbers 1, 5, 6, 10, 11 or 13, subsection (3) subject to the requirements of section 29 subsection (3), second sentence, number 1;</p> <p>b) a criminal offence pursuant to section 29a, section 30 subsection (1), numbers 1, 2, and 4, or section 30a;</p> <p>5. pursuant to the War Weapons Control Act:</p> <p>a) a criminal offence pursuant to section 19 subsection (2), or to section 20 subsection (1), in each case also in conjunction with section 21;</p>
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<p>b) besonders schwerer Fall einer Straftat nach § 22a Abs. 1 in Verbindung mit Abs. 2,</p> <p>6. aus dem Völkerstrafgesetzbuch:</p> <p>a) Völkermord nach § 6,</p> <p>b) Verbrechen gegen die Menschlichkeit nach § 7,</p> <p>c) Kriegsverbrechen nach den §§ 8 bis 12,</p> <p>7. aus dem Waffengesetz:</p> <p>a) besonders schwerer Fall einer Straftat nach § 51 Abs. 1 in Verbindung mit Abs. 2,</p> <p>b) besonders schwerer Fall einer Straftat nach § 52 Abs. 1 Nr. 1 in Verbindung mit Abs. 5.</p> <p>(3) Die Maßnahme darf sich nur gegen den Beschuldigten richten und nur in Wohnungen des Beschuldigten durchgeführt werden. In Wohnungen anderer Personen ist die</p>	<p>b) a particularly serious case of a criminal offence pursuant to section 22a subsection (1) in conjunction with subsection (2);</p> <p>6. pursuant to the Code of Crimes against International Law:</p> <p>a) genocide pursuant to section 6;</p> <p>b) crimes against humanity pursuant to section 7;</p> <p>c) war crimes pursuant to sections 8 to 12;</p> <p>7. pursuant to the Weapons Act:</p> <p>a) a particularly serious case of a criminal offence pursuant to section 51 subsection (1) in conjunction with subsection (2);</p> <p>b) a particularly serious case of a criminal offence pursuant to section 52 subsection (1), number 1, in conjunction with subsection (5).</p> <p>(3) The measure may be directed only against the accused and may be implemented only on the private premises of the accused. The measure shall be admissible on the private</p>
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<p>Maßnahme nur zulässig, wenn auf Grund bestimmter Tatsachen anzunehmen ist, dass</p> <ol style="list-style-type: none"> 1. der in der Anordnung nach § 100d Abs. 2 bezeichnete Beschuldigte sich dort aufhält und 2. die Maßnahme in Wohnungen des Beschuldigten allein nicht zur Erforschung des Sachverhalts oder zur Ermittlung des Aufenthaltsortes eines Mitbeschuldigten führen wird. <p>Die Maßnahme darf auch durchgeführt werden, wenn andere Personen unvermeidbar betroffen werden.</p> <p>(4) Die Maßnahme darf nur angeordnet werden, soweit auf Grund tatsächlicher Anhaltspunkte, insbesondere zu der Art der zu überwachenden Räumlichkeiten und dem Verhältnis der zu überwachenden Personen zueinander, anzunehmen ist, dass durch die Überwachung Äußerungen, die dem Kernbereich privater Lebensgestaltung zuzurechnen sind, nicht erfasst werden. Gespräche in Betriebs- oder Geschäftsräumen sind in der Regel nicht dem Kernbereich privater Lebensgestaltung zuzurechnen. Das Gleiche gilt für Gespräche über begangene Straftaten und Äußerungen, mittels derer Straftaten begangen werden.</p> <p>(5) Das Abhören und Aufzeichnen ist unverzüglich zu unterbrechen, soweit sich während der Überwachung Anhaltspunkte dafür ergeben, dass Äußerungen, die dem Kernbereich privater Lebensgestaltung zuzurechnen sind, erfasst werden.</p>	<p>premises of other persons only if it can be assumed on the basis of certain facts that</p> <ol style="list-style-type: none"> 1. the accused named in the order pursuant to Section 100d subsection (2) is present on those premises; and that 2. applying the measure on the accused's premises alone will not lead to the establishment of the facts or the determination of a co-accused person's whereabouts. <p>The measures may be implemented even if they unavoidably affect third persons.</p> <p>(4) The measure may be ordered only if on the basis of factual indications, in particular concerning the type of premises to be kept under surveillance and the relationship between the persons to be kept under surveillance, it may be assumed that statements concerning the core area of the private conduct of life will not be covered by the surveillance. Conversations on operational or commercial premises are not generally to be considered part of the core area of the private conduct of life. The same shall apply to conversations concerning criminal offences which have been committed and statements by means of which a criminal offence is committed.</p> <p>(5) The interception and recording is to be interrupted without delay if during the surveillance indications arise that statements concerning the core area of the private conduct of life are being recorded. Recordings of such statements are to be deleted without</p>
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<p>Aufzeichnungen über solche Äußerungen sind unverzüglich zu löschen. Erkenntnisse über solche Äußerungen dürfen nicht verwertet werden. Die Tatsache der Erfassung der Daten und ihrer Löschung ist zu dokumentieren. Ist eine Maßnahme nach Satz 1 unterbrochen worden, so darf sie unter den in Absatz 4 genannten Voraussetzungen fortgeführt werden. Im Zweifel ist über die Unterbrechung oder Fortführung der Maßnahme unverzüglich eine Entscheidung des Gerichts herbeizuführen; § 100d Abs. 4 gilt entsprechend.</p> <p>(6) In den Fällen des § 53 ist eine Maßnahme nach Absatz 1 unzulässig; ergibt sich während oder nach Durchführung der Maßnahme, dass ein Fall des § 53 vorliegt, gilt Absatz 5 Satz 2 bis 4 entsprechend. In den Fällen der §§ 52 und 53a dürfen aus einer Maßnahme nach Absatz 1 gewonnene Erkenntnisse nur verwertet werden, wenn dies unter Berücksichtigung der Bedeutung des zugrunde liegenden Vertrauensverhältnisses nicht außer Verhältnis zum Interesse an der Erforschung des Sachverhalts oder der Ermittlung des Aufenthaltsortes eines Beschuldigten steht. § 160a Abs. 4 gilt entsprechend.</p> <p>(7) Soweit ein Verwertungsverbot nach Absatz 5 in Betracht kommt, hat die Staatsanwaltschaft unverzüglich eine Entscheidung des anordnenden Gerichts über die Verwertbarkeit der erlangten Erkenntnisse herbeizuführen. Soweit das Gericht eine Verwertbarkeit verneint, ist dies für das weitere Verfahren bindend.</p>	<p>delay. Information acquired by means of such statements may not be used. The fact that the data was obtained and deleted is to be documented. If a measure pursuant to the first sentence has been interrupted, it may be re-continued subject to the conditions set out in subsection (4). If in doubt, a court decision on the interruption or continuation of the measures should be sought without delay; Section 100d subsection (4) shall apply <i>mutatis mutandis</i>.</p> <p>(6) In the cases referred to in Section 53 a measure pursuant to subsection (1) shall be inadmissible; if during or after implementation of the measure it becomes apparent that a case referred to in Section 53 is applicable, subsection (5), second to fourth sentences, shall apply <i>mutatis mutandis</i>. In the cases referred to in Sections 52 and 53a, information acquired through a measure pursuant to subsection (1) may only be used if, taking into consideration the significance of the underlying relationship of trust, this is not disproportionate to the interest in establishing the facts or determining the whereabouts of an accused person. Section 160a subsection (4) shall apply <i>mutatis mutandis</i>.</p> <p>(7) Insofar as a prohibition on use pursuant to subsection (5) is conceivable, the public prosecution office shall obtain a decision without delay from the court which made the order, as to whether the information acquired may be used. Insofar as the court does not approve such use, the decision shall be binding for the further proceedings.</p>
<p>§ 158 Strafprozessordnung</p>	<p>§ 158 Strafprozessordnung</p>

<u>Strafanzeige; Strafantrag</u>	<u>Criminal Informations; Applications for Prosecution</u>
<p>(1) Die Anzeige einer Straftat und der Strafantrag können bei der Staatsanwaltschaft, den Behörden und Beamten des Polizeidienstes und den Amtsgerichten mündlich oder schriftlich angebracht werden. Die mündliche Anzeige ist zu beurkunden. Dem Verletzten ist auf Antrag der Eingang seiner Anzeige schriftlich zu bestätigen. Die Bestätigung soll eine kurze Zusammenfassung der Angaben des Verletzten zu Tatzeit, Tatort und angezeigter Tat enthalten. Die Bestätigung kann versagt werden, soweit der Untersuchungszweck, auch in einem anderen Strafverfahren, gefährdet erscheint.</p> <p>(2) Bei Straftaten, deren Verfolgung nur auf Antrag eintritt, muß der Antrag bei einem Gericht oder der Staatsanwaltschaft schriftlich oder zu Protokoll, bei einer anderen Behörde schriftlich angebracht werden.</p> <p>(3) Zeigt ein im Inland wohnhafter Verletzter eine in einem anderen Mitgliedstaat der Europäischen Union begangene Straftat an, so übermittelt die Staatsanwaltschaft die Anzeige auf Antrag des Verletzten an die zuständige Strafverfolgungsbehörde des anderen Mitgliedstaats, wenn für die Tat das deutsche Strafrecht nicht gilt oder von der Verfolgung der Tat nach § 153c Absatz 1 Satz 1 Nummer 1, auch in Verbindung mit § 153f, abgesehen wird. Von der Übermittlung kann abgesehen werden, wenn</p>	<p>(1) Information of a criminal offence or an application for criminal prosecution may be filed orally or in writing with the public prosecution office, with authorities and officials in the police force, and with the Local Courts. An oral information shall be recorded in writing.</p> <p>(2) In the case of criminal offences which may be prosecuted only upon application, the application shall be made in writing or orally for the record to a court or to the public prosecution office; where the application is made to another authority, it shall be made in writing.</p> <p>(3) If an aggrieved person resident in Germany files information of a criminal offence committed in another Member State of the European Union, the public prosecution office shall, upon the application of the aggrieved person, transmit the information to the competent criminal prosecuting authority of the other Member State if the offence is not subject to German criminal law or if prosecution of the offence is dispensed with pursuant to Section 153c subsection (1), first sentence, number 1, also in conjunction with Section 153f. Transmission may be dispensed with if</p>

<p>1. die Tat und die für ihre Verfolgung wesentlichen Umstände der zuständigen ausländischen Behörde bereits bekannt sind oder</p> <p>2. der Unrechtsgehalt der Tat gering ist und der verletzten Person die Anzeige im Ausland möglich gewesen wäre.</p> <p>(4) Ist der Verletzte der deutschen Sprache nicht mächtig, erhält er die notwendige Hilfe bei der Verständigung, um die Anzeige in einer ihm verständlichen Sprache anzubringen. Die schriftliche Anzeigebestätigung nach Absatz 1 Satz 3 und 4 ist dem Verletzten in diesen Fällen auf Antrag in eine ihm verständliche Sprache zu übersetzen; Absatz 1 Satz 5 bleibt unberührt.</p>	<p>1. the offence and the circumstances of relevance for its prosecution are already known to the competent foreign authority or</p> <p>2. the injustice done through the offence is minimal and it would have been possible for the aggrieved person to file the information abroad.</p>
<p><u>§ 160a, Strafprozessordnung Maßnahmen bei zeugnisverweigerungsberechtigten Berufsheimnisträgern</u></p> <p>(1) Eine Ermittlungsmaßnahme, die sich gegen eine in § 53 Absatz 1 Satz 1 Nummer 1, 2 oder Nummer 4 genannte Person, einen Rechtsanwalt, eine nach § 206 der Bundesrechtsanwaltsordnung in eine Rechtsanwaltskammer aufgenommene Person oder einen Kammerrechtsbeistand richtet und voraussichtlich Erkenntnisse erbringen würde, über die diese das Zeugnis verweigern</p>	<p><u>§ 160 a, German Criminal Code Procedure Investigation Measures Where Person Has Right to Refuse Testimony</u></p> <p>(1) An investigation measure directed at a person named in Section 53 subsection (1), first sentence, numbers 1, 2 or 4, an attorney, a person who has been admitted to a Bar Association pursuant to section 206 of the Federal Regulations for Practising Lawyers or a non-attorney provider of legal services who has been admitted to a Bar Association shall be inadmissible if it is expected to produce</p>

dürfte, ist unzulässig. Dennoch erlangte Erkenntnisse dürfen nicht verwendet werden. Aufzeichnungen hierüber sind unverzüglich zu löschen. Die Tatsache ihrer Erlangung und der Löschung der Aufzeichnungen ist aktenkundig zu machen. Die Sätze 2 bis 4 gelten entsprechend, wenn durch eine Ermittlungsmaßnahme, die sich nicht gegen eine in Satz 1 in Bezug genommene Person richtet, von dieser Person Erkenntnisse erlangt werden, über die sie das Zeugnis verweigern dürfte.

(2) Soweit durch eine Ermittlungsmaßnahme eine in § 53 Abs. 1 Satz 1 Nr. 3 bis 3b oder Nr. 5 genannte Person betroffen wäre und dadurch voraussichtlich Erkenntnisse erlangt würden, über die diese Person das Zeugnis verweigern dürfte, ist dies im Rahmen der Prüfung der Verhältnismäßigkeit besonders zu berücksichtigen; betrifft das Verfahren keine Straftat von erheblicher Bedeutung, ist in der Regel nicht von einem Überwiegen des Strafverfolgungsinteresses auszugehen. Soweit geboten, ist die Maßnahme zu unterlassen oder, soweit dies nach der Art der Maßnahme möglich ist, zu beschränken. Für die Verwertung von Erkenntnissen zu Beweis Zwecken gilt Satz 1 entsprechend. Die Sätze 1 bis 3 gelten nicht für Rechtsanwälte, nach § 206 der Bundesrechtsanwaltsordnung in eine Rechtsanwaltskammer aufgenommene Personen und Kammerrechtsbeistände.

(3) Die Absätze 1 und 2 sind entsprechend anzuwenden, soweit die in § 53a Genannten das Zeugnis verweigern dürften.

(4) Die Absätze 1 bis 3 sind nicht anzuwenden, wenn bestimmte Tatsachen den

information in respect of which such person would have the right to refuse to testify. Any information which is obtained nonetheless may not be used. Any recording of such information is to be deleted without delay. The fact that the information was obtained and deleted shall be documented. Where information about a person referred to in the first sentence is obtained through an investigation measure that is not aimed at such person and in respect of which such person may refuse to testify, the second to fourth sentences shall apply *mutatis mutandis*.

(2) Insofar as a person named in Section 53 subsection (1), first sentence, numbers 3 to 3b or number 5, might be affected by an investigation measure and it is to be expected that information would thereby be obtained in respect of which the person would have the right to refuse to testify, this shall be given particular consideration in the context of examining proportionality; if the proceedings do not concern a criminal offence of substantial importance, then, in principle, no overriding interest in prosecuting the criminal offence should be presumed. Insofar as is expedient, the measure should be dispensed with or, to the extent possible for this type of measure, restricted. The first sentence shall apply *mutatis mutandis* to the use of information for evidential purposes. The first to third sentences shall not apply to attorneys, persons who have been admitted to a Bar Association pursuant to section 206 of the Federal Regulations for Practising Lawyers and non-attorney providers of legal services who have been admitted to a Bar Association.

(3) Subsections (1) and (2) are to be applied *mutatis mutandis*, insofar as the persons named in Section 53a would have the right to refuse to testify.

(4) Subsections (1) to (3) shall not apply where

<p>Verdacht begründen, dass die zeugnisverweigerungsberechtigte Person an der Tat oder an einer Datenhehlerei, Begünstigung, Strafvereitelung oder Hehlerei beteiligt ist. Ist die Tat nur auf Antrag oder nur mit Ermächtigung verfolgbar, ist Satz 1 in den Fällen des § 53 Abs. 1 Satz 1 Nr. 5 anzuwenden, sobald und soweit der Strafantrag gestellt oder die Ermächtigung erteilt ist.</p> <p>(5) Die §§ 97, 100c Absatz 6 und § 100g Absatz 4 bleiben unberührt.</p>	<p>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. If the offence may only be prosecuted upon application or with authorization, the first sentence shall apply in the cases referred to in Section 53 subsection (1), first sentence, number 5, as soon as and insofar as the application for prosecution has been filed or the authorization granted.</p> <p>(5) Section 97 and Section 100c subsection (6) shall remain unaffected.</p>
<p><u>§ 312, Strafprozessordnung</u></p> <p><u>Zulässigkeit</u></p> <p>Gegen die Urteile des Strafrichters und des Schöffengerichts ist Berufung zulässig.</p>	<p><u>§ 312, German Criminal Code Procedure</u></p> <p><u>Admissibility</u></p> <p>An appeal on fact and law shall be admissible against judgments of the criminal court judge and of the court with lay judges.</p>
<p><u>§ 383 Zivilprozessordnung</u></p> <p><u>Zeugnisverweigerung aus persönlichen Gründen</u></p> <p>(1) Zur Verweigerung des Zeugnisses sind berechtigt:</p>	<p><u>§ 383 Code of Civil Procedure</u></p> <p><u>Refusal to testify on personal grounds</u></p> <p>(1) The following persons are entitled to refuse to testify:</p>

<p>1. der Verlobte einer Partei oder derjenige, mit dem die Partei ein Versprechen eingegangen ist, eine Lebenspartnerschaft zu begründen;</p> <p>2. der Ehegatte einer Partei, auch wenn die Ehe nicht mehr besteht;</p> <p>2a. der Lebenspartner einer Partei, auch wenn die Lebenspartnerschaft nicht mehr besteht;</p> <p>3. diejenigen, die mit einer Partei in gerader Linie verwandt oder verschwägert, in der Seitenlinie bis zum dritten Grad verwandt oder bis zum zweiten Grad verschwägert sind oder waren;</p> <p>4. Geistliche in Ansehung desjenigen, was ihnen bei der Ausübung der Seelsorge anvertraut ist;</p> <p>5. Personen, die bei der Vorbereitung, Herstellung oder Verbreitung von periodischen Druckwerken oder Rundfunksendungen berufsmäßig mitwirken oder mitgewirkt haben, über die Person des Verfassers, Einsenders oder Gewährsmanns von Beiträgen und Unterlagen sowie über die ihnen im Hinblick auf ihre Tätigkeit gemachten Mitteilungen, soweit es sich um Beiträge, Unterlagen und Mitteilungen für den</p>	<p>1. The fiancé of a party, or that person to whom the party has made a promise to establish a civil union;</p> <p>2. The spouse or former spouse of a party;</p> <p>2a. The partner or former partner under a civil union with a party;</p> <p>3. Those who are or were directly related to a party, either by blood or by marriage, or who are or were related as third-degree relatives in the collateral line, or who are or were second-degree relatives by marriage in the collateral line;</p> <p>4. Clerics, with a view to what was entrusted to them in the exercise of their pastoral care and guidance;</p> <p>5. Persons who collaborate or have collaborated, as professionals, in preparing, making or distributing printed periodicals or radio or television broadcasts, if their testimony would concern the person of the author or contributor of articles or broadcasts and documents, or the source thereof, as well as the information they have been given with regard to these persons' activities, provided that this concerns articles or broadcasts, documents and information published in the editorial part of the periodical or broadcast;</p>
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<p>redaktionellen Teil handelt;</p> <p>6. Personen, denen kraft ihres Amtes, Standes oder Gewerbes Tatsachen anvertraut sind, deren Geheimhaltung durch ihre Natur oder durch gesetzliche Vorschrift geboten ist, in Betreff der Tatsachen, auf welche die Verpflichtung zur Verschwiegenheit sich bezieht.</p> <p>(2) Die unter Nummern 1 bis 3 bezeichneten Personen sind vor der Vernehmung über ihr Recht zur Verweigerung des Zeugnisses zu belehren.</p> <p>(3) Die Vernehmung der unter Nummern 4 bis 6 bezeichneten Personen ist, auch wenn das Zeugnis nicht verweigert wird, auf Tatsachen nicht zu richten, in Ansehung welcher erhellt, dass ohne Verletzung der Verpflichtung zur Verschwiegenheit ein Zeugnis nicht abgelegt werden kann.</p>	<p>6. Persons to whom facts are entrusted, by virtue of their office, profession or status, the nature of which mandates their confidentiality, or the confidentiality of which is mandated by law, where their testimony would concern facts to which the confidentiality obligation refers.</p> <p>(2) The persons designated under numbers 1 to 3 are to be instructed about their right to refuse to testify prior to being examined.</p> <p>(3) Even if the persons designated under numbers 4 to 6 do not refuse to testify, their examination is not to be aimed at facts and circumstances regarding which it is apparent that no testimony can be made without breaching the confidentiality obligation.</p>
<p><u>§ 19 Bundesdatenschutzgesetz</u></p> <p><u>Auskunft an den Betroffenen</u></p> <p>(1) Dem Betroffenen ist auf Antrag Auskunft zu erteilen über</p>	<p><u>§ 19 Federal Data Protection Act</u> <u>Provision of information to the data subject</u></p> <p>(1) The data subject shall, at his request, be provided with information on</p>

<p>1. die zu seiner Person gespeicherten Daten, auch soweit sie sich auf die Herkunft dieser Daten beziehen,</p> <p>2. die Empfänger oder Kategorien von Empfängern, an die die Daten weitergegeben werden, und</p> <p>3. den Zweck der Speicherung.</p> <p>In dem Antrag soll die Art der personenbezogenen Daten, über die Auskunft erteilt werden soll, näher bezeichnet werden. Sind die personenbezogenen Daten weder automatisiert noch in nicht automatisierten Dateien gespeichert, wird die Auskunft nur erteilt, soweit der Betroffene Angaben macht, die das Auffinden der Daten ermöglichen, und der für die Erteilung der Auskunft erforderliche Aufwand nicht außer Verhältnis zu dem vom Betroffenen geltend gemachten Informationsinteresse steht. Die verantwortliche Stelle bestimmt das Verfahren, insbesondere die Form der Auskunftserteilung, nach pflichtgemäßem Ermessen.</p> <p>(2) Absatz 1 gilt nicht für personenbezogene Daten, die nur deshalb gespeichert sind, weil sie aufgrund gesetzlicher, satzungsmäßiger oder vertraglicher Aufbewahrungsvorschriften nicht gelöscht werden dürfen, oder ausschließlich Zwecken der Datensicherung oder der Datenschutzkontrolle dienen und eine Auskunftserteilung einen unverhältnismäßigen Aufwand erfordern</p>	<p>1. stored data concerning him, including any reference in them to their origin,</p> <p>2. the recipients or categories of recipients to whom the data are transmitted, and</p> <p>3. the purpose of storage.</p> <p>The request should specify the type of personal data on which information is to be provided. If the personal data are stored neither by automated procedures nor in non-automated filing systems, information shall be provided only in so far as the data subject supplies particulars making it possible to locate the data and the effort needed to provide the information is not out of proportion to the interest in such information expressed by the data subject. The controller shall exercise due discretion in determining the procedure for providing such information and, in particular, the form in which it is provided.</p> <p>(2) Sub-Section 1 above shall not apply to personal data which are stored merely because they may not be erased due to legal, statutory or contractual provisions on their retention or exclusively serve purposes of data security or data protection control and the provision of information would require disproportionate effort.</p>
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<p>würde.</p> <p>(3) Bezieht sich die Auskunftserteilung auf die Übermittlung personenbezogener Daten an Verfassungsschutzbehörden, den Bundesnachrichtendienst, den Militärischen Abschirmdienst und, soweit die Sicherheit des Bundes berührt wird, andere Behörden des Bundesministeriums der Verteidigung, ist sie nur mit Zustimmung dieser Stellen zulässig.</p> <p>(4) Die Auskunftserteilung unterbleibt, soweit</p> <ol style="list-style-type: none"> 1. die Auskunft die ordnungsgemäße Erfüllung der in der Zuständigkeit der verantwortlichen Stelle liegenden Aufgaben gefährden würde, 2. die Auskunft die öffentliche Sicherheit oder Ordnung gefährden oder sonst dem Wohle des Bundes oder eines Landes Nachteile bereiten würde oder 3. die Daten oder die Tatsache ihrer Speicherung nach einer Rechtsvorschrift oder ihrem Wesen nach, insbesondere wegen der überwiegenden berechtigten Interessen eines Dritten, geheim gehalten werden müssen <p>und deswegen das Interesse des Betroffenen an der Auskunftserteilung zurücktreten muss.</p> <p>(5) Die Ablehnung der Auskunftserteilung bedarf einer Begründung nicht, soweit durch die Mitteilung der tatsächlichen und rechtlichen Gründe, auf die die Entscheidung gestützt wird, der mit der Auskunftsverweigerung verfolgte Zweck gefährdet würde. In diesem Fall ist der Betroffene darauf hinzuweisen, dass er sich</p>	<p>(3) If the provision of information relates to the transfer of personal data to authorities for the protection of the constitution, to the Federal Intelligence Service, the Federal Armed Forces Counterintelligence Office and, where the security of the Federation is concerned, other authorities of the Federal Ministry of Defence, it shall be admissible only with the consent of such bodies.</p> <p>(4) Information shall not be provided if</p> <ol style="list-style-type: none"> 1. this would be prejudicial to the proper performance of the duties of the controller, 2. this would impair public safety or order or otherwise be detrimental to the Federation or a Land or 3. the data or the fact that they are being stored must be kept secret in accordance with a legal provision or by virtue of their nature, in particular on account of an overriding justified interest of a third party <p>and for this reason the interest of the data subject in the provision of information must be subordinated.</p> <p>(5) Reasons need not be stated for the refusal to provide information if the statement of the actual and legal reasons on which the decision is based would jeopardize the purpose pursued by refusing to provide information. In such case it shall be pointed out to the data subject that he/she may appeal to the Federal Commissioner for Data Protection and</p>
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<p>an die Bundesbeauftragte oder den Bundesbeauftragten für den Datenschutz und die Informationsfreiheit wenden kann.</p> <p>(6) Wird dem Betroffenen keine Auskunft erteilt, so ist sie auf sein Verlangen der oder dem Bundesbeauftragten für den Datenschutz und die Informationsfreiheit zu erteilen, soweit nicht die jeweils zuständige oberste Bundesbehörde im Einzelfall feststellt, dass dadurch die Sicherheit des Bundes oder eines Landes gefährdet würde. Die Mitteilung der oder des Bundesbeauftragten an den Betroffenen darf keine Rückschlüsse auf den Erkenntnisstand der verantwortlichen Stelle zulassen, sofern diese nicht einer weitergehenden Auskunft zustimmt.</p> <p>(7) Die Auskunft ist unentgeltlich.</p>	<p>Freedom of Information.</p> <p>(6) If no information is provided to the data subject, it shall at his/her request be supplied to the Federal Commissioner for Data Protection and Freedom of Information unless the relevant supreme federal authority determines in a particular case that this would jeopardize the security of the Federation or a Land. The transfer from the Federal Commissioner to the data subject must not allow any conclusions to be drawn as to the knowledge at the disposal of the controller, unless the latter consents to more extensive information being provided.</p> <p>(7) Information shall be provided free of charge.</p>
<p><u>§ 17 Arbeitsschutzgesetz</u></p> <p><u>Rechte der Beschäftigten</u></p> <p>(1) Die Beschäftigten sind berechtigt, dem Arbeitgeber Vorschläge zu allen Fragen der Sicherheit und des Gesundheitsschutzes bei der Arbeit zu machen. Für Beamtinnen und Beamte des Bundes ist § 125 des Bundesbeamtengesetzes anzuwenden. Entsprechendes Landesrecht bleibt unberührt.</p> <p>(2) Sind Beschäftigte auf Grund konkreter Anhaltspunkte der Auffassung, daß die vom</p>	<p><u>§ 17 Act on the Implementation of Measures of Occupational</u></p> <p>(1) Workers are entitled to make suggestions to their employer in regard to all aspects of safety and health protection at work. Section 125 of the Federal Civil Service Act (<i>Bundesbeamtengesetz</i>, BBG) shall apply mutatis mutandis to civil servants. Corresponding <i>Land</i> legislation shall remain unaffected.</p> <p>(2) Where, based on specific indications, workers are of the opinion that the measures taken and means made available by the</p>

<p>Arbeitgeber getroffenen Maßnahmen und bereitgestellten Mittel nicht ausreichen, um die Sicherheit und den Gesundheitsschutz bei der Arbeit zu gewährleisten, und hilft der Arbeitgeber darauf gerichteten Beschwerden von Beschäftigten nicht ab, können sich diese an die zuständige Behörde wenden. Hierdurch dürfen den Beschäftigten keine Nachteile entstehen. Die in Absatz 1 Satz 2 und 3 genannten Vorschriften sowie die Vorschriften der Wehrbeschwerdeordnung</p>	<p>employer are not sufficient to guarantee safety and health protection at work and the employer does not remedy any complaints raised by the workers in this regard, they may contact the competent authority. The workers may suffer no disadvantages as a result thereof. The provisions referred to in subsection (1), second and third sentence, and the provisions set out in the Military Law Complaints Code (<i>Wehrbeschwerdeordnung</i>, WBO) and in the Act on the Parliamentary Commissioner for the Armed Forces (<i>Gesetz über den Wehrbeauftragten des Deutschen Bundestages</i>, WBeauftrG) shall remain unaffected.</p>
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ELSA GREECE

Contributors

National Coordinator

Anastasios Kalergis

National Academic Coordinator

Angelina Vlachou

National Researches

Stavroula Chaloulou

Chrysa Solaki

Eugnosia Papadopoulou

Ilias Tzeremes

Despina Ziana

Sofia Andreadaki

Lamprini Xenou

Olga Gkotsopoulou

Kornilia Pipidi-Kalogirou

Pinelopi Briffa

Stephania Efstathiou

National Linguistic Editors

Lamprini Koletsi

National Academic Supervisor

Pr. Triantafillia (Lina) Papadopoulou

1. Introduction

In a democratic society, the Press can only operate well when it is a means of free dissemination of information and criticism of the state's malfunctions. In order, however, for this to be possible, there is a necessity for guaranteed secrecy of the sources which provide the information. This is why, in many European countries there is special legislation establishing **journalist privilege**, through obligation of discretion to all the media factors. There are of course some exceptions that are allowed to make this general principle of journalist privilege retreat. The freedom of journalism is subject to certain limitations, in order to reduce the conflicts of legitimate goods established constitutionally, at national as well as international level. However, we cannot support that *de jure* and *a priori* the freedom of expression is to be oppressed whenever a conflict with public interest occurs. Therefore, a specific check of the conditions and balance of interests at stake has to be conducted in every such occasion of conflict. These conditions are to be analysed further upon in the research. What is more, other ways of protection of the journalists against state's invasive measures will be presented, along with the national courts' practice.

1. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

1.1. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information?

1.1.1. The Freedom of Press as the Legal Basis of the Right

Since the press came into existence in 1780, it has played a crucial role in shaping public opinion and perceptions, but it is also considered as the fourth pillar of the society. In fact, it is widely accepted that the press is the backbone of a healthy democracy, since it not only functions for the dissemination of information, but also as means of government control and political criticism.

Therefore, in the context of the Freedom of Expression, the press is protected by the Greek Constitution wherein article 14 § 2a it is stated that "The press is free. Censorship and any other precautionary measure are forbidden". According to the historical decision No. 10541/1976 provided by the Magistrate's Court of Athens, the journalists' duty and right not to disclose their source of information is recognized as a subject requiring legal protection. Indeed, at the court's conclusive sentence the interpretation of the article 14 § 2a of the Constitution referring to the Freedom of Press was, among others, presented as the legal basis for the protection of this right.

1.1.2. Definition of the Right

Accordingly, it was proven that the Right to Freedom of Expression, a significant precondition in order to guarantee the stable and proper operation of the state's institutions, serves as the starting point regarding the comprehension of the definition of the journalists' right not to disclose their source of information. The press is able to fulfill its mission to the society, if only the secrecy of its sources is secured. To that end, those who co-operate or have co-operated as professionals in the preparation, production and publication of periodicals and radio or television broadcasting, have the right to deny the testimony before a court, concerning the editor or the person that provided the information appearing on articles and documents.

The lack of protection of the journalistic sources would cause concerns about the reliability of the press, since the journalists would only have access to a limited amount of evidence, unable to keep the public sufficiently updated. Moreover, in the condition of lack of protection, the communicators, namely individuals with access to critical positions within public authorities¹ or private companies, would be unwilling to provide valuable information to the press at their own cost, due to the threat of legal penalties.² This would constitute an excessive restriction of the constitutionally established Right to Freedom of Expression of the press, as much as the state's interventions would have an inhibitory effect to the press's function.

Consequently, although the confidentiality of the journalistic sources is not legally established by any Greek law, the Greek courts have recognised that they are protected by virtue of constitutional provisions (article 14 § 2) safeguarding the Right to Freedom of Press. The journalists have also the right to deny their testimony, as they are not obliged to reveal their sources of information, even if it is requested by the police.

1.2. What type of legislation provides this protection?

1.2.1 Provisions in the Code of Criminal Procedure and the Criminal Code

The absence of specific legal provisions protecting directly the right of the journalists not to disclose their sources of information from the Greek legal order could be proven to have led to serious violations, concerning the validity and independence of the press.

Indeed, article 212 § 1 of the Greek Code of Criminal Procedure, under the title "Professional confidentiality of the witnesses", states that if professionals belonging to several categories are examined as witnesses, either during the prejudgment, or the main proceedings "the procedure (of testimony) is invalid". Due to the fact that journalists are not explicitly mentioned into this

¹ K.Chrisogonos, "Individual and Social Rights", 3rd revised edition, (*Nomiki Vivliothiki Athens 2006*), pp. 301-304 [Greek]

² A.I. Korgopoulos, 'Journalistic privacy: Foundation of the Right and Provisions of Implementation and Recession' [2008], p.159 [Greek].

provision, their testimony is not considered as forbidden evidence.³ Thus, they are not prohibited from testifying as witnesses before the criminal court disclosing information gained from the exercise of their profession. On the contrary, article 209, entitled “Obligation to testify”, states that “If someone is legally requested to testify before the court, he or she cannot deny it, aside from the exceptions that are explicitly mentioned in the code”, which practically reiterates the assertion that during interrogation journalists, if requested, are obliged to disclose their sources of information.

It has been argued that the journalists’ right not to disclose their sources of information is supported in article 371 of the Greek Criminal Code, entitled “Violation of professional secrecy” which in paragraph 1 states that “Clergies, lawyers and any kind of legal counsels, notaries, doctors, midwives, nurses, pharmacists and others, to which people usually entrust, as well as, the assistants of these individuals, due to their profession or capacity, are punishable by fine or imprisonment up to one year if they disclose confidential information that they have been entrusted or informed about”. It has been claimed that journalists are included in the category of “...others, to which people entrust, due to their profession or capacity, confidential information”.⁴ However, according to opposite claims, journalists cannot be included in the aforementioned category, since their main duty is to inform the public, not to safeguard their communicants’ names.⁵ Thus, regarding the professional secrecy of journalists, the author’s name is the only confidential part, excluding his/her work, which, in contrary, is possible to be published. In this case, journalists are no more exempted from the obligation to testify before the criminal court.

Concluding, it seems that the provision does not provide sufficient legal protection to journalists,⁶ since it neither mentions them explicitly as a category of professional, nor excepts them from the obligation to testify. However, they *could* be subject of this provision, as it can be interpreted as such.

Article 223 § 4 of the Code of Criminal Procedure provides partial procedural protection to journalists, as an exception from article 371 of the Criminal Code, as it states that “The witness is not obliged to testify about incidents from which their guilt of wrongdoing could emerge”. In that case, journalists requested to testify before the court are protected and eligible to deny disclosing their sources, on the supposition that they have committed a crime.

³ A. Konstantinidis, “Journalistic Privacy” [1994] Penal Journal Vol.4597 [Greek].

⁴ Karanikas *Εγχειρίδιο Ποινικού Δικαίου* (part 3, Special Mention 1962), 324 [Greek], who argues that journalists are partially included in the art. 371 of the Greek Criminal Code, and as a result they have the right to deny their testimony, regarding their sources of information, when they are confidential.

⁵ Vougioukas *Το ποινικό δίκαιο των ειδικών ποινικών νόμων* (part2b Sakkoulas Athens 1965), 67 [Greek].

⁶ K. Μπεϊς *Το απόρρητο των πηγών του δημοσιογράφου. Ένα θέμα που χρειάζεται νομοθετική ρύθμιση* [1982] *Ελευθεροτυπία* 7/01/1982 [Greek].

1.2.2 National Case-Law

The Greek Courts have established significant limits to the complexity of this issue, by recognising the journalists' right not to disclose their sources since 1976, despite not being explicitly described in any of the provisions. Even before the European Court of Human Rights, the courts in Greece initially adjudged this right as an integral part of the constitutionally established in article 14 § 2 Right to Freedom of Press. However, according to a subsequent decision with opposite substance,⁷ article 212 of the Code of Criminal Procedure was considered as the legal basis of which, avoided protecting this right.⁸

Over recent years, national courts started referring directly to article 10 of the European Convention of Human Rights and article 19 of the Universal Declaration of Human Rights as legislations with overriding supremacy and returning back to the initial judgement, because the application of provision of the Criminal Code and Code of Criminal Procedure does not comply with ECtHR case law. Since 1999, there has been a decision which indicates that "...as it emerges from article 14 § 2 of the Greek Constitution 1975/1986, the journalists' right not to disclose their sources of information is based on the constitutionally established Right to Freedom of the Press, and for this reason the constitutional provision prevails in case the journalist justifiably wishes not to disclose his or her knowledge and sources, since the opposite would result to the restriction of the Right to Freedom of the Press...".⁹

1.2.3. Other provisions

The secrecy of journalistic sources is also protected by the principle of non-legally binding documents. Article 2 § 9 of Journalists' Union of Athens Daily Newspapers and Panhellenic Association of Journalistic Unions Code of Ethics states that "Journalists have the right and obligation to: [...] respect the professional confidentiality with respect to their sources of information which have extracted in strict confidence". This is not considered as a detailed provision, since it lacks foreseeing details regarding the circumstances under which journalists should disclose their sources.¹⁰

1.3. How exactly is this protection construed in national law?

1.3.1. Constitutional Provisions as Legal Basis of this Protection

The Greek Constitution recognises the crucial role of the press towards society, as it is in the position not only to influence public opinion, but also to guarantee social stability and democracy.

⁷ Supreme Court of Greece (ΑΠ) Case No. 980/1987 [1987] *Pinika Chronika* Vol. 37 [1987] 797.

⁸ Karras *Πονηρό Δικονομικό Δίκαιο* (Nomiki Vivliothiki 1993), 616 [Greek].

⁹ Magistrate's Court of Athens 4092/1999 [1999] *Pinika Chronika* Vol. 49 [1999] 1057.

¹⁰ A. Damaskou 'Protection of Sources' <http://journalism.cmpf.eui.eu/maps/protection-of-sources/> [English].

Because of the importance of Press's function, the confidentiality of its sources appears as a *sine qua non* element in order for the journalists to fulfill their social mandate. An obligation to disclose the sources would damage its efficiency and its existence. Moreover, precautionary censorship would also affect the press's independence, since governments would have access and power to control everything published and distributed to the public.

Provided that the journalists' right not to disclose their sources of information is basically protected by the virtue of the constitutional provisions, it is inferred that in the context of the Right to Freedom of Press journalists are also provided with the right to deny their testimony before the court. In that case, article 209 of the Code of Criminal Procedure does not apply on journalists. Although, the journalists maintain the right to testify voluntarily or if they are willing to do so after the court has requested it, which a *contrario* means that if they deny it, they must not be examined. Even if a journalist is forced to testify, the findings are forbidden to be used as evidence, and this person will not face any penalties for his action.

2. Is There, in Domestic Law, a Provision that Prohibits a Journalist from Disclosing his/her Sources? How Exactly is This Prohibition Construed in National Law? What is the Sanction?

The Press has a very important role in society because it is a means of spreading ideas and information. It contributes to informing and shaping public opinion and it could be said that it is a form of exercise control of state power. Because of its primary role in social life, enshrined in our national constitution with explicit provision the Freedom of the Press in Article 14§2a¹¹ "the Press is free. Censorship and every precautionary measure is prohibited..." However the ensuring of the secrecy of sources is necessary about the correct and complete exercise of the Press's role. Otherwise, the relation of trust between the informant and the representative of Press is collapsed as a result the correct public information to be drastically reduced. And this because who will provide information when he knows that it will not be abided secrecy and will be revealed his identity, something that could have a direct influence on his private life; Thus the laws of many countries included legislative provisions for the confidentiality of sources of Press.¹² Relevant instructions issued also the European Union, which obliges the Member States to include relevant recognition in their national legislation.¹³

The meaning of the protection of sources lies in the obligation of the journalists not to disclose their sources even to the Court about the information on subjects they notified or are going to

¹¹ Ioannis Karakostas, *The Press Law* 23-25 [Το Δίκαιο των ΜΜΕ]; Prodromos Dagtoglou, *Constitutional Law-Individual Rights* 565... [Συνταγματικό Δίκαιο- Ατομικά Δικαιώματα].

¹² Alexandros Kargopoulos, *The Protection of Sources, Press Law* 158... [Το Δημοσιογραφικό Απόρρητο. Δίκαιο Μέσων Ενημέρωσης και Επικοινωνίας- ΔΙΜΕΕ].

¹³ Recommendation No. R (2000) 7.

notify at the public.¹⁴ In the following it will be clarified if this prohibition exists in any provision in domestic law. First of all, the obligation of the journalists not to disclose their sources is based on the Constitutional Law in Article 14§2 as it was referred but not explicit. The Greek Courts have integrated the protection of sources in the freedom of expression and press something that it is obvious in many decisions such as ΠλημμΑθ 1054/1976, ΠοινΧρον ΚΣΤ 667 where at the reason for judgment is clearly mentioned that the protection of sources is resulted from the constitutional right of Article 14§2. In the field of Criminal Substantive Law, there is the opinion that the Article 371 about the professional secrecy covers also the journalists.¹⁵ More specifically in according with this article “Clergymen, lawyers and any kind of legal counsel, notaries, doctors, midwives, nurses, pharmacists and others to whom some usually they trust because of their profession or their status, private secrets and assistants of such persons, are punished by fine or imprisonment up to one year if they reveal private secrets that others trusted them or learned them because of their profession or their status”. The journalists are not a part of the group of professions they are covered by the confidentiality, they are not included explicit. Although there is the opinion that they are included in the meaning “others to whom some usually they trust because of their profession” the prevailing opinion at theory and case law is that neither at this category falls into the prohibition of disclosure the sources.¹⁶ The reason is that, in contrast with the relations referred by the article 371, the purpose of the confidentiality between Press and informants is not the protection of them but the collection of information in order to inform the public. For these reasons it could not be claimed that the prohibition of disclosure is based also at criminal law. Even if that could be acceptable and journalists could disclose their sources at the base of this article, they could not finally testify as witnesses regarding the article 212 of Criminal Procedural Law because the list of person they are excluded from the task of testimony is exclusive.¹⁷ Thereafter, the prohibition of disclosing the journalistic sources is not be protected under Criminal Substantive or Procedural Law and it has still as legislative framework the article 14§2 of the Constitutional Law.

The presidential decree 77/2003¹⁸ in article 8§3 defined that the journalist has the right not to disclose his sources. However, it could not be claimed that this provision enshrines the prohibition of disclosing. First of all this presidential decree regards the journalistic television and radio broadcasts and not the other types of Press. More specifically the article 1 mentions that the rules of this decree apply to news- journalistic and political broadcasts on public and private radio and television. Furthermore the provision refers “the right of journalists” that means that they have the right not to disclose their sources. It is not an obvious obligation that law orders it.

¹⁴ *The Protection of Sources, Press Law 158.*

¹⁵ Argiris Karras, *Criminal Code* 119 [Ποινικός Κώδικας].

¹⁶ Aggelos Konstantinidis, *The Protection of Sources Criminal Annals* 897...[Το Δημοσιογραφικό Απόρρητο Ποινικά Χρονικά]; *Constitutional Law-Individual Rights* §696 [Συνταγματικό Δίκαιο]; Magistrate’s Court of Athens 10541/1976, *Criminal Annals* 667, Magistrate’s Court of Athens 4092/1999 *Criminal Annals* 1057 [ΠλημμΑθ10541/1976, ΠοινΧρον, ΠλημμΑθ 4092/1999, ΠοινΧρον].

¹⁷ *The Press Law* 230.

¹⁸ Προεδρικό Διάταγμα 77/2003 (Φ.Ε.Κ. 77-Α' 28-3-2003).

Apart from that provision there is also at greek system one more Code of Conduct about the journalists and the protection of sources. It is the Code from Journalist's Union of Athens daily Newspapers which explicit in article 2h mentions that the journalists must not disclose their sources.¹⁹ On one side it could be claimed that it is the only explicit provision about the prohibition of disclosing but it has a limited scope of application. This provision includes only the member of the Union and it binds someone if he has signed collective labor contract which includes the binding of Code. Its violation has the result of disciplinary penalties because it has not formal validity of law. This Code includes also provision about the sanction in case of violation of secrecy sources. Article 8 states that there are two Disciplinary Councils which are responsible for the controlling of any violations of the Code and they decide in joint session.

The Greek case-law has not appeared at the same position as many cases about the prohibition of disclosure of sources. In one case, it was recognised the right of the protection of sources and the accused of perjury writer must be declared innocent.²⁰ However, the base at another case,²¹ about the acquittal was not the prohibition of disclosure of sources but the excusable error of the journalist about the right of confidentiality. Furthermore, this decision of the Court was not based in other regulated supports as Constitution or international Law like the first decision. Its legal basis was the Article 212 of the Greek Criminal Procedural Law (professional secret witness) where the journalists are not included at the exhaustive list of professions.

The same act has also the ECtHR which has as basic line the article 10 ECHR about the freedom of expression where is included the meaning of prohibition of journalists not to disclose their sources. However from many cases it could be concluded that the European Court does not accept immediately this prohibition but weigh them up with many facts that is the public interest.

The European Court of Human Rights in the case ECHR *Goodwin v United Kingdom*,²² considered excessive the order of the authorities to the journalist to reveal the source of his information about a confidential business plan.

However, on the decision *Nordisk Film & TV APS in Denmark*, the European Court found that the order of the national court to the TV station to uncover research material which was acquired by a journalist for a documentary on pedophilia in Denmark (who -with secret identity; involved in a pedophile group) was a proportionate (and therefore allowed) interference in freedom of the journalist, for crime prevention in relation to a serious child abuse case.²³

¹⁹ <http://www.esica.gr/arxes-deontologias/>

²⁰ Magistrate's Court of Athens 10541/1976, Criminal Annals 667,668. This decision mentions not only the protection of sources but also the relation between this protection and the freedom of Press.

²¹ Magistrate's Court of Athens 36773/1980 [ΠλημμΑθ 36773/1980].

²² *Goodwin v United Kingdom* 27.03.1996.

²³ *Nordisk Film & TV A/S* 08.12.2005.

In case of *Financial Times vs. United Kingdom*, the ECtHR ruled in favour of the protection of journalistic sources to refuse four newspapers and a news agency to reveal the source of their information about an impending brewing absorption agreement.²⁴

To conclude, as far as we can see, there is no explicit provision in domestic law about the protection of journalistic sources. The prohibition of not to disclose them is included at the constitutional right of freedom of expression and Press. The national also European case law based on article 14 (Constitutional Law) and 10 (ECHR) about the protection of sources but their decision in each case is different and they do not accept this right without balancing.

3. Who is a “journalist” according to the national legislation? Is it in your view a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media actors? Is the protection of journalists’ sources extended to anyone else?

3.1. Who is a “Journalist” according to the National Legislation?

Greek legislation does not provide with a definition of a “journalist”. According to Art. 14 par. 8 of the Greek Constitution, “the conditions and the qualifications needed for the exercise of the journalistic profession are defined by law” but there is not a clear term provided in any regulation.

However, some valuable definitions have been provided in theory, and a journalist can be described as a person exercising the journalistic profession through newspapers, magazines, television and the radio. It is science focused on gathering, recording and publishing the news on the one hand, and being critical towards every person or situation, on the other.²⁵

Moreover, some unions of journalists include in their statute only some prerequisites for someone to become one of their members and not a specific definition. Such an example constitutes Journalists Union of Athens Daily Newspapers that focuses on elements such as the age (being over 21 and under 40 years old), a minimum of education (having completed the secondary level of education) and domicile (being a resident of Athens) as conditions for a person’s membership. Of course, these necessary features vary among the different unions and cannot be considered as parts of the definition of a “journalist”.

²⁴ *Financial Times vs. United Kingdom* 15.12.2009.

²⁵ Sklavounis G.N. “*Introduction to the Journalistic Science*”, Ellin, 2002.

Some important elements for the definition of “journalists” can occur from the criminal legislation, and especially from articles that either exclude journalists from the privilege to not testify for information they gathered during doing research (Art. 212 criminal procedure code) or can ensure that they also have the right to professional secrecy (Art. 371 penal code).

3.2. Is it, in your view, a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media actors? Is the protection of journalists’ sources extended to anyone else?

Firstly, we must emphasise the role of the journalist not only as a mere exponent of opinion and subject of the constitutionally guaranteed individual freedom of expression as it is stated in article 14 paragraph 1, but also as a factor of the press under its institutional dimension, enshrined in article 14 para 2. Thus, the journalistic profession is the only profession with the sole object of the exercise of a constitutionally guaranteed freedom, the one of the freedom of expression.²⁶ He also contributes to the shaping of the political will of the public and therefore the proper functioning of democracy. This institutional dimension of the press is not only enshrined in the above national provisions but also in supranational provisions, such as Article 10 ECHR and Article 19 paragraph 2 of the International Covenant on Civil and Political Rights.

The aforementioned dual aspect of the freedom of the press both as an individual right and as an institutional guarantee that justifies a special privileged status of “non intervention of public authorities”, explains why the journalistic profession remains currently unregulated and freely accessible.²⁷ The existence of the provision of Article 14, paragraph 8 of the Constitution which favours the legal definition of the conditions and qualifications for the exercise of the journalistic profession, besides being a dictatorial residue, can only be viewed critically, as it could possibly lead to manipulation of the press by the state.²⁸ It is supported in theory²⁹ and case-law that restrictions placed by the Constitution that are receptive of legal regulation of the press are interpreted as formal requirements for the exercise of the journalistic profession. Furthermore, such restrictions are acceptable if they regulate salary issues, insurance and other matters of the journalist's profession, such as their participation in the relevant professional and trade unions³⁰ (such as the Union of the daily newspaper editors of Athens) or the issue of the confidentiality

²⁶ Charalampos Anthopoulos, ‘The self-regulation of the media-General aspects’, (1999), issue 3-4, The Constitution, 467 with references to P. Dagtoglou, *Press and Constitution*, ‘A, Athens-Komotini 1991, 136 and K. Chrysogonos, *Individual and Social Rights*, Athens-Komotini, 1998, 253.

²⁷ Elsa I. Deligianni, *Ethics of the media -Journalistic Ethics*, Sideris, Athens, 2004, 82. See Also Supreme Court judgement n. 66/1982 regarding the potential adoption of a law of para 8 concerning the conditions and qualifications of the exercise of the journalistic profession .

²⁸ Ioannis K. Karakostas, *The law of the media*, Nomiki Vivliothiki, Athens, 2012, 581 with reference to P. Dagtoglou, *Media and the Constitution*, ‘A, Athens-Komotini, 1991, 771.

²⁹ See Konstantinidis, ‘The protection of journalistic sources, Criminal Chronicles ΜΔ’ (1994), 897 with further references.

³⁰ K. Chrysogonos, *Individual and social rights*, (3rd revised edition), Nomiki Vivliothiki, Athens, 2006, 307.

of journalists' sources. However, it has been held³¹ that regulations requiring the mandatory membership in a professional association as a necessary element for the proof of the journalistic status are incompatible with the individual constitutional freedoms (in this case the freedom of association) and the freedom of the press.

The *ratio* of the provision of Article 14 paragraph 8 of the Constitution does not involve taking the role of the evaluator in terms of the state that will distinguish between those who are worthy and unworthy in order to enter the journalistic profession by introducing criteria such as a diploma, professional experience, etc. This would considerably limit the number of the subjects of freedom of expression through the press.³² Instead, the ratio must be located to the goal of quality improvement of the press and the exercise of objective and effective journalistic investigation.

Accordingly, those entitled to the right of invoking the protection of journalistic sources who are also bearers of the freedom of the press, are natural or legal persons engaged professionally or occasionally with any activity or work related to the press.³³ This is also demonstrated through the common legislation, namely in the Article 1 of the Mandatory Law n. 1092/1938 where the 'press' is interpreted with a very broad sense, including not only the printing industry but also any mechanical or chemical means by which the production of a large number of identical copies, images, illustrations, etc is achieved in paper, fabric, metal, plastic, glass or other material.³⁴

Another aspect that needs to be taken into consideration for the protection of journalistic sources, in general, is that the right to research and obtain information is actually an aspect of the constitutionally protected freedom of expression (Art. 14 par 1 of the Greek Constitution). Therefore, there is the defensive right of repeling any interference of the State during the conduct of journalistic research³⁵ and any actor involved in the process can enjoy appropriate protection from obstacles in their work. This means that a "journalist" can invoke this defensive right not only when they conduct research themselves but also to protect the activity of any person that conducts research for them. Thus, there is a wide group of people that can freely obtain information, which constitutes an integral part of journalistic activity.³⁶

Finally, it has also been argued that there exists an additional condition as far as the bearers of the right of the protection of journalistic sources are concerned. This includes the fact of

³¹ Judgement of the Plenary Session of the Council of State n. 3198/1990, Armenopoulos 1990, 1143 who ruled on regulations of the tax legislation and the repealed of the Decree n. 1004/1971

³² K. Chrysogonos, *Individual and social rights*, (3rd revised edition), Nomiki Vivliothiki, Athens, 2006, 307. Also compare: Charalampos Anthopoulos, 'The self-regulation of the media-General aspects', (1999), issue 3-4, *The Constitution*, 467.

³³ Ioannis K. Karakostas, *The law of the media*, Nomiki Vivliothiki, Athens, 2012, 4.

³⁴ Cf Supreme Court judgement n. 669/1985, Nomiko Vima 1986, 447.

³⁵ Case 2209/1997, Council of State, *To Syntagma*, [1997], 636.

³⁶ Ioannis K. Karakostas, *The law of the media*, Nomiki Vivliothiki, Athens, 2012, 188.

receiving the relevant information *"in the exercise and for the purposes of their professional activity"*.³⁷ On the one hand, this limits the number of the entities, without upsetting the substantially broad definition prevailing in the subjective limits of the scope of the protection of journalistic sources.

The notion of the journalist as resulting from the national legislation and case law, as outlined above, is compatible with the one resulting from the case law of the ECtHR. The latter, applies the definitions of the relevant Recommendation and the related interpretative memorandum under which the 'journalist' is any natural or legal person or professional practitioner who engages systematically with the collection and dissemination of information to the general public through the media.³⁸ Therefore, according to the ECtHR, the right to non-disclosure of journalistic sources is not just a privilege for journalists, but also an aspect of the right to information.³⁹

4. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

Initially, it should be noted that the protection of journalistic sources is not explicitly guaranteed by any provision of the national legislation or the Constitution. In terms of the relevant jurisprudence, the protection of sources is only stated indirectly and implicitly leading to the conclusion that the jurists rather prefer a stance of abstinence of witness as far as the journalists are concerned whenever that is considered reasonable from the particular surrounding circumstances.⁴⁰ The legal basis of this broad interpretation, while it seems quite not a sufficient foundation⁴¹ is the provision of Article 371 paragraph 1 of the Criminal Code. More specifically, where it refers to "others to whom some usually trust private secrets because of their profession or their status", thus leaving the field open for the journalists. The categories of professionals that are entitled to invoke the right to confidentiality of the information they know due to their profession can be found in the affined to Article 371 provision of Article 212 of Criminal Procedure Code. However, journalists or all those involved in journalistic activities in general are not included in this provision. Thus, even when they invoke the protection of professional secrecy they may be found accountable for a series of offences, such as: perjury (Art. 224 par. 2

³⁷ Alexandros-Ioannis Kargopoulos, study-opinion, 'Law of the media', 2/2008, 158.

³⁸ Case of telegraf Media Nederland landelijke B.V and others V. The Netherlands, 22.02.2013 etc.

³⁹ Tina Stavriniaki, in Sicilianos Linos-Alexander and others (eds), *European Human Rights Convention interpretation according to article (Rights-admissibility-restitution-execution)*, Nomiki Vivliothiki, Athens, 2013, 400 with reference to Tillack V .Belgium (judgment of 27.11.2007).

⁴⁰ Pappas J. Basil, 'The terrorist violence, the expert and the judge, fair trial and the journalistic confidentiality', Greek Justice, issue March-April 1978, 184.

⁴¹ See also, Penal Code, interpretation per article, Volume second (Articles 235-473), 2nd edition, Nomiki Vivliothiki, 2014, edited by A. Charalampakis, 2996-2997, which mentions that journalists are not included in the persons amenable, with references to bibliography and jurisprudence.

of Criminal Code), false testimony (Art. 225 of Criminal Code), fomentation of criminals (Art 231 of Criminal Code), disobedience (Art. 169 of Criminal Code). Another aspect which arose and is consistently maintained by the case-law⁴² and for some theorists⁴³ seems to be a non-secure legal basis, relates the protection of the sources with the constitutionally guaranteed freedom of the press, considering it its integral part while also protecting this confidentiality.

Journalistic ethical code in the form of legislation is absent from the Greek legal system, as it is incompatible as a notion with the current Constitution⁴⁴ and could lead to a limitation of the freedom of the press. The regulation of this issue therefore lies in terms of professional ethics. Namely, through general and abstract rules adopted by the union organized profession which are binding for the members of the latter⁴⁵ and refer to the freedoms of expression and information as well as the "duties and responsibilities" which accompany them.⁴⁶

As regards to the determination of their nature as legal or moral rules (customary commercial practices), it should be noted that it depends on whether coercive sanctions imposed either by the relevant internal control bodies within their respective professional organizations or by independent authorities in terms of external control system of self-regulation rules, exist or not.⁴⁷

The Code of ethics of UNDEA (Union of the daily newspaper editors of Athens) (19-20.05.1998), which has been accepted by PFEU (Panhellenic Federation of Editor Unions) constitutes an example of self-regulation of the journalistic profession.⁴⁸ However, the force of this Code, which is an internal decision of a union is limited, since it can only be applied with the exercise of disciplinary powers of the unions that accept it.⁴⁹ For instance, electronic media journalists, that are not members of UNDEA and cause the major problems of unethical behavior, are not bound by this Code.⁵⁰ In the field of broadcasting, which is subject to a public regulation regime (article 15 paragraph 2 of the Constitution), along with the code of UNDEA

⁴²Magistrate's court of Athens judgement n. 10541/1976 Poinika Chronica ΚΣΤ' (1976), 667 επ., Magistrate's court of Athens judgement n. 4092/1999 Poinika Chronica ΜΘ' (1999) 1057 επ., Magistrate's court of Hraklium judgement N.60/1999 (nomos), Magistrate's court of Arta judgement n. 125/1995 Poinika Chronika ΜΕ' (1995), 977 επ.

⁴³ K. Mpeis, 'The confidentiality of journalist's sources. An issue that needs legislative regulation', Article published in *Eleftherotypia*, January 7, 1982: "... the constitutional guarantee of the freedom of the press is not a secure interpretive basis, where the reporter can support his refusal to punishment without the risk of being subjected to criminal prosecution or other sanctions. "

⁴⁴ Charalampos Anthopoulos, *The self-regulation of the media-General aspects, legal magazine: The Constitution*, issue 3-4/1999, 465.

⁴⁵ Elsa I. Deligianni, *Ethics of the media -Journalistic Ethics*, Sideris, Athens, 2004, 104.

⁴⁶ Charalampos Anthopoulos, 'Aspects of fundamental rights in the journalistic code of ethics of UNDEA (Union of the daily newspaper editors of Athens)', *Armenopoulos* 1999, 1039 επ.

⁴⁷ Charalampos Anthopoulos, *The self-regulation of the media-General aspects, legal magazine: The Constitution*, issue 3-4/1999, 440; Elsa I. Deligianni, *Ethics of the media -Journalistic Ethics*, Sideris, Athens, 2004, 107.

⁴⁸ Ioannis K. Karakostas, *The law of the media*, Nomiki Vivliothiki, Athens, 2012, 585.

⁴⁹ Ioannis K. Karakostas, *The law of the media*, Nomiki Vivliothiki, Athens, 2012, 586.

⁵⁰ Elsa I. Deligianni, *Media Codes of Ethics*, *Armenopoulos* 1999, 1032 επ, 1038.

there are the codes of ethics⁵¹ of National Council of Broadcasting (NCB) that are applied. Additionally, there exists a system of administrative sanctions that are provided in the broadcasting law in case of violations of the latter, which are in principle not susceptible to suspension⁵². Rules of conduct can also be included in collective labour agreements, such as the one signed between National Radio & Tv (NRT)- UNDEA on 07/25/1989.

Thus, the protection of journalistic confidentiality is ensured as follows: a) in the Statute of UNDEA (Article 7 paragraph 1η), b) in the Code of Ethics of UNDEA (Article 2 section Θ'-I'), c) in the collective NRT-UNDEA agreement (Annex 4 section IX), d) in the Code of Ethics of newscast and other journalistic and political emissions (Presidential Decree n. 77/2003, Article 8, paragraph 3) and e) Regulation n. 1/1991 NRT (Sheet of Government Paper B' 421) "on journalistic ethics in broadcasting" (journalistic ethics Code), Article 9 Paragraph 2.

It is worth noting that in a democratic society, press accountability must be disconnected from excessive political or judicial intervention and instead, independent enforcement mechanisms⁵³ composed of professionals from the journalistic field⁵⁴ must be promoted. Press Councils are a non-governmental institution with self-regulation character, responsible for supervising the observance of codes of conduct and dispute resolution amongst the media, the public and the public authorities, through arbitration without being able to impose its decisions.⁵⁵ The institution of Ombudsman (counsel for the listener-viewer-reader) is a part of these mechanisms. It is a single body composition, ie a journalist operating inside a media enterprise and its mission is to receive and convey complaints.⁵⁶ In contrast to those two institutions, there exist the Disciplinary Councils, which have a sanctioning capacity, following a complaint or *ex officio*.⁵⁷ They are divided into primary and secondary councils, and their final decisions are challenged before the regular justice.⁵⁸ Its disadvantage is that as long as they are provided by the Article 7 of the Statute of UNDEA they only have the capacity of indirect reference to the principles of the Code of Conduct of UNDEA, until the time the relevant article is reviewed and

⁵¹ Presidential Decree n. 77/2003 " Code of Ethics of the newscast and other journalistic and political programs' (Newspaper sheet of the Governmet n. A' 75).

⁵² Ioannis K. Karakostas, *The law of the media*, Nomiki Vivliothiki, Athens, 2012, 81.

⁵³ William Gore, *Self-regulatory bodies-Ensuring respect for a code of ethics*, (The Media Self-Regulation Guidebook, Vienna 2008)< <http://www.osce.org/fom/31497?download=true> > accessed 15 March 2016, 34.

⁵⁴ Miklos Haraszti, '*Foreword: The merits of media self-regulation, Balancing rights and responsibilities*', (The Media Self-Regulation Guidebook, Vienna 2008)< <http://www.osce.org/fom/31497?download=true> > accessed 15 March 2016, 11.

⁵⁵ Ognian Zlatev, *The press council: The archetype of a self-regulatory body*, (The Media Self-Regulation Guidebook, Vienna 2008)< <http://www.osce.org/fom/31497?download=true> > accessed 15 March 2016, 45-46; Elsa I. Deligianni, *Ethics of the media -Journalistic Ethics*, Sideris, Athens, 2004, 135-136.

⁵⁶ Veronique Maurus, *The ombdudsman: Media self-regulation within a news outlet*, (The Media Self-Regulation Guidebook, Vienna 2008)< <http://www.osce.org/fom/31497?download=true> > accessed 15 March 2016, 67-74, 78; Elsa I. Deligianni, *Ethics of the media -Journalistic Ethics*, Sideris, Athens, 2004, 136-137.

⁵⁷ Elsa I. Deligianni, *Media Codes of Ethics*, Armenopoulos 1999, 1032 επ, 1037.

⁵⁸ Elsa I. Deligianni, *Media Codes of Ethics*, Armenopoulos 1999, 1032 επ, 1037.

included in the new Code.⁵⁹ In case of surrender orders/injunctions and disclosure of sources, the safeguard applied as a compensation is the preventive control by a judge or any other body that is neutral and independent towards the involved parties. The role of this body is to decide whether there is an overriding public interest and determine whether the latter takes precedence in relation to the principle of protection of journalistic sources. Moreover, this body shall examine the proportionality of the means chosen by authorities to intervene and remove the protection of sources. Greek legislation lacks a regulation of this issue and there is neither statutory procedural regulation nor independent audit body setting for this purpose. This constitutes a violation of the procedural aspect of the right of freedom of expression (Article 10 Paragraph 2 ECHR) and the requirement deriving from it, that there shall be a relevant procedure prescribed by law.

5. In the respective national legislation, are the limits of non-disclosure of the information in line with the principles of the Recommendation No R (2000) 7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stakes? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to right of journalists not to disclose information?

Principles 1 and 2 of the Recommendation No R (2000) 7 of the Council of Europe “urge” the member-states to protect the right of non-disclosure of the sources both for journalists and for people, who acquire knowledge of information by their collaboration with journalists. However, the situation in the Greek legal practice is different.

The Greek courts, according to articles 14 par. 2 and 87 par. 2 of the Greek Constitution, are obliged to convict and not obey to any administrative and legislative measure, which can be characterised as a preventive measure, able to limit the freedom of expression. So, it is totally reassured that the legal status of the journalistic confidentiality is protected, as it is being entrenched by a constitutional provision (article 14 par. 2) and constitutes an individual right, which gives the power to the citizens to demand from the authorities not to intervene to the private sphere of this right (status negativus), according to the Greek constitutional theory.⁶⁰

However, in the Greek criminal legal practice, things are different. According to article 212 of the Greek Criminal Procedure Code, there are some categories of people, who, due to their profession, are exempted from testifying in a criminal case, because of the rule of confidentiality, whom violation constitutes criminal act and is liable to fine (150- 15.000€) and imprisonment of

⁵⁹ Elsa I. Deligianni, *Media Codes of Ethics*, Armenopoulos 1999, 1032 επ, 1037.

⁶⁰ Konstantinos Chrysogonos, *Ατομικά και Κοινωνικά Δικαιώματα, Νομική Βιβλιοθήκη* [2006] 30 [Greek]

ten days up to one year (articles 57 and 371 of the Greek Criminal Code). The Greek criminal theory and case-law⁶¹ **do not include** journalists to the categories, which are covered by professional confidentiality, so they are not exempted by the obligation of testimony (article 209 of the Greek Criminal Procedure Code). Moreover, if journalists – witnesses have been informed details that testify from other sources, they have to reveal them to the court (article 224 par.1 of the Greek Criminal Procedure Code).⁶²

The reason that both the Greek theory and case-law follow that opinion is that the list of the categories in article 212 of the Greek Criminal Procedure Code is exclusive (*numerus clausus*) and, as a consequence, article 371 of the Greek Criminal Code cannot support adequately the legal recognition of the journalistic confidentiality.⁶³ However, the 1976 decision recognises the journalist's right not to disclose information acquired by third persons in a criminal case, as there is narrow bond between journalistic confidentiality and freedom of expression.⁶⁴ Historically interpreted, this judicial decision comes out two years after the restoration of democracy in Greece after the seven years' military dictatorship (1967-1974) and the Greek judges desired to show that they follow the democratic climate of the newly-adopted Constitution of 1975, the most liberal constitution in the Greek constitutional history.

The right of non-disclosure is subjected to limitations, as they identified in the Greek and European case-law. First limitation could be identified as the right of the article 6 par. 2 of the European Convention of Human Rights, **the presumption of innocence**.⁶⁵ The Multimember First Instance Court of Veroia⁶⁶ recognised the fact that the right of free expression and non-disclosure has to be limited, in order the presumption of innocence of the defendant to be protected, as the case was still in the stage of the *preliminary examination*, and, as a consequence, the controversial newspaper article could create pieces of partiality in the judicial persons involved in the criminal procedure, so the newspaper had to compensate the plaintiff.

Another important restriction of the right of non-disclosure is the **right to private life**, as protected both by article 9 par. 1 of the Greek Constitution and article 8 of the European Convention of Human Rights. As private life can be defined an individual's general "*sphere of confidentiality*", for instance, his sexual life, health problems, arguments among the family members etc.⁶⁷

⁶¹ Decision 980 [1987] Supreme Court of Greece (Criminal Section), Criminal Chronicles 1987, 797 [Απόφαση 980/1987 Αρείου Πάγου (Ποινικό Τμήμα), Ποινικά Χρονικά 1987, 797]

⁶² Argyrios Karras, *Κώδικας Ποινικής Δικονομίας, Εκδόσεις Σάκκουλα* [2004] 120 [Greek]

⁶³ Ioannis Karakostas, *Το Δίκαιο των ΜΜΕ, Εκδόσεις Σάκκουλα* [2005] 230 [Greek]

⁶⁴ Decision 10541 [1976] Three-Member Misdemeanours Court of Athens, Criminal Chronicles 1976, 667 [Απόφαση 10541/1976 Τριμελούς Πλημμελειοδικείου Αθηνών, Ποινικά Χρονικά 1976, 667]

⁶⁵ Decision European Court of Human Rights November 24 2005, Case 53886/2000, Tourancheau and July v. France, NOMOS (Γράπεζα Νομικών Πληροφοριών)

⁶⁶ Decision 25 [2014] Multimember First Instance Court of Veroia, NOMOS (Forum for Legal Information) [Απόφαση 25/2014 Πολυμελούς Πρωτοδικείου Βέροιας, ΝΟΜΟΣ (Γράπεζα Νομικών Πληροφοριών)]

⁶⁷ George Michailidis-Nouaros, *Το απαράβιαστο του ιδιωτικού βίου και η ελευθερία του τύπου, Το Σύνταγμα* [1983] 379-380 [Greek]

The Supreme Administrative Court of Greece decided that the Personal Data Protection Authority rightly drew pecuniary penalty to TV station, according to articles 7 and 21 of Law 2472/1997,⁶⁸ who acquired from third sources photos from a couple's sexual life, as the rights of free expression and non-disclosure can be restricted towards the protection of personality, honour and private life, according to the article 10par.2 of the European Convention of Human Rights. Moreover, the TV station should compensate the couple, due to violation of the right to human dignity (article 2 par.1 of the Greek Constitution).⁶⁹

The right of non-disclosure can also be restricted when **the prestige and dignity of a juvenile can be taken offence**. In one of its decisions the Supreme Administrative Court of Greece decided that the National Radio-Television Council rightly drew sanctions to TV station, who publicized information about an 8-year old boy, who was suffering from a body disease.⁷⁰ The Court explained that the knowledge of this kind of illness could be adverse for the juvenile, because it could lead to his social isolation from his classmates. Moreover, found out violations of articles 8par.1 and 10par.1 of the Presidential Decree 77/2003⁷¹ were found, because the TV station's journalists were illegally spying the juvenile's school and showed those photos in national broadcast without the permission of the juvenile's parents.

Another example of restriction of the right of non-disclosure is **the crime of unlawful impersonation of cleric of the Greek Orthodox Church (article 175 par. 2 of the Greek Criminal Code)**. The Supreme Administrative Court of Greece decided that this action was violating articles 6par.3 and 8par.1 of the Presidential Decree 77/2003 and the restriction of article 5A of the Greek Constitution, because the necessity of acquiring information comes contrary to other rights, such as the citizens' right to demand the Church confidentiality.⁷²

Finally, the right of non-disclosure can also be restricted in front of the right to medical confidentiality. Medical confidentiality is being regulated by article 13 of Law 3418/2005,⁷³ which manifestly mentions that doctors are obliged both to protect and not disclose information about their clients' data or history. According the Greek case-law, the right of journalistic investigation and all the relevant rights of a journalist are able to be restricted, in order medical confidentiality

⁶⁸ Law No. 2472/1997 [Protection of the Citizens from the Processing of their Data] [Προστασία των Πολιτών από την Επεξεργασία των Προσωπικών τους Δεδομένων] 1997

⁶⁹ . Decision 3545 [2002] Supreme Administrative Court of Greece, Criminal Justice 2003, 132 [Απόφαση 3545/2002 Συμβουλίου της Επικρατείας, Ποινική Δικαιοσύνη 2003, 132]

⁷⁰ . Decision 3294 [2014] Supreme Administrative Court of Greece, NOMOS (Forum for Legal Information) [Απόφαση 3294/2014 Συμβουλίου της Επικρατείας, ΝΟΜΟΣ (Τράπεζα Νομικών Πληροφοριών)]

⁷¹ Presidential Decree No. 77 [Code of Conduct of Reportorial and Other Journalistic and Political Shows] [Κώδικας Δεοντολογίας Ειδησεογραφικών και άλλων Δημοσιογραφικών και Πολιτικών Εκπομπών] 2003

⁷² Decision 900 [2015] Supreme Administrative Court of Greece, NOMOS (Forum for Legal Information) [Απόφαση 900/2015 Συμβουλίου της Επικρατείας, ΝΟΜΟΣ (Τράπεζα Νομικών Πληροφοριών)]

⁷³ Law No 3418 [Medical Ethics Code] [Κώδικας Ιατρικής Δεοντολογίας] 2005

to be protected, due to the fact that it constitutes a *ius cogens* provision, which has been passed by law towards the regular and correct function of public (and private) hospitals.⁷⁴

The same opinion is being adopted and by the European Court of Human Rights, which in the case of *Plon v. France*, recognised that everybody are entitled to enjoy the right to medical confidentiality, even the high-ranked persons, because the relevant provisions are law of public order. However, the principle of proportionality shall always be taken into consideration, when such a restrictive measure comes in force.⁷⁵

As a final thought, it is really necessary to underline that there are some steps missing in the Greek legislation, whom fulfillment can “open” the road for the secure regulation of the journalistic confidentiality. Firstly, it is vital an explicit legislation about the journalistic confidentiality, which can be strongly invoked by journalists or any other person relevant to journalism and, secondly, a simultaneous amendment of both article 212 of the Greek Criminal Procedure Law Code and article 371 of the Greek Criminal Code about the protection of professional confidentiality, which is going to include journalists to the protective spirit of the provisions.

6. In the Recommendation No R (2000) 7 the following principles should be respected when the necessity of disclosure is stated: absence of reasonable alternative measures, outweighing legitimate interest (protection of human life, prevention of major crime, defense of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the disclosure outweigh the interest in non-disclosure?

According to Greek constitutional theory, both individual and social rights are able to be restricted. The mainest restriction is inherent, which means that it comes from the constitutional rights themselves, due to the fact that they are incorporated to the Constitution, the most fundamental and supreme law of the state, and are able to determine their own narrower or wider scope, as far as the extent of protection that provide.⁷⁶ Restrictions are being established, in order the individual and general interest to be outweighed.

⁷⁴ Decision 3880 [2002] Supreme Administrative Court of Greece, Legal Step 2003, 1987 [Απόφαση 3880/2002 Συμβουλίου της Επικρατείας, Νομικό Βήμα 2003, 1987]

⁷⁵ Nikos Alivizatos, *Σχολιασμός στην Υπόθεση Plon v. France*, Δίκαιο Μέσων Ενημέρωσης [1/2005] 16-17 [Greek]

⁷⁶ Dimitrios Tsatsos, *Συνταγματικό Δίκαιο· Τόμος Γ', Εκδόσεις Σάκκουλα [1988] 229-232 [Greek]*

First criterion for outweighing the disclosure and non-disclosure of the journalistic sources is the **abusive exercise of this right**. According to the article 25, paragraph 3 of the Greek Constitution, all the rights entrenched by the Greek Constitution's provisions is prohibited to be exercised abusively. This provision has the meaning that prohibits the exercise of a behaviour, which aims to illegal or out of the spirit of the Constitution purposes and, simultaneously, capsulizes the content of these rights, as the Greek constitutional theory accepts.⁷⁷ Moreover, there is abusive exercise of the right, when actions obviously exceed the ethics, as far as the social and economic intent of the it.⁷⁸ In this case it is right to decide in favour of disclosure.

Another criterion shall be the fundamental principle of the Greek Constitution, **the principle of proportionality** (article 25par.1 of the Greek Constitution). According to this, a restriction in a constitutional right is able to be established, if the measure that has been taken is appropriate to the purpose intended.⁷⁹ Moreover, the principle of proportionality is containing **the principle of necessity**, which has the meaning that the restriction has to be constituted with the necessary measure, which does not lead to the annulment of the right.⁸⁰

These principles are able to function when there is a conflict between the right of free expression and non-disclosure and the right of respect of the personality. The theory upon this matter accepts that firstly it is necessary to examine any insult of the right in personality. If this step is fulfilled, it is examined the possibility a person to has set out of the protection some aspects of his personality or these interventions in his personality to come out from the kind of life that he has chosen to live. Moreover, the time, the place and the ad hoc conditions shall be taken into consideration. Taken all them into consideration, the judge is able to decide in favour the right of non-disclosure or the right in personality.⁸¹ A characteristic example is the case of *Nordisk Film & TV A/S v. Denmark*. The European Court of Human Rights found that the Danish authorities rightly confiscated journalistic material of sources, due to the fact that the defendant journalist was using them, while participating into a network of paedophilia.⁸²

Furthermore, it is accepted that a measure has to be taken in favour the right of personality, it should be examined as far as its necessity concerned. The judge has to decide according to the

⁷⁷ Aristovoulos Manesis, *Ατομικές Ελευθερίες, Εκδόσεις Σάκκουλα* [1982] 88-89 [Greek]

⁷⁸ Constantinos Chrysogonos, *Ατομικά και Κοινωνικά Δικαιώματα, Νομική Βιβλιοθήκη* [2006] 70 [Greek]

⁷⁹ Ibid 90

⁸⁰ Decision 1149 [1988] Supreme Administrative Court of Greece, *The Constitution* 1988,325 [Απόφαση 1149/1988 Συμβουλίου της Επικρατείας], *Το Σύνταγμα* 1988, 325

⁸¹ Catherine Voulgari, *Το δικαίωμα της δημοσιογραφικής έρευνας· Σκιαγράφηση του περιεχομένου του και οριοθέτησή του σε σχέση με το δικαίωμα της προσωπικότητας, Δίκαιο Μέσων Ενημέρωσης* [3/2007] 362 [Greek]

⁸² Case of Case of Nordisk Film & TV A/S v. Denmark, ΔΙΚΟΓΡΑΦΙΑ [2012] 10 (Νομικό Περιοδικό του Δικηγορικού Συλλόγου Λάρισας)

facts of a case. A characteristic example is the *Case of Delfi AS v. Estonia*.⁸³ In this case the European Court of Human Rights decided that the “symbolic” penalty (320€) that the holder of a blog site established to a user, was within the scope of the article 10 of the European Convention of Human Rights and the Estonian judge outweighed correctly the right of free expression and non-disclosure with the right of respect of personality.

Another criterion that the European Court of Human Rights’ case-law accepts is **the truth of the details described by a journalist, although the relevant information has been obtained illegally**. However, a journalist is able to use this material, if it is necessary a supreme interest to be served. The European Court of Human Rights accepted that the Slovakian authorities had violated article 10 of the European Convention of Human Rights, because the journalists had an obligation to inform citizens about the management of a public insurance company, which is a political matter, although this conversation had illegally bugged.⁸⁴

Moreover, the European Court of Human Rights condemned Switzerland in the *Case of Haldimann and Others v. Switzerland*, because the judges decided that there was violation of article 10 of the European Convention of Human Rights, due to the fact that the controversial documentary was right, it was of informative character and under no circumstances was able to harm the insurance companies’ reputation. Moreover, the situation in the insurance companies described by the documentary was real, as was proven by the Swiss courts.⁸⁵

Important criteria for the outweighing between the disclosure and non-disclosure are constituted by **article 14 paragraph 3 of the Greek Constitution**. According to Greek constitutional theory, newspapers can be confiscated, if the controversial newspaper or magazine article insults the Greek Orthodox religion or any other known religion, the President of the Hellenic Republic, provides information of military character or intends to violent overthrow of democracy, puts in danger the territorial integrity of Greece and it is amoral. Especially in the case that there is possibility of disclosure of information of military character, the Public Prosecutor is able to issue a writ of confiscation, even if the controversial articles haven’t been publicised, because the military confidentiality of the Greek army is not accessible to foreign armies or Greek citizens and possible acknowledgement on behalf of them could harm the Greek citizens’ right to demand insurance and integrity of their territory.⁸⁶ This reasoning seems compatible with the European Court of Human Rights case-law, according to which restrictions to the freedom of the article 10 of the European Convention of Human Rights can be established if there is “coercive social necessity”, whom existence can examine both the

⁸³ Decision European Court of Human Rights November 24 2005, Case 64569/2009, Delfi AS v. Estonia, NOMOS (Τράπεζα Νομικών Πληροφοριών)

⁸⁴ Case of Radio Twist SA v. Slovakia, Δικαιο Μέσων Ενημέρωσης [2007] 139

⁸⁵ Case of Haldimann and Others v. Switzerland, Ελληνική Επιθεώρηση Ευρωπαϊκού Δικαίου [2/2015] 237-238

⁸⁶ Prodromos Dagtoglou, *Ατομικά Δικαιώματα· Τόμος Α', Εκδόσεις Σάκκουλα [1991] 525 [Greek]*

member-states and the European Court of Human Rights. At any case, such measures should be fully justifiable and describe the reason of restriction.⁸⁷

As a final thought, we can conclude that the Greek legal theory is in line with the Recommendation No R (2000) 7, because the Greek Constitution recognises that the journalistic confidentiality has to be outweighed with other legitimate interests and requirements. There is the Greek judge's relevant obligation to define the protective spirit of criminal and other provisions of various legal nature and, taking into consideration the facts, to be adjudged in favour of the journalistic confidentiality or any other public interest. However, this compliance is theoretical. In practice, there are not judicial decisions of major interest in the Greek judicial practice, especially by the criminal courts, in order to examine this matter by another scope, the judicial one.

7. In the light of the case law of the European Court of Human Rights, how do national courts apply the respective laws with regard to the right to protect sources? In particular, how do they balance the different interests at stake?

The Greek case-law concerning the protection of journalistic sources, even though it is limited, appears very lenient towards that protection. The Greek courts generally accept that the protection of journalistic sources is a general principle of the Greek law system. They also state that a journalist's professional duty is to keep confidential the identity of its sources. Furthermore, based on Greek constitutional and common legislation, not only do they take a stand on the issue of the disclosure of journalistic sources, but they also promulgate that the freedom of the press is inextricably connected to that right of non-disclosure. It is also worth mentioning that the Greek courts have mentioned the above, since the 1970s.

7.1. Case-Law

7.1.1. Minor crimes' court (Πλημμελειοδικείο) of Heraklion - 60/1999

Background

That case concerns a publication in a local newspaper announcing a decision of the local police department of Heraklion. The decision ordered the juror administrative examination of a police officer named I.M., who had firstly examined (during an investigation) N.D (a minor police officer who worked at the immigration department), for the last had been accused by two

⁸⁷ Paroula Naskou- Perraki, *Διεθνής Προστασία Ανθρωπίνων Δικαιωμάτων, Εξδόσεις Παπαζήση* [2008] 411 [Greek]

foreign women for having acted culpably towards them. N.D. accused I.M. for having violated the penal procedure during the first examination. As a result, the Ministry of Public Order and Security ordered the mentioned above administrative examination.

That newspaper publication, not only announced the administrative proceeding and its cause (N.D's accuses towards I.M.) but also criticized the decision taken by the Ministry. After that, the Police department ran the juror administrative examination of I.M. immediately, in order to find out who had given this information to the press and seek potential penal responsibility. Assistant Director. E.K. undertook that examination.

E.K. examined the Director of the newspaper E.M. as a witness during the examination. The latter accepted whole responsibility for the publication but denied to mention the author and its sources, as he was bound by the journalists' right of non-disclosure of sources. After that, E.M. was accused for constant perjury under articles 98 and 224par. 1&2 of the Penal Code.

7.1.2. Court's Legal Thought

The Court firstly found that under the scope of article 224 of the Penal Code, the perpetrator of the crime of perjury is the one who, while being examined by an authority in charge of prosecuting juror administrative examinations, consciously lies or denies or hides the truth. This rule is bended only when it comes to people who are bound by the professional secrecy. Article 212 of the Penal Code lists restrictively which categories of professionals are bound by the professional secrecy, however, the journalists are not among them. Article 371 of the Penal Code does not include journalists either. Consequently, the Supreme Court in Areios Pagos (ΑΠ 980/1987 ΠρωΧρ ΑΖ` 797) has judged that there is no such prohibit for the journalists to testify as witnesses and provide with every information they collected during their professional duties. It is also worth mentioning that according to article 200 of the new penal procedure code, the journalists-members of recognised professional unities, are not obliged to mention the identity of the sources which supplied them with confidential information, unless it is found that they are absolutely essential for a judged crime and their truthfulness can be confirmed only by the source's reveal.

From the above, it is clear that, at least under their present form, the articles mentioned above don't provide with a legal base that can excuse journalists from denying to reveal their sources. *However, this last issue has to be judged with regard to the freedom of the press, which is guaranteed by the freedom of expression (which also includes the right to receive and transmit information).*

This right is enshrined with the *Unites Nations' General Assembly Universal Declaration of Human Rights of the year 1948 (article 19)*, while *article 10 of the Convention for the protection of human rights and fundamental freedoms of the year 1950* states that "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas"

The press's important mission, as it consists the means of expression and transmission of thoughts and information and a factor which forms the public opinion, imposed its constitutional protection. *Article 14 par. 1&2 of the actual Constitution (1975) state that : "Everyone is able to express and transmit verbally or via the press his/ her personal thoughts, while respecting the national law.*

The press is free. Censorship and any other preventive means are prohibited". The constitutionally enshrined right of receiving and imparting information premises the freedom of its sources, which is only achieved by the protection of their secrecy. Consequently, the right of the journalists not to disclose the identity of the source, can be based on the above mentioned constitutional article.

It also has to be mentioned, that, as far as the journalistic deontology is concerned, there is an international acceptance of the fact that a journalist should never reveal its sources (article 6 of the preamble of the "Code of honour of journalists", which was adopted by the international Federation of journalists, at their second congress at Bordeaux, in 1954), while article 7 of the statutory of the Editors' Union of Everyday Newspapers of Athens inserts equal regulation in Greece.

7.1.3. Court's Decision

Under these circumstances, the accused journalist and director of the "E" newspaper, by denying to reveal the source of his sources, exercised a legal right of his, and acted inside the limits of the mentioned constitutional articles, aiming to preserve the secrecy of the newspaper's sources, a vital component for the acceptance and transmission of information.

7.2. Minor Crimes' Court of Athens – 10541/1976

In the present case, the accused for perjury journalist denied to identify his sources to the investigator. The Court found out that this very denial was not illegal, and he had to be acquitted. According to the decision's reasoning:

- The revealing of the identity of the victim-prisoner who got raped would offend violently the human dignity and would consist an infringement of her personal and family life. These goods are enshrined by the Constitution and their protection is a major obligation of the State and a right of each person alone.
- The investigator's compulsory intervention in the accusant's mind is contrary to *article 14 of the Constitution, according to which "Everyone is able to express and transmit verbally or via the press his/her personal thoughts, while respecting the national law"*
- The accused, while being examined as a witness, has the right not to provide with any information with which he could be blamed for committing detraction.
- The accused was blamed for the particular facts in a negative way, so he has no obligation to answer for their positive scope.
- Lastly, the journalist-accused completed his professional duty to keep his sources secret.

8. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear

legislative norms in the context of surveillance and anti-terrorism provisions?

8. 1 What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information?

However important might be the role of press and journalism in the development of genuine democracy, it is important to set certain limits to this great power. Human dignity and protection of individuality are a common ground of violations during the conduction of journalistic research, as a result conflicts between the freedom of journalistic research/ freedom of expression and other legal interests is inevitable. Fortunately, it is usual in legal theory these battles to be resolved by the method of the evaluation of conflicting interests when the implementation of harmonization is unattainable.

Between the states of the European Union, which all are considered as mature democracies, private life is under a very special protection, which is reflected at their existing Statues. Accordingly interferences are allowed only after there has been applied computation of legitimate interest and the principle of proportionality. In this context, respectively it has been structured the basic aspects of the provisions about confidentiality of communications, which are in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms.

Consequently, electronic surveillance and anti-terrorism laws are part of state's policies which put forward certain other interests, besides the one of freedom of expression, although it doesn't have necessarily to conclude at it's circumvention. Especially these policies might include practices such as interception of communications, surveillance actions, search or even seizure actions, in order to achieve the superior goal of ensuring a public good. Despite the invasive nature of those measures they are governed through some specific principles, which prevent the arbitrary application of the referred authorities' practices and actions.

Firstly, according to the Community Law⁸⁸ telecommunication's surveillance must be conducted under the principles of necessity and proportionality of the selected measure compared to the protection of person's privacy. As a result personal surveillance must be restricted according to those principles, legitimate interest must be evaluated, also the degree of assault of the private sphere must be proportional according to the protected public interest, and finally there must be an examination of the choice of the proper and necessary measure, according to feasibility of the particular case.⁸⁹ Considering the above for example, according to the Art. 10 of the Convention,

⁸⁸ I. P Xoxlioyros, *Security Issues Electronic Infrastructure and Applications*(Athens,Sakkoulas,2007)45[Greek]

⁸⁹ K.X Boulgari, *The right of journalistic investigation* , (ΔiMEE,2007/3)363[Greek]

only in cases of serious felonies personal surveillance is allowed, although the person under investigation has the right to be informed about the conducted procedures, as long as this knowledge doesn't prevent the proper conduction of the investigation.⁹⁰

Alongside, according to existing legal status of European States members, surveillance actions in the field of communication, even if conducted by authorities in order to assure the protection of public security, national defense and the security of the state from criminal and terrorist actions, are considered unlawful if they are not enacted under certain conditions and according to the above principles. As a result, authorities could proceed to the use of surveillance actions only as long as there are legal safeguards about the protection of the compromised rights, applying in that way the principle of transparency.⁹¹

The degree of protection that eventually is being received from the European citizens depends on the development and the adjustment of each national's legal framework to the contemporary reality of cyber revolution. In Greek legal order, the provisions about surveillance are being located at the Article 9A where it's being introduced the right for the protection of a human's personal data, especially by electronic means. All the above are ensured by the creation of an independent authority, which is constituted by law.⁹² Furthermore, in Article 19 of Greek Statue it is being ensured the absolute inviolable of secrecy of letters and other forms of free correspondence or communication. "The guaranties under which the judicial authority shall not be bound by this secrecy for reasons of national security or for purpose of investigating especially serious crimes, shall be specified by law."⁹³ This provision has been structured in the same way as the Article 10 of the Convention for the Protection for Human Rights and Fundamental Freedoms, since both of them take into consideration the same criteria to create the conditions of exception.

Furthermore, according to 9A and 19§2 specific independent authorities shall be specified by law in order to facilitate the protection of Personal Data and the Assurance of Secrecy of Communications.⁹⁴ Also, it must be mentioned that no Greek authority can proceed to the process of lifting the confidentiality according to Article 19 C since the use of evidence which are not complied with provisions 19, 9, 9A , are declared illegal after a substantive control from the ASC.⁹⁵ In that context, it is of great importance to take into considerations the recommendation of Council of Europe Committee of ministers⁹⁶ about the right of journalist not to disclosure their sources. According to the above provisions surveillance must be in accordance to the specific status of journalists. "For example Police or judicial authorities might

⁹⁰ I. P Xoxlioyros, *Security Issues Electronic Infrastructure and Applications*(Athens,Sakkoulas,2007)45[Greek]

⁹¹ Ibis.52

⁹² Statute of Greece 2008, 9A

⁹³ Statute of Greece2008, Art. 19.

⁹⁴ N.3115 (Authority assurance of confidentiality of communications.)2003[Αρχή διασφάλισης του Απορρήτου των Επικοινωνιών.]

⁹⁵ I. P Xoxlioyros, *Security Issues Electronic Infrastructure and Applications*(Athens,Sakkoulas,2007)46[Greek]

⁹⁶ Recommendation No. R (2000) 7.

keep journalists under surveillance for legal reasons not related to their sources. In such a case, the surveillance order and action should not reveal any information identifying a source.⁹⁷

Finally, due to the rapid development of internet era and cyber communications it is obvious that has occur the need of legislation for updating, in this aspect there has been the development of law 3471/2006⁹⁸ about “Protection of personal data and privacy in the electronic sector”, which modifies the law. 2472/1997. Noted that it is forbidden every kind of monitoring, surveillance from other besides the users, without their consent, except in cases legally authorised.⁹⁹

As far as anti-terrorism provisions are concerned things are quite less complicated either because at first governments didn't consider terrorism as a major problem for Greek society, either because it has been believed that the common penal legislation was adequate in the struggle to halt terrorists.¹⁰⁰ In this context, governments, at first, limited their actions in adopting international conventions, although later they created anti-terrorism laws such as the 1916/1990 and the most recent 2928/2001. Law 1916/1990¹⁰¹ holds a special interest in our study since it's relevant with suppression of freedom of press. According to its provisions the main purpose was to prevent terrorist organisations communicating with society through the press. However, generally it was considered as a censorship measure which is not consistent with the Statutory provisions. The recent law, 2928/2001, seems to be more of state's effort, alongside with the existing penal provisions, to show it's political will to cope with the matter. In fact every case is being dealt individually, since the involvement of the judicial control and independent authorities is extensive.

8.2. Are the national law provisions accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

The significance of the above question is based on the importance of these provisions. Since they result in a restriction of individual freedoms for certain acts, they should be defined in a clear and objective manner, so as to avoid the risk of application the restriction in cases of limited importance. It is worth mentioning that in the European Convention for the 'suppression of terrorism', signed in Strasbourg on 27.1.1977,¹⁰² a quite broad definition of terrorist offenses was adopted, so the distinction between those crimes and the individual common penal law crimes was not obvious, considering the fact that no other delimitation has been set(e.g State attack purpose).

⁹⁷ Recommendation No. R (2000) 7, Art.56.

⁹⁸ Government Gazette A 133 28/06/2006

⁹⁹ I. P Xoxlioyros, *Security Issues Electronic Infrastructure and Applications*(Athens,Sakkoulas,2007)52[Greek]

¹⁰⁰ L.Margaritis, *The Trial of 17N,the appeals were rejected but the legal culture level downgraded.*(ΠοινΔ,2003/3)301 [Greek]

¹⁰¹Law1916 (To protect society from organized crime)1990 [Για την προστασια της κοινωνιας απο το οργανωμένο έγκλημα]

¹⁰² European Convention on the Suppression of Terrorism, Strasbourg, January ,1977.

Respectively, the same problem exists in Law 2928/2001 which was the latest one law adopted in Greece, aimed as it was stated to counter terrorism. In the process, the objective of course is generally viewed as confronting organised crime - although it is known that political terrorism doesn't have the basic characteristics of organised crime.¹⁰³ Actually, the text of the law makes no reference either to organised crime or to terrorist activity or even to some of their basic characteristics. Instead, the legislation includes a wide catalogue of felonies that covers almost the Criminal Code, which affects everyone who has just joint one organisation, regardless of the fact they might not fulfill the requirements of terrorisms or organized crime as it stated in Article 2 of the Palermo Treaty.¹⁰⁴ The outcome of such a vagueness can be extremely severe. For example in order to elucidate a terrorist attack the telephone privacy of all citizens and not only of those for whom there is sufficient guilt clues may be lifted. Therefore, the profuse invoking of terrorism might in some cases legitimise the basis for a substantial and widespread curtailment of civil liberties of all citizens.

On the other hand, the protection of personal data is explicitly guaranteed by constitutional norm (Article 9A). At the level of the common law, the protection guaranteed by Law 2472/1997, while specific rules for the electronic communications sector identified in Law 2774/1999. Currently, the Ministry of Justice has filed a Draft Law, which introduced into domestic law the provisions of Directive 2002/58 and modified by extensive way the Law 2472/1997, to better align with Directive 95/46.¹⁰⁵ Furthermore, special safety tools are being introduced at the use of personal data, for example the contribution of judicial control has been reinforced by the establishment of the independent authority of the Assurance of Privacy of Communications in 2003 (Law 3115/2003). In fact, if there is a specific request of the prosecuting authorities for access to telecommunications data, the institutional framework is being activated to lift the confidentiality of communications. In order to happen so, the procedure for removing the secrecy is governed by Decree 47/2005, which covers the existing legal loopholes, while it's arranged in accordance with the constitutional mandate of Article 19 only by a judicial authority.

Concluding, in the field of protection of personal data it seems that the legal framework covers the necessary "areas", especially by the Decree 47/2005 in which specified all the types of communications related to the lifting of confidentiality. On the other hand anti-terrorism provisions might not be considered as much precise, due to the fact that there are still some implication on how to distinguish common penal crimes from terrorist acts.

¹⁰³ Key characteristics of organized crime considered to be the business structure and purpose of making a profit, which are not typical of political terrorism. C. Milonopoulos, Law 2928/2001 about protection of citizens by illegal actions of criminals organizations. (Πλογ,2001)794,[Greek]

¹⁰⁴ United Nations Convention against Transnational Organized Crime , Palermo, Italy, December,2000.

¹⁰⁵ H. Simeonidou-Kastanidou, *Definition of Terrorism*. (ΠοινΔτ,1/2001)62, [Greek]

9. Can journalists rely on encryption and anonymity online to protect themselves and their sources against surveillance?

The right of journalists to encryption and anonymity to protect themselves consists the right and obligation of a journalist to refuse, even before court principles, the disclosure of sources and the identification of the origin of his information and data received for issues that either already has or is willing to disclose to the public.¹⁰⁶ The protection of sources is inextricably linked to the right of anonymity and the right of freedom of expression which is guaranteed by the Greek Constitution on Article 14.¹⁰⁷ Even if it is not stated clearly article 14 guarantees the protection of journalist and their sources on internet.¹⁰⁸

Art. 14 of the Greek Constitution

“1. Every person may express and propagate his thoughts orally, in writing and through the press in compliance with the laws of the State.

2. The press is free. Censorship and all other preventive measures are prohibited.

3. The seizure of newspapers and other publications before or after circulation is prohibited.

Seizure by order of the public prosecutor shall be allowed exceptionally after circulation and in case of: a) an offence against the Christian or any other known religion, b) an insult against the person of the President of the Republic, c) a publication which discloses information on the composition, equipment and set-up of the armed forces or the fortifications of the country, or which aims at the violent overthrow of the regime or is directed against the territorial integrity of the State, d) an obscene publication which is obviously offensive to public decency, in the cases stipulated by law.

4. In all the cases specified under the preceding paragraph, the public prosecutor must, within twenty-four hours from the seizure, submit the case to the judicial council which, within the next twenty-four hours, must rule whether the seizure is to be maintained or lifted; otherwise it shall be lifted ipso jure. (...)”

After the directive of the Council of Europe in 2000, urging the Member States to adopt explicitly and recognise to their own legislation the journalistic privacy, while setting limits to the right to confidentiality of journalistic sources Greece started adopted many innovated case-law. However the protection of sources in Europe was founded by the ECtHR judgment in *Goodwin* and has further reinforced by subsequent cases. Greek courts have adopted the principles of the ECHR and have recognised the protection of sources through the inclusion of freedom of expression of journalists guaranteed by the Constitution and other international contracts.

More specifically, in Greece, the right of anonymity has not been established by the relevant case law on the right to freedom of the press but the confidentiality of journalists' sources is legally protected. Besides Article 14 of the Greek Constitution the Greek law is very liberal regarding the freedom of press and the protection of journalists on internet and has also adopted the Code of Professional Deontology which ensures the freedom of information and expression in the light of autonomy and dignity of journalist. The Code of Professional Deontology enshrined the

¹⁰⁶ . K. Chrysogonos, *Personal and social rights*

¹⁰⁷ Article 14 of Greek Constitution as revised since 2007

¹⁰⁸ Panagiotis Mantzoufas, Article: *Protection of freedom of expression and Internet*, 2010

obligation to respect the confidentiality regarding the sources and the identity of the informant, an opinion supported also by the Greek case law. The effective exercise of this right presupposes a trust relationship between the journalist and informants.

Art 14. Protection of sources- Code of Professional Deontology

“The journalists have a moral obligation to observe professional secrecy regarding the source of information obtained confidentially. Journalist is not obliged to reveal the source of his information. At the same time, it is the duty of the journalist to ensure that the sources of the information they provide is valid.”

Greek law does not explicitly recognise to journalist the right of anonymity and encryption or the right to refuse to testify. More specifically, Article 371 of Greek Penal Code mentions:

- 1. Clergymen, lawyers and any kind of legal counsel, notaries, doctors, midwives, nurses, pharmacists and others to whom some trust usually because of their profession or status of private secrets and assistants of such persons, be punished by a fine or by imprisonment up to one year if they reveal private secrets of the trust or the learned because of their profession or their status.*
- 2. Similarly punished, after the death of one of the faces of para. 1, and from this cause is document owner or notes of the deceased on the exercise of his profession, or of his status and these reveal private secrets.*
- 3. The prosecution only by indictment.*
- 4. The practice is not unfair and goes unpunished if the perpetrator intended to fulfill his duty or to safeguard legitimate or otherwise justified substantial interest * public or himself or another, which could not be preserved otherwise.”*

Article 371 of the Criminal Code which punishes the violation of professional secrecy does not recognize explicitly the duty of professional confidentiality of journalists. However it has been supported that press is an important social vocation, because it provides an important social mission to people.¹⁰⁹ Since then, journalists are under obligation to respect professional secrecy, especially when the events accredited by the privacy of the individual.¹¹⁰ Also, Greek courts have interpreted this provision and have included also the protection of journalists'. The Supreme Court of Greece in the case number 980/1987 granted the protection of sources and highlighted the close connection with the freedom of the press. What is more, the confidentiality of journalist relies mainly on maintaining anonymity including whichever might lead to the disclosure of the informant.¹¹¹ Therefore, journalist's duty of confidentiality contents events, which closely linked to the informant¹¹² and especially when the source of the information is, confidential and under the scope of the protection of private life.¹¹³

¹⁰⁹ Misdemeanor Court of Heraklion, 60/1999

¹¹⁰ Vougiouka, *The Criminal Law of Special Criminal Regulations*, 67

¹¹¹ Misdemeanor Court of Athens, 10541/1976

¹¹² Appeal Court of Athens, 9975/1986

¹¹³ Karanikas, *Manual of Criminal Law*, 324

10. Are whistle-blowers explicitly protected under law protecting journalistic sources? Is there another practice protecting whistle-blowers? Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

Following many Greek scandals, originating both from the public and private sector and the refusal of involved parties to break their silence, something had to be done. The term protection of journalistic sources is a major characteristic of most national legal regimes regarding journalism and consists of the right and the obligation that a journalist has, to refuse, even in judicial proceedings, disclosure of sources, the identification of the origin of the information and data received on matters that either already has been or will be disclosed to the public.¹¹⁴ Greek legislation decided to acknowledge that and established a system of protection, as we will see further on.

A **whistle-blower** is a person who exposes any kind of information or activity that is deemed illegal, unethical or not correct within an organisation that is either private or public.¹¹⁵ Those people who disclose wrongdoing play a critical role in the fight against corruption, because detection is a precondition to initiate investigations that will lead to prosecution. The information of alleged wrongdoing can be classified in many ways: violation of company policy/rules, law, regulation, or threat to the “ordre public”/national security, as well as fraud, and corruption. Those who become whistle-blowers can choose to bring information or allegations to surface either internally or externally. Internally, a whistle-blower can bring his/her accusations to the attention of other people within the accused organisation. Externally, a whistle-blower can bring allegations to light by contacting a third party outside of an accused organisation. He/She can reach out to the media, government, law enforcement, or those who are concerned. Whistle-blowers differ from the so called “witnesses” in the Greek legal system, as the whistle-blower comes forward to provide information always on his own initiative and the illegal or wrongful act comes to light for the first time thanks to the disclosure made by the whistle-blower.¹¹⁶ Regarding the behavior of (potential) whistle-blowers it has been observed that in many cases, people who knew did not provide information, as they failed to acknowledge the offence or the abusive act that was taking place in their surroundings.¹¹⁷ Furthermore, senior executives tend to become whistle-blowers with greater frequency, employees tend to become

¹¹⁴Kargopoulos, A. (2008/2), The protection of journalistic sources. Entitlement and conditions of implementation and downturn, Media law, p. 158

¹¹⁵Vandekerckhove, Wim (2006). *Whistleblowing and Organizational Social Responsibility : A Global Assessment*. Ashgate.

¹¹⁶ European Parliament – Directorate General Internal Policies of the Union – Budgetary Support Unit – Budgetary Affairs, Whistleblowing Rules: Best Practice; Assessment and Revision of Rules Existing in EU Institutions, pp. 9.

¹¹⁷ Ethics Resource Center, Inside the Mind of a Whistleblower - a Supplement Report of the 2011 National Business Ethics Survey, 2012.

whistle-blowers more often when they feel that the financial situation of the institution in which they work is good, when they themselves feel financially secure and protected by retaliation. In this regard, it is noted that employees who are members of the relevant workers' union tend to become whistle-blowers with greater frequency!¹¹⁸

Third-party groups like Wikileaks and others offer protection to whistle-blowers, but that protection can only go so far. Whistle-blowers face legal action, criminal charges, social stigma, and termination from any position, office, or job. Two other classifications of whistleblowing are private and public. The classifications relate to the type of organisations someone chooses to whistle-blow on: private sector, or public sector. Both can have different results that depend on many factors. However, whistleblowing in the public sector organisation is more likely to result in federal felony charges and jail-time. A whistle-blower who chooses to accuse a private sector organisation or agency is more likely to face termination and legal and civil charges. Deeper questions and theories of whistleblowing and why people choose to do so can be studied through an ethical approach. Whistleblowing is truly an entirely ethical decision, and action. In the case of many like Edward Snowden, whistleblowing is seen as the last ethically right thing to do. Legal protection can also be granted to protect whistle-blowers, but that protection is subject to many stipulations. Hundreds of laws grant protection to whistle-blowers, **but stipulations can easily cloud that protection** and leave whistle-blowers vulnerable to retaliation and legal trouble. Whistleblowing is not a new phenomenon. In fact, it is thousands of years old. However, the decision and action has become far more complicated with recent advancements in technology and communication.¹¹⁹ Whistle-blowers frequently face reprisal, sometimes at the hands of the organization or group which they have accused, sometimes from related organisations, and sometimes under law. Questions about the legitimacy of whistleblowing, the moral responsibility of whistleblowing, and the appraisal of the institutions of whistleblowing are part of the field of political ethics.¹²⁰

The protection of journalistic sources is guaranteed by the Greek Constitution, as an aspect of the active right to information. The right to information is specifically protected under the Article 5A of the Greek Constitution, as revised by the parliamentary resolution of May 27th 2008 of the VIII Revisionary Parliament. Accordingly, *"1. All persons have the right to information, as specified by law. Restrictions to this right may be imposed by law only insofar as they are absolutely necessary and justified for reasons of national security, of combating crime or of protecting rights and interests of third parties. 2. All persons have the right to participate in the Information Society. Facilitation of access to electronically transmitted information, as well as of the production, exchange and diffusion thereof, constitutes an obligation of the State, always in observance of the guarantees of articles 9, 9A and 19."*

¹¹⁸ Providing an Alternative to Silence: Towards Greater Protection and Support for Whistle-blowers in the EU Country Report - Greece, Transparency International, April 2013

¹¹⁹Delmas, Candice (January 2015). "The Ethics of Government Whistleblowing". *Social Theory and Practice*.

¹²⁰Wikipedia, <https://en.wikipedia.org/wiki/Whistle-blower>

The legality of the information collection, in particular when it is imposed by the public interest,¹²¹ goes hand-in-hand with the legality of the information publication, under the condition that the concerned journalist did not take part in the illegal collection/acquisition of information.¹²² Until recently, Greece was not in disposition of a law for the specific, efficient and sufficient protection of whistle-blowers, while there was little or no political momentum to address these shortcomings, despite the considerable number of big financial and political scandals in combination with the alleged threats against whistle-blowers and journalists.^{123 124}

Albeit, in 2014 in accordance with the international obligations that Greece undertook with the ratification of the United Nations Convention Against Corruption (Art.33),¹²⁵ the Council of Europe Civil Law Convention on Corruption¹²⁶ in combination with the Council of Europe Criminal Law Convention on Corruption (Art.22)^{127 128} and its commitments established with the Memorandum of Understanding on Economic and Financial Policies concerning the overall reform of tax administration¹²⁹ as well as its anti-corruption policy objectives presented in the national anti-corruption action plan of 2013,¹³⁰ the Law 4254/2014 (85/Α/7-4-2014) was issued, providing under the auspices of Article 1, para. XV (in Greek: *IE*) and its subparagraphs 15, 16 and 17 for the first time in the Greek criminal law specific protection for the “whistle-blowers”.¹³¹ In particular, according to the Article 45B of the Criminal Procedure Code, which was added with the afore-mentioned subparagraph 15, every person who contributes essentially thanks to the information he/she gives to the Authorities, without being personally involved in the particular case and without having a personal interest in the reporting and processing of

¹²¹ *Guja v. Moldova*, [2008] European Court of Human Rights [Grand Chamber] 26.

¹²² See the Decision 122/2012 issued by the Hellenic Data Protection Authority and the Decision of the Supreme Administrative Court 1213/2010 [Grand Chamber].

¹²³ M. Worth (2013), *Whistleblowing in Europe: Legal protections for whistle-blowers in Europe*, Transparency International, 49-50.

¹²⁴ Transparency International Hellas (2013), *Alternative to silence: Effective protection and support of the whistle-blowers in European Union* [Greek], 11-14.

¹²⁵ Law n.3666 (Ratification and application of the United Nations Convention Against Corruption and amendment of the relevant Criminal Code provisions) 2008 [Κύρωση και εφαρμογή της Σύμβασης των Ηνωμένων Εθνών κατά της Διαφθοράς και αντικατάσταση των συναφών διατάξεων του Ποινικού Κώδικα].

¹²⁶ Law n. 2957 (Ratification of the Council of Europe Civil Law Convention on Corruption) 2001 [Κύρωση και εφαρμογή της Σύμβασης του Συμβουλίου της Ευρώπης για θέματα Αστικού Δικαίου περί διαφθοράς].

¹²⁷ Law n. 3560 (Ratification of the Council of Europe Criminal Law Convention on Corruption) 2007 [Κύρωση και εφαρμογή της Σύμβασης Ποινικού Δικαίου για τη διαφθορά και του Πρόσθετου σε αυτήν Πρωτοκόλλου].

¹²⁸ Act of the Athens Appeals Court Prosecutor n. 7 (Definition of the whistle-blower – international/european/national application of the institution-Meaning and consequences) 2015 [ΠραξΕισΕφΑθ 7/2015 -Έννοια μάρτυρα δημοσίου συμφέροντος (whistle-blower) – Διεθνής/ευρωπαϊκή/ εθνική κατοχύρωση θεσμού – Έννοια και συνέπειες] ΠΟΙΝΙΚΗ ΔΙΚΑΙΟΣΥΝΗ Τεύχος 5/2015, Μάιος [Greek]. With this Act, the first whistleblower in Greece, with regards to the new law provisions, was recognised.

¹²⁹ European Commission, *Greece to the EU anti-corruption report*, Brussels 2014, 4.

¹³⁰ Hellenic Republic, Ministry of Justice, Transparency and Human Rights, *Transparency: National anti-corruption action plan*, January 2013, 66.

¹³¹ Law n. 4254 (Measures for the support and development of the Greek economy within the application framework of the Law n. 4046/2012 and other provisions) 2014 [Μέτρα στήριξης και ανάπτυξης της ελληνικής οικονομίας στο πλαίσιο εφαρμογής του ν. 4046/2012 και άλλες διατάξεις].

cases related to bribery - including both giving and receiving a bribe - of politicians,¹³² of state employees,¹³³ of law officers¹³⁴ as well as commerce/influence of intermediaries,¹³⁵ and all the acts related to them, may be called “whistle-blower” (in Greek: *witness of public interest – μάρτυρας δημοσίου συμφέροντος*) and be provided with special protection measures, as seen hereinafter.

Furthermore, according to Art. 45B, a person may be recognized as “whistle-blower” with the Act of the competent Prosecutor, after the consent of the Deputy Public Prosecutor of the Supreme Criminal Court. This Act may be revoked at any stage of the criminal process, if the Prosecutor judges that the reasons for its issue lack their validity. If a complaint is pending against the whistle-blower concerning crimes of perjury, false accusation, malicious slander, as well as infringement of the professional confidentiality or of personal data, the Deputy Public Prosecutor of the Supreme Criminal Court may request the permanent refraining from prosecution, as long as the prosecution of the whistle-blower is not necessary for the protection of the public interest.

The Law 4254/2014 also added in the Art. 9 of the Law 2928/2001 (141/A/27-06-2001)¹³⁶ a 7th paragraph,¹³⁷ which permits the effective protection of whistle-blowers against alleged acts of threat and revenge under the provisions of Art. 9 par. 1 till 5 of the latter law and extends the protection as well to their relatives – if necessary. The suggested process of protection includes the following:

- Protection offered by qualified police staff;
- Recording of the whistle-blower statement with the use of audiovisual or only audio means;
- No-reference of the whistle-blower’s name, birthplace, residence and workplace address, profession and age on the statement/examination report;
- Alteration of the whistle-blower’s identity data;
- Relocation of state employees for an undetermined time period, with the issue of a ministerial decision satisfying all the necessary precautions of confidentiality.

¹³² as described in Art. 159 and 159A (Bribery of state officials) [Δωροληψία και δωροδοκία πολιτικών Αξιωματούχων] of the Criminal Code.

¹³³ as described in Art. 235 and 236 (Bribery of employee)[Δωροληψία και δωροδοκία υπαλλήλου] of the Criminal Code.

¹³⁴ as described in Art. 237 (Bribery of law officers) [Δωροληψία και δωροδοκία δικαστικών λειτουργών] of the Criminal Code.

¹³⁵ as described in Art. 237A (Commerce/influence of intermediaries)[Εμπορία επιρροής – Μεσάζοντες] of the Criminal Code.

¹³⁶ Law n.2928 (Modification of provisions of both the Criminal Code and the Code of Administrative Procedure as well as other provisions for the protection of the citizen against crimes committed by criminal organizations) 2001 [Τροποποίηση διατάξεων του Ποινικού Κώδικα και του Κώδικα Ποινικής Δικονομίας και άλλες διατάξεις για την προστασία του πολίτη από αξιόποινες πράξεις εγκληματικών οργανώσεων].

¹³⁷ Art.1, para. XV subpara. 2 of the Law n. 4254/2014.

Leniency measures are enforced, on the grounds of the Art. 263B of the Criminal Code¹³⁸ when the person who is involved in the crimes of the aforementioned Art. 236 para. 1, 2 and 3 and 237 para. 2 and 3 as well as 237B para. 1 of the Criminal Code¹³⁹ voluntarily confesses his/her acts to the competent Prosecutor or any other competent authority. In this case, the concerned person is not prosecuted. If the liable person or an associate reveals to the Authorities the participation of another employee in the above-mentioned crimes as well as those described in Articles 239 - 261 and article 390 of the Criminal Code,¹⁴⁰ then his/her sentence gets reduced.¹⁴¹ Similarly, lenient treatment may be adopted for crimes described in Articles 235 - 261 and 390 of the Criminal Code in the following cases: a) the liable person or associate who contributes essentially in the disclosure of corruption acts conducted by an employee in a higher position, conveys all the goods he/she has illegally obtained to the state,¹⁴² b) the liable person provides proof when current or vice members of the government are involved in corruption cases.¹⁴³

As far as it concerns in particular the state employees who disclose corruption cases, two categories of protection may be detected: a) state employees, recognised as “whistle-blowers” and b) state employees, not recognised as “whistle-blowers”, but with essential contribution in the revelation and prosecution of cases under the above-mentioned Art. 45B of the Criminal Procedure Code. Under the category (a), according to the Art. 26 of the Code for the Status of State Political Administrative Employees and Employees of Legal Entities of Public Law as ratified with the Law n. 3528/2007¹⁴⁴ and revised with the Art. 1, para. XV, subpara. 17 of the Law n. 4254/2014, state employees recognised as “whistle-blowers” are offered the following guarantees: they are considered for the promotion process, cannot be subjects of disciplinary processes or punishment, cannot be fired and do not face directly or indirectly any other unfavorable treatment - mainly, with regards to promotion, transfer or hiring, during the necessary for the case investigative time, carried out by the court. Under the category (b), the state employees who have contributed essentially but they are not recognised as “whistle-blowers”, are protected against any arbitrary disciplinary prosecution – the burden of proof is

¹³⁸ Art. 263B of the Criminal Code (Protection and leniency measures for those who contribute in the disclosure of corruption acts) [Μέτρα Προστασίας και Επειρείας για Όσους Συμβάλλουν στην Αποκάλυψη Πράξεων Διαφθοράς].

¹³⁹ Art. 237B of the Criminal Code (Bribery in the private sector) [237B: Δωροληψία και δωροδοκία στον ιδιωτικό τομέα].

¹⁴⁰ Art. 239 – 261 and 390 of the Criminal Code (under the general category: offences related to Abuse of Office) [εγκλήματα σχετικά με την υπηρέσια].

¹⁴¹ On the grounds of Art. 44 para. 2 (a) of the Criminal Code (Withdrawal from the act) [Υπαναχώρηση].

¹⁴² Art. 263B para. 3 of the Criminal Code.

¹⁴³ Art. 263B para. 4 (a) of the Criminal Code.

¹⁴⁴ Law n. 3528 (Ratification of Code for the Status of State Political Administrative Employees and Employees of Legal Entities of Public Law) 2007 [Κύρωση του Κώδικα Κατάστασης Δημοσίων Πολιτικών Διοικητικών Υπαλλήλων και Υπαλλήλων Ν.Π.Δ.Δ].

reversed and affects the disciplinary committee, which starts the process.¹⁴⁵ Moreover, their anonymity is totally protected during the preliminary investigation, as long as they are not involved in any way in the crimes or they do not aim to make a personal profit out of them.¹⁴⁶

After the preliminary investigation, the anonymity is protected only if the concerned employee becomes subject of the protection of the Art. 9 of the Law 2928/2001, as read above.

Concerning employees in private companies - based on the OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance - many Greek companies appear to have developed some form of corporate compliance, internal controls and ethics programmes, often followed by the issue of Codes of Corporate Ethics, where provisions about whistle-blowers are included.¹⁴⁷ Nevertheless, even for companies that have compliance programmes which deal with bribery and other forms of crime, it is not entirely clear that these programmes have been fully implemented, while at the same time there is a deficiency of legal provisions establishing a harmonised national framework and a general standard of codes of ethics.¹⁴⁸ Last but not least, civil society has also implemented initiatives for reporting bribes or corrupt practices, mostly through anonymous online report mechanisms.¹⁴⁹

All in all, despite the positive steps that can be observed the last years, especially after the frustrating conclusion of the Third Evaluation Phase Compliance Report on Greece, adopted by GRECO in 2012,¹⁵⁰ where Greece was found to comply with only one of the 27 recommendations contained in the Third Round Evaluation Report adopted in 2010 concerning anti-corruption measures, there is still space for improvement, always bearing in mind the recent decisions of the EctHR about freedom of expression. Particularly, some of the critics to the current legislation and policy refer to the lack of a central agency where whistle-blowers can bring their cases, the fact that whistleblowing may be protected when related to a few specific criminal offences – mostly bribery cases - but not all of them, the problematic of anonymous complaints in Greek law and last but not least, the lack of regulation for the private sector.

¹⁴⁵ Art. 110, para. 6 of the Law n. 3528/2007, *ibid*.

¹⁴⁶ Art. 125, para. 4 of the Law n. 3528/2007, *ibid*.

¹⁴⁷ M. Worth (2013), *Whistleblowing in Europe: Legal protections for whistle-blowers in Europe*, Transparency International, 49-50.

¹⁴⁸ OECD, *Phase 3 report on implementing the OECD anti-bribery convention in Greece*, June 2012, 33.

¹⁴⁹ European Commission, *Greece to the EU anti-corruption report*, Brussels 2014, 4. For instance: <http://www.edosafakelaki.org/>

¹⁵⁰ Council of Europe and Group of States against Corruption (GRECO), *Compliance Report on Greece "Incriminations (ETS 173 and 191, GPC 2) and "Transparency of Party Funding"*, June 2012,11.

11. Conclusion

To sum up, this is the legal basis and the courts' practice in Greece, as far as the topic of disclosure of journalists' sources is concerned. Even if there is no special legislation, clearly recognising the journalist privilege, neither explicit right for refusal of testimony, it constitutes, however, one of the widely recognised rights. It is getting empowered through practice, which has established a precedence protecting it over conflicting rights. The journalist privilege is an integral part of freedom of Press, therefore belonging to the core of the *jus cogens* international rules. The conditions under which it can retreat have been presented above, with a hope that even more stable legal guarantees will be enacted in the future. The ECtHR's jurisprudence is always pioneer in setting the pace for this protection; there is, therefore, anticipation from the Greek legislators to introduce a new, specific legal frame.

The freedom of Expression is a significant precondition for the stable and proper operation of a democratic state, so the Press is only able to fulfil its mission in the society, if the secrecy of its sources is really secured.

After all, *"Freedom of Press is not an end in itself, but a means to the end of achieving a free society"*-Felix Frankfurter

12. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

12.1. Legislation

- Προεδρικό Διάταγμα 77/2003 (Φ.Ε.Κ. 77-Α' 28-3-2003).
- Recommendation No. R (2000) 7.

12.2. Case Law

- Goodwin v United. Kingdom 27.03.1996.
- Nordisk Film & TV A/S 08.12.2005.
- Financial Times vs. United Kingdom 15.12.2009.
- Magistrate's Court of Athens 10541/1976, Criminal Annals 667, [ΠλημμΑ010541/1976 , ΠοινΧρον].
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12.4. Internet Sources

- <http://www.esica.gr/arxes-deontologias/>

13. Table of Provisions

Provisions in native language	Corresponding translation
Σύνταγμα της Ελλάδος	Greek Constitution
<p>Άρθρο 14:</p> <p>1. Καθένας μπορεί να εκφράζει και να διαδίδει προφορικά, γραπτά και δια του τύπου τους στοχασμούς του τηρώντας τους νόμους του Κράτους.</p> <p>2. Ο τύπος είναι ελεύθερος. Η λογοκρισία και κάθε άλλο προληπτικό μέτρο απαγορεύονται.</p> <p>3. Η κατάσχεση εφημερίδων και άλλων εντύπων, είτε πριν από την κυκλοφορία είτε ύστερα από αυτή, απαγορεύεται. Κατ' εξαίρεση επιτρέπεται η κατάσχεση, με παραγγελία του εισαγγελέα, μετά την κυκλοφορία:</p> <p>α) για προσβολή της χριστιανικής και κάθε άλλης γνωστής θρησκείας,</p> <p>β) για προσβολή του προσώπου του Προέδρου της Δημοκρατίας,</p> <p>γ) για δημοσίευμα που αποκαλύπτει πληροφορίες για τη σύνθεση, τον εξοπλισμό και τη διάταξη των ενόπλων δυνάμεων ή την οχύρωση της Χώρας ή που έχει σκοπό τη βίαιη ανατροπή του πολιτεύματος ή στρέφεται κατά της εδαφικής ακεραιότητας του Κράτους,</p> <p>δ) για άσεμνα δημοσιεύματα που προσβάλλουν ολοφάνερα τη δημόσια αιδώ, στις περιπτώσεις που ορίζει ο νόμος.</p> <p>4. Σ' όλες τις περιπτώσεις της προηγούμενης παραγράφου ο εισαγγελέας, μέσα σε είκοσι τέσσερις ώρες από την κατάσχεση, οφείλει να υποβάλει την υπόθεση στο δικαστικό συμβούλιο, και αυτό, μέσα σε άλλες είκοσι τέσσερις ώρες, οφείλει να αποφασίσει για τη διατήρηση ή την άρση της κατάσχεσης, διαφορετικά η κατάσχεση αίρεται αυτοδικαίως. Τα ένδικα μέσα της έφεσης και της</p>	<p>Article 14</p> <p>1. Every person may express and propagate his thoughts orally, in writing and through the press in compliance with the laws of the State.</p> <p>2. The press is free. Censorship and all other preventive measures are prohibited.</p> <p>3. The seizure of newspapers and other publications before or after circulation is prohibited. Seizure by order of the public prosecutor shall be allowed exceptionally after circulation and in case of:</p> <p>a) an offence against the Christian or any other known religion,</p> <p>b) an insult against the person of the President of the Republic,</p> <p>c) a publication which discloses information on the composition, equipment and set-up of the armed forces or the fortifications of the country, or which aims at the violent overthrow of the regime or is directed against the territorial integrity of the State,</p> <p>d) an obscene publication which is obviously offensive to public decency, in the cases stipulated by law.</p> <p>4. In all the cases specified under the preceding paragraph, the public prosecutor must, within twenty-four hours from the seizure, submit the case to the judicial council which, within the next twenty-four hours, must rule whether the seizure is to be maintained or lifted; otherwise it shall be lifted ipso jure. An appeal may be lodged with the Court of Appeals and the Supreme Civil and</p>

αναίρεσης επιτρέπονται στον εκδότη της εφημερίδας ή άλλου εντύπου που κατασχέθηκε και στον εισαγγελέα.

**5. Καθένας ο οποίος θίγεται από ανακριβές δημοσίευμα ή εκπομπή έχει δικαίωμα απάντησης, το δε μέσο ενημέρωσης έχει αντιστοίχως υποχρέωση πλήρους και άμεσης επανόρθωσης. Καθένας ο οποίος θίγεται από υβριστικό ή δυσφημιστικό δημοσίευμα ή εκπομπή έχει, επίσης, δικαίωμα απάντησης, το δε μέσο ενημέρωσης έχει αντιστοίχως υποχρέωση άμεσης δημοσίευσης ή μετάδοσης της απάντησης. Νόμος ορίζει τον τρόπο με τον οποίο ασκείται το δικαίωμα απάντησης και διασφαλίζεται η πλήρης και άμεση επανόρθωση ή η δημοσίευση και μετάδοση της απάντησης.

6. Το δικαστήριο, ύστερα από τρεις τουλάχιστον καταδίνες μέσα σε μία πενταετία για διάπραξη των εγκλημάτων που προβλέπονται στην παράγραφο 3, διατάσσει την οριστική ή προσωρινή παύση της έκδοσης του εντύπου και, σε βαριές περιπτώσεις, την απαγόρευση της άσκησης του δημοσιογραφικού επαγγέλματος από το πρόσωπο που καταδικάστηκε, όπως νόμος ορίζει. Η παύση ή η απαγόρευση αρχίζουν από την ημερομηνία της απόφασης ή της αμετάκλητης.

**7. Νόμος ορίζει τα σχετικά με την αστική και ποινική ευθύνη του τύπου και των άλλων μέσων ενημέρωσης και με την ταχεία εκδίκαση των σχετικών υποθέσεων.

8. Νόμος ορίζει τις προϋποθέσεις και τα προσόντα για την άσκηση του δημοσιογραφικού επαγγέλματος.

**9. Το ιδιοκτησιακό καθεστώς, η οικονομική κατάσταση και τα μέσα χρηματοδότησης των μέσων ενημέρωσης πρέπει να γίνονται γνωστά, όπως νόμος ορίζει. Νόμος προβλέπει τα μέτρα και τους περιορισμούς που είναι αναγκαίοι για την πλήρη διασφάλιση της διαφάνειας και της πολυφωνίας στην ενημέρωση. Απαγορεύεται η συγκέντρωση του

Criminal Court by the publisher of the newspaper or other printed matter seized and by the public prosecutor.

** 5. Every person offended by an inaccurate publication or broadcast has the right to reply, and the information medium has a corresponding obligation for full and immediate redress. Every person offended by an insulting or defamatory publication or broadcast has also the right to reply, and the information medium has a corresponding obligation to immediately publish or transmit the reply. The manner in which the right to reply is exercised and in which full and immediate redress is assured or publication and transmission of the reply is made, shall be specified by law.

6. After at least three convictions within five years for the criminal acts defined under paragraph 3, the court shall order the definitive ban or the temporary suspension of the publication of the paper and, in severe cases, shall prohibit the convicted person from practising the profession of journalist as specified by law. The ban or suspension of publication shall be effective as of the date the court order becomes irrevocable.

** 7. Matters relating to the civil and criminal liability of the press and of the other information media and to the expeditious trial of relevant cases, shall be specified by law.

8. The conditions and qualifications requisite for the practice of the profession of journalist shall be specified by law.

** 9. The ownership status, the financial situation and the means of financing of information media must be made known as specified by law. The measures and restrictions necessary for fully ensuring transparency and plurality in information shall be specified by law. The concentration of the control of more than one

<p>ελέγχου περισσότερων μέσων ενημέρωσης της αυτής ή άλλης μορφής. Απαγορεύεται ειδικότερα η συγκέντρωση περισσότερων του ενός ηλεκτρονικών μέσων ενημέρωσης της αυτής μορφής, όπως νόμος ορίζει. Η ιδιότητα του ιδιοκτήτη, του εταίρου, του βασικού μετόχου ή του διευθυντικού στελέχους επιχείρησης μέσων ενημέρωσης είναι ασυμβίβαστη με την ιδιότητα του ιδιοκτήτη, του εταίρου, του βασικού μετόχου ή του διευθυντικού στελέχους επιχείρησης που αναλαμβάνει έναντι του Δημοσίου ή νομικού προσώπου του ευρύτερου δημόσιου τομέα την εκτέλεση έργων ή προμηθειών ή την παροχή υπηρεσιών. Η απαγόρευση του προηγούμενου εδαφίου καταλαμβάνει και κάθε είδους παρένθετα πρόσωπα, όπως συζύγους, συγγενείς, οικονομικά εξαρτημένα άτομα ή εταιρείες. Νόμος ορίζει τις ειδικότερες ρυθμίσεις, τις κυρώσεις που μπορεί να φθάνουν μέχρι την ανάκληση της άδειας ραδιοφωνικού ή τηλεοπτικού σταθμού και μέχρι την απαγόρευση σύναψης ή την ακύρωση της σχετικής σύμβασης, καθώς και τους τρόπους ελέγχου και τις εγγυήσεις αποτροπής των καταστρατηγήσεων των προηγούμενων εδαφίων.</p>	<p>information media of the same type or of different types is prohibited. More specifically, concentration of more than one electronic information media of the same type is prohibited, as specified by law. The capacity of owner, partner, major shareholder or managing director of an information media enterprise, is incompatible with the capacity of owner, partner, major shareholder or managing director of an enterprise that undertakes towards the Public Administration or towards a legal entity of the wider public sector to perform works or to supply goods or services. The prohibition of the previous section extends also over all types of intermediary persons, such as spouses, relatives, financially dependent persons or companies. The specific regulations, the sanctions, which may extend to the point of revocation of the license of a radio or television station and to the point of prohibition of the conclusion or to the annulment of the pertinent contract, as well as the means of control and the guarantees for the prevention of infringements of the previous sections, shall be determined by law.</p>
<p>Άρθρο 15: 1. Οι προστατευτικές για τον τύπο διατάξεις του προηγούμενου άρθρου δεν εφαρμόζονται στον κινηματογράφο, τη φωνογραφία, τη ραδιοφωνία, την τηλεόραση και κάθε άλλο παρεμφερές μέσο μετάδοσης λόγου ή παράστασης.</p> <p>**2. Η ραδιοφωνία και η τηλεόραση υπάγονται στον άμεσο έλεγχο του Κράτους. Ο έλεγχος και η επιβολή των διοικητικών κυρώσεων υπάγονται στην αποκλειστική αρμοδιότητα του Εθνικού Συμβουλίου Ραδιοτηλεόρασης που είναι ανεξάρτητη αρχή, όπως νόμος ορίζει. Ο άμεσος έλεγχος του Κράτους, που λαμβάνει και τη μορφή του καθεστώτος της προηγούμενης άδειας, έχει ως σκοπό την αντικειμενική και με ίσους όρους μετάδοση πληροφοριών και ειδήσεων, καθώς και προϊόντων του λόγου και της τέχνης, την εξασφάλιση της ποιοτικής στάθμης των προγραμμάτων που επιβάλλει η κοινωνική αποστολή της ραδιοφωνίας και της τηλεόρασης και</p>	<p>Article 15 1. The protective provisions for the press in the preceding article shall not be applicable to films, sound recordings, radio, television or any other similar medium for the transmission of speech or images.</p> <p>** 2. Radio and television shall be under the direct control of the State. The control and imposition of administrative sanctions belong to the exclusive competence of the National Radio and Television Council, which is an independent authority, as specified by law. The direct control of the State, which may also assume the form of a prior permission status, shall aim at the objective and on equal terms transmission of information and news reports, as well as of works of literature and art, at ensuring the quality level of programs mandated by the social mission of radio and television and by the cultural development of the Country, as well as at the</p>

<p>η πολιτιστική ανάπτυξη της Χώρας, καθώς και το σεβασμό της αξίας του ανθρώπου και την προστασία της παιδικής ηλικίας και της νεότητας. Νόμος ορίζει τα σχετικά με την υποχρεωτική και δωρεάν μετάδοση των εργασιών της Βουλής και των επιτροπών της, καθώς και προεκλογικών μηνυμάτων των κομμάτων από τα ραδιοτηλεοπτικά μέσα.</p>	<p>respect of the value of the human being and the protection of childhood and youth. Matters relating to the mandatory and free of charge transmission of the workings of the Parliament and of its committees, as well as of the electoral campaign messages of the political parties by radio and television, shall be specified by law.</p>
<p>Άρθρο 19:</p> <p>1. Το απόρρητο των επιστολών και της ελεύθερης ανταπόκρισης ή επικοινωνίας με οποιονδήποτε άλλο τρόπο είναι απόλυτα απαραβίαστο. Νόμος ορίζει τις εγγυήσεις υπό τις οποίες η δικαστική αρχή δεν δεσμεύεται από το απόρρητο για λόγους εθνικής ασφάλειας ή για διακρίβωση ιδιαίτερα σοβαρών εγκλημάτων.</p> <p>**2. Νόμος ορίζει τα σχετικά με τη συγκρότηση, τη λειτουργία και τις αρμοδιότητες ανεξάρτητης αρχής που διασφαλίζει το απόρρητο της παραγράφου 1.</p> <p>**3. Απαγορεύεται η χρήση αποδεικτικών μέσων που έχουν αποκτηθεί κατά παράβαση του άρθρου αυτού και των άρθρων 9 και 9Α.</p>	<p>Article 19</p> <p>1. Secrecy of letters and all other forms of free correspondence or communication shall be absolutely inviolable. The guaranties under which the judicial authority shall not be bound by this secrecy for reasons of national security or for the purpose of investigating especially serious crimes, shall be specified by law.</p> <p>** 2. Matters relating to the constitution, the operation and the functions of the independent authority ensuring the secrecy of paragraph 1 shall be specified by law.</p> <p>** 3. Use of evidence acquired in violation of the present article and of articles 9 and 9A is prohibited.</p>
<p>**Άρθρο 9Α:</p> <p>Καθένας έχει δικαίωμα προστασίας από τη συλλογή, επεξεργασία και χρήση, ιδίως με ηλεκτρονικά μέσα, των προσωπικών του δεδομένων, όπως νόμος ορίζει. Η προστασία των προσωπικών δεδομένων διασφαλίζεται από ανεξάρτητη αρχή, που συγκροτείται και λειτουργεί, όπως νόμος ορίζει.</p>	<p>** Article 9A</p> <p>All persons have the right to be protected from the collection, processing and use, especially by electronic means, of their personal data, as specified by law. The protection of personal data is ensured by an independent authority, which is constituted and operates as specified by law.</p>

<p>Άρθρο 25:</p> <p>**1. Τα δικαιώματα του ανθρώπου ως ατόμου και ως μέλους του κοινωνικού συνόλου και η αρχή του κοινωνικού κράτους δικαίου τελούν υπό την εγγύηση του Κράτους. Όλα τα κρατικά όργανα υποχρεούνται να διασφαλίζουν την ανεμπόδιση και αποτελεσματική άσκησή τους. Τα δικαιώματα αυτά ισχύουν και στις σχέσεις μεταξύ ιδιωτών στις οποίες προσιδιάζουν. Οι κάθε είδους περιορισμοί που μπορούν κατά το Σύνταγμα να επιβληθούν στα δικαιώματα αυτά πρέπει να προβλέπονται είτε απευθείας από το Σύνταγμα είτε από το νόμο, εφόσον υπάρχει επιφύλαξη υπέρ αυτού και να σέβονται την αρχή της αναλογικότητας.</p> <p>2. Η αναγνώριση και η προστασία των θεμελιωδών και απαράγραπτων δικαιωμάτων του ανθρώπου από την Πολιτεία αποβλέπει στην πραγμάτωση της κοινωνικής προόδου μέσα σε ελευθερία και δικαιοσύνη.</p> <p>3. Η καταχρηστική άσκηση δικαιώματος δεν επιτρέπεται.</p> <p>4. Το Κράτος δικαιούται να αξιώνει από όλους τους πολίτες την εκπλήρωση του χρέους της κοινωνικής και εθνικής αλληλεγγύης.</p>	<p>Article 25</p> <p>** 1. The rights of the human being as an individual and as a member of the society and the principle of the welfare state rule of law are guaranteed by the State. All agents of the State shall be obliged to ensure the unhindered and effective exercise thereof. These rights also apply to the relations between individuals to which they are appropriate. Restrictions of any kind which, according to the Constitution, may be imposed upon these rights, should be provided either directly by the Constitution or by statute, should a reservation exist in the latter's favour, and should respect the principle of proportionality.</p> <p>2. The recognition and protection of the fundamental and inalienable rights of man by the State aims at the achievement of social progress in freedom and justice.</p> <p>3. The abusive exercise of rights is not permitted.</p> <p>4. The State has the right to claim of all citizens to fulfil the duty of social and national solidarity.</p>
<p>Ελληνικός Ποινικός Κώδικας</p>	<p>Greek Criminal Code or Penal Code</p>
<p>Άρθρο 371</p> <p>1. Κληρικοί, δικηγόροι και κάθε είδους νομικοί παραστάτες, συμβολαιογράφοι, γιατροί, μαίες, νοσοκόμοι, φαρμακοποιοί και άλλοι στους οποίους κάποιος εμπιστεύονται συνήθως λόγω του επαγγέλματος τους ή της ιδιότητάς τους ιδιωτικά απόρρητα, καθώς και οι βοηθοί των προσώπων αυτών, τιμωρούνται με χρηματική ποινή ή με φυλάκιση μέχρι ενός έτους αν φανερώσουν ιδιωτικά απόρρητα που τους τα εμπιστεύτηκαν ή που τα έμαθαν λόγω του επαγγέλματος τους ή της ιδιότητάς τους.</p>	<p>Article 371</p> <p>1. Clergymen, lawyers and any kind of legal counsel, notaries, doctors, midwives, nurses, pharmacists and others to whom some trust usually because of their profession or status of private secrets and assistants of such persons, be punished by a fine or by imprisonment up to one year if they reveal private secrets of the trust or the learned because of their profession or their status.</p> <p>2. Similarly punished, after the death of one of the faces of para. 1, and from this cause is</p>

<p>2. Όμοια τιμωρείται όποιος, μετά το θάνατο ενός από τα πρόσωπά της παρ. 1, και απ' αυτή την αιτία γίνεται κάτοχος εγγράφων ή σημειώσεων του νεκρού σχετικών με την άσκηση του επαγγέλματός του, ή της ιδιότητάς του και από αυτά φανερώνει ιδιωτικά απόρρητα.</p> <p>3. Η ποινική δίωξη γίνεται μόνο με έγκλιση.</p> <p>4. Η πράξη δεν είναι άδικη και μένει ατιμώρητη αν ο υπάιτιος απέβλεπε στην εκπλήρωση καθήκοντός του ή στη διαφύλαξη έννομου ή για άλλο λόγο δικαιολογημένου ουσιώδους συμφέροντος,* δημόσιου ή του ίδιου ή κάποιου άλλου, το οποίο δεν μπορούσε να διαφυλαχθεί διαφορετικά.</p>	<p>document owner or notes of the deceased on the exercise of his profession, or of his status and these reveal private secrets.</p> <p>3. The prosecution only by indictment.</p> <p>4. The practice is not unfair and goes unpunished if the perpetrator intended to fulfill his duty or to safeguard legitimate or otherwise justified substantial interest * public or himself or another, which could not be preserved otherwise.</p>
<p>Ελληνικός Κώδικας Ποινικής Δικονομίας</p>	<p>Greek Criminal Procedural Code</p>
<p>Άρθρο 45B</p> <p>1. Σε υποθέσεις σχετικές με τις αξιόποινες πράξεις των άρθρων 159, 159Α, 235, 236, 237 και 237Α του Ποινικού Κώδικα και τις συναφείς με αυτές πράξεις, είναι δυνατόν, μετά από έγκριση του Αντεισαγγελέα του Αρείου Πάγου που εποπτεύει και συντονίζει το έργο των Εισαγγελέων Εγκλημάτων Διαφθοράς, να χαρακτηρίζεται ως μάρτυς δημοσίου συμφέροντος με πράξη του κατά τόπον αρμόδιου εισαγγελέα πλημμελειοδικών ή του Εισαγγελέα Εγκλημάτων Διαφθοράς όποιος, χωρίς να εμπλέκεται καθ' οιονδήποτε τρόπο στις εν λόγω πράξεις και χωρίς να αποβλέπει σε ίδιον όφελος, συμβάλλει ουσιωδώς, με τις πληροφορίες που παρέχει στις διωκτικές αρχές, στην αποκάλυψη και δίωξή τους. Η κατά το προηγούμενο εδάφιο πράξη του εισαγγελέα μπορεί να ανακαλείται με τον ίδιο τρόπο και σε οποιοδήποτε στάδιο της ποινικής δίκης, αν ο εισαγγελέας κρίνει ότι δεν συντρέχουν οι λόγοι που τον οδήγησαν στην έκδοσή της.</p> <p>2. Αν έχει υποβληθεί έγκλιση ή μήνυση για τα εγκλήματα της ψευδορκίας, της ψευδούς καταμήνυσης, της συκοφαντικής δυσφήμισης ή της παραβίασης υπηρεσιακού απορρήτου του Ποινικού Κώδικα ή για τις πράξεις των παραγράφων 4 ή 8 του άρθρου 22 του ν. 2472/1997 σε υπόθεση σχετική</p>	<p>Article 45B</p> <p>1. In cases related to the offences of the articles 159, 159A, 235, 236, 237 and 237A of the Criminal Code and the related to them acts, it is possible, after the consent of the Vice Prosecutor of the Supreme Criminal Court who supervises and coordinates the work of the Corruption Crimes Prosecutors, for somebody to be characterized as whistle-blower, with the Act of the competent Prosecutor [...], when this person, without being involved in any way in those acts and without aiming at the satisfaction of own interests, contributes essentially with the information that he/she provides the investigation authorities with, to the disclosure and prosecution of these offences. The Act of the Prosecutor, as described in the previous point, may be revoked in the same way and in any stage of the criminal trial, if the Prosecutor judges that the reasons, which led to its initial issue, lack their validity.</p> <p>2. If a complaint is filed for the crimes of perjury, false accusation, malicious slander or infringement of the professional confidentiality of the Criminal Code or for the acts of the paragraphs 4 or 8 of the article 22 of the Law</p>

<p>με τις αξιόποινες πράξεις που αναφέρονται στην προηγούμενη παράγραφο, ο αρμόδιος για την άσκηση της ποινικής δίωξης εισαγγελέας, πριν από κάθε άλλη ενέργεια, ενημερώνει σχετικά τον Αντεισαγγελέα του Αρείου Πάγου που εποπτεύει και συντονίζει το έργο των Εισαγγελέων Εγκλημάτων Διαφθοράς.</p> <p>3. Αν ο Αντεισαγγελέας του Αρείου Πάγου που εποπτεύει και συντονίζει το έργο των Εισαγγελέων Εγκλημάτων Διαφθοράς, κρίνει μετά από την κατά την προηγούμενη παράγραφο ενημέρωσή του, ότι η ποινική δίωξη των εγκλημάτων της ψευδορκίας, της ψευδούς καταμήνυσης, της συκοφαντικής δυσφήμισης ή της παραβίασης υπηρεσιακού απορρήτου ή των εγκλημάτων των παραγράφων 4 ή 8 του άρθρου 22 του ν. 2472/1997, δεν είναι απαραίτητη για την προστασία του δημοσίου συμφέροντος, μπορεί να παραγγείλει στον αρμόδιο για την άσκηση της ποινικής δίωξης εισαγγελέα την οριστική αποχή από την ποινική δίωξη για τις εν λόγω πράξεις.</p>	<p>2472/1997 in a case related to the offences mentioned in the previous paragraph, the competent Prosecutor, before any other act, may inform the Vice Prosecutor of the Supreme Criminal Court, who supervises and coordinates the work of the Corruption Crimes Prosecutors.</p> <p>3. If the Vice Prosecutor of the Supreme Criminal Court who supervises and coordinates the work of the Corruption Crimes Prosecutors, after his/her briefing as seen in the previous paragraph, that the prosecution of the crimes of perjury, false accusation, malicious slander or infringement of the professional confidentiality or for the acts of the paragraphs 4 or 8 of the article 22 of the law 2472/1997, judges that is not necessary for the protection of the public interest, may order the competent Prosecutor to refrain permanently from the prosecution of those offences.</p>
<p>Άρθρο 212</p> <p>1. Η διαδικασία ακυρώνεται, αν εξεταστούν στην προδικασία ή στην κύρια διαδικασία : α) οι κληρικοί σχετικά με όσα έμαθαν από την εξομολόγηση β) οι συνήγοροι, οι τεχνικοί σύμβουλοι και οι συμβολαιογράφοι σχετικά με όσα τους εμπιστεύτηκαν οι πελάτες τους· οι συνήγοροι και οι τεχνικοί σύμβουλοι κρίνουν σύμφωνα με τη συνείδησή τους αν και σε ποιο μέτρο πρέπει να καταθέτουν όσα άλλα έμαθαν με αφορμή την άσκηση του λειτουργήματός τους γ) οι γιατροί, οι φαρμακοποιοί και οι βοηθοί τους, καθώς και οι μάιες σχετικά με όσα εμπιστευτικά πληροφορήθηκαν κατά την άσκηση του επαγγέλματός τους, εκτός όπου ειδικός νόμος τους υποχρεώνει να τα αναγγείλουν στην αρχή και δ) οι δημόσιοι υπάλληλοι, όταν πρόκειται για στρατιωτικό ή διπλωματικό μυστικό ή μυστικό που αφορά την ασφάλεια του κράτους, εκτός αν ο αρμόδιος υπουργός με αίτηση της δικαστικής αρχής ή κάποιου από τους διαδίκους ή και αυτεπαγγέλτως τους εξουσιοδοτήσει σχετικά.</p>	<p>Article 212</p> <p>1. The process is canceled, if they are examined during preliminary or main process: a) clerics for what they learned from the confession b) lawyers, technical consultants and notaries for these trusted to them by their customers; advocates and advisory judge should judge according to their conscience whether and to what extent they should testify what have learned in response to the discharge of their duties c) doctors, pharmacists and their assistants and midwives about what confidential learned in the exercise their profession, except where special law oblige them to announce it at the beginning and d) civil servants when it comes to military or diplomatic secret or secret concerning security of the state, unless the Minister at the request of a judicial authority or someone of the litigant or their authorized on its own initiative.</p>

ELSA HUNGARY

Contributors

National Coordinator

Nóra Dorottya Nagy

National Researchers

Dóra Greiner
Balázs Áron Mravik
Kamilla Gál
Balázs Gáti
Krisztián Jebudenszki

National Linguistic Editors

Ádám Gergely
Kálmán Varga
Miklós Vida

National Academic Supervisor

Professor Gábor Halmai

Introduction

The protection of sources is very important question, because in some cases if it is not assured, it would make the source fall silent in fear of the consequences about the matters that require absolute publicity for themselves in favour of the public. That is why the protection of journalistic sources is one of the most important cornerstones within the freedom of the press. Regarding the importance of journalists, the Hungarian Constitutional Court also defines that the journalist is one of the most focal participants in a democratic state.¹

1. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

First of all, defining some basic phenomena concerning the field of this article.

According to the Council of Europe's recommendation, the definition of a journalist is: "it means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication." Information means any "statement of fact, opinion or idea in the form of text, sound and/or picture." Source means any person who provides information to a journalist." The term of "information identifying a source" means, as far as this is likely to lead to the identification of a source

- the name and personal data as well as voice and image of a source,
- the factual circumstances of acquiring information from a source by a journalist,
- the unpublished content of the information provided by a source to a journalist
- personal data of journalists and their employers related to their professional work.²

What does the right of the journalists not to disclose their source of information mean? This right simply protects the relationship of trust between the journalists and their sources.³

In the Hungarian legal system, the definition of the journalist and the journalistic sources are similar to the definitions above. We will present them within the frame of Questions 3 and 4.

¹ Constitutional Court Decision no.: 37/1992. (VI. 10.) Due to the 4th Amendment of the Fundamental Law, this decision is not in force anymore, this is an important decision under the previous constitution, and since the provisions on freedom of the press are more or less identical in the old and the new constitution, it should still apply, and the CC usually accept this.

<http://public.mkab.hu/dev/dontesek.nsf/0/261126A74CAFE513C1257ADA005277C3?OpenDocument> (2016.02.15.)

² 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

[http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec\(2000\)007&expmem_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(2000)007&expmem_EN.asp) (2016.02.12)

³ Koltay András, Nyakas Levente *Magyar és európai médijog*, [p. 403] Wolters Kluwer Kft. 2013

1.1. Basic Facts and Statements

At the top of the national legal system, – like other countries – we have the Hungarian Constitution – now called the Fundamental Law – which provides these rights, in that: “Everyone shall have the right to freedom of speech”.⁴ Hungary shall recognise and protect the freedom and diversity of the press, and shall ensure the conditions for free dissemination of information necessary for the formation of democratic public opinion.⁵ The detailed rules relating to the freedom of the press and the organ supervising media services, press products and the communications market shall be laid down in a Cardinal Law.^{6,7}

Also, Article VI of the Fundamental Law of Hungary could be relevant – because it is disposed about the further requirements according to this subject as the most important document in the Hungarian legal system – which provision stipulates that: “The application of the right to the protection of personal data and to access data of public interest shall be supervised by an independent authority established by a cardinal Act.” Furthermore, we will be more specific and we will present the cardinal acts mentioned and other criminal and administrative laws. In public life regarding the past few years, the topic chiefly has been affiliated with the much criticised new media act⁸. The act was used to regulate the source-protection in the following way: “if the journalist refuses to disclose the source of her or his information, he or she needs to prove, that the information is concern to public interest”. This part of the act has been annulled by the Hungarian Constitutional Court which appended the following reasoning to its annulment: ‘it would be wrong to stipulate a basic right or constitutional principle which if enforced, would justify tying in the protection of the information source with the duty to provide evidence.’ As a result of this decision, the right of the press to withhold the source of information has been declared as a general and unconditional right of the press.⁹ In its decision, the Constitutional Court has defined the requirements – which applies both to the electronic media and the printed press – under which the violation of the Constitution by legislative omission may be remedied.

These criteria include:

-opportunity to resort to preliminary Court revision against the first verdict;

⁴ Subsection 1 of Article IX of THE FUNDAMENTAL LAW OF HUNGARY (We quoted only the relevant paragraphs) www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf

⁵ Subsection 2 of Article IX of THE FUNDAMENTAL LAW OF HUNGARY (I quoted only the relevant paragraphs) www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf

⁶ Subsection 6 of Article IX of THE FUNDAMENTAL LAW OF HUNGARY www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf

⁷ Cardinal law, which are defined by the Fundamental Law (FL) need a 2/3 majority of the MPs present.

⁸ Act CLXXXV of 2010 on Media Services and Mass Communication http://hunmedialaw.org/dokumentum/153/Mttv_110803_EN_final.pdf

⁹ Decision 165/2011. (XII. 20.) AB; <http://mertek.eu/en/article/ruling-no-1652011-xii-20-ab-of-the-constitutional-court-summary>

- the statutory limitation shall be in accordance with the provisions of Article 10 of the European Convention on Human Rights, that is, limitation shall be properly substantiated;
- limitation is possible only when the Authorities do not have alternative ways to obtain the particular information;
- the limitation should be proportionate, that is, revealing the identity of information sources should take place in exceptional cases only, when so justified by threat to human life or health or particularly significant public interest;
- in the context of protecting information sources, the opportunity to reject delivery of documents, deeds and data media shall also be provided for;¹⁰
- no burden of proof may be required for the exercise of the right of information source protection.¹¹;

The journalist also has the right to reject testifying when the protection of the source needs it.

There is also a paragraph in the Act on General Rules of Administrative Proceedings and Services.¹² The Subsection (2) of Section 50/A of this Act stipulates about the properties which could expose the information source: „[...]Any person who cannot be heard as a witness shall not be compelled to surrender the property, nor any person who has the right to refuse to testify under Paragraph c) of Subsection (4) of Section 53 if having the property surrendered would expose the identity of a person from whom he receives information”.

1.2. The Limits of the Right

We also need to see where the limits are of these rights. It is possible to get the journalist to disclose her or his source of information. In this cases there are a few criteria to comply with. First of all the keyword in any circumstances must be proportionality. The criteria are written in the Act XIX of 1998 on Criminal Proceedings. The cornerstones of the regulation are the following: seriousness, purposefulness a 3-year term of confinement or more, when the Authorities do not have alternative ways to obtain the particular information.¹³

The most important element in the regulation is that only the court – which is separated from the other branches of power – could compel the journalist to disclose her or his source of information. So, neither the National Media and Infocommunications Authority (NMHH), nor other institutions of authority can do this.

¹⁰ Act CLXXXV of 2010 on Media Services and Mass Media
http://english.nmhh.hu/dokumentum/164596/media_act_final_updated_140930.pdf

¹¹ 155§ (5) b): the Authority may not oblige the media content provider or a person in an employment relationship or in a work-related legal relationship with a media content provider to provide any data, or to hand over any deed, instrument or document that would reveal the identity of the person delivering information to him/her in connection with the media content provider's activities.

¹² http://hunmedialaw.org/dokumentum/94/08_1652011_Abh_final.pdf

¹³ Act CXL of 2004 on the General Rules of Administrative Proceedings and Services

¹⁴ Act XIX of 1998 on Criminal Proceedings 82§ (6)

2. Is there, in domestic law, a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

First and foremost it shall be stated, that there is no dedicated provision for this question in the domestic law. However, we will present some means of application and some sanctions against the journalists who disclose his/her sources.

2.1. Prohibitions Form Another Perspective

The right of the source can be a prohibition at the same time for the journalist as long as Hungary does not have a correct prohibition which is regulated by the Hungarian criminal code.

In this question, the regulations of the Fundamental Law of Hungary governs as follows: "Everyone shall have the right to have his or her private and family life, home, communications and good reputation respected. Everyone shall have the right to the protection of his or her personal data, as well as to access and disseminate data of public interest. The application of the right to the protection of personal data and to access data of public interest shall be supervised by an independent authority established by a cardinal Act."¹⁴

The journalists who disclose their sources, definitely will be punished by the Hungarian National Committee of Journalists (MUOSZ)¹⁵, (which is just a self-regulatory entity, but its sanction indirectly may cause the end of the career for the journalist) because this violates section 8.2 in the Committee's Code of Ethics¹⁶. The reprimands include:

- verbal caution
- reprimand
- serious reprimand
- if a chosen candidate did something against the ethic codex the council could call him/her back
- suspension of membership for 1 year
- expelled from the organisation

The question can be viewed from the perspective of the victim in this case from the view of the disclosed source. We mean firstly the defence of the inherent rights, furthermore within this category: the protection of personal data. The question may be the victim's - in this case, the disclosed source of information - point of view is to look at. The focus is the legal protection of personality, the right to a good reputation and protection of personal data within it. The cases of

¹⁴ Article VI of THE FUNDAMENTAL LAW OF HUNGARY

¹⁵ <https://muosz.hu/>

¹⁶ <https://muosz.hu/kodex.php?page=etikai&sub=etikaikk09> The violated rules are in the 8§

defamation: responsibility regarding any person, orally or in writing is realized directly or indirectly: information obtained from others, adding further information. The determination of infringement is sufficient to determine whether the communication is suitable for a person is wrong, or has a negative perception. It does not need to examine the results, that is, to actually adversely change the social judgement of that person. In terms of the protection of personal data in the Basic Law sets out its rules: the personal data of the private sector, privacy and personality, the protection of private assets. There is a need to return to a row that we have under Hungarian law constituting personal data. Personal data is data relating to the data subject, in particular by reference to the name and identification number of the data subject or one or more factors specific to his physical, physiological, mental, economic, cultural or social identity as well as conclusions drawn from the data in regard to the data subject;¹⁷ The Hungarian Criminal Code describes it in the following way:

(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.¹⁸

3. Who is a “journalist” according to the national legislation? Is it in your view a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media actors? Is the protection of journalists’ sources extended to anyone else?

3.1. Who is a “Journalist” According to the National Legislation?

In the last 10 years have seen huge swings in media-consumption patterns, and innovations in technology — from mobile applications to the Internet — have created new channels for people to communicate with mass audiences. That has complicated efforts to define a journalist. As

¹⁷ Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information, Section 3

¹⁸ Act C of 2012 on the criminal code

technology has transformed communications and become inexpensive and user-friendly, anyone can share his or her views with the world, putting them almost on the same playing field as traditional journalists.

In their efforts to define the right to protect sources, some international bodies have opted to entirely avoid the term 'journalist'. The Declaration of Principles on Freedom of Expression adopted by the *LACMHR* states: *"Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential."* Other bodies have instead been careful to formulate a very wide definition of 'journalist', covering anyone who serves as a conduit of information to the public, regardless of whether they would normally be perceived as journalists. According to the Hungarian legislation what is based on the adaptation of the Recommendation of the *CoE's* Committee of Ministers states: ***"The term 'journalist' means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication."***¹⁹

- a) A journalist is typically a natural person. The holder of the information provided by the source may be, however, not only the journalists themselves but also their employers. Therefore, legal entities like publishing companies or news agencies are also to be protected like "journalists" under this Recommendation.
- b) A journalist typically works regularly and receives some form of remuneration for his or her work. Therefore, the Recommendation uses the terms "regularly or professionally engaged". This must not exclude, however, journalists who work freelance or part-time, are at the beginning of their professional career, or work on an independent investigation over some time. Professional accreditation or membership is not necessary.
- c) The term "collection and dissemination (...) to the public via any means of mass communication" shall refer to the fact that information is made available to the public at large or to a wider and open group of recipients, like subscribers, customers or members. Persons engaged in the creation and dissemination of personalised correspondence or advertisements are not meant hereby. All kinds of communication techniques can be used, including non-periodical publications and audiovisual works. Therefore, press journalists, photo journalists, radio journalists, audiovisual journalists and journalists working for computer-based media are equally included.

3.2. Is it, in Your View, a Restricted Definition for the Purpose of the Protection of Journalistic Sources?

The right to preserve the confidentiality of sources is usually referred to, both in international and domestic law, as a right of journalists. Nevertheless, it can sometimes be validly invoked by persons who would not normally identify themselves, or be identified by the general public, as journalists. The purpose of the right is to ensure that sources are not deterred from conveying

¹⁹ Article 19, 'Protection of sources' (Article n.d.) <<https://www.article19.org/pages/en/protection-of-sources-more.html>> accessed 10 May 2016

important information to the public through a 'middleman'. It is the middleman who is entitled to invoke the right to protect his or her sources. In most cases, this role is played by a 'traditional' journalist in the service of a mass media outlet; but there is no reason to apply a different rule when the middleman is someone else whose profession involves collecting and disseminating information, such as an NGO activist or academic commentator.

However this definition is broad and includes professional full-time reporters, analysts and citizen journalists as well, like bloggers and others who engage in forms of self-publication in print, on the Internet or elsewhere. In circumstances where a person provides information on the basis that he will not be named or compromised in any way it is one of the key rules of journalism.

Given the nature of their profession, journalists are not required to maintain confidentiality or, more precisely: such obligations may originate not from the nature of the profession (as is the case with doctors and attorneys), but from an agreement concluded with their sources. This means that the obligation they are subject to is not related to their profession but to a civil agreement, which may be concluded by anyone -non-journalists, too - with the source of important information.²⁰

Furthermore journalists would find it difficult to gain access to places and situations where they can report on matters of public interest and fulfil their role as watchdogs if they cannot when necessary give a strong and genuine promise of confidentiality to their sources. If they cannot guarantee a source's anonymity, then they may not be able to report at all. One side will view such a source as a disloyal, untrustworthy employee who needs to be found and removed; the other side sees them as a whistle-blower acting in the public interest.²¹

3.3. What is the Scope of Protection of Other Media Actors?

In those member States where systems of protection of sources already exist, protection was originally intended for journalists working for the traditional mass media (e.g. newspapers, broadcasters). However, there is no argument to limit such protection to these persons and to apply a different regime to those working professionally in the collection and dissemination of information via new means of communication such as the Internet. This being said, member States may find it more difficult to define the characteristics of the professional work of journalists who exclusively use these new means of communication, in order to justify the same protection, due to the development of new professions in this area. The main protections that apply to journalists should apply to bloggers (including the right to protect sources, accreditation

²⁰ Prof. dr. Dirk Voorhoof, "The media in a democratic society: reconciling freedom of expression with the protection of human rights" (2002) <http://www.coe.int/T/E/Com/Files/Events/2002-09-Media/intervention_voorhoof.asp> accessed 11 May 2016

²¹ Gill Phillips, 'On Protection of Journalistic Sources' (2014) <<http://journalism.cmpf.eui.eu/discussions/on-protection-of-journalistic-sources/>> accessed 6 May 2016

and guarantee of safety.)²² Hungary's new legislation extends to online news portals and blogs that either "inform, entertain, or educate," have any kind of advertising content and have an editor. This means that a blog with a Google ad falls under the new definition of the "press" and can be fined and shut down for publishing content deemed offensive to public morals, for instance, at the media authority's discretion. This goes against the most fundamental notion of press independence. The government should not have the power to determine what news is.²³

3.4. Is the Protection of Journalists' Sources Extended to Anyone Else?

The right to maintain the confidentiality of sources (Article 6 of the Press Freedom Act) Pursuant to Article 6 (1) of the Press Freedom Act, all media service providers, and publishers of press products, and journalists are entitled "to the right to keep the identity of their confidential informants." The general right of confidentiality also applies to judicial and administrative proceedings. Therefore, this enables the media to be exempt from the duty to testify.²⁴ Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established.

In other words, the right to withhold a source's identity belongs not only to the 'middleman', but also to others collaborating with him or her. The purpose of this rule is, of course, to prevent the protection of sources from being simply side-stepped by going around the 'middleman'.

4. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

4.1 Overview of the Decisions of the European Court of Human Rights

Before analysing the Hungarian safeguards, we must overview the decisions of The European Court of Human Rights (ECtHR) in the topic. Promise of confidentiality is significant as sometimes anonymous sources are the only key to unlock a story. The *Goodwin v United Kingdom*

²² Explanatory Memorandum (EC) to Recommendation No. R (00) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information [2000] Adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministers' Deputies

²³ Amy Brouillette, 'Hungarian Chill' (2011) <http://www.cjr.org/behind_the_news/hungarian_chill.php> accessed 7 May 2016

²⁴ The Press Freedom Act (2010) Article 6

case²⁵ was the first significant decision of the ECtHR in the topic, it was concerned a disclosure order imposed on a journalist requiring him to reveal the identity of his source. According to ECtHR view there was not a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve the aim. The order requiring the applicant to reveal his source and the fine imposed upon him because he refused to reveal his source gave rise to a violation of his right to freedom of expression under Article 10 of the European Convention on Human Rights.²⁶

“Protection of journalistic sources is one of the basic conditions for press freedom. ...Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined, and the ability of the press to provide accurate and reliable information be adversely affected. ... [A]n order of source disclosure ...cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.”²⁷

4.2 The Hungarian Legislations

In light of an example from the ECtHR case law it is time to analyse the Hungarian regulations and safeguards. First of all, let's have a look at the relevant paragraphs of the Fundamental Law of Hungary:

Article IX

- (1) Everyone shall have the right to freedom of speech.
- (2) Hungary shall recognise and protect the freedom and diversity of the press, and shall ensure the conditions for free dissemination of information necessary for the formation of democratic public opinion.

In 2010 the Hungarian parliament adopted new media regulation which created tension among journalists and received several criticisms in Hungary and abroad. The original regulation in 2010 would allow police officers to demand to identify the journalists' source. Later on, according to Decision 165/2011 (XII. 20.) AB (The Constitutional Court of Hungary) the Hungarian government modified the law. The relevant paragraphs of the current regulation are the following:

Article 6

- (1) A media content provider or a person in an employment relationship or in other work-related legal relationship with a media content provider shall be entitled, as stipulated by the respective Act, to keep the identity of a person delivering information to him/her in connection with the media content provider's activities (hereinafter as: journalists' source) in the course of court or regulatory procedures, as well as to refuse to hand over any documents, objects or data carriers that could potentially reveal the identity of the journalists' source.

²⁵ [http://hudoc.echr.coe.int/eng?i%3D001-57974#{"itemid":\["001-57974"\]}](http://hudoc.echr.coe.int/eng?i%3D001-57974#{)

²⁶ http://www.echr.coe.int/Documents/Convention_ENG.pdf

²⁷ http://www.echr.coe.int/Documents/FS_Journalistic_sources_ENG.pdf

(2) In order to investigate a crime, the court has the right – in exceptionally justified cases as defined by law – to oblige the media content provider or a person in an employment relationship or in other work-related legal relationship with a media content provider to reveal the identity of the journalists' source or to hand over any document, object, or data carrier that could potentially identify the journalists' source.

Pursuant to Article 6 (1) of the Press Freedom Act, all media service providers, and publishers of press products, and journalists are entitled “to the right to keep the identity of their informants confidential”. This general right of confidentiality also applies to judicial and administrative proceedings, thereby enabling the media to be exempt from the duty to testify. The 1986 Press Act failed to provide protection for the press in the most important cases, namely in criminal proceedings, when it failed to guarantee the right of confidentiality, but referred the resolution of the issue within the scope procedural law. According to Article 11(1)(b) of the previous Press Act, journalists „are entitled—and are obliged upon his request—to keep the identity of the person providing information confidential. When receiving information pertaining to a criminal act, the provisions of criminal law shall prevail.” Thus, as a general rule, in civil litigations and administrative proceedings, refusal to reveal information sources was permitted. At the same time, pursuant to Article 82(1)(c) of the Criminal Procedure Act, testimony may be refused when a person is bound by confidentiality due to the nature of his profession. Given the nature of their profession, journalists are not required to maintain confidentiality or, more precisely: such obligations may originate not from the nature of the profession (as is the case with doctors and attorneys), but from an agreement concluded with their sources. This means that the obligation they are subject to is not related to their profession but to a civil agreement, which may be concluded by anyone -non-journalists, too-with the source of important information. Prior to the new regulation, therefore, journalists could be obliged to reveal their sources in criminal proceedings. Under the new rule, the general right of confidentiality is not unlimited. It does not cover the protection of journalists' sources transmitting classified data without authorisation and, in exceptionally justified cases during judicial and proceedings by investigating authorities, media content providers may be obliged to reveal their sources “in the interests of protecting national security and public order or uncovering or preventing criminal acts”. The scope of exceptions is narrow and justifies the restriction of journalists' rights to confidentiality (even the most debated category of “public order” can be interpreted based on criminal law jurisprudence). The courts and competent authorities must construe these exceptions narrowly in order to ensure that the freedom of the press is respected. However, the Media Council cannot be regarded as an authority entitled to proceed under Article 6(3) of the Press Freedom Act in the investigation of sources. Under the new rule, the general right of confidentiality is not unlimited. It does not cover the protection of journalists' sources transmitting classified data without authorization and, in exceptionally justified cases during judicial and proceedings by investigating authorities, media content providers may be obliged to reveal their sources “in the interests of protecting national security and public order or uncovering or preventing criminal acts”. The scope of exceptions is narrow and justify the restriction of journalists' rights to confidentiality (even the most debated category of “public order” can be interpreted based on criminal law jurisprudence). The courts and competent authorities must construe these exceptions narrowly in order to ensure that the freedom of the press is respected. However, the Media Council cannot be regarded as an authority entitled to proceed under Article 6(3) of the Press Freedom Act in the investigation of sources. First of all, the Media Council is not an investigating authority. Article 182(c) of the

Media Act precisely defines the administrative powers of the Media Council concerning the supervision of the obligations set forth in the Press Freedom Act (“the Media Council shall... supervise compliance with requirements set forth in Articles 13-20 of the Press Freedom Act”). Article 182 and other provisions of the Media Act provide an exhaustive list, in accordance with the Administrative Proceedings Act, on the Media Council’s administrative powers. Meanwhile, based on relevant judicial and Constitutional Court jurisprudence, the “narrowly defined” range of The right to maintain the confidentiality of information with respect to criminal proceedings is created by the Press Freedom Act. The Press Freedom Act also defines the exceptions from the right to confidentiality, but none of these pertain to the media authority, so it could not oblige journalists to reveal their sources. administrative powers is unambiguous and therefore cannot be extended (pursuant to the Administrative Proceedings Act, a decision made in absence of authority is to be annulled). For purposes of Article 6(3) of the Press Freedom Act, no additional administrative powers or cases are being introduced under the Media Act, and Article 6(3) of the Press Freedom Act also falls outside the investigative rights in administrative proceedings, as no references to such powers on data provision are made even in the procedural rules of the Media Act. Accordingly, the provisions of the Media Act on clarifying the facts (Article 155) and on data provision (Article 175) cannot be applied in connection with Article 6 of the Press Freedom Act. Obviously, it is not the task of the Media Council to protect „public order” and „national security” and investigate and prevent „criminal acts”; as these are tasks of the police and the authority responsible for national security. Provided, strictly on a theoretical level, that the Media Council would decide to use the above provisions for the disclosure of sources, the media service provider or publisher concerned could, in all cases, seek legal remedy under the Administrative Proceedings Act against such order of the Council, and the order would be adjudicated by the administrative court. Furthermore, the court conducting the legal review may not consider the annulment of the respective administrative decision, since decisions made without authority are void.²⁸

The media regulation made its progress as originally the government wanted to give police officials the power to demand the name of journalist's source. Now only a judge can decide whether a journalist must name his source so this regulation is rather coherent with ECHR because the court is independent.

4.3 Outside the Law: Media Self-Regulation and Media Co-Regulation

There is another safeguard outside the law which is called self-regulation. What does media self-regulation mean? According to Miklós Haraszti, “Media self-regulation is a joint endeavour by media professionals to set up voluntary editorial guidelines and abide by them in a learning process open to the public. By doing so, the independent media accept their share of responsibility for the quality of public discourse in the nation, while fully preserving their editorial autonomy in shaping it.” Complaints launched with self-regulatory bodies come at no cost which is a huge advantage for the average citizen. Media self-regulation advances the

²⁸ http://mediatanacs.hu/dokumentum/2791/1321457199hungary_new_media_regulation_eng_web.pdf

transition from a government-owned, state-controlled press to one owned and controlled by civil society.²⁹ Although in Hungary self-regulation doesn't have a long history its principals can set a good model to follow. When it comes to media co-regulation in July 2011, the Media Council of the National Media and Infocommunications Authority concluded public administration agreements on media co-regulation with the four Hungarian media self-regulatory bodies: the Association of Hungarian Content Providers (MTE), the Advertising Self-regulatory Body (ÖRT), the Association of Hungarian Publishers (MLE) and the Association of Hungarian Electronic Broadcasters (MEME). The Act CLXXXV of 2010 on Media Services and Mass Media regulates the media co-regulation in chapter VI. (Act 190-202), which is a completely new element of the Media Act and provides an opportunity for self-regulatory organisations to participate in the arrangement of cases that would fall under the competences of the Media Council.³⁰

5. In the respective national legislation are the limits of non-disclosure of the information in line with the principles of the Recommendation No R (2000) 7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

Principle 1 of Recommendation No R (2000) 7³¹ is the right of non-disclosure of journalists.

Hungarian media regulation ensures a general right of non-disclosure of journalists, which means a limited protection with some exceptions. The basis of the current media regulation is Act CIV of 2010 on Freedom of Press and Fundamental Rules of Media Contents³² (hereinafter: Press Freedom Act) and Act CLXXXV of 2010 on Media Services and Mass Communication³³ (hereinafter: Media Act). Both have come into force on 1 of January, 2011. The Press Freedom Act specifies unified rules, content rules and obligations.

²⁹ The Media Self-Regulation Guidebook <http://www.osce.org/fom/31497?download=true>

³⁰ http://hunmedialaw.org/dokumentum/162/coregulation_summary_final.pdf

³¹ 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

³² Act CIV of 2010 on Freedom of Press and Fundamental Rules of Media Contents'

³³ Act CLXXXV of 2010 on Media Services and Mass Communication

For Sources of information of journalists the amendment adopted in June 2012, has created the necessary procedural guarantees and the possibility for judicial remedy prevailing in each case based on Decision 165/2011. (XII. 20.)³⁴ of the Constitutional Court.

Act LXIV of 2012 on Amending Acts related to Media-services and Press-products³⁵ has re-regulated the provision related to protection of information sources of the Press Freedom Act and determined the conditions of rules of procedure of the possibility of refusal of testimony of journalists, and incorporated them into the laws of criminal procedure, civil procedure, administrative procedure, and offences.

Rules of the Press Freedom Act related to source protection have been amended according to the following:

Based on Paragraph (1) of Article 6 a media content provider or a person in an employment relationship or in other work-related legal relationship with a media content provider shall be entitled, as stipulated by the respective Act, to keep the identity of a person delivering information to him/her in connection with the media content provider's activities (hereinafter as: journalists' source) in the course of court or regulatory procedures, as well as to refuse to hand over any documents, objects or data carriers that could potentially reveal the identity of the journalists' source.

According to Paragraph (2) of Article 6 in order to investigate a crime, the court is the only entitled authority– in exceptionally justified cases as defined by law – to oblige journalists to reveal the identity of their source. “National security” and “official secret” are not part of the enabling conditions of disclosure anymore, because the legislature has classified these categories obscure. Therefore the case of exceptional justification can only be assessed by court, strictly in case of a crime.

Thus, the exceptions of source protection are regulated in Act XIX of 1998 on Criminal Proceedings³⁶ (hereinafter: Criminal Proceedings Act).

According to the new provisions journalist not only have the right of non-disclosure but can also deny the disclosure of document, object, or data carrier that could potentially identify the journalists' source. The right of non-disclosure is extended to every judicial and magisterial procedure, and it is extended to the protection of sources which hand over classified information without authorization.³⁷

³⁴ Decision 165/2011. (XII. 20.) AB of the Hungarian Constitutional Court on the Media Regulation

³⁵ Act LXIV of 2012 on Amending Acts related to Media-services and Press-products
<http://mkogy.jogtar.hu/?page=show&docid=a1200066.TV>

³⁶ Act XIX of 1998 on Criminal Proceedings [https://www.icrc.org/ihl-nat.nsf/0/033d3f79294dc84ec1257163002cd383/\\$FILE/Act%20XIX%20of%201998.pdf](https://www.icrc.org/ihl-nat.nsf/0/033d3f79294dc84ec1257163002cd383/$FILE/Act%20XIX%20of%201998.pdf)

³⁷ Kóczyán Sándor: Hungarian media regulation and the protection of sources of information

Article 155 Paragraph (2) of Media Act entitles Media Authority only to collect information concerning business secrets. In order to establish the facts of the case, the Authority shall have the right to view, examine and make duplicates and extracts of any and all instruments, deeds and documents containing data related to the media service, the publication of the press product or the media service distribution, even if such instrument, deed or document contains business secrets.³⁸

The Authority may not oblige the media content provider or a person in an employment relationship or in a work-related legal relationship with a media content provider to provide any data, or to hand over any deed, instrument or document that would reveal the identity of the person delivering information to him/her in connection with the media content provider's activities. (Paragraph (5) b) of Article 155)

Any client or other participant of the proceeding obliged to provide data or to hand over or present any deed, instrument, or document despite of having recourse to the exemption stipulated in Paragraph (5) may seek legal remedy with suspensive effect. (Paragraph (7) and (Paragraph (5) b) of Article 155)

The exemption specified under Paragraph (5) shall remain valid even after the legal relationship justifying the exemption is terminated. (Paragraph (6) of Article 155)

Due to procedural rules journalists can practice their rights not only in media- and criminal procedure, but also in civil, administrative and misdemeanour procedure. The right is extended to refuse to hand over any documents, objects or data carriers that could potentially reveal the identity of the journalists' source.

Based on the supplement Act No III of 1952 on the Code of Civil Procedure³⁹ (hereinafter: Civil Procedure Code) journalist can deny testimony (deposition), is his deposition could potentially reveal the identity of the journalists' source in the related question. (Paragraph (1) f) of Article 170)The exemption shall remain valid even after the legal relationship justifying the exemption is terminated. (Paragraph (6) a) of Article 170)

Based on General Rules of Administrative Proceedings and Services Act⁴⁰ (hereinafter: Administrative Proceedings and Services Act) journalists can also deny deposition in administrative procedure if the deposition could potentially reveal the identity of the person delivering information to him/her in connection with the media content provider's activities in the related question. (Paragraph (4) c) of Article 53 of Administrative Proceedings and Services

³⁸ Opinion of TASZ (Society for Freedoms) right defender organization on Act LXIV of 2012 on Amending Acts related to Media-services and Press-products Rec. No. T/7022/37. unitary recommendation http://tasz.hu/files/tasz/imce/2011/tasz_velemenymedia_modositas_0523.pdf

³⁹ Act No III of 1952 on the Code of Civil Procedure
http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=95200003.TV

⁴⁰ General Rules of Administrative Proceedings and Services Act

Act). The exemption shall remain valid even after the legal relationship justifying the exemption is terminated. (Paragraph 8 of Article 53)

Journalist is exempt from confiscation, is not obliged to hand over the good if it would reveal the identity of the source. The exemption from the handover shall remain valid even after the legal relationship justifying the exemption is terminated. (Paragraph (2)-(2) a) of Article 50) The same exemption is concerning to report obligation a (Paragraph (4) a) c) of Article 51) and to inspection. (Paragraph 7 of Article 57/A) The obliged may seek legal remedy with suspensive effect. (Paragraph (5) of Article 50/A, Paragraph (4) b) of Article 51)

Act II of 2012 on offences, the procedure in relation to offences and the offence record system⁴¹ (hereinafter: Act on Offences) contains similar exemptions for journalists: deny of deposition, (Article 60/(C)), which shall remain valid even after the legal relationship justifying the exemption is terminated. (Article 60/(A)) exemption from confiscation (Paragraph (1) a) of Article 76.) and from inspection (Paragraph (2) a) of Article 70.).

Limits to the right of non-disclosure are **in line with Principle 3**. Limits to the right of non-disclosure are regulated by Paragraph (2) of Article 6) of Press Freedom Act only empowers the judicial authorities to oblige journalist to disclose information, if it is required in case of revealing a crime and only in exceptionally justified cases.

Based on Paragraph 2 of Press Freedom Act, courts can only oblige media content provider or a person in an employment relationship or in other work-related legal relationship with a media content provider to hand over any documents, objects or data carriers in case of revealing a crime, in exceptional and legally specified case.

Exceptions are regulated in the Criminal Proceedings Act, not in the Press Freedom Act, based on Paragraph 6 of Article 82:

Courts can only oblige media content provider or a person in an employment relationship or in other work-related legal relationship with a media content provider to reveal the identity of his source, for revealing onerous, intentional crime, which is ordered to be punished with 3-year term of confinement or more, the identity of the source of the information is essential, and the expected evidence cannot be substituted.

Probably due to legal aspects, we were not able to find concrete pieces of cases which contains explicit data about the co-operation of a media-content provider (journalist), concerning the revelation of its source during any criminal procedure.

It probably has procedural reasons, because of the principle of protecting the identity of the witness or any other person who provides information for the authorities, based on Article 95 of the Criminal Proceedings Act.

⁴¹ Act II of 2012 on offences, the procedure in relation to offences and the offence record system

An appeal can be submitted against the binding resolution, with suspensive effect. (Paragraph 4 of Article 293 of Criminal Proceedings Act) Before submitting the indictment, the investigational judge decides about the obligation of revealing. (Paragraph (2) f) of Article 207 of Criminal Proceedings Act)

Against the resolution of the investigating judge an appeal can be submitted as well, with suspensive effect. (Paragraph (5) a) of Article 215 of Criminal Proceedings Act

Based on the current regulation, journalist cannot be obliged to reveal the sources of their information nor in civil, administrative and offence procedure, thus they shall only use other available evidence for the purpose of establishing the allegation, **in line with Principle 4.**

Article 82 has been amended by an act, which regulates the refusal of deposition among the barriers of deposition.

Based on the rules of the Criminal Proceedings Act, journalists can refuse deposition, if his deposition would reveal the identity of his source, except for if the court obliged him to reveal the source. (Paragraph (1) b) of Article 82). The exemption shall remain valid even after the legal relationship justifying the exemption is terminated. (Paragraph 4 of Article 83) Exemption is extended into the confiscation of objects containing information. (Paragraph (3)-(4) of Article 152), except for the compulsory injunction of the Court. (Paragraph (5) d) of Article 152)

In Principle 5, conditions concerning disclosures are actually basic procedural guarantees, which shall be applied by all courts. The Hungarian regulation is in line with Principle 5, however it is not in strong relation with this question.

In line with Principle 6, Media Act, the Administrative Proceedings and Services Act, and the Act on Offences, journalist enjoy exemption to hand over any documents, objects or data carriers that could potentially reveal the identity of the journalists' source. Only criminal court can oblige journalist to reveal the source of his information. The decision depends on the investigational judge. (Paragraph (2) f) of Article 207 of Act of Criminal Proceedings). Against his injunction further remedy shall be submitted.

During criminal procedure, exemption is extended to the confiscation of objects containing information of the source. (Paragraph (3)-(4) of Article 152 of Criminal Proceedings Act), except for the Court obliged the journalist to reveal the identity of the source. (Paragraph (5) d) of Article 152 Criminal Proceedings Act)

The provisions of the Criminal Code related to depositions, are in line with **Principle 7**. Based on the rules of the Criminal Proceedings Act, journalists can refuse deposition, if his deposition would reveal the identity of his source, except for if the court obliged him to reveal the source. (Paragraph (1) d) of Article 82). The exemption shall remain valid even after the legal relationship justifying the exemption is terminated. (Paragraph (4) of Article 83) Exemption is extended into the confiscation of objects containing information. (Paragraph (3)-(4) of Article 152), except for the compulsory injunction of the Court. (Paragraph (5) d) of Article 152)

It is still uncertain, who can enjoy the right of non-disclosure. The Press Freedom Act only denotes the media-content provider or a person in an employment relationship or in other work-related legal relationship with a media content provider amongst the exempted ones.

Journalist cannot be obliged to reveal the identity of their sources, if they themselves are media content providers or persons in an employment relationship or in other work-related legal relationship with a media content provider, however the exemption shall remain valid even after the legal relationship justifying the exemption is terminated.⁴² Thus protection is not extended to freelancer journalists, nor sources of bloggers dealing with public issues. The effect of Media Act is not extended to professional blogs, (for instance economic, public or educational blogs), if blogging is not conducted commercially, for achieving profits. The protection is explicitly extended for online press products, functioning as economic undertakings providing mass media.⁴³ Thus the provisions of thus are not extended for bloggers. Due to the recommendation of the European Commission,⁴⁴ the term journalist means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication. Thus the definition considers journalists persons who are regularly engaged in the collection and dissemination of information as well as professionals.

Experts of the European Commission has explicated in their Opinion on Media Legislation of Hungary, that the extension of the protection to freelancer journalists would be justifiable, whom might get information prior to those, who are in legal relationship with any media content provider.⁴⁵

The party who refers to the right of non-disclosure shall provide that the respective information was obtained in relation with media content, therefore during journalistic activity. Thus the regulation should be amended in favour of freelancer journalists.

In Hungary, the general investigating authority is the police. (Paragraph (1) of Article 36 of Criminal Proceedings Act.) It shall fall within the exclusive competence of the prosecutor's office to conduct investigation in criminal offences determined under Article 29 of the Criminal Proceedings Act.

In Hungary, no investigating authority can decide about the necessity of disclosure, the authority itself only reveals information from alternative sources. The category "alternative sources" involves all information, facts and data that can be acquired by any other investigative method as an alternative measure.

⁴² Kóczyán Sándor: Hungarian media regulation and the protection of sources of information

⁴³ Koltay András (2011) The constitutionality of media content in the new Hungarian media regulation. Médiakutató, autumn

⁴⁴ Recommendation No R (2000) 7

⁴⁵ Experts of the European Commission has explicated in their Opinion on Media Legislation of Hungary, Page 25-26, Report by Nils Muižnieks commissioner for human rights of the Council of Europe following his visit to Hungary from 1 to 4 July 2014 https://www.ecoi.net/file_upload/1226_1421659549_com-instranet.pdf

These authorities are bound by the particular provisions of the Criminal Proceedings Act. The decision depends on the investigational judge. Against his injunction further remedy shall be submitted.

6. In the Recommendation No R (2000) 7 the following principles should be respected when the necessity of disclosure is stated: absence of reasonable alternative measures, outweighing legitimate interest (protection of human life, prevention of major crime, defence of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the disclosure outweigh the interest in the non-disclosure?

Limits to the right of non-disclosure are regulated by Paragraph (2) of Article 6) of Act CIV of 2010 on Freedom of Press and Fundamental Rules of Media Contents⁴⁶ (hereinafter: Press Freedom Act) only empowers the judicial authorities to oblige journalist to disclose information, if it is required in case of revealing a crime and only in exceptionally justified cases.

Based on Paragraph 2 of Press Freedom Act, courts can only oblige media-content provider or a person in an employment relationship or in other work-related legal relationship with a media content provider to hand over any documents, objects or data carriers in case of revealing a crime, in exceptional and legally specified case.

Thus, exceptions are regulated in Article 82 of Act XIX of 1998 on Criminal Proceedings⁴⁷ (hereinafter: Criminal Proceedings Act), not in Press Freedom Act.
Based on Article 82 of Criminal Proceedings Act:

Courts can only oblige media content -provider or a person in an employment relationship or in other work-related legal relationship with a media content provider to reveal the identity of his source, for revealing onerous, intentional crime, which is ordered to be punished with 3-year term of confinement or more, the identity of the source of the information is essential, and the expected evidence cannot be substituted.

An appeal can be submitted against the binding resolution, with suspensive effect. (Paragraph 4 of Article 293) Before submitting the indictment, the investigational judge decides about the obligation of revealing. (Paragraph (2) f) of Article 207)

Against the resolution of the investigational judge an appeal can be submitted as well, with suspensive effect. (Paragraph (5) a) of Article 215)

⁴⁶ Act CIV of 2010 on Freedom of Press and Fundamental Rules of Media Contents'

⁴⁷ Article 82 of Act XIX of 1998 on Criminal Proceedings

Based on Paragraph (2) f) of Article 207 of Criminal Proceedings Act, only criminal court can oblige journalist to reveal the source of his information. **The decision depends on the investigational judge.** Against his injunction further remedy shall be submitted.

These are the required conditions to oblige a media content provider to disclose information. As it is drafted in the Criminal Proceedings Act, the regulation is in accordance with the principle of „absence of reasonable alternative measures”.

However, outweighing legitimate interest is a wider category in the Hungarian regulation, than in the Recommendation. Due to the provisions of the Criminal Proceedings Act, the condition of the necessity of disclosure is in case of an intentional crime, which is ordered to be punished with 3-year term of confinement or more.

There are many crimes in the Hungarian Criminal Code which are ordered to be punished with the extent mentioned above, thus the Hungarian regulation ensures more discretionary power for the investigational judge when deciding about the necessity of disclosure. Therefore in Hungary, protection of human life, prevention of major crime, defence of a person accused or convicted of having committed a major crime is not an exclusive circle for obliging the media-content provider to disclosure.

As a consequence, from this particular aspect, the Hungarian regulation is not absolutely in accordance with the principles of the Recommendation.

7. In the light of the case law of the European Court of Human Rights, how do national courts apply the respective laws with regard to the right to protect sources? In particular, how do they balance the different interests at stake?

7.1. The Case Law of ECtHR

The European Convention on Human Rights and Fundamental Freedoms was opened for signature by The Council of Europe in 1950, and taken effect in 1953. Article 10 of this Convention protects the freedom of expression. The European Court of Human Rights (hereinafter referred to as: “Court”) has no authority to annul the decisions of the member state’s courts, or start modification of the national law, but the default judgement will have consequences in the given state. “The case-law of the judiciary mediates legal culture without fail and it is a legal treasure, common value. It shows the development of an era” - says András Baka, the prior Hungarian judge of the Strasbourg Court. The Court tries to define a common minimum requirement connected to the human rights. This standard, the disciplines and practice of judgements formed by the Court can be strict in different ways in certain fundamental rights, moreover within the rights, too. The public debates, the protection of political expressions and the free review of public figures get priority in the exercise of justice. The same can be told in the some question of the liberty of press, like the journalist’s right to keep in secret the sources. In these cases the Court acted tolerably active, so they have put the collective minimum standard on

a high level. In the case of other kinds of speeches the Court satisfies with keeping alive the already existing collective minimum, like racism expressions, which are otherwise controlled in every state. In a third group the Court leaves the sweep of the members relating to the restricting rules of the freedom of expression, for example reviling religious and words against the public moral.⁴⁸ The decisions of The European Court of Human Rights exemplify, that they keep the press as the public watchdog of democracy, which is inspired to have in tow the democratic order, so the media can be restricted in only extraordinary cases, shows by the adjudicative power. Despite retaining the jurisdiction of the member state, alias the principle of margin of appreciation has basic importance in the practice of the Court. The freedom of expression can be limited only with the numerous reasons contained in Article 10, Subsection (2), however the guarantees of restriction are written in the text.⁴⁹

7.2. Justice in Hungary

7.2.1. Introduction

The Convention had been signed by Hungary in November of 1990 and ratified two years later, then enacted as the Act XXXI of 1993.⁵⁰ How does the case-law of Strasbourg and the ECHR affect the internal law of the partial states? The text of the Convention only prescribes, that the adjudication power of the Court extends all issues relating to the interpretation and application of the Convention and its protocols (Article 32, Subsection (1.)) Based on the Article 46., Subsection (1.) of binding force and execution of judgments, the states undertake, that they accept, that the judgements of the Court have binding force, when they are parties in a case. This provision doesn't contain the wider interpretation agreed by lots, which includes, that the text of the Convention as an undertaken obligation in an international treaty and the whole case-law of the Strasbourg Court oblige the Hungarian dispensation of justice. The Convention is not only binding because of it is an international treaty, but also a part of the internal law since 1993, therefore the national courts have to apply it based on the principle of *nullum crimen sine lege*. But it is solely refers to the text, so it is not applicable for know the exact limits and the restriction opportunities of the fundamental rights, however it gives clue better, than the Constitution anyway.⁵¹

48 András Koltay: A szólásszabadság alapvonalai, page 51.-54.

<https://jak.ppke.hu/uploads/articles/12332/file/Koltay%20Andr%C3%A1s%20PhD.pdf>

49 Perry Keller : Európai és nemzetközi médiajog (European and International Media Law, page 234.-238.

50 http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99300031.TV

51 András Koltay: A szólásszabadság alapvonalai, page 55.

<https://jak.ppke.hu/uploads/articles/12332/file/Koltay%20Andr%C3%A1s%20PhD.pdf>

7.2.2. Restriction of the Freedom of Expression

In the Decision 30/1992. (V. 26.)⁵² the Constitutional Court - affected by the joint to the ECHR – gave expression to the opinion, which says, that the freedom of expression is the "mother law" of communication rights. Furthermore, it declares that this right is not unrestrictable, but the restricting rules of law have to be interpreted tight. There are no defined occasions by the Constitution, when this fundamental right can be limited, but they declared, that the freedom of press principally has aerial limits, including the press emendation and this right is ensured by the non-intervention of the government (Decision 37/1992. (VI. 10.) AB).⁵³ Our authoritative act of press,⁵⁴ the Conventional, together with the Decree-law 8. of 1976 on the Proclamation of International Covenant on Civil and Political Rights⁵⁵ contains provisions to restrict the freedom of expression next to certain conditions.⁵⁶

7.2.3. Justice Formed by the Constitution

The Constitutional Court - who keeps guard above the Constitution – always recons with the case law of Strasbourg in its practice? This comes with a good effect that the Constitutional Court's decisions can strain of the limits of the law, which are unacceptable for Strasbourg. This can be happened, because they interpret the Hungarian acts and the Constitution by the judgements of ECtHR, too. If any Hungarian law falls foul of the practice of Strasbourg, the Constitutional Court solves the conflict. An important example for this is Decision 165/2011 (XII.20.) AB57. It says, that the provisions - refer to the rules of media contents and the journalist's protection of sources from the Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content⁵⁸, together with the obligation to render information and the rules refer to the Media – and Broadcasting Commissioner from the Act CLXXXV of 2010 on Media Services and Mess Media⁵⁹ – are against the Constitution. The ECHR is underlying for the explanation on more points, even more they refer to the case law of the ECtHR, inter alia the significant case of *W. Goodwin contra The United Kingdom*. The Constitutional Court declares, that the restriction of the act has to have correspondence with the Article 10, Subsection (2). For the same reasons they refused the government's proposal, that recommended to interpret again the Article IX. of the Constitution about the freedom of press (Decision 21/2012. IV.17.AB).⁶⁰ It is an indirect effect, when the case law of ECtHR appears in

52 <http://public.mkab.hu/mkab/dontesek.nsf/0/C12579890041A608C125798800473E9B?OpenDocument>

53 <http://public.mkab.hu/dev/dontesek.nsf/0/261126A74CAFE513C1257ADA005277C3?OpenDocument>

54 http://nmhh.hu/dokumentum/162262/smtv_110803_en_final.pdf

55 http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=97600008.TVR

56 Pákozdy Csaba: A véleménynyilvánítás szabadsága és a nemzetközi jog, különös tekintettel az EJEB joggyakorlatára, page 209-210.

57 <http://public.mkab.hu/mkab/dontesek.nsf/0/C12579890041A608C125798F004FEC26?OpenDocument>

58 http://nmhh.hu/dokumentum/162262/smtv_110803_en_final.pdf

59 http://hunmedialaw.org/dokumentum/153/Mttv_110803_EN_final.pdf

60 http://www.mediajogfigyelo.hu/uploads/files/6_21_2012.pdf

the practice of the Constitutional Court, forms it and causes modifications in the national law system. The case law of Strasbourg can turn up in the practice of the national courts, but it is pretty rare in Hungary. This can lead to problems for example at the area of the freedom of expression.⁶¹ There was a meaningful problem, when a new act by the current government named the Constitution of Media in 2010, restricted many provisions regard to the freedom of press. It caused a mess, because the Hungarian rule was reverse of the Convention. The Constitutional Court earlier alluded to the constitutional requirement, that the courts have to take notice of the ECHR, even more later in a decision they put down, that the opinion of the European Court of Human Rights forms and binds the Hungarian practice of law (Decision 18/2004. (V.25.)).⁶² Finally, the modification of the Media Constitution (Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content) by the Constitutional Court terminated the dispute, as I mentioned above.⁶³

7.2.4. Example for the Effect of the Case-law of Strasbourg

Hungary joined the European tendency that the freedom of expression is playing down the criminal sanctions. It doesn't mean that a perpetrator has no responsibility, just the current rules of human rights extend in the application of law. The Constitutional Court employed the "necessity test" shaped by the Strasbourg Court in the case of *Sunday Times v. United Kingdom* in 1979. Based on the test the complaint about the restriction has to be examined, that is it necessary in a democratic state or not, furthermore how much is it proportional with the legal goal. In the same Decision (36/1994. (VI. 24.))⁶⁴ of the ECtHR, which dealt with the expression of freedom regard to public figures (*Lingens v. Austria*, *a Castells v. Spain*, *az Oberschlick v. Austria* és a *Thorgeirson v. Iceland*). National law practice implemented the consideration of the public persons can get bigger amount of critics, than private persons according to the rules of ECtHR's case-law.⁶⁵

61 <https://jak.ppke.hu/uploads/articles/12332/file/Koltay%2520Andr%25C3%25A1s%2520PhD.pdf>

62 <http://public.mkab.hu/dev/dontesek.nsf/0/4EA2726C0A3F263EC1257ADA00529A10?OpenDocument>

63 http://www.mediakutato.hu/cikk/2011_01_tavasz/02_uj_mediatorveny

64 <http://net.jogtar.hu/jr/gen/getdoc2.cgi?docid=994H0036.AB>

65 http://www.mediakutato.hu/cikk/2006_03_osz/06_kozszereplok_szemelyisegvedelme

8. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

8.1 *What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information?*

According to the Hungarian National Security Services Act CXXV of 1995, the Intelligence Office shall gather information on organised crime abroad threatening national security, in particular, on terrorist organisations, illegal drug and arms trafficking, as well as on the illegal international circulation of weapons of mass destruction and the components thereof, and the materials and means required for their production. The national security services may only use special means and methods of intelligence gathering, if the data required for the fulfilment of the tasks specified in this Act cannot be acquired in any other manner.

The directors general of the national security services may authorise the gathering of intelligence until a decision is made by the authoriser, if having the intelligence gathering authorised by an outside organ would bring about a delay that would obviously interfere with the interest in the successful operation of the national security service in the given matter. The directors general of the national security services shall submit the proposal for outside authorisation simultaneously with the granting of their authorization. Unless a new fact arises that directly threatens national security, the gathering of intelligence may be ordered only once in the same matter on the basis of the exceptional authorization specified above.

As part of the gathering of intelligence, the national security services

- a) may ask for information;
- b) may gather information by concealing the national security nature thereof;
- c) may establish secret contacts with private individuals;
- d) may establish and use information systems promoting the gathering of intelligence;
- e) may set a trap that does not cause injury or impair health;
- f) may prepare and use cover documents for the protection of their own staff members and the natural persons co-operating with them, as well as for the concealment of the national security nature involved;
- g) may establish and maintain cover organizations;
- h) may put the persons affected by their tasks under surveillance, together with the rooms, buildings, and other installations, sectors and route sections, vehicles, and events that may be associated with them, and may record the observations using technical means;
- i) may tap conversations, and may record the observations using technical means;

j) may gather information from telecommunications systems and other data storage systems subject to licence.

Law enforcement agencies may be used as cover organizations, and the documents thereof may be used as cover documents only with the information thereof of the competent Minister and the national head of the organisation concerned.⁶⁶

The National Security Special Service upon written request, shall provide services, using the special means and methods of intelligence gathering subject to legal rules, for the intelligence gathering activities of organisations authorized by the law to do so; based on the requirements of organisations authorized by the law, shall provide the special technical means and materials needed for the intelligence gathering activities furthermore it shall provide special telecommunications connection for users specified by the Government and oversee, in the capacity of authority, the protection of security documents.

The Hungarian Criminal Procedure distinguishes two forms of secret data collection. The so called covert intelligence gathering is executed by the authorities before the opening of the criminal procedure and can be performed for purpose of criminal investigation or for other purposes (particularly for national security). The covert intelligence gathering shall be permitted by a judge or by the minister of justice depending on its purpose. The other form is the covert data gathering. This shall follow only purposes of criminal investigation and can be performed during the criminal procedure. This data gathering shall be permitted by the investigation judge who afterward controls whether this secret operation has been performed under the law. If the performing authority goes beyond legal limits, the investigation judge terminates the covert data collection and the results cannot be used as evidence. Covert data gathering may be applied if the proceedings are conducted upon suspicion of a criminal offence or preparations for a criminal offence that have been committed intentionally and is punishable by five years or more imprisonment or other felonies. Furthermore, generally, the power of seizure belongs to the public prosecutor, to the court and to the investigating authority, but some objects can be seized only upon order of the court. Seizure means divesting the owner of a property of his/her right of disposal in order to obtain evidence or ensure the confiscation or forfeiture of the property. The object of seizure can be property and also computer system or data medium containing data recorder.

Hungary's parliament moved to increase surveillance of high-level public officials, with the modification of the National Security Law on 24 May 2013. It was designed to allow the state to identify any risks that could lead to someone influencing or blackmailing a person under surveillance, which would in turn cause state security issues, the law says. The range of positions in the secret service's focus is detailed: the people subject to such surveillance are ambassadors, state secretaries, heads of administrative bodies and councils, the management of parliament, the

⁶⁶ Act on the National Security Services 1995 s 54 (1)

head of the military forces and army generals, police commanders and superintendents, and heads and board members of state-owned companies. The person in question needs to sign an approval for the surveillance to be allowed. Refusal to sign means they lose their jobs. The modification has raised concerns on the part of the ombudsman and civil rights groups, and sparked comments that the secret service's reach into people's private lives would now be "total". The bill also lifts the earlier requirement of a court nod for the secret gathering of information on people by opening their letters, making audio and video recordings or searching and bugging their homes.

Apart from allowing surveillance of a selected group of people without letting them seek legal remedy, the law provides no regulations that limit who can see the information, what can be done with it, or how long it can be stored. The law also allows for employees to be fired for conduct outside the workplace, for as yet unspecified reasons. It means that Hungary now allows investigation of particular individuals without any need to demonstrate a specific reason why every aspect of a person's life must be reviewed. That is unusual in democratic states. The new national security law has really created an Orwellian landscape in Hungary.⁶⁷

In other words, it is possible for virtually any person in Hungary to be subjected to secret surveillance as the legislation does not describe the categories of persons who, in practice, may have their communications intercepted. The authorities simply have to identify to the responsible minister the name of the individual(s) or the "range of persons" to be intercepted, without demonstrating their actual or presumed relation to any terrorist threat. Furthermore, under the legislation, when requesting permission from the Minister of Justice to intercept an individual's communications, the anti-terrorism task force is merely required to argue that the secret intelligence gathering is necessary, without having to provide evidence in support of their request. In particular, such evidence would provide a sufficient factual basis to apply such measures and would enable an evaluation of their necessity based on an individual suspicion regarding the targeted individual. The Court reiterated that any measure of secret surveillance which did not correspond to the criteria of being strictly necessary for the safeguarding of democratic institutions or for the obtaining of vital intelligence in an individual operation would be prone to abuse by authorities with formidable technologies at their disposal. Another element which could be prone to abuse is the duration of the surveillance. It is not clear from the wording of the law whether the renewal of surveillance warrant (on expiry of the initial 90 days stipulated under the National Security Act) for a further 90 days is possible only once or repeatedly. Moreover, these stages of authorisation and application of secret surveillance measures lacked judicial supervision. Although the security services are required, when applying for warrants, to outline the necessity of the secret surveillance, this procedure does not guarantee an assessment of whether the measures are strictly necessary, notably in terms of the range of persons and the premises concerned. For the Court, supervision by a politically responsible member of the executive, such as the Minister of Justice, did not provide the necessary

⁶⁷ Éva Tomássy, 'Data retention and the use of spy software in Hungary' (Report 2014) <<https://giswatch.org/en/country-report/communications-surveillance/hungary>> accessed 3 June 2016

guarantees against abuse. External, preferably judicial control of secret surveillance activities offers the best guarantees of independence, impartiality and a proper procedure.⁶⁸

On January 12, in the *Szabó and Vissy vs. Hungary* case, the European Court of Human Rights (“ECHR”) condemned the surveillance of individuals by Hungarian authorities for anti-terrorism purposes. The case concerned the 2011 Hungarian legislation on secret anti-terrorist surveillance operations (“Legislation”). Under the Legislation, a special anti-terrorism task force has specific powers for purposes of intelligence gathering, including that it may conduct secret house searches and surveillance with recording, open letters and parcels, and check and record the contents of electronic or computerised communications – all this without the consent of the persons concerned.

Hungarian legislation on secret anti-terrorist surveillance does not have sufficient safeguards against abuse. In particular, the ECtHR criticised:

- that virtually anyone in Hungary may be subjected to covert surveillance as this does not require the authorities to demonstrate an actual or presumed relation to any terrorist threat;
- the fact that when requesting permission to intercept an individual’s communication, the anti-terrorism task force is merely required to argue that the secret intelligence gathering is necessary without having to provide evidence in support of their request;
- the fact that the Legislation does not clearly limit the duration of the surveillance;
- the lack of judicial oversight of the surveillance program – under the Legislation, covert surveillance only requires authorisation by the executive without an assessment of whether it is strictly necessary and without any external judicial or other control;
- the fact that affected citizens are at no point in time informed that they have been the subject of secret surveillance; and
- the lack of any effective remedy against secret surveillance measures.

Hungary has three months to request that the matter be considered by the Grand Chamber of the ECtHR. If this request is not made, Hungary will have to amend its laws in order to create safeguards and oversight of its surveillance activities.⁶⁹

⁶⁸ edecapitani, 'Strasbourg Court: Hungarian legislation on secret anti-terrorist surveillance does not have sufficient safeguards against abuse' (14 January 2016) <<http://free-group.eu/2016/01/14/strasbourg-court-hungarian-legislation-on-secret-anti-terrorist-surveillance-does-not-have-sufficient-safeguards-against-abuse/>> accessed 23, October 2016

⁶⁹ Denise Lebeau-Marianna, 'Hungary condemned for its mass surveillance program' (2016) <<http://www.bakerinform.com/home/2016/2/19/hungary-condemned-for-its-mass-surveillance-program>> accessed 22 October 2016

8.2 Are the national law provisions accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

The principle of legal certainty is essential to the confidence in the judicial system and the rule of law the state must make the text of the law easily accessible. It has also a duty to respect and apply, in a foreseeable and consistent manner, the laws it has enacted. Foreseeability means that the law must where possible be proclaimed in advance of implementation and be foreseeable as to its effects: it has to be formulated with sufficient precision to enable the individual to regulate his or her conduct. Legal certainty requires that legal rules are clear and precise, and aim at ensuring that situations and legal relationships remain foreseeable⁷⁰

There was growing concern about the powers of the Hungarian intelligence agency, the Anti-Terrorism Task Force (TEK), under the Police Act of 1994. The Act provided one set of surveillance powers exercisable in the context of criminal investigations (which subjected surveillance to judicial authorisation), and another set of powers (in section 7/E(3)) applicable to intelligence gathering in the context of national security. The national security surveillance powers were subject to ministerial, rather than judicial, authorisation; were not linked to a particular crime; and required a warrant to relate only to a premises persons concerned, or “a range of persons,” and was thus potentially executable against any person. In conclusion the wording of the law is not clear, virtually anyone in Hungary may be subjected to covert surveillance, the Legislation does not clearly limit the duration of the surveillance and there is not an effective remedy against secret surveillance measures.⁷¹

Regarding to the anti-terrorism provisions the Hungarian Parliament is set to amend several acts in order to enhance the effectiveness of the state in combatting terrorism.

Previous versions of the bill would have banned end-to-end encryption, and imposed criminal sanctions for their users and providers. While the current version is much more moderate, there are several provisions that would impose disproportionate restrictions on fundamental rights.

⁷⁰ Venice Commission, 'European Commission for Democracy through Law' (Report 2011) <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e)> accessed 6 May 2016

⁷¹ Carly Nyst, 'The European Court of Human Rights Constrains Mass Surveillance ' (Article 2016) <<https://www.justsecurity.org/28939/ecthr-constrains-mass-surveillance/>> accessed 13 May 2016

9. Can journalists rely on encryption and anonymity online to protect themselves and their sources against surveillance?

9.1 Right to a Name

As we know media get many relevant information from anonymous sources but do journalists have a right to write under assumed names? The Act V of 2013 on the Civil Code of Hungary declares journalists right to a name in section 2:49:

“(1) Literary, artistic or scientific activities or activities accompanying public performances may be pursued under an assumed name, provided that it does not result in any harm to the relevant lawful interests of other persons.

(2) If the name of a person engaged in literary, artistic or scientific activities or in activities accompanying public performances can be confused with the name of another person who has already been engaged in similar activities, at the request of the relevant person such name may be used with a distinctive addendum or omission while engaged in such activities.”⁷²

9.2 The Hungarian Media Regulation and its Material Scope

The Hungarian media law (Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content) and Act CLXXXV of 2010 on media services and mass media (the Media Act) give a description on their material scope. The Acts define the concept of establishment in accordance with the AVMS Directive. Article 1(1) of the Media Act divides the basic services under its scope into two large groups: **media services** and **press products**. The new regulation refers to the providers of the two different services as media content providers. **Media service** shall mean “any independent service of a commercial nature, as defined in Articles 56 and 57 of the Treaty on the Functioning of the European Union, provided on a regular basis, for profit, by taking economic risks, for which the media service provider bears editorial responsibility, the primary aim of which is the delivery of programmes to the general public for informational, entertainment or educational purposes through an electronic communications network.

Press products shall mean “individual issues of daily newspapers or other periodical papers, online newspapers or news portals, which are offered as a business service, for the content of which a natural or legal person, or a business association without legal personality has editorial responsibility, and the primary purpose of which is to deliver textual or image content to the general public for information, entertainment or educational purposes, in a printed format or through any electronic communications network. Editorial responsibility shall mean the responsibility for the actual control over the selection and composition of the media content and shall not necessarily result in legal responsibility in connection with the press product. Business

⁷² Act V of 2013 on the Civil Code of Hungary

service shall mean any independent service of a commercial nature, provided on a regular basis, for profit, by taking economic risks.”

Both services are business services, for which the provider of the service bears editorial responsibility and whose main purpose is the provision of the service to the general public for information, entertainment or education purposes.⁷³

As a consequence, internet blogs which are not qualified as economic services are not regulated in the statute; however general regulations apply to them, for example Act C of 2012 on the Criminal Code and Act V of 2013 on the Civil Code.

9.3 The Hungarian Media Regulation and Its Problems

In 2010, the Hungarian parliament adopted new media regulation which included many changes and created a heated argument in Hungary and in Europe too. The European Parliament and the Organisation for Security and Cooperation in Europe (OSCE) have voiced concern over the changes in the law. In December 2011, the Constitutional Court of Hungary decided that the protection of journalists' sources is not sufficiently guaranteed by the new media law. The court's decision states that the protection of journalist's sources has to be ensured in criminal investigations and civil procedures too. In individual cases it is the state authority that has to prove the court that the identification is justifiable the information cannot be obtained in any other way. After a few months the Hungarian government modified the media law:

Article 6

(2) In order to investigate a crime, the court has the right – in exceptionally justified cases as defined by law – to oblige the media content provider or a person in an employment relationship or in other work-related legal relationship with a media content provider to reveal the identity of the journalists' source or to hand over any document, object, or data carrier that could potentially identify the journalists' source.

Under the new rule, the general right of confidentiality is not unlimited. It does not cover the protection of journalists' sources transmitting classified data without authorization and, in exceptionally justified cases during judicial and proceedings by investigating authorities, media content providers may be obliged to reveal their sources “in the interests of protecting national security and public order or uncovering or preventing criminal acts”. The scope of exceptions is narrow and justifies the restriction of journalists' rights to confidentiality (even the most debated category of “public order” can be interpreted based on criminal law jurisprudence). The courts and competent authorities must construe these exceptions narrowly in order to ensure that the freedom of the press is respected.⁷⁴

⁷³ http://hunmedialaw.org/dokumentum/95/Mediaszolg_sajtoterm_fogalma_IAS_EN_FINAL_20120117_final.pdf

⁷⁴ http://mediatanacs.hu/dokumentum/2791/1321457199hungary_new_media_regulation_eng_web.pdf

Encryption and Anonymity of the Sources

Anonymity is primarily characteristic of the online press. Anonymous journalism or journalistic activity conducted under a pen-name does not, of course, entail a waiver of legal liability. When it comes to the right of public figures and private persons to privacy, similarly to the protection of reputation and honour, there are differences in the extent of privacy protection afforded to public figures and private persons. The private life of a public figure has a huge impact on his or her position. According to decision No. 60/1994 (XII.24) of the Constitutional Court, in order to serve the purposes of a democratic public life and of public opinion, constitutionally protected extent of privacy afforded to state officials and other public figures in politics is more limited than the privacy of others (...) With regard to persons exercising state powers and undertaking a public role for political purposes, the right of others- especially of voting citizens- to the disclosure of public interest data is given priority over the right to the protection of the personal data of the former persons if such personal data may be relevant to the public activities- or to the evaluation thereof- of such persons [justification, Part IV/2, Point *ba*].

Nevertheless, even the most prominent politicians have a certain degree of privacy. According to the *erga omnes* presumption stipulated in [Article 8(7) of] the Freedom of Information Act, “permission shall be deemed as granted by the subject in relation to personal data disclosed or released for publication by the subject during a public appearance.”⁷⁵

Investigative journalists often use encryption software in order to protect their data. One popular data protecting software called Pretty Good Privacy (PGP) is freely available without government interference. National Security services can “gather information from telecommunications systems and other data storage devices” without a warrant. According to the Electronic Communications Act, electronic communications service providers are obligated to “cooperate with organizations authorized to perform intelligence information gathering and covert acquisition of data.” Additionally, the act states that “the service provider shall, upon the written request from the National Security Special Service, agree with the National Security Special Service about the conditions of the use of tools and methods for the covert acquisition of information and covert acquisition of data.” In accordance with the EU Directive 2006/24/EC on data retention, ISPs and mobile phone companies in Hungary must retain user data for up to one year, including personal data, location, caller phone numbers, the duration of phone conversations, IP addresses, and user IDs for investigative authorities and security services. There is no data on the extent of these activities, even though there is a legal obligation to provide the European Commission with statistics of the queries for data made by the investigating authorities. However, in April 2014, the European Court of Justice declared the EU Data Retention Directive invalid, causing a number of countries within the EU to rethink their data retention legislation.⁷⁶

⁷⁵ András Koltay, *Hungarian Media Law* (2012)

⁷⁶ http://nhit.hu/dokumentum/72/Freedomhouse_HU1209.pdf

10. Are whistle-blowers explicitly protected under law protecting journalistic sources? Is there another practice protecting whistle-blowers? Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

10.1 The Question's Appearance in Hungary

The protection of sources and informants in Hungary had been unclear for a long time. Protection of insider informants incidentally became part of the common talk as well as part of the principal priority of the governance's anti-corruption program, right after Stephen M. Kohn's – chief of the American Nation Whistleblower Center – visit to Hungary in 2008. The summit was attended by high ranked Hungarian politicians and government representatives as well as members of the Anticorruption Advisory Board, which was set up by the Hungarian government. Information about the American whistleblowing policy's practice caused severe misinterpretations. Since then, in government pronouncements and press releases, domain policy concerning the delivering insider information had been presents as the major tool for the Anti-corruption fight, which had been widely spread in developed democracies. The hurriedly made Hungarian regulations in turn worked out procedures for the protection of informants and for the purpose of incentive material compensations. According to the newly introduced American example – the government decided to set up a General Welfare Bureau⁷⁷.

10.2. The Historical Motives Behind the Regulation

Despite the existence of several progressive international regulations, an act winded up source protection from January 1, 2011, which was imposed by the next government. Several American member states' shield-laws or the European Court of Human Rights' verdicts could have served as a bench-mark (*Sanoma Uitgevers B.V. v. The Netherlands*, 2010). Nevertheless, in the name of law, solely sources concerning public welfare could enjoy the benefit of source protection. Protection act tied to the indeterminable public welfare does not have subjective right nature. The by-laws say that in exceptionally justified cases, the source of the information can be forced to disclosure by the court or any other authorities for the purpose of protecting state-security and public order, or felony reconnaissance and prevention. This means that the disclosure of the informant practically can be forced, referring to any obscure cause, without the need for judicial decision. The act remains silent on harmonies with procedural laws (especially criminal laws), this also pints to the fact that the regulation is not prudent.⁷⁸

⁷⁷ Szente Zoltán: A bennfentes informátorok(whistleblower) alkalmazásának lehetőségei a korrupcióellenes küzdelemben (The opportunities of applying whistleblowers in the fight against corruption) page 1.-2.

⁷⁸ <http://tasz.hu/politikai-szabadsagjogok/mediatorveny-elemzese-also-resz>

In May 2012 the Hungarian parliament recognized the change of the “media-constitution”, which significantly extended the protection of journalist’s sources. This was triggered by the impact of national and international media coverage and a precedent that caused general public outcry. In June 2011, a department of the Budapest Police Headquarters had ordered Hungary’s leading news website chief editor to reveal informants, only a few days after the Constitution came into force in media provisions that allowed it. Thomas Bodoky – of course – did not disclose the source, referring to the acts of the Constitutional Law and European Human Rights. During the long legal procedure, the police and the prosecutor’s office rejected the request, and then in December 2011, the Constitutional Court stated: the legislator inadequately regulated the journalistic source protection. The National Cooperation System – in an uncharacteristic manner – five months later prepared the act-proposal, moreover in the parliament debate; it accepted an amendment from the opposition⁷⁹.

10.3. The Executory Regulation

According to the new regulation, sources of journalists can only be disclosed in criminal proceedings and has to be supported by judicial decisions only. This can only take place if the knowledge of the identity of a source of information is essential in detecting the crime in the current case, the expected evidence from the source is irreplaceable, and the interest of detecting the crime in the particular case outweighs the interest of the protection of the information’s source. There is only one problem with the provision: in almost all criminal cases, the journalist can be forced by the court to disclose the source’s identity, although this can only be allowed in serious crimes – according to the European Human Rights. In practice, this conflict can be resolved, if the acting judges can measure up properly the interest of the society in each case.⁸⁰

The amendment added to the Code of Civil Procedure (Act III of 1952 170.§ (1) f))⁸¹, the Criminal Procedure (Act XIX of 1998. 82.§ (1) d))⁸² and General Rules of Administrative Proceedings and Services (Act CXL of 2004. 53.§ (4) c)), that a media service or a third party that is in contract with the mentioned body, may refuse to testify, if that leads to the disclosure of the informant’s identity. Also, it added that a person can only be forced to disclosing a source’s identity, if the court decides so, but only if conditions stated in the acts of basic rules of press’ freedom and media contents are met. In addition, the current law on the topic (Act CIV of 2010 on the Freedom of the Press and Fundamental Rules of Media Content basic rules)⁸³ also states that a media service cannot be held responsible for any infringement that was committed for the purpose of collecting information that concerns public interest (in controlled framework, e.g. the act of collection cannot be in conflict with criminal laws).

⁷⁹ http://hvg.hu/cimke/Bodoky_Tam%C3%A1s

⁸⁰ <http://atlatszo.hu/2012/05/25/ujzagiroi-forrasvedelem-mukodik-a-nemzeti-egyuttmukodes-rendszere/>

⁸¹ http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=95200003.TV

⁸² http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99800019.TV

⁸³ http://nmhh.hu/dokumentum/162262/smtv_110803_en_final.pdf

The Section 78 Subsection (1) of Labour Code (Act I of 2012 on the Labour Code, the Labour Code)⁸⁴, states that an employer or employee may terminate an employment relationship by extraordinary dismissal in the event that the other party

- a) wilfully or by gross negligence commits a grave violation of any substantive obligations arising from the employment relationship, or
- b) otherwise engages in conduct rendering further existence of the employment relationship impossible. No deviation from this provision shall be considered valid.

From this it cannot be validly derogated from. Although the scope of the “substantive obligations” arising from the employment relationship cannot be accurately determined (that should be considered in each case separately), according to the Labour Code, today in Hungary an employer is entitled to dismiss an employee, who is delivering insider information to an outside body, because the 10. § (2) paragraph of the Act states that, [a] Employers may only disclose facts, data and opinions concerning an employee to third persons in the cases specified by law or with the employee's consent.” This provision – which is one of the “fundamental rule” of meeting obligations in the Labour Code – itself is also incompatible with external “whistleblowing”, because the exact principle is that, someone is delivering confidential information about the organisation to other body or person, who has the possibility to perform against the misdemeanour or infringement. But it is in contradiction to the so called internal whistleblowing, where the concerned organisation does not have the institutional procedure that provides for receiving and investigating such notifications. So the insider information trading is per definition classified as serious violation of obligation by the Hungarian Labour Act, which renders the most severe employer sanction – the termination of employment with extraordinary notice.⁸⁵ Although from 2014, privately held companies are also entitled to set up a statutory abuse-reporting system, under which employees may report securely about suspicious events inside the company.

The Act CLXV of 2013 on Complaints and General Interest's Notification is a positive development, but Hungary may not yet be classified to the “most advanced announcer-protection law practicing states” on the list of Transparency International, because it does not currently have a particular program, that would ensure the effective protection of announcers against the possible negative sanctions. According to the domestic law, the person concerned with the investigation can handle the personal data of the announcers and people involved in the announcement without prior consent, assuming that the operation of the system is reported to the data protection register and comply with the other statutory obligations.⁸⁶

⁸⁴ <http://www.1x1forditiroda.hu/Act I of 2012 on the Labor Code.pdf>

⁸⁵ Szente Zoltán: A bennfentes informátorok(whistleblower) alkalmazásának lehetőségei a korrupcióellenes küzdelemben (The opportunities of applying whistleblowers in the fight against corruption) page 15.
http://www.kozigkut.hu/doc/szente_09okt.pdf

⁸⁶ <http://www.haszon.hu/archivum/10409-vedett-vallalati-besugok.html>

Article 257 of Act IV of 1978 of the old Criminal Code existed for the protection of insider informants and was directly applicable, which makes the retaliation against the “public concern announcer” a criminal offense, when it states that “Any person who takes any detrimental action against a person who has made an announcement of public concern is guilty of a misdemeanour punishable by imprisonment for up to two years, community service work, or a fine.” The new Code regulates only the abuse of data relating to a public concern: misdemeanour is committed when a person conceal, destroy, or falsify data after the court has obliged the person to release the data (Article 220 Subsection (1) of Act C of 2012 on new Criminal Code).⁸⁷

12. Conclusion

Based on this research we can see that freedom of the press does not mean that journalism have no legal restrictions and controls. However we have limits in every field of our lives, we can still be free. The key is to define the limits precisely and find balance.

In the case of the press the obligation for the journalists - where they are **forced to disclose the source- is quite clear and exact**. First of all after some disappointing incident (like the Bodoky-case⁸⁸) the legislators corrected the inaccuracy and follow the amendment of the law. It is partly the result of the Constitutional Court's control, and partly the reasonable thinking in the parliament. Secondly, originally the government wanted to give police officials the power to demand the name of a journalist's source. Now only a judge can decide whether a journalist must name their source. So it is already a development.

Besides legal safeguards for the press have special significance as the **freedom of expression** is an essential and very sensitive pillar in democratic societies. Although the Hungarian law tries to protect the freedom of expression and contains **guarantees the right of the journalist to not disclose the source of information** the Hungarian legal system really needs to improve.

We can claim that the justice of **Hungary tries to implement the practice of the Strasbourg Court**. Our Constitutional Court's decisions are the safeguards of the respect of the ECHR. Traversed the last twenty years the Constitutional Court adopted about 1500 decisions from which they referred to the culture of the human right's protection of Strasbourg at about 150 occasions. The asked Courts in Hungary said that they do not allude to the Convention in their sentences, but the judges are reckon with the principles of the Convention and the practice formed by the case law of the ECtHR.

⁸⁷ Szente Zoltán: A bennfentes informátorok (whistleblower) alkalmazásának lehetőségei a korrupcióellenes küzdelemben (The opportunities of applying whistleblowers in the fight against corruption) page 16.

http://www.kozigkut.hu/doc/szente_09okt.pdf

⁸⁸ In 2011 the Hungarian police confiscated a hard drive which was the property of Tamas Bodoky the co-founder and editor in chief of atlazo.hu investigative site. Tamas Bodoky made a complaint and the case ended up in a law amendment. (with the help of CC of Hungary's decision)

To sum up Hungary should regulate this matter (prohibition for the journalists) much detailed and should defend the sources much more – if needed even against the journalists – like other European countries do it. But we made our own progress and it slowly gets closer to the European standards.

13. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

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- Act V of 2013 on the Civil Code of Hungary
- Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information
- Act CIV of 2010 on Freedom of Press and Fundamental Rules of Media Contents'
- Act LXIV of 2012 on Amending Acts related to Media-services and Press-products
- Act II of 2012 on offences, the procedure in relation to offences and the offence record system
- Decision 165/2011. (XII. 20.) AB of the Hungarian Constitutional Court on the Media Regulation
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- 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

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14. Table of provisions

Provisions in native language	Corresponding translation
<p>Alaptörvény IX. Cikk</p> <p>(1) Mindenkinek joga van a véleménynyilvánítás szabadságához.</p> <p>(2) Magyarország elismeri és védi a sajtó szabadságát és sokszínűségét, biztosítja a demokratikus közvélemény kialakulásához szükséges szabad tájékoztatás feltételeit.</p>	<p>Fundamental Law Article IX</p> <p>(1) Everyone shall have the right to freedom of speech.</p> <p>(2) Hungary shall recognise and protect the freedom and diversity of the press, and shall ensure</p> <p>the conditions for free dissemination of information necessary for the formation of</p> <p>democratic public opinion.</p>
<p>a Polgári Törvénykönyvről szóló 2013. évi V. törvény 2:49. §</p> <p>(1) Irodalmi, művészeti, tudományos vagy közéleti szerepléssel járó tevékenységet felvett névvel is lehet folytatni, ha ez nem jár mások lényeges jogi érdekének sérelmével.</p> <p>(2) Ha az irodalmi, művészeti, tudományos vagy közéleti szerepléssel járó tevékenységet folytató személy neve összetéveszthető a már korábban is hasonló tevékenységet folytató személy nevével, az érintett személy kérelmére a név - e tevékenység gyakorlása során - megkülönböztető toldással vagy</p>	<p>Act V of 2013 on the Civil Code of 2:49:</p> <p>(1) Literary, artistic or scientific activities or activities accompanying public performances may be pursued under an assumed name, provided that it does not result in any harm to the relevant lawful interests of other persons.</p> <p>(2) If the name of a person engaged in literary, artistic or scientific activities or in activities accompanying public performances can be confused with the name of another person who has already been engaged in similar activities, at the request of the</p>

<p>elhagyással használható.</p>	<p>relevant person such name may be used with a distinctive addendum or omission while engaged in such activities.”</p>
<p>Büntetőeljárásról szóló 1998. évi XIX. törvény</p> <p>36. § (1) bekezdés Az általános nyomozó hatóság a rendőrség.</p>	<p>Criminal Procedure Act of 1998</p> <p>Article 36 (1) The general investigating authority is the police.</p>
<p>82. § (1) bekezdés A tanúvallomást megtagadhatja:</p> <p><i>b)</i> az, aki a (4) bekezdés esetét kivéve magát vagy hozzátartozóját bűncselekmény elkövetésével vádolná, az ezzel kapcsolatos kérdésben, akkor is, ha a tanúvallomást az <i>a)</i> pont alapján nem tagadta meg,</p> <p><i>c)</i> - a 81. § (2) bekezdésében foglalt titoktartási kötelezettség esetét ide nem értve - az, aki a foglalkozásánál vagy közmegebízásánál fogva titoktartásra köteles, ha a tanúvallomással a titoktartási kötelezettségét megsértené, kivéve, ha ez alól a külön jogszabály szerint jogosult felmentette, vagy külön jogszabály szerint a bíróság, az ügyész, illetőleg a nyomozó hatóság megkeresésére a titoktartási kötelezettség alá eső adat továbbítása a felmentésre jogosult számára kötelező,</p>	<p>Article 82(1) The following may refuse to testify as a witness:</p> <p><i>b)</i> Those who – with the exception of subsection (4) – would incriminate themselves or their relatives, on the related issues, even if they have not refuse to testify under item a)</p> <p><i>c)</i> those – excluding the case of secrecy obligation set forth in 81 (2) who are bound by secrecy owing to their profession or public office, if their testimony would violate such secrecy obligation, unless they have been relieved by a person authorised pursuant to a separate legal regulation, or unless the person authorised pursuant to a separate legal regulation is obliged to transmit the data subject to secrecy obligation under a separate legal regulation at the request of the court, the prosecutor or the investigating authority.</p>

<p>82. § (6) bekezdés A bíróság akkor kötelezheti a médiatartalom-szolgáltatót, valamint a vele munkaviszonyban vagy munkavégzésre irányuló egyéb jogviszonyban álló személyt a számára a médiatartalom-szolgáltatói tevékenységgel összefüggésben információt átadó személy kilétének felfedésére, ha három évig terjedő vagy ennél súlyosabb szabadságvesztéssel büntetendő szándékos bűncselekmény felderítése érdekében az információt átadó személy kilétének ismerete nélkülözhetetlen, az ettől várható bizonyíték mással nem pótolható, továbbá a bűncselekmény felderítéséhez fűződő érdek - különösen a bűncselekmény tárgyi súlyára tekintettel - olyan kiemelkedő, amely az információforrás titokban maradásához fűződő érdeket egyértelműen meghaladja.</p>	<p>Article 82.(6)</p> <p>The court will compel the media content provider , as well as other person who has legal relationship with him or who is employed or working for him in the context of media content service activity information source identity disclosure, if up to 3 or more years serious punishable with imprisonment for an intentional crime detection information transfer knowledge is essential to identify the person , if the expected evidence is irreplaceable, and if the and moral interests of crime detection (especially in view of the seriousness of the crime) is an outstanding source of information which clearly exceeds the interest in maintaining the confidentiality of the information source</p>
<p>95. § A tanú életének és testi épségének vagy személyes szabadságának védelme, valamint annak érdekében, hogy a tanú a vallomástételi kötelezettségének eleget tegyen és a vallomását megfélemlítés nélkül tegye meg, a tanút az e törvényben meghatározottak szerint védelemben kell részesíteni.</p>	<p>Article 95 In order to protect the life, physical integrity or personal freedom of the witness as well as to ensure that the witness fulfils the obligation of giving testimony and the testimony is given without any intimidation, the witness shall be provided protection as specified in this Act.</p>
<p>152. § (3) bekezdés Nem foglalhatók le a terhelt és a tanúvallomás megtagadására a 82. § (1) bekezdése alapján jogosult személy</p>	<p>Article 152 (3) Letters and other written communication between the defendant and a person who may refuse to testify as a witness</p>

<p>között váltott levelek és más írásbeli közlések, feltéve, ha a dolgot a tanúvallomás megtagadására jogosult személy őrzi.</p>	<p>under Section 82 (1) may not be seized, when they are kept by the latter person.</p>
<p>152. § (4) bekezdés Nem foglalhatók le azok az iratok sem, amelyeknek tartalmára a tanúvallomás megtagadható, ha az iratot a tanúvallomás megtagadására jogosult személy őrzi. Ez a korlátozás kiterjed annak a személynek a hivatali helyiségében őrzött iratokra és dolgokra, aki a 82. § (1) bekezdés <i>c)</i> pontja alapján a tanúvallomást megtagadhatja.</p>	<p>Article 152(4) Documents the contents of which may be subject to the refusal of a testimony may not be seized, either, when they are kept by the person who may refuse to testify as a witness.</p> <p>This restriction shall also apply to the papers and properties kept at the official premises of a person who may refuse to testify as a witness pursuant to Section 82 (1) c)</p>
<p>2004. évi CXL. törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól</p> <p>50/A. § (2) bekezdés A lefoglalás érdekében a dolog birtokosát fel kell szólítani, hogy a dolgot adja át. Nem köteles a dolog átadására az, aki tanúként nem hallgatható meg, valamint az, aki az 53. § (4) bekezdés <i>c)</i> pontja alapján a tanúvallomást megtagadhatja, ha a számára információt átadó személy kilétét a dolog átadásával felfedné.</p>	<p>Act CXL of 2004 on the general rules of administrative proceedings and services</p> <p>50/A. Article (2) In the process of implementation of the seizure the holder of the property shall be advised to surrender the property. Any person who cannot be heard as a witness shall not be compelled to surrender the property, nor any person who has the right to refuse to testify under Paragraph <i>c)</i> of Subsection (4) of Section 53 if having the property surrendered would expose the identity of a person from whom he receives information.</p>

<p>50/A. § (2a) bekezdés Az 53. § (4) bekezdés <i>c)</i> pontja alapján a tanúvallomás megtagadására jogosult személynek a dolog átadása alóli mentessége az annak alapjául szolgáló jogviszony megszűnése után is fennmarad.</p>	<p>50/A. Article (2a) The exemption of any person who has the right to refuse to testify under Paragraph <i>c)</i> of Subsection (4) of Section 53 from having to surrender the property shall remain to apply after the underlying relationship is terminated.</p>
<p>50/A. § (5) bekezdés A lefoglalást elrendelő, valamint a lefoglalás megszüntetése iránti kérelmet elutasító végzés ellen önálló fellebbezésnek van helye. A fellebbezésnek a végzés végrehajtására nincs halasztó hatálya, kivéve, ha a lefoglalás elrendelésére az 53. § (4) bekezdés <i>c)</i> pontjára hivatkozás ellenére került sor.</p>	<p>50/A. Article (5) The ruling ordering seizure, and the ruling declining a request for the termination of the effect of the seizure may be appealed independently. The appeal shall have no suspensory effect on the enforcement of the ruling, unless seizure is ordered notwithstanding reference to Paragraph <i>c)</i> of Subsection (4) of Section 53.</p>
<p>51§ (4) bekezdés A törvényen vagy kormányrendeleten alapuló adatszolgáltatást hivatalból folytatott eljárásban az ügyfél, illetve kérelemre indult eljárásban az ellenérdekű ügyfél akkor tagadhatja meg, ha</p> <p><i>b)</i> nyilatkozatával saját magát vagy hozzátartozóját bűncselekmény elkövetésével vádolná</p> <p><i>c)</i> az ügyfél, illetve az ellenérdekű ügyfél médiatartalom-szolgáltató, vagy vele munkaviszonyban vagy munkavégzésre irányuló egyéb jogviszonyban álló személy, és nyilatkozatával a számára a médiatartalom-szolgáltatói tevékenységgel összefüggésben információt átadó személy kilétét felfedné.</p>	<p>Article 51(4) Where the disclosure of data is prescribed by an act or government decree, the client in proceedings opened ex officio, or the adverse party in proceedings opened upon request may refuse to comply if:</p> <p><i>b)</i> compliance would implicate himself or his relative in some criminal activity; or</p> <p><i>c)</i> the client or the adverse party is a media content provider or any person it employs under contract of employment or some other form of employment relationship, and his statement would expose the identity of any person from whom they receive information relating to the media content they provide</p>

<p>53§ (4) bekezdés A tanúvallomás megtagadható, ha</p> <p>a) a tanú az ügyfelek valamelyikének hozzátartozója,</p> <p>b) a tanú vallomásával saját magát vagy hozzátartozóját bűncselekmény elkövetésével vádolná, vagy</p> <p>c) A cselekvőképtelen és a korlátozottan cselekvőképes tanú meghallgatását csak a tanú törvényes képviselőjének jelenlétében lehet lefolytatni.</p>	<p>Article 53(4) Testimony may be refused if:</p> <p>a) the witness is a relative of any of the clients;</p> <p>b) it would implicate the witness himself or his relative in some criminal activity; or</p> <p>c) Questioning of an incompetent person or person of limited legal capacity may take place only if the witness's legal representative is present</p>
<p>53§ (8) bekezdés A (4) bekezdés c) pontjában foglalt mentesség az annak alapjául szolgáló jogviszony megszűnése után is fennmarad.</p>	<p>Article 53 (8) The exemption described in Paragraph c) of Subsection (4) shall remain to apply after the underlying relationship is terminated.</p>
<p>57/A § (7) bekezdés Ha a szemletárgy birtokosa médiatartalom-szolgáltató, vagy vele munkaviszonyban vagy munkavégzésre irányuló egyéb jogviszonyban álló személy, nem kötelezhető a szemletárgy felmutatására, ha ezzel a számára a médiatartalom-szolgáltatói tevékenységgel összefüggésben információt átadó személy kilétét felfedné. Ez a mentesség az annak alapjául szolgáló jogviszony megszűnése után is fennmarad.</p>	<p>Article 57/A (7) The holder of the subject-matter of the inspection, if a media content provider or any person it employs under contract of employment or some other form of employment relationship, may not be ordered to present the subject-matter of the inspection if it would expose the identity of any person who supplies information relating to the media content provided. Such exemption shall remain to apply after the underlying relationship is terminated.</p>

<p>Munka törvénykönyvéről szóló 2012. évi I. törvény</p> <p>78. § (1) A munkáltató vagy a munkavállaló a munkaviszonyt azonnali hatályú felmondással megszüntetheti, ha a másik fél</p> <p><i>a)</i> a munkaviszonyból származó lényeges kötelezettségét szándékosan vagy súlyos gondatlansággal jelentős mértékben megszegi, vagy</p> <p><i>b)</i> egyébként olyan magatartást tanúsít, amely a munkaviszony fenntartását lehetetlenné teszi.</p>	<p>Labour Code Section 78 (1) An employer or employee may terminate an employment relationship without notice if the other party:</p> <p>a) willfully or by gross negligence commits a grave violation of any substantive obligations arising from the employment relationship; or</p> <p>b) otherwise engages in conduct that would render the employment relationship impossible.</p>
<p>10. § (2) A munkáltató köteles a munkavállalót tájékoztatni személyes adatainak kezeléséről. A munkáltató a munkavállalóra vonatkozó tény, adatot, véleményt harmadik személlyel csak törvényben meghatározott esetben vagy a munkavállaló hozzájárulásával közölhet.</p>	<p>Article 10(2) Employers shall inform their workers concerning the processing of their personal data. Employers shall be permitted to disclose facts, data and opinions concerning a worker to third persons in the cases specified by law or upon the worker's consent.</p>
<p>a médiaszolgáltatásokról és a tömegkommunikációról szóló 2010. évi CLXXXV. törvény</p> <p>1. § (1) A törvény hatálya kiterjed a Magyarországon letelepedett médiatartalom-szolgáltató által nyújtott médiaszolgáltatásra</p>	<p>Act CLXXXV of 2010 on Media Services and Mass Communication</p> <p>Article 1 (1) The Act shall apply to media services and press products provided and published by media content providers</p>

<p>és kiadott sajtótermékre.</p>	<p>established in Hungary.</p>
<p>155.§ (2) bekezdés A Hatóság a tényállás tisztázása érdekében jogosult a médiaszolgáltatással, sajtótermék kiadásával, illetve műsorterjesztéssel kapcsolatos, akár üzleti titkot is magában foglaló adatot tartalmazó valamennyi eszközt, iratot, dokumentumot megtekinteni, megvizsgálni, azokról másolatot, kivonatot készíteni.</p>	<p>Article 155 (2) In order to establish the facts of the case, the Authority shall have the right to view, examine and make duplicates and extracts of any and all instruments, deeds and documents containing data related to the media service, the publication of the press product or the media service distribution, even if such instrument, deed or document contains business secrets</p>
<p>155.§ (5)b) a Hatóság nem kötelezheti a médiatartalom-szolgáltatót, valamint a vele munkaviszonyban vagy munkavégzésre irányuló egyéb jogviszonyban álló személyt olyan adatszolgáltatásra, valamint olyan irat, eszköz, dokumentum átadására, amellyel az a számára a médiatartalom-szolgáltatói tevékenységgel összefüggésben információt átadó személy kilétét felfedné.</p>	<p>Article 155 (5) b) the Authority may not oblige the media content provider or a person in an employment relationship or in a work - related legal relationship with a media content provider to provide any data, or to hand over any deed, instrument or document that would reveal the identity of the person delivering information to him/her in connection with the media content provider's activities.</p>
<p>155.§ (6) bekezdés Az (5) bekezdés szerinti mentesség az annak alapjául szolgáló jogviszony megszűnése után is fennmarad. Az (5) bekezdés a) pontjában foglalt tilalom alól az ügyfél felmentést adhat.</p>	<p>Article 155 (6) The exemption specified under Paragraph (5) shall remain valid even after the legal relationship justifying the exemption is terminated. The client may grant an exemption regarding the prohibition stipulated in Point a) of Paragraph (5).</p>

<p>a nemzetbiztonsági szolgálatokról szóló</p> <p>1995. évi CXXV. törvény</p> <p>54. § (1) bekezdés A titkos információgyűjtés keretében a nemzetbiztonsági szolgálatok</p> <p>a) felvilágosítást kérhetnek;</p> <p>b) a nemzetbiztonsági jelleg leplezésével információt gyűjthetnek;</p> <p>c) titkos kapcsolatot létesíthetnek magánszeméllyel;</p> <p>d) az információgyűjtést elősegítő információs rendszereket hozhatnak létre és alkalmazhatnak;</p> <p>e) sérülést vagy egészségkárosodást nem okozó csapdát alkalmazhatnak;</p> <p>f) a saját személyi állományuk és a velük együttműködő természetes személyek védelmére, valamint a nemzetbiztonsági jelleg leplezésére fedőokmányt készíthetnek és használhatnak fel;</p> <p>g) fedőintézményt hozhatnak létre és tarthatnak fenn;</p> <p>h) a feladataik által érintett személyt, valamint azzal kapcsolatba hozható helyiséget, épületet és más objektumot, terep- és útvonalszakaszt, járművet, eseményt megfigyelhetik, az észlelteket technikai eszközzel rögzíthetik;</p> <p>i) az 56. §-ban foglaltakon kívül beszélgetést lehallgathatnak, az észlelteket technikai</p>	<p>Act on the National Security Services 1995 Article 54 (1)</p> <p>As part of the gathering of intelligence, the national security services</p> <p>a) may ask for information;</p> <p>b) may gather information by concealing the national security nature thereof;</p> <p>c) may establish secret contacts with private individuals;</p> <p>d) may establish and use information systems promoting the gathering of intelligence;</p> <p>e) may set a trap that does not cause injury or impair health;</p> <p>f) may prepare and use cover documents for the protection of their own staff members and the natural persons co-operating with them, as well as for the concealment of the national security nature involved;</p> <p>g) may establish and maintain cover organizations;</p> <p>h) may put the persons affected by their tasks under surveillance, together with the rooms, buildings, and other installations, sectors and route sections, vehicles, and events that may be associated with them, and may record the observations using technical means;</p> <p>i) may tap conversations, and may record the observations using technical means;</p>
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<p>eszközökkel rögzíthetik;</p> <p>j)¹²⁰ hírközlési rendszerekből és egyéb adattároló eszközökből információkat gyűjthetnek.</p>	<p>j) may gather information from telecommunications systems and other data storage systems subject to licence.</p>
<p>a sajtószabadságról és a médiatartalmak alapvető szabályairól 2010. évi CIV. törvény</p> <p>6§ (1) bekezdés A médiatartalom-szolgáltató, valamint a vele munkaviszonyban vagy munkavégzésre irányuló egyéb jogviszonyban álló személy törvényben meghatározottak szerint jogosult a számára a médiatartalom-szolgáltatói tevékenységgel összefüggésben információt átadó személy (a továbbiakban: információforrás) kilétét a bírósági és hatósági eljárások során titokban tartani, továbbá bármely, az információforrás azonosítására esetlegesen alkalmas dokumentum, irat, tárgy vagy adathordozó átadását megtagadni.</p>	<p>the Press Freedom Act (2010)</p> <p>Article 6 (1) A media content provider or a person in an employment relationship or in other work-related legal relationship with a media content provider shall be entitled, as stipulated by the respective Act, to keep the identity of a person delivering information to him/her in connection with the media content provider's activities (hereinafter as: journalists' source) in the course of court or regulatory procedures, as well as to refuse to hand over any documents, objects or data carriers that could potentially reveal the identity of the journalists' source.</p>
<p>6§ (2) bekezdés A bíróság - bűncselekmény elkövetésének felderítése érdekében - törvényben meghatározott, kivételesen indokolt esetben az információforrás felfedésére, valamint az információforrás azonosítására esetlegesen alkalmas dokumentum, irat, tárgy vagy adathordozó átadására kötelezheti a médiatartalom-szolgáltatót, valamint a vele munkaviszonyban vagy munkavégzésre irányuló egyéb jogviszonyban álló személyt.</p>	<p>Article 6 (2) In order to investigate a crime, the court has the right – in exceptionally justified cases</p> <p>as defined by law – to oblige the media content provider or a person in an employment relationship or in other work-related legal relationship with a media content provider to reveal the identity of the journalists' source or to hand over any document, object, or data carrier that</p>

	could potentially identify the journalists' source.
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ELSA IRELAND

Contributors

National Coordinator

Kaleb Honer

National Academic Coordinator

Kaleb Honer

National Researchers

Declan Gardiner

Gemma Hayes

Ina Mizkulin

Kelly O'Brien

Kevin O'Reilly

Kuiying Meng

Leanne Digney

Naoise Duffy

Sam Elliott

Sarah Redmond

1. Introduction

The legal position of journalists in Ireland is somewhat unclear due to a distinct lack of legislative oversight. Ambiguity is a reoccurring theme when addressing the protection of journalistic sources - this is evident from the lack of an explicit definition of a journalist, and direct protection of sources. However, this gap in the law has been filled to an extent by cases guided by the European Convention on Human Rights namely, *Mahon and Others v Keena and Kennedy*.¹ The aim of this report is to analyse the legal position of journalistic sources in Ireland with reference to the European Convention on Human Rights.

2. Does The National Legislation Provide (Explicit or Otherwise) Protection of the Right of the Journalists Not to Disclose Their Source of Information? What Type of Legislation Provides this Protection? How exactly is this Protection Construed in National Law?

2.1. Introduction

Under current Irish national legislation, there are no safeguards to protect journalistic sources, express or otherwise. Any protections in the Irish jurisdiction arise under common law precedent and have been granted by the Supreme Court, the highest court in the State, most notably in *Mahon and Others v Keena and Kennedy*.² Protection of journalistic sources is considered to be central to preserving the flow of information from members of the public to the media and essential for a democratic state to exist and thrive. According to Byrne: "...without such protection, sources would be deterred from assisting the press and the public would, as a consequence, not be informed about matters of public interest... protection of confidential journalistic sources is therefore one of the basic conditions for press freedom and for a properly functioning democracy."³ Bills were introduced in 1995 to amend national defamation legislation which contained provisions ensuring protection of journalistic sources. The Defamation Bill (No.5 of 1995) sought to require disclosure of a journalist's sources only where it was necessary in the interests of justice, national security, or for prevention of disorder or crime.⁴ Another bill, the Contempt of Court Bill (No. 2 of 1995) was also proposed with the aim of protecting journalistic sources, yet neither were enacted by *Dáil Éireann* (Irish House of Parliament).

¹ *Mahon and Others v Keena and Kennedy* [2010] 1 IR 336

² *Mahon and Others v Keena and Kennedy* [2010] 1 IR 336

³ Damian Byrne, The Law on Protection of Journalistic Sources in Ireland, (2009) 14(6) The Bar Review, 119

⁴ Marie McGonagle, *Media Law* (2nd edn, Round Hall 2003) page 195

The Irish Courts had previously refused to recognise the entitlement of journalists to maintain confidentiality of their sources.⁵ Many have called for express protection to be recognised by national legislation, due to the *Mabon* case; article 40.6.1 of *Bunreacht na hÉireann* (Constitution of Ireland); and Article 10 of the European Convention on Human Rights, which both offer protection to an individual's right to freedom of expression. Until *Mabon*, no journalistic privilege of refusal to answer questions in court existed in this State and this was solidified by precedent. Hyde notes that; "... historically in Ireland there has been a certain antipathy to the notion of an informer. Academics have highlighted how there has often been a reluctance in the Irish psyche to "*speak truth to power*".⁶ This research paper will outline the precedent which has contributed to the Irish position on protection of journalists' sources, and question whether protection through common law is sufficient. Further, this paper will assess whether the Irish jurisdiction is in compliance with the rulings of the European Court of Human Rights.

2.2. Precedent

In 1974, in the case of *Re Kevin O'Kelly*, a journalist at the trial of an accused person was questioned by counsel about an interview with the accused he had published.⁷ The prosecution was relying upon the journalist's evidence to establish that the accused was a member of an illegal organisation. The journalist refused to reveal the identity of the person he interviewed, citing it as a breach of journalistic ethics to disclose the name of confidential sources. The Court found the journalist to be in contempt of court and was sentenced to three months' imprisonment. Applicability of Article 40.6.1^o considered in *O'Kelly*, where the Court of Criminal Appeal declined to recognise any form of journalistic privilege.⁸ Walsh J commented: "Journalists and reporters are not any more constitutionally or legally immune than other citizens from disclosing information received in confidence. The fact that a communication was made under terms of express confidence or implied confidence does not create a privilege against disclosure."⁹

In *DPP v O'Keefe*, a journalist refused to identify her sources in front of a tribunal investigating irregularities in the Irish meat processing sector.¹⁰ These irregularities were highlighted by the defendant's documentary which was broadcasted by Channel 4 in the United Kingdom. McGonagle argues that journalists in this scenario could argue that the source documents are not in their power of control, but that of the broadcaster company.¹¹ The case failed due to lack of evidence.

⁵ Eoin Carolan and Ailbhe O'Neill, *Media Law in Ireland* (1 edn, Bloomsbury Professional 2010), page 130

⁶ Joanne Hyde, The Protected Disclosures Act 2014: An Overview, (2014) 11(4) Irish Employment Law Journal 114

⁷ *Re Kevin O'Kelly* (1974) 63 ILTR 97

⁸ Damien Murphy, A Privilege Worthy Of Protection: Journalists And Their Sources (2012) 30 TCL Rev 1

⁹ *Re Kevin O'Kelly* (1974) 63 ILTR 97

¹⁰ *DPP v O'Keefe*, The Irish Times, January 28 1995

¹¹ Marie McGonagle, *Media Law* (2nd edn, Round Hall 2003) page 195

The Irish court diverged from the *O'Kelly* decision in *Mahon* in 2012.¹² This case concerned an anonymous letter received by the first named defendant, Keena, a journalist for *The Irish Times* newspaper. The correspondence included letters from the *Tribunal of Inquiry Into Certain Planning Matters and Payments*, (hereafter “the Mahon Tribunal”) seeking information in relation to certain payments made to the then *Taoiseach* (Prime Minister), Mr Bertie Ahern.¹³ The Mahon Tribunal was investigating corrupt payment made to certain Irish politicians in the 1990s. As a result of the anonymous correspondence, *The Irish Times* published a report on September 21st 2006 with the headline “Tribunal Examines Payments to *Taoiseach*”. Some days later, the Mahon Tribunal ordered the defendants to produce all documents which made up the communication received by *The Irish Times* which lead to the September 21st publication. The second named defendant, the editor of the newspaper, revealed that this was not possible, as they had been advised by legal counsel to destroy the correspondence. *The Irish Times* disputed the right of the Tribunal to require the production of these documents on the grounds that their production would run the risk of identifying journalistic sources, thereby jeopardising the primary obligation of every editor and journalist to protect their sources of information, and that it was in the public interest that this obligation and right was protected in the production of a story which, in itself, was published in the public interest.¹⁴ The newspaper further argued that the Mahon Tribunal’s case for disclosure was weakened by the fact that the source of the letter could not be established due the anonymous nature of the correspondence. Murphy highlights that this meant there was a very real possibility that no concrete benefit would accrue as a result of piercing the journalists’ privilege to protect their source’s identity.¹⁵

The Supreme Court held on appeal that the journalists were not required to reveal the identity of their confidential source to the Mahon Tribunal. Fennelly J, whilst condemning *The Irish Times*’ decision to destroy the letter, held with concern: “I raise the question as to whether it can truly be said to be in accord with the interests of a democratic society based on the rule of law that journalists, as a unique class, have the right to decide for themselves to withhold information from any and every public institution or court regardless of the existence of a compelling need, for example, for the production of evidence of the commission of a serious crime ... In the event of conflict, whether in a civil or criminal context, the courts must adjudicate and decide, while allowing all due respect to the principle of journalistic privilege. No citizen has the right to claim immunity from the processes of the law.”¹⁶ In coming to their decision, the majority relied on cases from the European Court of Human Rights, such as *Goodwin v United Kingdom*, which declared: “Protection of journalistic sources is one of the basic conditions for press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest.”¹⁷ This is also in accordance with Article 10(2) of the

¹² *Mahon and Others v Keena and Kennedy* [2010] 1 IR 336

¹³ Damian Byrne, *The Law on Protection of Journalistic Sources in Ireland*, (2009) 14(6) *The Bar Review*, 119

¹⁴ Diarmuid Murphy, *A Privilege Worthy Of Protection: Journalists And Their Sources* (2012) 30 *TCL Rev* 1

¹⁵ *ibid* (2012) 30 *TCL Rev* 1

¹⁶ *Mahon v Keena and Kennedy* [2010] 1 IR 336

¹⁷ *Goodwin v United Kingdom* (1996) 22 *EHRR* 123

ECHR. This privilege is not absolute but restrictions must be in accordance with law, pursue a legitimate aim and be considered necessary in a democratic society, as per *Goodwin*.¹⁸

2.3. Conclusion

It is submitted that if journalists could be judicially compelled to depart from their undertaking of confidentiality, the relationship of trust and confidence between journalist and confidential source would be endangered. If it was known that there was a likelihood that an earlier promise of confidentiality could later be overruled by a court of law, it would act as a barrier to the freedom of the press, the public's right to know, and freedom of expression. After Ireland enacted the European Convention on Human Rights Act 2003, it can firmly be asserted that *Re O'Kelly* is no longer good law, due to the protection of freedom of expression under Article 10. This was recognised by the Supreme Court in *Mahon*, where the court appeared to acknowledge the right of non-disclosure of journalistic sources as a discreet category of private privilege. Nonetheless, there is no question of journalism as a profession enjoying an absolute privilege against disclosure of confidential sources — it is subject to judicial discretion, to be weighed against competing rights and interests on a case-by-case basis. Journalists will still be compelled to answer questions or reveal sources by a court if disclosure is deemed justified “by an overriding requirement in the public interest”.¹⁹

This judicial power is too restrictive on a journalist's right to freedom of expression and does not act as an adequate protection of journalistic privilege. A common law protection is not enough to protect journalistic sources, especially when it is subjected to judicial discretion. The Irish legislature should develop upon the rights conferred under the ECHR, the ECHR Act 2003, and as implied by the Supreme Court in *Mahon*, and enact provisions which guarantee protection of journalistic sources and their freedom of expression. Article 40.3.1^o of the Irish Constitution reads: “The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen”.²⁰ As such, the State is required to vindicate the rights to a journalist's freedom of expression, and in extension, the protection of journalistic sources through legislation and common law.

¹⁸ *ibid*

¹⁹ Damian Byrne, *The Law on Protection of Journalistic Sources in Ireland*, (2009) 14(6) *The Bar Review*, 119

²⁰ *Bunreacht na hÉireann*, Article 40.3.1^o

3. Is there, in domestic law, a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

In Ireland the right to freedom of expression is enshrined in Article 40.6 of the 1937 Constitution²¹. The right to freedom of expression is of course laid down in the European Convention on Human Rights in Article 10 and Courts in Ireland are obliged in so far as possible to give effect to these rights when interpreting Irish law²². However there is no explicit reference to a prohibition on the disclosure of journalistic sources in either the Irish Constitution or Article 10. Neither is there express protection for freedom of press in both of these articles, however courts have consistently acknowledged the important role that the press plays in the exercise of freedom of expression rights²³ and the position of journalists and media as the eyes and ears of the public. Some legislation in Ireland limits the broadcasting of information on the basis of protecting a public interest such as the Radio and Television Act 1988, such a ban must be prescribed by law, pursuing a legitimate aim and necessary in a democratic society²⁴. There is no overarching rule in Ireland in statute that prohibits the disclosure of journalistic sources, such a rule would severely impact the power of the courts to limit the extent of journalistic privilege. This creates a conflict where the confidentiality and trust between a journalist and their network of sources comes into contact with a duty in proceedings to disclose sources.

3.1. National Codes of Conduct

Journalists in Ireland, and also the UK, may be members of the National Union of Journalists (NUJ) which is one of the largest unions of its kind in the world. One of the key aims of the NUJ alongside protection of employment rights is the protection of press freedom. One of the principles of the code of conduct is to protect; 'the identity of sources who supply information in confidence and material gathered in the course of her/his work'²⁵. The NUJ states that journalists have a right to apply this code and claims that it will support journalists who act in accordance with this code and the NUJ does provide legal aid to member journalists²⁶. While this does not constitute a prohibition on disclosure for the purposes of Irish law it does create an interesting dynamic whereby journalists prioritise the confidentiality of sources where to do so could possibly hold them in contempt of court.

²¹ Constitution of Ireland Article 40.6.

²² European Convention on Human Rights Act 2003 s.2

²³ Angel Fahy, 'Confidential Sources and Contempt of Court: An argument for change' (2009) DIT, p3.

²⁴ *Murphy v Ireland* [2003] ECHR 352.

²⁵ National Union of Journalists Code of Conduct, 2011. URL: <https://www.nuj.org.uk/about/nuj-code/> Accessed on: February 28 2016.

²⁶ *Ibid.*

The Press Council of Ireland which was established in 2008 also provides a code of practice. Principle 6 briefly states that; 'Journalists shall protect confidential sources of information'²⁷. At the same time the Press Council highlights the importance of protecting the public interest and fair procedures²⁸. Does this mean that the duty not to disclose information should give way where the journalist is compelled to do so by law? The consequences of a breach of this code of practice is determined by the Office of the Press Ombudsman through a process of mediation. The downside is that the ombudsman has no power to fine publications, it can only oblige the publication to publish the decision on the front page²⁹. The problem with this is that it cannot undo the damage of revealing the name of a source which could be in breach of the code of practice, even an apology or redaction could not remedy such a breach. It is interesting to note however that the source of the complaint can ask to maintain their anonymity in the complaints procedure. The Council of Europe also recognised that journalists may sign up to codes of conduct and that due recognition must be given to these³⁰. The Council also recommended that authorities should attempt to limit public disclosure where relevant in order to protect confidentiality³¹. Although these two provisions could contradict one another where the disclosure of journalistic sources is concerned the latter principle appears to be phrased more strongly so as to offer greater protection to confidentiality rather than freedom of expression.

3.2. The Public Interest

In many situations the public interest requires the opposite of a prohibition on the disclosure. The main reason why prohibitions on disclosure of sources don't exist in Ireland seems to be a conflict arising in the interests of protecting confidential information and protecting confidential sources. For example the Freedom of Information Act 1997 excludes certain classes of information from being publicly accessible³². One of the most recent Irish Supreme court decisions concerning court ordered disclosure of journalistic sources is *McMahon Tribunal v Keena*³³. In this case the High Court made an order under Tribunal of Inquiries (Evidence) (Amendment) Act 1997³⁴ compelling the journalist to reveal his confidential sources. It seems from this case that in an attempt to prohibit the disclosure of confidential information, the court wanted to order the disclosure of the confidential source of this information. Fennelly J. giving judgement in the Supreme Court ultimately found that the order compelling the disclosure of the source had not been justified by an overriding public interest required by Art 10 ECHR looking especially at the case of *Goodwin v The United Kingdom*³⁵. It seems then that the Irish courts are

²⁷ Press Council of Ireland, Code of Practice, 2016. URL: <http://presscouncil.ie/code-of-practice.150.html>
Accessed on: February 28 2016.

²⁸ Ibid, Principle 3.

²⁹ Eoin Carolan, *Media Law in Ireland*, (Dublin, 2010, Bloomsbury Professional) [9.20-9.22].

³⁰ Council of Europe Committee of Ministers, Recommendation No. R (2000) 7.

³¹ Ibid, Principle 5e.

³² Part III.

³³ [2009] IESC 64.

³⁴ Section 4.

³⁵ [2002] 35 EHRR 18

trying to align themselves better with ECHR law to achieve a better balance between counter-veiling public interests and protecting sources.

3.3. Criminal Law Prohibitions

Another area of law that could prohibit disclosure derives from common law and only applies to court proceedings. Journalists can be held to be in civil contempt of court if they frustrate an order of confidentiality³⁶. For example in the case of *Council of the Bar of Ireland v Sunday Business Post Ltd* a journalist that breached an injunction designed to protect a confidential letter was held to have interfered with the process of the court³⁷. Civil contempt can also apply to other proceedings for example tribunals of inquiry³⁸. The consequences of being held in civil contempt of the court could be a fine or imprisonment and such punitive measures may continue until the contempt is remedied.

In an effort to deal with Ireland's deteriorating reputation in relation to corruption and whistleblowing the legislature introduced the Protected Disclosures Act 2014. Section 16(1) prevents disclosure of information that might identify the person that made the protected disclosure. Disclosures may also be made directly to the media and for this there is a much higher standard that must be reached in order for the disclosure to be protected³⁹. Some of the protections offered in part III of the act are for immunity from suit, protection from dismissal and possible tort action to recover for any detriment suffered.

4. Definition of Journalist in Irish Law and the Scope of Application

4.1. Who is a "Journalist" According to the National Legislation?

Under current national legislation, there is no explicit definition of a journalist in Ireland. However, there are a number of related definitions considered in certain statutes in Irish law and an important consideration set out in the Irish Constitution. Furthermore, as Ireland has a common law legal system, there is essential case law to be considered in terms of defining a journalist.

The role of the media is set out in the Irish Constitution⁴⁰ in Article 40.6.1.

The most relevant aspects of Article 40.6.1 in the current context is the mention of the importance of "education of public opinion" by the "organs of public opinion". A journalist could be seen to fall under the capacity of an organ of public opinion. The Article clearly

³⁶ Carolan (n 8) [5.61]

³⁷ HC, Unreported, 30 March 1993; Carolan (n 8).

³⁸ Tribunals of Inquiry Acts 1921-1979; Carolan (n 8) [5.88].

³⁹ Section 10.

⁴⁰ *Bunreacht na hÉireann*, Article 40.6.1°

recognises the freedom of expression of the media with particular reference to allowing criticism of government policy. This further conveys the importance of the role of the media in ensuring constitutional democracy.⁴¹

The position of a journalist in Irish law was further considered in case law. In the case of *Re Kevin O'Kelly*⁴², Walsh J set out that, subject to the restrictions above in the Constitution, “a journalist has a right to publish news and that right carries with it, of course, as a corollary the right to gather news. No official or governmental approval or consent is required for the gathering of news or the publishing of news.” This conveys that a journalist is an individual who gathers news and this individual has a right to publish such news, recognising the function and importance of newsgathering. This case’s main point of consideration involved journalistic privilege and disclosure of sources where it was found that “journalists are no more constitutionally or legally immune than other citizens from disclosing information received in confidence”. This judgment was departed from in the Supreme Court decision of *Mahon v Keena*⁴³, in terms of journalistic privilege. However, the description of a journalist’s right to gather information and the right to publish news has not be distinguished and can be seen to remain relevant.

It can be further seen in the 2012 High Court ruling in *Cornec*⁴⁴, that an individual who may not be a journalist in the “strictest sense” can still be recognised under Article 40.6.1 and that the traditional distinction between a journalist and a lay person has broken down in recent times. The individual in this case had been chronicling the activities of religious cults and it was found that his activities fell squarely within the “education of the public” conceived in the Constitution. This established that a person who blogs on an internet site can constitute an “organ of public opinion”. This provides constitutional protection to those outside the traditional notions of journalism.⁴⁵ This may appear to broaden the scope of a traditional journalist to provide for protection for those not historically seen to be journalists.

The Defamation Act 2009 also provides legislative strength to the Press Council of Ireland. The Press Council’s Code of Practice sets out in its Preamble that there is a freedom to publish which includes the right of a print and online news media to publish what it considers to be news and the right to comment upon it. Furthermore, with this freedom of press comes the responsibility to maintain the highest ethical and professional standards.

In relation to defamation, a journalist, who is involved with a member of the Press Council, would be required to uphold the standards set out in the Press Council’s Code of Practice and these standards apply to both print and online media.

⁴¹ Eoin Carolan and Ailbhe O'Neill, *Media Law in Ireland* (Bloomsbury Professional 2010) 19

⁴² *Re Kevin O'Kelly* (1974) 108 ILTR 97

⁴³ *Mahon v Keena* [2009] 2 ILRM 373

⁴⁴ *Cornec v Morrice & Ors* [2012] IEHC 376

⁴⁵ Eoin Carolan, "The Implications of Media Fragmentation and Contemporary Democratic Discourse for "Journalistic Privilege" and the Protection of Sources" [2013] 49(1) *The Irish Jurist* 187

4.2. Is it in your view a Restricted Definition for the Purpose of the Protection of Journalistic Sources?

As there is no explicit definition of a journalist in Irish legislation, it is difficult to expressly state whether it is restrictive for the purpose of the protection of journalistic sources.

The Constitution's description of "organs of public opinion" does not set out exact limits as to who or what qualifies under this description but includes the press, radio and cinema. However, it does contain a restriction in stating that these organs of public opinion shall not be used to undermine the authority of the state or public order and morality. This can still be seen to be open for interpretation by the courts, which will be discussed by reference to a number of cases in this text.

While Irish Courts initially appeared to hold the view that a journalist does not have a greater right to privilege than the ordinary citizen⁴⁶, there has been a shift from this viewpoint in which the Irish courts have developed a method of protecting journalistic sources unless the disclosure of said sources is necessary for the administration of justice.⁴⁷ The description of a journalist in the case of *Re Kevin Kelly* is based on a right to gather and publish news and the description itself is not restrictive and appears to be quite broad. However, there are certainly restrictions imposed upon the individual who gathers and publishes news surrounding the concept of journalistic privilege and protecting journalistic sources.

The significant cases in this regard are the previously mentioned Irish Supreme Court decision in *Mahon v Keena*⁴⁸ and the European Court of Human Rights cases considered in this judgment.⁴⁹ In Ireland, the privilege to refuse to answer questions can be employed by solicitors, clergymen and members of the Oireachtas in certain circumstances, but this right was not enjoyed by journalists.⁵⁰ However, the decision in *Mahon v Keena* departed from this blanket restriction.⁵¹ The Mahon case involved a journalist and an editor for The Irish Times who refused to answer questions about a source for a tribunal. The source took place in the form of a letter and this was subsequently destroyed. Justice Fennelly in this judgment acknowledged that while the tribunal was entitled to inquire about the disclosure of such information, the information in question was "a matter of public interest which a newspaper would in the ordinary way be entitled to print".⁵² The Supreme considered the case of *Goodwin v United Kingdom*⁵³ and observed that the national courts had a margin of appreciation in deciding whether to order the disclosure of a source. In order to make this decision the court needs to ascertain "whether there is a pressing need for

⁴⁶ *Re Kevin O'Kelly* (1974) 108 ILTR 97

⁴⁷ Damien Byrne, 'The Law on Protection of Journalistic Sources in Ireland' [2009] 14(6) The Bar Review 122

⁴⁸ *Mahon v Keena* [2009] 2 ILRM 373

⁴⁹ *Goodwin v United Kingdom* (1996) EHRR 123. Also *Fressoz and Roire v France* (1999) 31 EHRR 28

⁵⁰ Eoin Carolan and Ailbhe O'Neill, *Media Law in Ireland* (Bloomsbury Professional 2010) 163

⁵¹ *Ibid* 164

⁵² *Mahon v Keena* [2009] 2 ILRM 373

⁵³ *Goodwin v United Kingdom* (1996) EHRR 123

such a restriction” under Article 10 of the European Convention on Human Rights.⁵⁴ The court noted the importance of the availability of sources in order for the free press to function and keep the public informed and also described journalists as a “unique class”.⁵⁵ Fennelly J ultimately decided that in the event of either a criminal or civil conflict, the courts must be the ones to adjudicate and decide whether a journalist’s source should be protected, while also allowing “all due respect to the principle of journalistic privilege”.⁵⁶ This ultimately provides journalists a manner of protection for their sources in Irish law, even if there are limits.

In relation to the Press Council’s Code of Practice of newspapers and periodicals, it is also of interest to note under Principle 6 that “journalists shall protect confidential sources of information.”⁵⁷ This confirms the high standards of confidentiality in the profession of journalism in this regard.

4.3. What is the Scope of Protection of other Media Actors? Is the Protection of Journalists’ Sources Extended to Anyone Else?

In terms of the scope of protection of other media actors, it is necessary to consider those who may not traditionally fall within the description of a journalist. Once again, the protection of journalistic privilege and of freedom of the press relates to the Constitution’s identification of “organs of public opinion”.⁵⁸ These organs of public opinion include the press, radio and cinema. Organs of public opinion have a role to play in facilitating and informing the public debate.⁵⁹

In terms of analysing the scope and parameters of journalistic privilege under Irish law, it is necessary to examine two High Court decisions. The first case is that of *Cornec v Morrice*⁶⁰ and the second is *Walsh v News Group Newspapers*⁶¹.

In the *Cornec* case, it was stated that the public interest in ensuring the protection of journalist’s sources is high as journalism is central to the free flow of information. This judgment appears to, through its considerations, support the notion that these “organs of public opinion” enjoy constitutional protection in this regard because of what they do, rather than what they are.⁶² Journalists are central to the process of dissemination of information and encouraging public

⁵⁴ *Mabon v Keena* [2009] 2 ILRM 373

⁵⁵ *Ibid*

⁵⁶ *Ibid*

⁵⁷ Damien Byrne, 'The Law on Protection of Journalistic Sources in Ireland' [2009] 14(6) *The Bar Review* 119

⁵⁸ *Bunreacht na hÉireann*, Article 40.6.1°

⁵⁹ Eoin Carolan, 'The Implications of Media Fragmentation and Contemporary Democratic Discourse for "Journalistic Privilege" and the Protection of Sources' [2013] 49(1) *The Irish Jurist* 183

⁶⁰ *Cornec v Morrice & Ors* [2012] IEHC 376

⁶¹ *Walsh v News Group Newspapers* [2012] IEHC 353

⁶² Eoin Carolan, 'The Implications of Media Fragmentation and Contemporary Democratic Discourse for "Journalistic Privilege" and the Protection of Sources' [2013] 49(1) *The Irish Jurist* 186

debate. Carolan argues that the Constitution is concerned with protecting the process rather than to provide privileges to particular personnel.⁶³

Therefore, it can be seen that the *Cornec* case adopted a broad approach to the scope of journalistic privileges and to whom these protections can be extended. This expansive approach was based on facilitating the journalistic endeavour in the name of public interest.⁶⁴ Based on this analysis, the court concluded that these protections could be invoked by individuals who were not journalists but who performed an essentially analogous role.⁶⁵ In the case of *Cornec*, this individual was a blogger for an internet site and he was found to be equally entitled to rely on the constitutional protection. The court further acknowledged that the traditional distinction between ordinary citizens and the traditional media has broken down in recent times, partially due to the existence of social media.⁶⁶ The individual's actions in this case fell "squarely within the education of public opinion" originating from the constitution and therefore his sources were to be protected to the same extent as that of a journalist. This appears to create a flexibility in terms of this constitutional protection regardless of the person or medium and their links to traditional journalism and media.

However, it is important to note that this does not mean that all blogs can garner this protection. Justice Hogan specifically limited this protection by stating "it is probably not necessary here to discuss questions such as whether the casual participant on an internet discussion site could invoke Goodwin-style privileges"⁶⁷.

It is also important to briefly consider the case of *Walsh v News Group Newspapers*⁶⁸ which confirms that protection of journalistic sources can be limited by the courts based on the public interest. This allows the protection of sources to be contextual even when concerning an established news organisation or journalist.⁶⁹ This case involved a false accusation made by an individual and it was alleged that a sum of money had been offered by the journalist if the individual lodged said false complaint. While the journalist stated the individual was not relied upon as a source and therefore the court did not need to adjudicate on whether the journalistic protection was extended to this conduct, the court's tone illustrates it may have been reluctant to protect the activity in this case. O'Neill J. stated that this conduct could merit the description of "improper journalism".⁷⁰ It was also stated that it could not be contended that financial inducements of this nature could benefit from such privileged protection. The court also held that, in relation to a member of An Garda Síochána, discovery could be sought in a respect of any communications on the basis that the public interest did not protect unlawful disclosure of

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Ibid 187

⁶⁶ *Cornec v Morrice & Ors* [2012] IEHC 376

⁶⁷ Ibid

⁶⁸ *Walsh v News Group Newspapers* [2012] IEHC 353

⁶⁹ Eoin Carolan, "The Implications of Media Fragmentation and Contemporary Democratic Discourse for "Journalistic Privilege" and the Protection of Sources" [2013] 49(1) *The Irish Jurist* 190

⁷⁰ *Walsh v News Group Newspapers* [2012] IEHC 353

information by these officers. The Garda Síochána Act 2005 criminalised such disclosure in certain circumstances as mentioned by O'Neill J. The basis of this measure relates to the European Convention on Human Rights which states that the prevention of disorder or crime would be justified in interfering with the normal freedom of the media.⁷¹ This can be seen to relate to the report on the protection of journalists' sources to the Committee on Culture, Science and Education in 2010, which states the public authorities must not demand the disclosure of a source unless the Convention requirements are met and that the interest in the disclosure outweighs the public interest in non-disclosure. The *Walsh* case conveys that protection of journalistic sources in Ireland can be limited on public interest grounds, and possibly rejected if the court finds it is outweighed by public interest.

5. Legal Safeguards Regarding the Protection of Journalistic Sources

5.1. What are the legal safeguards for the protection of journalistic sources?

5.1.1. Constitutional Protection

Article 40.6.1^o(i) of the Constitution of Ireland provides for the right to freely express opinions and for the education of the public by organs of public expression, such as the press. It also sets out the circumstances in which these rights may be limited, including to protect morality and public order. The provision's vaguely defined potential limitations have led to multiple calls for its reform, including by a Constitutional Review Group (CRG) in 1996 who recommended it be amended along the lines of Article 10 ECHR, calling the provision 'weak and heavily circumscribed'.⁷² These amendments were never introduced, and the call for reform was echoed over a decade later by a Joint Committee tasked with reviewing Article 40.6.1^o(i).⁷³ However, the Joint Committee found that due to the courts' less restrictive interpretation of the provision in recent years, such amendments were not 'immediately necessary', and that it should therefore be amended 'whenever an appropriate opportunity arises'.⁷⁴ No such amendments have yet taken place, nor are there any scheduled in the near future.

5.1.2. ECHR and Other Domestic Protection

Journalists may also rely on Article 10 ECHR to protect them from being forced to disclose their sources, by virtue of The ECHR Act 2003, which incorporated the provisions of the ECHR into Irish law. Article 2 of the ECHR Act obliges courts to interpret any legal provision in a manner which is compatible with the provisions of the ECHR.

⁷¹ European Convention on Human Rights, Art. 10(2)

⁷² The Constitutional Review Group, *Report of the Constitution Review Group* (1996) 268.

⁷³ Joint Committee on the Constitution, *First Report of the Joint Committee on the Constitution: Article 40.6.1.i – Freedom of Speech* (2008) 69.

⁷⁴ *ibid* 75.

Other legal safeguards may include the Protected Disclosures Act 2014, which will be discussed in Section 10, and judicial review proceedings. A journalist ordered by an administrative body, such as a tribunal, to disclose their sources may seek a judicial review by the High Court of the body's decision-making process and whether they had the authority to make such an order.⁷⁵ Relief may be granted in the form of an injunction, damages or by quashing the order. Though there have been a number of cases where journalists have been ordered by tribunals to disclose their sources,⁷⁶ judicial review proceedings have never been used to safeguard journalistic privilege.

5.1.3. Where a Journalist Wishes to Disclose the Identity of a Confidential Source

In the event that a journalist wishes to disclose the identity of a previously confidential source, due to, for example, public interest concerns, there is no specific legislation outlining the steps to be taken, nor do the Press Council of Ireland (PCI) or Press Ombudsman offer any direction. In the context of broadcast journalism, the national broadcaster Raidió Teilifís Éireann (RTÉ) outlines in its 'Journalism Guidelines' that the approval of the Managing Director who initially granted confidentiality to a source must be sought if the journalist in question wishes to no longer honour 'an assurance given in relation to conditions of participation, use of content, confidentiality or anonymity'.⁷⁷ It is likely that the internal practices of a publication may similarly determine the procedure to be followed in such a scenario involving print media outlets (for whom there are no equivalent published guidelines available, save for the PCI's Code of Practice⁷⁸).

5.2. How are the laws implemented?

5.2.1. Pre-ECHR Act 2003

Historically, Article 40.6.1^o(i) was applied in an inconsistent and often restrictive manner. The first case taken under the provision in 1982 saw the Supreme Court set a low threshold to be met to justify a restriction on the rights guaranteed by Article 40.6.1^o(i), namely that they not be restricted on 'any irrational or capricious ground',⁷⁹ yet just two years later the same court stressed that those rights could only be curtailed if necessary for the administration of justice.⁸⁰ Article 40.6.1^o(i) therefore served as a weak and uncertain protection for journalists wishing to protect their sources, a failing which was acknowledged by the CRG in 1996.⁸¹

⁷⁵ RSC Ord 84.

⁷⁶ *Mahon v Keena* [2009] IESC 64; *Mahon v Post Publications* [2009] IESC 15.

⁷⁷ RTÉ 'Journalism Guidelines' (April 2012) 25 < <http://www.rte.ie/documents/about/rte-journalism-guidelines-april3-2012.pdf> > accessed 13 April 2016.

⁷⁸ 'Code of Practice' < <http://www.presscouncil.ie/code-of-practice.150.html> > accessed 22 February 2016.

⁷⁹ *The State (Lynch) v Cooney* [1982] 1 IR 361.

⁸⁰ *Cullen v Toibin* [1984] ILRM 577.

⁸¹ The Constitution Review Group, *Report of the Constitution Review Group* (1996) 268.

5.2.2. Adoption of ECHR Act 2003

The adoption of the ECHR Act in 2003 created a new impetus for the development and clarification of the position of journalistic privilege in Ireland.⁸² Irish courts began to interpret journalistic privilege to reflect ECtHR case law in the area, and it became accepted that the privilege was an important part of Irish jurisprudence which journalists could rely on.⁸³ Recent cases taken under Article 40.6.1^o(i) such as *Cornec v Morrice*⁸⁴ have seen the courts adopt a proportionality doctrine, as well as balancing the competing interests at stake to determine whether the privilege should apply.

In most cases concerning journalistic privilege, however, the courts have tended to rely on Article 10 ECHR in lieu of Article 40.6.1^o(i).⁸⁵ In *Mabon v Post Publications*,⁸⁶ which concerned a journalist refusing to disclose sources following an order for disclosure by a tribunal of inquiry, both the High and Supreme Courts focused their consideration almost exclusively on Article 10 and ECtHR case law. In refusing the tribunal's request for an injunction, both courts found that the tribunal had not established relevant or sufficient reasons for the order, nor was the order sought proportionate.⁸⁷

The court adopted a similar approach in *Mabon v Keena*,⁸⁸ whose facts were broadly similar to those of *Mabon v Post Publications*. After considering ECtHR case law, the High Court granted the tribunal's order for disclosure, stating that the identification of the source of leaked confidential information was a pressing social need which satisfied the ECtHR's 'necessary in a democratic society' test, thereby justifying the order.⁸⁹ An important issue was the fact that the journalists had destroyed the documents sought by the tribunal *after* being asked to disclose them, which the court called 'reprehensible conduct'.⁹⁰ This view was reiterated by the Supreme Court, however they overturned the High Court's ruling, finding that the journalists' conduct was not a relevant consideration in whether journalistic privilege could be asserted, and that the tribunal had not established a sufficiently clear benefit to justify the order for disclosure.⁹¹ However, the court directed that legal costs be awarded against the journalists, stressing that in the event of a conflict, it is only for the court to decide whether a journalist should be compelled to reveal their

⁸² Eoin Carolan, 'The Implications of Media Fragmentation and Contemporary Democratic Discourse for 'Journalistic Privilege' and the Protection of Sources' (2013) 49 *The Irish Jurist* 182, 184.

⁸³ *Cornec v Morrice* [2012] IEHC 376; *Louis Walsh v The News Group Newspapers Limited* [2012] IEHC 353.

⁸⁴ [2012] IEHC 376.

⁸⁵ Dr Pascale Duparc-Portier, 'Media Reporting of Trials in France and in Ireland' (2006) 6 *Judicial Studies Institute Journal* 197, 202.

⁸⁶ [2005] IEHC 307 affd [2007] IESC 15.

⁸⁷ *Mabon v Post Publications* [2007] IESC 15 [98].

⁸⁸ [2007] IEHC 348 revd [2009] IESC 64.

⁸⁹ *Mabon v Keena* [2007] IEHC 348.

⁹⁰ *ibid.*

⁹¹ *Mabon v Keena* [2009] IESC 64 [100].

sources.⁹² This was upheld by the ECtHR following an appeal of the costs decision. The court did not accept that the decision would have a 'chilling effect' on freedom of expression, stating that it would have no impact on journalists who 'vehemently protected their sources yet recognised and respected the rule of law'.⁹³

While the ECHR Act and ECtHR case law have undoubtedly been beneficial to the judicial interpretation of journalistic privilege in Ireland, the courts' tendency to rely on Article 10 means there has been little clarification or elaboration on the difficult constitutional questions posed by Article 40.6.1^o(i), such as when the vaguely defined restrictions listed in the provision may be invoked.⁹⁴ This has resulted in a great deal of uncertainty as to the scope of the safeguards of journalistic privilege available under the Constitution.

5.3. How are the legal safeguards combined with self-regulatory mechanisms?

Formed in 2008, The Press Council of Ireland (PCI) is independent of both media and government, though it is statutorily recognised by section 44 of the Defamation Act 2009. The PCI acts as an independent regulator of the press through its complaints mechanism and Code of Practice, which sets out the ethical standards which all member publications must comply with.

If a publication or journalist's behaviour is in breach of the Code of Practice, any individual or organisation affected may make a complaint for free to the Press Ombudsman. If the complaint is upheld by the Ombudsman, the offending publication may be ordered to publish the decision in line with the PCI's publication guidelines.⁹⁵ Any decision of the Ombudsman may also be appealed to the PCI. This 'dual system' of the Ombudsman and PCI has been seen as providing a more 'thorough and efficient' complaints mechanism.⁹⁶

If a matter complained of is already the subject of legal proceedings in Ireland, the complaint will not be processed by the Ombudsman until the proceedings have concluded. This is provided that the proceedings conclude within 2 years and the complaint is submitted to the Ombudsman within the standard 3 month deadline.

⁹² *Mahon v Keena* [2009] IESC 78.

⁹³ *Keena & Kennedy v Ireland* App no 29804/10 (30 September 2014) [50].

⁹⁴ Tom Daly 'Strengthening Irish Democracy: A Proposal to Restore Free Speech to Article 40.6.1^o(i) of the Constitution' (2009) 31 *Dublin University Law Journal* 228, 229.

⁹⁵ 'Press Council's Publication Guidelines' (April 2014) <<http://www.pressombudsman.ie/cases-and-appeals/publication-guidelines-for-newspapers-and-periodicals.1162.html>> accessed 22 February 2016.

⁹⁶ Annabel Brody 'Pressing Times Ahead: The Evolution of Press Councils in an Age of Media Convergence' (2011) 16 *Communications Law* 106, 108.

The Ombudsman receives an average of 383 complaints per year, however just 39 of these on average are subject to a decision by the Ombudsman.⁹⁷ Principle 6 of the Code of Practice, which requires journalists to protect their confidential sources, is the principle under which the least complaints are made, with no complaints being made in 2008, 2011, 2012, 2013 or 2014.⁹⁸ In contrast, an average of 152 complaints are made per year in relation to the most frequently cited principle, which deals with truth and accuracy in reporting.⁹⁹

6. In the respective national legislation are the limits of non-disclosure of the information in line with the principles of the Recommendation No R (2000) 7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

6.1. Constitutional Protection of the Freedom of Expression

Talking about the freedom of expression in Ireland, the 1937 Constitution, specifically article 40.6.1. is the starting point, which provides the right to freely express opinions and for the education of the public by organs of public expression, such as the press.¹⁰⁰

Originally, the Constitution was not interpreted in a way to offer sufficient protection against disclosure of journalistic sources. This is also visible from the wording of the provision stressing the fact that the limitations of the freedom of expression are public order, morality or the authority of the State¹⁰¹. This authority of the State was imposed on the journalists prior to *Mahon v Keena*. In the *Re Kevin O'Kelly*¹⁰², Walsh J stated that journalists are no different than any other citizen and they may be charged with common law offence of contempt of court for failing to reveal their sources.

Although this Constitutional provision did not offer a great level of protection being too wide to guarantee the defense of the journalists' rights to freedom of expression, recent jurisprudence of

⁹⁷ 'Statistics' 2008-2014 <<http://www.presscouncil.ie/case-and-statistics.152.html>> accessed 16 February 2016.

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ *Bunreacht na hÉireann*, Article 40.6.1°

¹⁰¹ Eoin Carolan, *Constitutionalizing Discourse: Democracy, Freedom of Expression and the Future of Press* (2014), 51(1), *The Irish Jurist*, 1-27, 7

¹⁰² *Re O'Kelly* (1974) 108 ILTR 97

the Irish Courts set clear parameters for protection of journalistic privilege in line with the article 10 of the European Convention of Human Rights and the decisions of the ECHR.¹⁰³ An act of the Irish Parliament, the European Convention on Human Rights Act 2003, gave further power to the Convention in Ireland requiring the Irish Courts to interpret legislation in accordance with its provisions. Reading through the recent Irish case law it is clear that the provisions of the Recommendation No R (2000) 7 are respected even though the Recommendation itself has not been formally incorporated in the Irish legislature.

6.2. Case Law

The first Irish case that acknowledged the right of non-disclosure of journalistic sources and engaged in balancing the public interest in protecting the journalistic sources and countervailing benefits of their disclosure was *Mahon v Keena*¹⁰⁴. The Court confirmed that the journalistic privilege is protected in Irish law but with certain limitations.

In the subsequent case *Cornec v Morrice*, Justice Hogan restated the Court's opinion from the *Mahon v Keena*. *"Yet the public interest in ensuring that journalists can protect their sources remains very high, since journalism is central to the free flow of information which is essential in a free society (...) If journalism and the media did not enjoy at least a general protection in respect of their sources, that robust political debate – a sine qua non in any democratic society – would be still born. Only the naïve would suggest otherwise."*¹⁰⁵ This role of the press as the "public watchdog" was previously identified by the ECHR in the case *Sanoma Uitgevers BV v Netherlands*¹⁰⁶.

In this, very important ruling, Nicola Tallant and Mike Garde objected to the orders to compel them to testify in the US proceedings. They objected on the ground of journalistic privilege. While Mr. Tallant was a journalist of *Sunday World*, Mr. Garde was a blogger and a director of *Dialogue Ireland*, an organisation promoting freedom of religious choices. Nevertheless, the judge made an analogy between blogging and a traditional journalism as both activities fall within "education of public opinion".

It was decided that Constitution protects this kind of speech and his right to impart information. *"Mr. Garde's activities fall squarely within the "education of public opinion" envisaged by Article 40.6.1. A person who blogs on an internet site can just as readily constitute an "organ of public opinion" as those which were more familiar in 1937 and which are mentioned (but only as examples) in Article 40.6.1, namely, the radio, the press and the cinema."*¹⁰⁷ The court even expanded the scope of the privilege from the protection of the journalistic sources to the protection of the content, even in the cases when the identity of the source is known. The fact that the identity of the person is revealed should be just one of the

¹⁰³ *Carolan (n1) 7*

¹⁰⁴ *Mahon v Keena* [2009] 2 ILRM 373

¹⁰⁵ 2012 IEHC 376 at para 46

¹⁰⁶ *Sanoma Uitgevers BV v Netherlands* App. no. 38224/03 (EctHR, 2010)

¹⁰⁷ *Cornec v Morrice (n9)* at paras 65-67

fact that could weight in favour of the proportionality of the measure aiming at disclosure of information.¹⁰⁸

6.2. Limits on Principle of Non-Disclosure

After concluding that the Irish courts recognize the principle of non-disclosure, it is important to explore the limits of such a protection. Recommendation of the Council of Europe sets clear limits of non-disclosure, enumerating the situations in which the disclosure could be regarded as necessary. The importance of the procedure applied to limit the journalistic privilege and of finding the balance between public interest to protect the journalistic sources and countervailing public interest, was touched upon in *Mahon v Keena*. *“While the present case does not concern information about the commission of serious criminal offences, it cannot be doubted such a case could arise. Who would decide whether the journalist's source had to be protected? There can be only one answer. In the event of conflict, whether in a civil or criminal context, the courts must adjudicate and decide, while allowing all due respect to the principle of journalistic privilege. No citizen has the right to claim immunity from the processes of the law.”*¹⁰⁹

Similarly, the ECHR in *Uitgevers BV v Netherlands*, ruled that *“First and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body. (...) The requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not.”*¹¹⁰

In *Walsh v News Group Newspapers*¹¹¹ the Court allowed limited disclosure of journalists notes. The documents in question were obtained from a member of Garda, which constituted criminal offence and they could not be protected by the journalistic privilege. The Court, to support its findings, turned to the article 10.2 of the Convention, “prevention of disorder and crime” as a basis of interference with the freedom of expression, which is necessary in democratic society. In addition to that, the source was already identified. Nevertheless, the Court allowed any part of evidence that might lead to the identification of any yet unknown source to remain undisclosed.¹¹²

¹⁰⁸ Eoin Carolan, The Implications of media fragmentation and contemporary democratic discourse for “journalistic privilege” and the protection of sources, (2013) 49, *The Irish Jurist*, 182-192, 187

¹⁰⁹ *Mahon v Keena* [2009] 2 ILRM 373

¹¹⁰ *Sanoma Uitgevers* (n10) para 90

¹¹¹ *Walsh v News Group Newspapers* [2012] IEHC 353 (HC)

¹¹² Carolan (n12) 191

7. In the Recommendation No R (2000) 7 the Following Principles Should be Respected When the Necessity of Disclosure is Stated: Absence of Reasonable Alternative Measures, Outweighing Legitimate Interest (Protection of Human Life, Prevention of Major Crime, Defence of a Person Accused or Convicted of Having Committed a Major Crime). Under Which Criteria Can the Interest in the Disclosure Outweigh the Interest in the Nondisclosure?

7.1. The History of Journalistic Privilege in Ireland

Until quite recently the concept of journalistic privilege did not exist in any real sense in Ireland, let alone any legal discourse on scenarios whereby interest in disclosure outweighed nondisclosure in relation to journalistic sources. The Constitution grants protection to the freedom of expression in Ireland, however with set limitations and conditions.¹¹³ Immediately it is established that every citizen's right to freely express their convictions and opinions is not absolute, and is in fact 'subject to public order and morality', and establishes that the organs of public opinion must not undermine 'public order, morality or the authority of the State.' Therefore, it is clear that the Irish Constitution is not a strong protector of freedom of expression, but rather instead confines 'organs of public opinion' to restrictions which are 'open-ended and evasive of precise definition.'¹¹⁴ In fact, the Report of the Constitution Review Group recommended that this particular passage from the Constitution be replaced with something more similar to Article 10 of the European Convention on Human Rights, as it viewed the existing phrasing as "weak and heavily circumscribed."¹¹⁵

A prime example of the initial lack of any journalistic privilege in Ireland, let alone any discourse on potential nondisclosure of sources exists in *O'Brennan v Tully*, which resulted in a fine for the editor of a local newspaper for refusing to answer a relevant question, which may have identified his source.¹¹⁶ Walsh J, in *Re Kevin O'Kelly*, stated that 'journalists or reporters are not any more constitutionally or legally immune than other citizens from disclosing information received in confidence' as 'the public has a right to every man's evidence except for those persons protected by a constitutional or other established or recognized privilege.'¹¹⁷ O'Kelly believed that had he responded to the line of questioning, which required him to identify a voice on a tape recording, he would have damaged his credibility as a journalist and would have also threatened the free exchange of public opinion, thereby negatively impacting the public good.¹¹⁸

¹¹³ Article 40.6.10°

¹¹⁴ Diarmaid Murphy, "A Privilege Worthy of Protection: Journalists and their Sources" [2011] 14 TCLR 97.

¹¹⁵ Report of the Constitution Review Group (Stationery Office, 1996)

¹¹⁶ *O'Brennan v Tully* [1933] 69 ILTR 116

¹¹⁷ *Re Kevin O'Kelly* [1974] 108 ILTR 97

¹¹⁸ Marie McGonagle, *Media Law* (2nd edn, Roundhall 2003) 190

7.2. The European Approach to Journalistic Privilege

Recent developments at a European level have done much to establish journalistic privilege through the Committee of Ministers Recommendation R(2000) 7, which, among other principles, sets out suggestions for the limits to the right of nondisclosure for journalists, such as an overriding requirement in the public interest and, if circumstances are of a sufficiently vital and serious nature, encourages the seeking out of alternative evidence to journalists' sources where appropriate, as well as outlining some conditions concerning disclosure.¹¹⁹ Furthermore, due to the recent incorporation of the European Charter of Human Rights into Irish law through the 2003 Act, Ireland subsequently has to take such recommendations into consideration and is now influenced by cases from other jurisdictions that come before the European Court of Human Rights.¹²⁰

7.3. Disclosure versus Non-Disclosure at a European Level

Fressoz concerned a leaked tax document and its' inclusion in a French satirical publication, which had the outcome of the applicants being convicted and fined by French Courts.¹²¹ The European Courts noted that, despite certain protection of sources being acknowledged, journalists cannot be completely released from their duty to obey the ordinary criminal law.¹²² On foot of the facts that in this case the good faith and accuracy of the published material, along with the fact that there was not overriding necessity compelling protection of the published information, the court found that in this instance there had in fact been a violation of Article 10, as there was an absence of 'a reasonable relationship of proportionality between the legitimate aim pursued by the journalists' conviction and the means deployed to achieve that aim given the interest a democratic society has in ensuring and preserving freedom of the press.'¹²³

Fennelly also considered *Goodwin*, a landmark case in relation to journalistic privilege and in establishing the criteria necessary for disclosure or nondisclosure in contentious situations. In *Goodwin*, the European Court notably stated that the order for disclosure of journalists' sources 'cannot be compatible with Article 10 of the convention unless it is justified by an over-riding requirement in the public interest.'¹²⁴ Furthermore, it also stated that any limitations to journalistic privilege in relation to the nondisclosure of source required the 'most careful scrutiny by the court.'¹²⁵ This is in line with the guidelines issued by the Committee of Ministers.¹²⁶

¹¹⁹ Committee of Ministers Recommendation R (2000) 7

¹²⁰ European Convention on Human Rights Act 2003, Number 20

¹²¹ Eoin Carolan and Ailbhe O'Neill, *Media Law in Ireland* (Bloomsbury Professional 2010) 167

¹²² Eoin Carolan and Ailbhe O'Neill, *Media Law in Ireland* (Bloomsbury Professional 2010) 167

¹²³ *Fressoz and Roire v France* (1999) 31 EHRR 28

¹²⁴ *Goodwin v UK* (1996) EHRR 123

¹²⁵ Eoin Carolan and Ailbhe O'Neill, *Media Law in Ireland* (Bloomsbury Professional 2010) 167

¹²⁶ Committee of Ministers Recommendation R (2000) 7.

Fennelly J in deliberating the case crucially determined that in hypothetical future scenarios concerning a journalists' sources and the issue of whether there was a compulsion to disclose or a right to nondisclosure of source in situations where a serious crime is involved, it would be 'up to the courts in the event of a conflict, either civil or criminal, to adjudicate and decide while allowing due respect to the principle of journalistic privilege'.¹²⁷ 'No citizen', he claimed, 'has the right to claim immunity from the processes of the law'.¹²⁸ Fennelly believed that the discovery of the source would, in fact, be of little benefit to the Tribunal and as such there was 'no overriding requirement in the public interest' that would justify the negative effects of disclosure.¹²⁹

In *Financial Times v UK* the subject of disclosure came before the European Court of Human Rights once again, however this time it was in the context of the common law Norwich Pharmacol Principle, whereby if a person through no fault of their own becomes involved in the wrongdoing of others so as to facilitate that wrongdoing, he becomes obligated to assist the person wronged by furnishing them with all the relevant information and disclosing the identity where necessary.¹³⁰ Also unusual in this scenario was the inclusion of false information with correct information.¹³¹ The European Court of Human Rights held that an enforcement order, as was issued in this instance, though not as yet enforced against the applicants, was still sufficient to constitute an interference with freedom of expression under Article 10¹³² but that it was 'prescribed by law' within the meaning of article 10 (2).¹³³ The court was of the opinion that ordering the disclosure of a journalist's source, considering the 'chilling effect' that this could potentially have, would only be employed as a last resort where there are no alternative, less invasive methods to uncover the source and, importantly, where the risk is 'sufficiently serious and defined'.¹³⁴ It was determined that this was not the case in these proceedings as it was not clear whether or not other avenues had been explored.¹³⁵ In this case the public's interest in the protection of journalist's sources prevailed. The European Court of Human Rights also warned against allowing the conduct of the source to be a determinative issue in *Financial Times v United Kingdom*.¹³⁶

Sanoma Uitgevers BV v Netherlands is an example of another case which debates the criteria necessary for the interest in disclosure to outweigh the perceived right to nondisclosure by journalists. While the previously mentioned 'chilling effect' that disclosure can produce as a result of compelling the production of information that could help to identify source, which in this case were photographs, was acknowledged, the majority in the Third Chamber attached

¹²⁷ *Mahon v Kenna* [2009] 2 ILRM 373.

¹²⁸ *ibid.*

¹²⁹ Eoin Carolan and Ailbhe O'Neill, *Media Law in Ireland* (Bloomsbury Professional 2010) 168

¹³⁰ *Norwich Pharmacol Co v Customs and Excise Commissioners* [1974] AC 133, 175, HL

¹³¹ *Financial Times Ltd v UK* (Application No 821/03) 15 December 2009 (Forth Section)

¹³² Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR) Art 3, 1950

¹³³ *Financial Times Ltd v UK* (Application No 821/03) 15 December 2009 (Forth Section)

¹³⁴ Eoin Carolan and Ailbhe O'Neill, *Media Law in Ireland* (Bloomsbury Professional 2010) 170

¹³⁵ Eoin Carolan and Ailbhe O'Neill, *Media Law in Ireland* (Bloomsbury Professional 2010) 171

¹³⁶ *Financial Times v United Kingdom* (2010) 50 EHRR 46

more credence to the importance of the following: the disclosure order in this case was not intended to identify the applicant's source; no reasonable, alternative possibility to identify the vehicle, which was involved in a serious crime, was feasible; and the applicant's sources were never put to any inconvenience over the street race, which was the nature of the journalists' involvement with these particular sources.¹³⁷ With this in mind, the court determined that infringement on the applicant's Article 10 rights was legitimate and allowable.¹³⁸ The European Court of Human Rights found that the case was in violation of Article 10, as there had been a lack of procedural safeguards, such as a pre-emptive review of the seizure by an independent and impartial third party.¹³⁹ The investigating judge in this case, it transpired, had a role that was more advisory, which was inadequate.¹⁴⁰ This case is a prime example of the fail-safes put in place by the Recommendation No R (2000) 7 to avoid misuse of the limitations that are in place regarding the disclosure of journalists' sources.

7.4. Concluding Remarks on the Criteria under which the Interest in Disclosure Outweighs the Need for Non-Disclosure

The law in relation to journalistic privilege is still some way from achieving clarity in Ireland, and therefore so too is the distinction between scenarios when the need for disclosure outweighs the need for nondisclosure. However, upon reviewing the limited case law in Ireland, and the cases brought before the European Court of Human Rights from other jurisdictions, an indication of some of the criteria that need to be met in order for the interest in disclosure to outweigh the interest in nondisclosure can be seen. Firstly, and arguably most importantly, is the necessity for there to be an over-riding requirement in the public interest that outweighs the consistently strong desire for a free and unfettered press in a democratic society, such as, but not limited to, the prevention or prosecution of a serious crime. Secondly, there must not exist an alternative, less invasive and damaging method whereby the desired information can be ascertained which would not require the disclosure of the journalists' source, and such routes must be explored. Lastly, it is clear that certain procedural safeguards must be met in order for the disclosure to be perceived as legitimate, such as the inclusion of an independent, impartial third party to review seizures of documents that could potentially disclose a journalists' source. Though the courts in *Mahon v Keena and Kennedy*¹⁴¹ appear to have recognised the right of nondisclosure of journalistic sources, there can be no doubt that the reasons for forced disclosure are not limited to the criteria set out in the Commission, and that it is, in fact, subject to judicial discretion, and will no doubt be judged on a case by case basis. It is necessary, therefore, in order to protect the rights of journalists and ensure that the balance between when it is necessary to disclose a source and when it is prudent for the source to remain anonymous, that the recommendations set out by the Council should be incorporated into statute.

¹³⁷ *Sanomo Uitgevers BV v Netherlands* (2009) ECHR 994, (2010) ECHR 1284

¹³⁸ Diarmaid Murphy, "A Privilege Worthy of Protection: Journalists and their Sources" [2011] 14 TCLR 97

¹³⁹ *Sanomo Uitgevers BV v Netherlands* (2009) ECHR 994, (2010) ECHR 1284

¹⁴⁰ *ibid.*

¹⁴¹ *Mahon Tribunal v Keena* [2009] IESC 64

8. In the light of the case law of the European Court of Human Rights how do national courts apply the respective laws with regard to the right to protect sources?

8.1. Pre-ECHR Implementation Irish Case Law regarding the Right to Protect Sources

Protection of journalistic sources is seen as the foundation of journalistic ethics. The Press Council of Ireland published the Code of Practice which dictates the standards of ethics, which the journalist of Ireland are expected to uphold. Principle 6 explicitly states that journalists shall protect confidential sources of information.¹⁴²

In the 1974 Irish case of *Re O'Kelly*¹⁴³ an RTÉ journalist was called as a prosecution witness before the Special Criminal Court. Mr Seán McStíofán, the accused, had been charged with being a member of an unlawful organisation. The journalist in question gave evidence that he had tape-recorded an interview with a man, thought to be the accused; he identified the tape in court but refused to identify the man as he believed it would be a breach of journalistic ethics to disclose the name.

The journalist was held in contempt of court and was sentenced for three months for his refusal. The sentence was appealed to the Court of Criminal Appeal where Walsh J rejected the concept of a journalist's right to not disclose sources. Walsh J stated in his decision that, "*Journalists and reporters are not any more constitutionally or legally immune than other citizens from disclosing information received in confidence... so far as the administration of justice is concerned the public has a right to every man's evidence except for those persons protected by constitutional or other established and recognised privilege.*"¹⁴⁴

While the journalist in question did not serve the balance of his sentence, the case did set an assertion by the Court of Criminal Appeal that in the event that the administration of justice is being inhibited, journalists cannot in fact claim any privileges regarding the non-disclosure of sources.

It is important to note that the Court of Criminal Appeal found that the question of confidentiality did not arise in the case, nor did Kevin O'Kelly appeal the conviction for contempt of court, merely the sentence. Therefore it is important to express that Walsh J's comments on the matter be regarded as *obiter dicta*.

¹⁴² Principle 6.1, Code of Practice, The Press Council

¹⁴³ *Re O'Kelly* [1974] 108 ILTR 97

¹⁴⁴ *Re O'Kelly* [1974] 108 ILTR 97

The position taken by the Irish Courts in the *O'Kelly* case took place before the European Convention of Human Rights¹⁴⁵ was incorporated in Irish law in 2003. Article 10 of the Convention declares;

*"1. Everyone has the right to freedom of expression." And, 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..."*¹⁴⁶

The issue that arises, pertaining to journalistic sources, is therefore whether the forceful disclosure of sources is a contravention of the right to free speech which is encompassed in Article 10.

However, even up to the year 2007, in the case of *Gray v Minister for Justice, Equality and Law Reform*,¹⁴⁷ whereby a journalist refused to identify members of An Garda Síochána as the sources to the publication in question in the case, Quirke J expressed scepticism about the journalists attempt to exercise *"a questionable privilege in support of his refusal"*.¹⁴⁸ Although these statements were made *obiter dicta*, it highlights the aspersions of the judiciary, relating to the validity of this journalistic privilege, in the Irish Jurisdiction, as recently as the year 2007.

8.2. Relevant ECtHR Case Law

The leading ECtHR authority in this area is the case of *Goodwin v United Kingdom*.¹⁴⁹ The case arose when a journalist was put in contempt of court for not revealing his confidential source. The reason the identity of the source was being investigated was because they had revealed corporate plans of a company and the company in question was seeking an injunction on further publication of such information. In this case the European Court of Human Rights ruled in a majority of 11 to 7, that to compel a journalist to reveal his sources was contrary to article 10 of the ECHR. The court held that

*"Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest."*¹⁵⁰

In the case of *Roemen and Schmit v Luxembourg*,¹⁵¹ a journalist published an article in *Lëtzebuurger Journal* where he alleged that a minister had committed tax fraud. He concluded that the minister's conduct was particularly shameful as he was a public figure and should be setting a good example. To establish the truth of these statements the investigating judge issued two

¹⁴⁵ European Convention on Human Rights Act 2003

¹⁴⁶ European Convention on Human Rights Act 2003, s 10

¹⁴⁷ *Gray v Minister for Justice, Equality and Law Reform* [1994] 2 I.R. 61

¹⁴⁸ *Gray v Minister for Justice, Equality and Law Reform* [1994] 2 I.R. 61

¹⁴⁹ *Goodwin v The United Kingdom* [1996] EHRR 123

¹⁵⁰ *Goodwin v The United Kingdom* [1996] EHRR 123, Para 39

¹⁵¹ *Roemen and Schmit v Luxembourg* (App no. 51772/99) [2003]

search warrants for searches to be made in the applicant's home and workplace. Both warrants were executed on 19 October 1998, but no evidence was found. The applicant then sought orders setting aside the warrants on the grounds that the searches constituted an interference with his rights under Article 10 of the European Convention on Human Rights. The search warrants had been issued in order to discover the identity of the journalist's source of information. The court unanimously held that this constituted a breach of the journalist's right of non-disclosure and therefore was a breach of his rights under article 10.

In the more recent case of *Voskuil v the Netherlands*¹⁵² the importance of the freedom of the press was acknowledged and the international instruments that reflect that freedom were considered. One such international instrument being; the Council of Europe's Committee of Ministers Recommendation No. R (2000) 7¹⁵³ on the right of journalists not to disclose their sources of information.¹⁵⁴ In *Voskuil* a journalist was summoned to court to reveal his sources for a story written about arms trafficking. The purpose of his testimony was in the interests of the accused and to aid the defence. *Voskuil* however invoked his right of non-disclosure and as a result the court ordered immediate detention. When the case was referred to the ECtHR, it was upheld that journalists have a right to not disclose their sources and that requiring disclosure of sources is not compatible with Article 10¹⁵⁵ unless it is justified by an overriding public interest, echoing the test in *Goodwin*.¹⁵⁶

In the case of *Tillack v Belgium*¹⁵⁷ the ECtHR stressed that a journalist's right to not reveal his/her sources was not a mere privilege that could be given and taken away, and that the right itself should be treated with caution.¹⁵⁸ The court held that The European Anti-Fraud Office OLAF's investigation and attempt to identify Tillack's informant was indeed contrary to Article 10 of the ECHR.

Similarly in the case of *Sanoma Uitgevers B.V. v The Netherlands*¹⁵⁹ an illegal street race was held in January 2002 on the outskirts of the town of Hoorn. Journalists of *Autoweek* were invited to the event by the organisers and as such were in attendance. The applicant company intended to publish an article about illegal car races. This article would be accompanied by photographs of the street race held in January 2002, however the photograph's would be edited so as to endure anonymity. The police and prosecuting authorities were afterwards led to suspect that one of the vehicles participating in the street race had been used as a getaway car following a ram raid.

¹⁵² *Voskuil v the Netherlands* (App No. 64752/01) [22 November 2007]

¹⁵³ 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

¹⁵⁴ *Voskuil v the Netherlands* (App No. 64752/01) [22 November 2007] Para 65

¹⁵⁵ European Convention on Human Rights Act 2003, s 10

¹⁵⁶ *Goodwin v The United Kingdom* [1996] EHRR 123

¹⁵⁷ *Tillack v Belgium* (App no. 20477/05) [27 November 2007]

¹⁵⁸ Damien Byrne, *The Law on Protection of Journalistic Sources in Ireland*, (2009) 14(6) *The Bar Review*, 119

¹⁵⁹ *Sanoma Uitgevers BV v The Netherlands* (App no. 38224/03) [14 September 2010]

Subsequently a police officer contacted *Autoweek* summoning the editors to surrender to the police all photographic materials concerning the street race. At a domestic level, both in the regional and supreme courts that the principles of proportionality had been complied with and that the interference had thus been justified.

The ECtHR, however, found that the quality of the law was deficient as there were no adequate legal safeguards for *Autoweek* to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources. This therefore resulted in a violation of Article 10 of the Convention, not because there was interference but because the interference in question was not “prescribed by law”.

8.3. The Irish Perspective after the Implementation of the ECHR and the Consideration of Case Law from the ECtHR

In the Irish jurisdiction, the issue was contemplated in wake of the implementation of the ECHR and in light of the ECtHR case law outlined above, in the case of *Mabon v Keena and Kennedy*¹⁶⁰.

One substantial effect that the Convention has had on Irish free speech law is to use of the proportionality test favoured by the ECtHR. This doctrine is now regularly applied by Irish courts in their interpretation of Article 40.6.1 °.¹⁶¹ For example, in the case *Mabon v Post Publications*¹⁶² Kelly J used the proportionality doctrine, holding that any restriction on press freedom “*must be proportionate and no more than is necessary to promote the legitimate object of the restriction*”.¹⁶³ Fennelly J approved this approach on appeal.¹⁶⁴

The Supreme Court in *Mabon* referred to the approach taken by the ECtHR in *Goodwin*¹⁶⁵ where it was held that it is a requirement to take into consideration the role that journalists play in ensuring a democratic society and the disastrous effects that would occur if journalists were compelled to reveal their sources.

The decision in *Mabon v Keena & Kennedy*¹⁶⁶ is very much at odds with the decision in *Re Kevin O'Kelly*¹⁶⁷. This is a direct result of the incorporation of the European Convention On Human Rights into Irish Law by virtue of the 2003 Act and indeed because of the precedents set down by case law regarding journalistic protection, emanating from the ECtHR.

¹⁶⁰ *Mabon v Keena and Kennedy* [2009] IESC 64

¹⁶¹ Eoin Carolan and Ailbhe O'Neill, *Media Law in Ireland* (1 edn, Bloomsbury Professional 2010), p 19

¹⁶² *Mabon v Post Publications* [2007] 3 IR 338

¹⁶³ *Mabon v Post Publications* [2007] 3 IR 338 Para 72

¹⁶⁴ *Mabon v Keena and Kennedy* [2009] IESC 64

¹⁶⁵ *Goodwin v The United Kingdom* [1996] EHRR 123

¹⁶⁶ *Mabon v Keena and Kennedy* [2009] IESC 64

¹⁶⁷ *Re O'Kelly* [1974] 108 ILTR 97

8.4. How do they balance the different interests at stake?

The primary issue in the *Mahon* case was the balancing of tribunals' right to conduct an inquiry and the defendants' right to freedom of expression, which is guaranteed under Article 40.6.1 ° of the Constitution¹⁶⁸ and Article 10 of the ECHR¹⁶⁹

The High Court¹⁷⁰ declared that it had to consider and determine three issues, 1) whether the tribunal actually had the power to conduct an investigation into the identity of the source 2) whether the tribunal is entitled to conduct such investigations in a private sphere and 3) assuming positive answers to the first two questions, how that right of the tribunal is to be balanced against the defendants' aforementioned rights.

Following the reasoning of the European Court in the *Goodwin* case,¹⁷¹ an order compelling the defendants to answer questions for the purpose of identifying their source could only be "*justified by an overriding requirement in the public interest*". In this case the public interest requirement was not met and so by using the proportionality test, which was established in the ECtHR case law mentioned above, it was decided that in the balancing of rights, the right to freedom of expression must be upheld in this case.

9. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

9.1. The Statutory Basis for Electronic Surveillance

The seminal sources of surveillance law in Ireland are the Criminal Justice (Surveillance) Act 2009 and the Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993.¹⁷² The 2009 act provides a statutory basis for state surveillance by way of electronic devices (such as clandestine recordings).¹⁷³ The 1993 act provides limited provision for the

¹⁶⁸ Article 40.6.1 °

¹⁶⁹ European Convention on Human Rights Act 2003, s 10

¹⁷⁰ *Mahon v Post Publications* [2007] 3 IR 338

¹⁷¹ *Goodwin v The United Kingdom* [1996] EHRR 123

¹⁷² *Ibid*

¹⁷³ John Barry, 'The Criminal Justice (Surveillance) Act 2009: An Examination of the Compatibility of the New Act with Article 8 of the European Convention on Human Rights' [2010] 1(1) *Cork Online Law Review*

interception of phone calls, postal communications, and governs the interception of electronic messages.¹⁷⁴

Irish law does not distinguish between journalist's sources and other intelligence for the purposes of surveillance. Both the 1993 act and 2009 act do not differentiate as to the source of the information itself, nor do they offer any specific protection for the media or other bodies.

9.1.1. The 1993 Act and the Interception of Messages and Stored Data

The 1993 act sets out the offense of interception of communications.¹⁷⁵¹⁷⁶ Protection is limited to messages being transmitted by 'authorized undertakings', which broadly covers telephone service providers and ISPs.¹⁷⁷ Third party services – such as Gmail, iMessage, Skype etc – do not fall within this definition.¹⁷⁸ Privacy International note that 'it is unclear what protections, if any, are in place for users of [third party] services'.¹⁷⁹ They further note that there is no regulation regarding access to stored communications, and that the Irish authorities regularly request access to archived communications held by 3rd party providers.¹⁸⁰

The lack of clear – or indeed, any – boundaries results in the law on interception being imprecise, unforeseeable, and absent of adherence to legislative norms. There is no requirement for any prior judicial authorization, nor is there any requirement that subjects be notified that they have been subject to surveillance.¹⁸¹ Furthermore, the statute offers no specific protection for media sources – confidential or otherwise.

9.1.2. Oversight and Transparency in the 1993 Act

Whilst the 1993 act provides for a 'designated judge' to be given responsibility for oversight on the legislation¹⁸², the resultant annual report is relatively minimalist.¹⁸³ By way of example, a 2010 case involving the inappropriate use of a data retention system to spy on a former partner resulted in a single sentence response in the subsequent report of the Designated Judge.¹⁸⁴

<<http://corkonlinelawreview.com/editions/2010/CRIMINAL%20JUSTICE-BARRY.pdf>> accessed 7 December 2015 (herein Barry)

¹⁷⁴ Ibid

¹⁷⁵ Privacy International 'The Right to Privacy in Ireland' (2016) privacyinternational.org accessible at <<https://www.privacyinternational.org/node/748>> accessed 4 March 2015 (herein Privacy International)

¹⁷⁶ Telecommunications Services Act 1983, as amended by the Telecommunications Messages (Regulation) Act 1993

¹⁷⁷ Privacy International 10

¹⁷⁸ *ibid*

¹⁷⁹ *ibid*

¹⁸⁰ *Ibid*; "Microsoft Law Enforcement Requests Report," (2015) [microsoft.com](http://www.microsoft.com) accessible at

<<http://www.microsoft.com/about/corporatecitizenship/en-us/reporting/transparency/>> accessed 4 March 2016

¹⁸¹ Privacy International 5

¹⁸² Interception of Postal Packets and Telecommunications Messages (Regulation) Act, 1993 s8

¹⁸³ Privacy International 5

¹⁸⁴ *Ibid* 6

Therefore, we can conclude that there is a marked lack of both transparency and oversight as regards the 1993 act. The result is largely inaccessible law, with little guidance available to the public and to practitioners.

9.1.3. The 2009 Act and Electronic Monitoring and Surveillance

The 2009 act allows for 'monitoring, observing, listening to or making a recording of a particular person or group of persons' using surveillance devices.¹⁸⁵ A broad definition is given to 'surveillance devices' – as any apparatus designed or adapted for use in surveillance – but explicitly excludes night vision apparatus, CCTV, and photographic cameras.¹⁸⁶

9.1.4. Authorization for Deployment of Surveillance Measures under the 2009 Act

Superior officers of An Garda Síochána¹⁸⁷, the Irish Defence Forces, and the Revenue Commissioners may submit an application for authorization to a judge assigned to any District Court district.¹⁸⁸

Applications by the Gardaí may be made where the superior officer has reasonable grounds to believe that the surveillance is necessary for the purposes of obtaining information as to whether an offence has been committed. Applications may also be made where Gardaí are seeking to obtain evidence for the purposes of proceedings in relation to the offence. Finally, surveillance may be authorized for the purpose of 'maintaining the security of the State'.¹⁸⁹

9.1.5. Interpretation of the Statutory Criteria for the 2009 act

Whilst there is little ambiguity as regards arrestable offences, the term 'security of the State' is not defined in the legislation.¹⁹⁰ This provision of the 2009 act has not been examined since enactment.

Some guidance may be found in the earlier judgment in *Kennedy v Ireland*¹⁹¹, wherein the plaintiff brought proceedings for damages following the unlawful tapping of their telephones by the State. The plaintiffs were well known political correspondents with Irish national newspapers.¹⁹²

¹⁸⁵ Criminal Law (Surveillance) Act 2009 s1

¹⁸⁶ Ibid

¹⁸⁷ An Garda Síochána – which translates to 'the Guardian of the Peace' – are the principal Irish law enforcement body.

¹⁸⁸ Criminal Law (Surveillance) Act 2009 s4 (1) – (3) & s5 (2)

¹⁸⁹ ibid s4 (1) – (3)

¹⁹⁰ Barry 9

¹⁹¹ [1987] IR 587 (*Kennedy* herein)

¹⁹² ibid

The telephones were tapped on the back of warrants authorized by the Minister for Justice. The State admitted in evidence that there was ‘no justification for the tapping of either of the two telephones in question’.¹⁹³

The plaintiffs submitted that the State had breached their unenumerated right to privacy under Article 40 (3) of Bunreacht na hEireann.¹⁹⁴¹⁹⁵ Hamilton P accepted this argument, noting that the tapping was deliberate, conscious, and unjustifiable.¹⁹⁶ Particular attention was given to the fact that the tapping ‘went beyond what could be explained as just an error of judgment’, and that the systematic safeguards to ensure justifiable surveillance had been ignored by the Minister for Justice.¹⁹⁷ However tapping for security reasons and the investigation of serious crime are recognized as justifiable reasons in the context of the judgment.¹⁹⁸

The ambiguity in the 2009 act also appears to be at odds with the judgment in *Weber & Savaria v Germany*¹⁹⁹ wherein the blanket justification of ‘national security’ – in German surveillance law – was ruled incompatible with article 8 of the ECHR.²⁰⁰²⁰¹ This potential incompatibility has not yet been examined in domestic courts.

As with the 1993 act, the precise circumstances wherein an individual may be subject to surveillance remain unclear. There is stronger regulation and delineation of the rules surrounding access to data, but the statute itself remains mostly untested by the Courts. There is no specific protection for journalists, nor their sources. Whilst Privacy International note that there is stronger oversight from the respective Designated Judge²⁰², there is still no requirement that individuals be notified if they have been subject to surveillance.

Overall, the lack of sufficient precision and foreseeability within the act runs contrary to the judgment in *Sunday Times v UK*.²⁰³ Therein the ECtHR established that – in order to allow for restrictions to freedom of speech under Article 10 (2) of the ECHR – a state must demonstrate

¹⁹³ *ibid*

¹⁹⁴ The Constitution of Ireland. Available at <https://www.constitution.ie/Documents/Bhunreacht_na_hEireann_web.pdf>.

¹⁹⁵ Whilst there is no general right to privacy contained within Bunreacht na hEireann, the Irish Courts have recognized unenumerated rights emanating from Article 40 (3). These rights are effectively unwritten, but come into existence by way of an obligation on the State to vindicate the personal rights of citizens therein.

¹⁹⁶ Echoing Henchy J in *Norris v AG* [1984] I.R. 36. *Norris* is a seminal case on the right to privacy under Irish law, albeit in the content of a ban on the then-illegality of homosexual intercourse.

¹⁹⁷ *Kennedy* at 589

¹⁹⁸ *Ibid* at 595

¹⁹⁹ [2008] 46 EHRR SE5.

²⁰⁰ Barry 9.

²⁰¹ Under the European Convention of Human Rights Act, 2003, Irish Courts are obligated to interpret legislation in accordance with the ECHR as far as is possible. However, incompatible provisions do not cease to be enforceable.

²⁰² Privacy International 9; the Designated Judges having been noted to provide lengthy annual reports, provide statistics as to trends within state surveillance, and to undertake periodic reviews of random cases.

²⁰³ Application No. 6538/74

that the restriction is 'prescribed by law'.²⁰⁴ The ECtHR set two further requirements for a restriction to be 'prescribed by law': the law must be accessible, so as to allow citizens to see where the law is applicable, and a norm cannot be regarded as 'law' if citizens cannot regulate their behavior to be compliant.²⁰⁵

The need for foreseeable and obeyable law is further reiterated in the judgment in *Huvig v France*²⁰⁶, wherein surveillance carried out by the French state was deemed not to have breached Article 8. Of particular note is the Court's view that judicial oversight does not give a *carte blanche* for compatible surveillance, unless said oversight is combined with clear limits on the circumstances wherein surveillance is appropriate.^{207/208}

Given that the boundaries of the 2009 act are not defined, it appears that Ireland is in breach of the rule in *Sunday World* and *Huvig*. It is not clear as to under what circumstances the law can be – and is being – used. Furthermore, it is not clear as to where the limits of the 'national security' justification lie.

9.2. Search and Seizure

There are no extraordinary powers granted to Irish authorities to seize information – journalistic or otherwise – under Irish anti-terrorism law.

There is no specific Search Warrant Act under Irish law.²⁰⁹ One of the most commonly used provisions is s10 of the Criminal Justice (Miscellaneous Provisions) Act 1997. The section empowers a District Court judge to issue a search warrant where satisfied by information on oath that evidence of, or relating to, the commission of an arrestable offense is to be found at any place.²¹⁰ There are further, specific legislative provisions allowing senior members of an Garda Síochána to issue search warrants without judicial approval.²¹¹

Whilst the law on search and seizure is relatively robust from the perspective of individual rights, a unified Search Warrant Act would bring welcome clarity as to the rules and exceptions. However, the provisions are relatively accessible, foreseeable, and adhere to legislative norms.²¹²

²⁰⁴ Ibid at 46; this is synonymous with 'in accordance with law'.

²⁰⁵ Ibid

²⁰⁶ Application no. 11105/84

²⁰⁷ Ibid para 34

²⁰⁸ A similar conclusion was reached in *Valenzuela Contreras v Spain* [1998] Application no. 58/1997/842/1048

²⁰⁹ Law Reform Commission 'Issues Paper on Search Warrants' (2014) lawreform.ie accessible at <http://www.lawreform.ie/_fileupload/Issues%20Papers/Issues%20Paper%20on%20Search%20Warrants%2031%20Jan%202013%20final.pdf> accessed 6 March 2016

²¹⁰ Ibid 3

²¹¹ Ibid 9

²¹² Supra 214

10. Can journalists rely on encryption and anonymity online to protect themselves and their sources against surveillance?

Yes, journalists can rely on encryption and anonymity online to protect themselves and their sources against surveillance.

Protection of journalists and their sources as a freedom of press according to Article 10 of European Convention for the Protection of Human Rights and Fundamental Freedoms and other national provisions.

10.1. Journalists aspect to protect themselves and their sources

“Protection of journalistic sources is one of the basic conditions for press freedom.”²¹³

In case of *Financial Times Ltd & Ors v United Kingdom*²¹⁴, person X, as an anonymous information provider, disclosed a copy of document about a contemplated takeover by Interbrew of SAB to some media presses and then journalists of these newspapers investigated and reported this news according to X’s disclosure.²¹⁵ At the end of 2001, the British courts asked the four newspapers to identify X’s information with the reason that “[i]t was on any view a maleficent one, calculated to do harm whether for profit or for spite, and whether to the investing public or Interbrew or both.”²¹⁶ However, the European Court of Human Rights believed that the British courts’ judgment neglected the journalist’s right of protection of sources. The ECtHR came to the conclusion that although Interbrew would like to prevent further damage to their interests by identifying X, it was insufficient to outweigh the public interests in protecting journalists’ sources, so that the British courts violated journalists’ right of protecting sources under Article 10 of the Convention.²¹⁷

On the other hand, in 2010, the judges of the Grand Chamber of the ECtHR in the case *Sanoma Uitgevers B.V. v. the Netherlands*²¹⁸ came to the conclusion that the opinion to hand over a CD-ROM with photographs in the possession of a journalist was a violation of Article 10 of the Convention that it violated the journalists’ right to protect their sources.²¹⁹ It is not only because the disclosure of the sources. In this judgment, the ECtHR emphasized the importance on protecting journalists’ sources. Furthermore, it noted that if the CD-ROM content was leaked, there would be an impact on “members of public who had an interest in receiving information

²¹³ *Goodwin v United Kingdom* [1996] 22 EHRR 123 [39]

²¹⁴ *Financial Times Ltd & Ors v United Kingdom* [2009] ECHR 821/03

²¹⁵ IRIS 2010-2/1

²¹⁶ *Interbrew v. Financial Times et al.* [2002] EWCA Civ 274 [55]

²¹⁷ *Interbrew v. Financial Times et al.* [2002] EWCA Civ 274

²¹⁸ *Sanoma Uitgevers B.V. v. the Netherlands* [2010] ECHR 1284

²¹⁹ IRIS 2010-10/2

imparted through anonymous sources”²²⁰. It shows the meaning that the anonymous sources is one method where the public as well as the journalists receive the information and it is regarded as the similar journalists’ sources protected by Article 10 of the Convention.

In Ireland, *Re O’ Kelly*²²¹ is the start dealing with the journalists’ sources as well as journalist privilege. Kevin O’Kelly, who was a journalist in RTE, refused to reveal a source and faced a sentence because he reckoned that if he revealed the sources, it would damage the confidence between clients and journalists all over Ireland and the public. In the end, Mr. O’ Kelly was sentenced as not answering the question he was asked rather than he did not disclose the source.²²² It is not a strong case to interpret the protection of journalists’ sources and there is not a clear provision about it in Ireland yet. Meanwhile, in *Media Law in Ireland*, Dr. Carolan refers it as the journalistic privilege but states ‘...there was no recognition in this jurisdiction of such a privilege (refuse to answer questions in court in certain circumstances) for journalists seeking to protect their sources.’²²³ However, at least, it shows the courts’ consideration on journalist privilege and confidential sources.

10.2. Surveillance against journalists: *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*²²⁴

The Netherlands security and intelligence services (AIVD) used the power of surveillance, which was lack of legal basis, against two journalists, whose sources were telephone tapped and discovered.²²⁵ The ECtHR found that the Netherland institution violated the journalists’ right of sources to be protected under Article 10 of the Convention.

According to these cases, it is a need for the journalists to protect themselves and their sources against surveillance by encryption and anonymous. On one hand is that it is the basic right for them to protect their sources under Article 10 of the Convention. On the other hand, it is not easy to find that they themselves and their sources are under surveillance but easy for authorities to monitor the journalists, for example, *Telegraaf v. the Netherlands* (2012) was the third time that the ECtHR found Netherland authorities disrespected the right of journalists to protect their sources.²²⁶ Encrypting and anonymizing themselves or their sources is an efficient way to prevent their privacy and freedom of speech being violated and monitored, which is a prevention method rather than remedy after the violation happens.

²²⁰ [2010] ECHR 1284

²²¹ *Re O’Kelly* (108) ILTR 97.

²²² *Ibid.*

²²³ Eoin Carolan and Ailbhe O’Neill, *Media Law in Ireland* (Bloomsburg Professional, 2010) 163-4

²²⁴ *Telegraaf Media Nederland Landelijke Media N.V. and Others v. the Netherlands* App no 39315/06 (ECHR 22 November 2012)

²²⁵ *ibid.*

²²⁶ IRIS 2013-2/2

10.3. Anonymity and encryption under national provisions

There is not any case law on the topic, but Anglo case, where the police accessed to the encrypted documents, could be cited. Gardai could not examine about a third of the documents without passwords, under the request of sec. 28 of the Electronic Commerce Act 2000.²²⁷ At the same time, there is a trend that electronic discovery groups attempt to bypass the encryption files.²²⁸

Sec. 28 of the Act explains the confidentiality of deciphering data as '[n]othing in this Act shall be construed as requiring the disclosure or enabling the seizure of unique data, such as codes, passwords, algorithms, private cryptographic keys, or other data, that may be necessary to render information or an electronic communication intelligible.' As well as interpreted by the sec. 48 of the Theft and Fraud 2001, a computer, a place, a document or a record search warrant, by the need of evidence or the commission of an offence, shall be applied under authority. On the other hand, Criminal Justice (Surveillance) Act 2009 states that the applications of surveillance should be carried under authorization by a judge, when they are relating to the offence or the security of the State.

Data Protection Acts 1998 and 2003 provide the protection of individuals' privacy. Under sec. 2(1)(d) and 2C, journalists, as the data controllers who control and use other person's data as their sources, can take all reasonable use of appropriate security measures against authority actions with their sources. The protection of journalists themselves and their sources is necessary, without an authorised order or warrant and irrelevant with the offences, regarding as protecting their free expression as well as others' privacy.

However, the use of encryption and anonymous has limitations. In Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye states the use of the encryption and anonymous for individuals to protect their rights of free expression in the digital world.²²⁹ In his report, he addresses three strict tests of necessity and proportionality for using encryption and anonymous to protect one's rights:

- (1) Any encryption or anonymous must be precise²³⁰, public²³¹ and transparent²³², and avoid providing State authorities with unbounded discretion to apply the limitation.²³³
- (2) Encryption and anonymous may only be protected specified interests such as rights or

²²⁷ Tom Brady, Shane Phelan and Tim Healy, 'Anglo chiefs facing quiz on missing passwords' (*New Irish News*, 10 November 2010) <http://www.independent.ie/irish-news/anglo-chiefs-facing-quiz-on-missing-passwords-26698319.html> accessed 14 April 2016

²²⁸ eDiscovery Group of Ireland, 'Good practice guide to Electronic Discovery in Ireland' (Version 1.0 - 16 April 2013) 60

²²⁹ General Assembly, *Promotion and protection of the right to freedom of opinion and expression* (A/HRC/29/32, 2012)

²³⁰ Human Rights Committee, general comment No. 34 (2011) [35]

²³¹ Human Rights Committee, general comment No. 34 (2011)

²³² Human Rights Committee, general comment No. 34 (2011) [39]

²³³ General Assembly, *Promotion and protection of the right to freedom of opinion and expression* (A/HRC/29/32, 2012)

reputations of others; national security; public order; public health or morals.²³⁴ This restriction is according to Article 19 of the International Covenant on Civil and Political Rights that "...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."²³⁵

(3) The restriction on encryption and anonymous must be "necessary".²³⁶

These restrictions are strict. In the judgment of *Goodwin v. the United Kingdom*, the court outweighed the public interest in protecting the journalist's sources and required the applicant to reveal his source.²³⁷ In *Nagla v. Latvia*, Ms Nagla claimed that the action of searching her home violated her privacy and her sources might be disclosed which violated the protection of the freedom of speech and journalists' sources under Article 10 of the Convention.²³⁸ However, the ECtHR stated that "[w]hile recognizing the importance of securing evidence in criminal proceedings, the Court emphasizes that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources."²³⁹

Although the journalists and their sources should be protected and encryption and anonymous is one method to achieve their aims, the courts still consider the three restrictions above to avoid misuse of journalists' rights. Even though there is not journalistic privilege, journalists are different from the normal public. What they access is much broader and deeper than us. Especially in the digital age, journalists can rely on technologies, like encryption and anonymous, to protect themselves and their sources.

11. The Scope of Whistle-Blowing Legislation in Ireland Regarding Journalistic Sources.

11.1. Are whistle-blowers explicitly protected under law protecting journalistic sources?

As discussed above there is a severe lack of legislation which protects journalistic sources under Irish law. There is no legislation setting out the rights afforded to journalistic sources and therefore no protection of Whistle-blowers within that context. However, Ireland possesses a common law system and therefore a great amount of weight should be placed on the protection of Whistle-blowers as provided by the Courts. In the case of *Burke v Central Independent*

²³⁴ *ibid.*

²³⁵ International Covenant on Civil and Political Rights [1966]

²³⁶ Human Rights Committee, general comment No. 34 (2011) [2]; General Assembly, *Promotion and protection of the right to freedom of opinion and expression* (A/HRC/29/32, 2012); European Convention for the Protection of Human Rights and Fundamental Freedoms [1950] ECHR, art10

²³⁷ *Goodwin v United Kingdom* [1996] 22 EHRR 123

²³⁸ *Nagla v. Latvia* App no 73469/10 (ECHR,16 July 2013)

²³⁹ *Nagla v. Latvia* App no 73469/10 (ECHR,16 July 2013); see also [2009] ECHR 821/03

*Television*²⁴⁰ the Supreme Court decided that journalists do not have to disclose their sources where the life of those sources would be in danger if revealed. The case of *Mahon v Keena*²⁴¹ went further as to enshrine into the Irish constitution the concept of protection of journalistic sources; however the case made no explicit reference to the general protection of Whistle-blowers.

Despite this lack of protection for Whistle-blowers under any Irish law protecting journalistic sources, the Protected Disclosures Act (2014) is a distinct piece of legislation which aims to protect Whistle-blowers who reveal any corrupt practises within their course of employment.

11.2. Is there another practice protecting whistle-blowers?

There was a distinct need for The Protected Disclosures Act (2014) after a number of scandals in Irish society; most notably the discloser by a number of Irish Police members about corrupt practices within the force as well as a decade of revelations about abuse perpetrated by Catholic Clergy. Despite these reasons for the Irish government to legislate for Whistle-blowing, it is quite clear that the Act (2014) was created in a direct response to the Committee of Ministers Recommendation CM/Rec (2014) 7. The object of the Recommendation is to reaffirm the Freedom of Expression as protected under Article 10 of the European Convention²⁴² and to recognise that Whistle-blowers can contribute to strengthening transparency and democratic accountability in facilitating the exchange of information which is fundamental to the functioning of a genuine democracy.²⁴³

The Protected Disclosures Act (2014) aims to prevent an employer from dismissing or in any way penalising any worker who makes a protected discloser; Whistle-blowing. It is important to note that the Act (2014) only applies to workers who reveal some otherwise unknown information which they have discovered within the course of their employment. This definition in the Act (2014) derives strongly from the Committee Recommendation.²⁴⁴ For the purposes of the Recommendation a Whistle-blower is '*any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship*'.²⁴⁵ The Irish definition is provided by S1 of the Unfair Dismissals Act (1977) and is understood to be an individual who has entered into work under a contract of employment.²⁴⁶ While the Irish definition is simply following that of the Committee Recommendation, it is narrower than that which is generally accepted by the academic community. The more extensively used definition was developed by Near and Miceli in their 1985 research; a Whistle-blower must possess four elements (1) that the Whistle-blower is an 'insider' of the organisation which is allegedly carrying out the wrong doing, (2) who lacks the authority to change the conduct of the activity of the organisation (3) who

²⁴⁰ (1994) 2 IR 61.

²⁴¹ Mahon & Ors v Keena [2010] 1 IR 336.

²⁴² European Convention on Human Rights.

²⁴³ Recommendation CM/Rec(2014) 7 of the Committee of Ministers, 5.

²⁴⁴ Ibid.

²⁴⁵ Ibid at 6..

²⁴⁶ Unfair Dismissals Act 1977, s1.

remains, at least partly anonymous for the duration of the Whistle-blowing and; (4) that the Whistle-blower occupies the position to which the wrongful activity is being prescribed.²⁴⁷ Essentially a whistle blower is fundamentally an organisational or institutional insider who reveals some wrong doing with the organisation or institution to someone else with the intention of effect that action should be taken to address it.²⁴⁸ The main difference between the generally accepted academic definition and that included in the Irish legislation is the prerequisite for employment in the course of the relationship between the organisation and the Whistle-blower. Criticism must be levelled at the Protected Disclosures Act (2014) and indeed the Committee Recommendation in focusing only in protecting employees. The Protected Disclosures Act (2014) leaves a number of groups vulnerable to redress where they have 'blown the whistle.' For those who are involved in an organisation or institution which is not public or with whom they do not possess a contract of employment, such as volunteers, then they are not protected in circumstance where they 'blow the whistle'. This lacuna in the law is surprising in the Irish context given the last decade of revelations about the Catholic Church which left many questioning how the abuse was never brought to the public's attention – in failing to step outside the remit of the Committee Recommendation to protect non-employees, the Irish drafters of the legislation are allowing history to repeat itself.

Unlike the definition of a Whistle-blower, the drafters of the Protected Disclosure Act (2014) went beyond the Committee Recommendation in defining which content from a disclosure will be protected. Section 5 of the Act (2014) provides that a Protected Discloser is either the reasonable belief of an employee which shows wrongdoing on the part of the employer²⁴⁹ or is wrongdoing which came to the attention of the employee within the course of their employment.²⁵⁰ Section 5(3) of the Act then goes on to set out the type of wrongdoing which concerns this Act:

- A criminal offence has or will be committed;
- Where the employer has failed to comply with any legal obligation;
- A miscarriage of justice has or is likely to occur;
- Health and safety or the environment is endangered;
- There has been an unlawful or improper use of a public body or funds;
- There is an act or omission by a public body which is oppressive, discriminatory, grossly negligent or constitutes gross mismanagement; or,
- That information tending to show any matter falling within the rest of the act is being or likely to be concealed or destroyed.²⁵¹

²⁴⁷ Janet Near and Marcia Miceli, 'Organisational Dissidence: A Case for Whistle-blowing' (1985) 4(1) *Journal of Business Ethics*, 1.

²⁴⁸ David Lewis, AJ Brown and Richard Moberly, *International Handbook on Whistleblowing Research* (Edward Elgar 2014).

²⁴⁹ Protected Disclosures Act (2014), S5(2)(a).

²⁵⁰ Ibid, S5(2)(b).

²⁵¹ Protected Disclosures Act (2014), s5(3)(a)-(h).

As the above demonstrates the Protected Disclosures Act (2014) is concerned with a wide variety of sources which may reveal information of public interest and is therefore protected. At this point another criticism of the Act should be made, this time in the view of employers. Regardless of whether the claim made in the Protected Disclosures has a factual basis or not, the Whistle-blower is protected from any civil liability even where they make an incorrect disclosure which has the potential to damage the business of their employer.²⁵² This may be the trade-off required to ensure that those who have founded concerns do not remain silent for fear of repercussion. However it is worth noting that the Protected Disclosures Act (2014) moves away from the Committee Recommendation in one key element. In accordance with European Court of Human Rights (ECtHR) judgments the Committee Recommendation notes that one of the channels of reporting information to the public is through journalistic sources. Meanwhile Section 10 of the Protected Disclosures Act (2014) limits the disclosure of information to a journalistic source, this is in order to allow the employer to address the wrong-doing and prevent and reputational damage that could be caused by an incorrect “Whistle-blowing”. Despite the fact that Whistle-blowing, particularly to the media, is one of the most effective ways of uncovering corrupt behaviour, the Act (2014) only envisages disclosure to a journalistic source when other channels of disclosure have failed to bring the issue to sufficient public attention.²⁵³ This conception by the Irish legislation differs from the standard as provided for by the ECtHR. The case of *Goodwin v United Kingdom*²⁵⁴ was the first case which the ECtHR ruled on in relation to the protection of Whistle-blowers under Article 10 of the ECHR in what is considered the Court’s landmark case on the protection of journalistic sources. The Court found that any requirement that a journalist would have to reveal his sources would be a violation of the Freedom of Expression as established in Article 10 of the ECHR. Further holding that in failing to protect journalistic sources, such sources – Whistle-blowers – may be deterred from coming forward with information of great public importance.²⁵⁵ While the Irish law is in no way requiring journalists from revealing their sources, it does not offer protections to employees who do go to the press and disclose some information about their employer. Following this landmark judgment, in the case of *Guja v Moldova*²⁵⁶ the ECtHR found that the Freedom of Expression could only be limited where it is necessary for the proper functioning of a democratic society, a test which was confirmed in the case of *Matúz v Hungary*.²⁵⁷ Section 10 of the 2014 Act does not explicitly operate to limit the freedom of expression in Article 10 of the ECHR, but rather attempts to confine the disclosure to protect both the Whistle-blower from legal action and the employer from a false or defamatory claim. As the Protected Disclosures Act (2014) is such a new piece of legislation that it will be interesting to see how the Irish Courts interpret it in light

²⁵² Protected Disclosure Act (2014), s13; s14.

²⁵³ David Lewis, AJ Brown and Richard Moberly, *International Handbook on Whistleblowing Research* (Edward Elgar 2014); Protected Disclosures Act (2014), s10.

²⁵⁴ (1996) App no 25680/94 (ECtHR, 27 March 1996).

²⁵⁵ Ibid.

²⁵⁶ (2008) App no 14277/04 (ECtHR, 12 February 2008).

²⁵⁷ (2014) App no 73571/10 (ECtHR, 21 October 2014).

of not only their own decisions in *Burke*²⁵⁸ and *Mahon*²⁵⁹, but also to the principles established by the ECtHR case law²⁶⁰ and the European Committee Recommendation.²⁶¹

10.3. Is there legislation prohibiting authorities and companies from identifying whistle-blowers?

Section 16 of the Protected Disclosures Act (2014) provides for the protection of the identity of the individual making a protected disclosure. However, the section does not go into detail as to how this protection is to be realised. The Committee Recommendation does elaborate in so far as to say that Whistle-blowers should be entitled to have the confidentiality of their identity maintained, subject to fair trial guarantees.²⁶² The Protected Disclosures Act does however provide for a number of other strong provisions which may protect the Whistle-blower. Section 11 of the Act provides for an unfair dismissal procedure where the contract of employment with the employee who made the Protected Disclosure has been terminated.²⁶³ Section 12 provides for protection from any other penalty as a result of making a Protected Disclosure, while sections 13 and 14 of the Act provide that the maker of a Protected Disclosure is free from any Tort action and immunity from civil liability relating to the disclosure respectively. Finally, Section 15 of the Act provides that making a Protected Disclosure is not a criminal offence.

12. Conclusion

In a recent report carried out by the European University Institute²⁶⁴, Media Pluralism was assessed with reference to four indicators; Protection of Freedom of Expression, Protection of Right to Information, Journalistic Profession, Standards and Protection, and Independence of National Authorities. The highest risk outlined by the report related to the Journalistic Profession, Standards and Protection indicator which was presented as a 38% risk (medium). This report is reflective of the finding of this paper - Ireland has safeguards to protect journalistic sources, however, this protection is not explicit in legislation but is contained in case law guided by the European Convention on Human Rights.

²⁵⁸ *Burke v Central Independent Television* (1994) 2 IR 61.

²⁵⁹ *Mahon & Ors v Keena* [2010] 1 IR 336.

²⁶⁰ *Goodwin v United Kingdom* (1996) App no 25680/94 (ECtHR, 27 March 1996); *Guja v Moldova* (2008) App no 14277/04 (ECtHR, 12 February 2008); *Matúz v Hungary* (2014) App no 73571/10 (ECtHR, 21 October 2014).

²⁶¹ Recommendation CM/Rec(2014) 7 of the Committee of Ministers.

²⁶² *Ibid.*

²⁶³ S6(2)(ba) of the Unfair Dismissals Act as inserted by S11 of the Protected Disclosures Act.

²⁶⁴ Roderick Flynn, 'Media Pluralism Monitor 2015 – Results (Ireland)' (*European University Institute*, 1 October 2015) <<http://monitor.cmpf.eui.eu/mpm2015/results/ireland/>> accessed 1 June 2016

The findings of this paper highlight, that these safeguards are adequate and allow for a free media, but the question on whether explicit legislative address is necessary remains.

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14. Table of Provisions

Provisions in native language	Corresponding translation
<p>Protected Disclosures Act, 2014</p> <p><i>Section 5</i></p> <p>5. (1) For the purposes of this Act “protected disclosure” means, subject to subsection (6) and sections 17 and 18 , a disclosure of relevant information (whether before or after the date of the passing of this Act) made by a worker in the manner specified in section 6 , 7 , 8 , 9 or 10 .</p> <p>(2) For the purposes of this Act information is “relevant information” if—</p> <p>(a) in the reasonable belief of the worker, it tends to show one or more relevant wrongdoings, and</p> <p>(b) it came to the attention of the worker in connection with the worker’s employment.</p>	

(3) The following matters are relevant wrongdoings for the purposes of this Act—

(a) that an offence has been, is being or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged,

(f) that an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring

or is likely to occur,

(g) that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement, or

(h) that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be concealed or destroyed.

Section 10

(1) A disclosure is made in the manner specified in this section if it is made otherwise than in the manner specified in sections 6 to 9 and—

(a) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(b) the disclosure is not made for personal gain,

(c) any one or more of the conditions in subsection (2) is met, and

(d) in all the circumstances of the case, it is reasonable for the worker to make the disclosure.

(2) The conditions referred to in subsection (1)(c) are—

(a) that, at the time the worker makes the disclosure, the worker reasonably believes that the worker will be subjected to penalisation by the worker's employer if the worker makes a disclosure in the manner specified in section 6 , 7 or 8 ,

(b) that, in a case where no relevant person is prescribed for the purposes of section 7 in relation to the relevant wrongdoing, the worker reasonably believes that it is likely that evidence relating to the relevant wrongdoing will be concealed or destroyed if the worker makes a disclosure in the manner specified in section 6 ,

(c) that the worker has previously made a disclosure of substantially the same information—

(i) in the manner specified in section 6 , or

<p>(ii) in the manner specified in section 7 or 8 ,</p> <p>and</p> <p>(d) that the relevant wrongdoing is of an exceptionally serious nature.</p> <p>(3) In determining for the purposes of subsection (1)(d) whether it is reasonable for the worker to make the disclosure regard shall be had, in particular, to—</p> <p>(a) the identity of the person to whom the disclosure is made,</p> <p>(b) in a case falling within subsection (2) (a), (b) or (c), the seriousness of the relevant wrongdoing,</p> <p>(c) in a case falling within subsection (2)(a), (b) or (c), whether the relevant wrongdoing is continuing or is likely to occur in the future,</p> <p>(d) in a case falling within subsection (2)(c), any action which the employer of the worker or the person to whom the previous disclosure was</p>	
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made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(e) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure the use of which by the worker was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

(5) In subsection (1)(b) “personal gain” excludes any reward payable under or by virtue of any enactment.

Section 16

(1) A person to whom a protected disclosure is made, and any person to whom a protected disclosure is referred in the performance of that person’s duties, shall not disclose to another person any information that might identify the person by whom the protected disclosure was made.

Criminal Justice (Surveillance) Act, 2009

Section 4

(1) A superior officer of the Garda Síochána may apply to a judge for an authorisation where he or she has reasonable grounds for believing that—

(a) as part of an operation or investigation being conducted by the Garda Síochána concerning an arrestable offence, the surveillance being sought to be authorised is necessary for the purposes of obtaining information as to whether the offence has been committed or as to the circumstances relating to the commission of the offence, or obtaining evidence for the purposes of proceedings in relation to the offence,

(b) the surveillance being sought to be authorised is necessary for the purpose of preventing the commission of arrestable offences, or

(c) the surveillance being sought to be authorised is necessary for the purpose of maintaining the security of the State.

(2) A superior officer of the Defence Forces may apply to a judge for an authorisation where he or she has reasonable grounds for believing that the surveillance being sought to be authorised is necessary for the purpose of maintaining the security of the State.

(3) A superior officer of the Revenue Commissioners may apply to a judge for an authorisation where he or she has reasonable grounds for believing that—

(a) as part of an operation or investigation being conducted by the Revenue Commissioners concerning a revenue offence, the surveillance being sought to be authorised is necessary for the purpose of obtaining information as to whether the offence has been committed or as to the circumstances relating to the commission of the offence, or obtaining evidence for the purpose of proceedings in relation to the offence, or

(b) the surveillance being sought to be authorised is necessary for the purpose of preventing the commission of revenue offences.

Section 5

(2) Subject to subsection (4), the judge shall issue such authorisation as he or she considers reasonable, if satisfied by information on oath

of the superior officer concerned that—

(a) the requirements specified in subsection (1), (2) or (3), as the case may be, of section 4 are fulfilled, and

(b) to do so is justified, having regard to the matters referred to in section 4 (5) and all other relevant circumstances.

**Interception of Postal Packets and
Telecommunications Messages
(Regulation) Act, 1993**

Section 8

(1) The President of the High Court shall from time to time after consultation with the Minister invite a person who is a judge of the High Court to undertake (while serving as such a judge) the duties specified in this section and, if he accepts the invitation, the Government shall designate him for the purposes of this Act.

(2) A person designated under this section (referred to in this Act as “the designated judge”) shall hold office in accordance with the terms of his designation and shall have the duty of keeping the operation of this Act under

review, of ascertaining whether its provisions are being complied with and of reporting to the Taoiseach—

(a) at such intervals (being intervals of not more than twelve months) as the designated judge thinks desirable in relation to the general operation of the Act, and

(b) from time to time in relation to any matters relating to the Act which he considers should be so reported.

(3) For the purpose of his functions under this Act, the designated judge—

(a) shall have power to investigate any case in which an authorisation has been given, and

(b) shall have access to and may inspect any official documents relating to an authorisation or the application therefor.

(4) The designated judge may, if he thinks it desirable to do so, communicate with the Taoiseach or the Minister on any matter concerning interceptions.

(5) Every person who was concerned in, or has information relevant to, the making of the application for, or the giving of, an authorisation, or was otherwise concerned with the operation of any provision of this Act relating to the application or authorisation, shall give the designated judge, on request by him, such information as is in his possession relating to the application or authorisation.

(6) If the designated judge informs the Minister that he considers that a particular authorisation that is in force should not have been given or (because of circumstances arising after it had been given) should be cancelled or that the period for which it was in force should not have been extended or further extended, the Minister shall, as soon as may be, inform the Minister for Transport, Energy and Communications and shall then cancel the authorisation.

(7) The Taoiseach shall cause a copy of a report under subsection (2) of this section together with a statement as to whether any matter has been excluded therefrom in pursuance of subsection (8) of this section to be laid before each House of the Oireachtas.

(8) If the Taoiseach considers, after consultation with the designated judge, that the publication of any matter in a report under subsection (2) of this section would be prejudicial to the prevention or detection of crime or to the security of the State, the Taoiseach may exclude that matter from the copies of the report laid

before the Houses of the Oireachtas.

**European Convention on Human Rights
Act, 2003**

Section 2

(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

(2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter.

ELSA ITALY

Contributors

National Coordinator

Natasha Divina Renzetti

National Academic Coordinator

Desara Dushi

National Researchers

Giada Azadi

Fabrizio De Gregorio

Mariano Delli Santi

Chiara Nuzzaci

Carmine Emanuele Papa

National Academic Supervisor

Prof. Marina Castellaneta

1. Introduction

“Domestic law and practice in member states should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms”¹

This fundamental principle of Recommendation No. R (2000) 7 of the Council of Europe, supported also by other international legislation and case-law, shows the great importance of the right to protection of journalistic sources as part of one of the fundamental freedoms, which is the freedom of expression. On this basis, this report explains the current level of protection of journalistic sources in Italy through an analysis of legal provisions regarding this issue, case-law, and compliance with international legal standards in the field. The situation in this country is not so clear due to a number of factors which are explained throughout the report, such as: a lack of an explicit and clear definition of ‘journalist’ and the existence of a stratification of the profile of a journalist. The main national legislation regulating issues related to the journalistic profession in Italy is Law no. 63 of 1969 on the Organisation of the Journalistic Profession. Through this law, together with other legal provisions, the Italian legislator has tried to adapt its national legislation to meet as much as possible the international standards for the protection of freedom of expression and journalistic sources.

2. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

2.1 The Construction of the Right of the Journalist not to Disclose their Sources

The starting point of the analysis on the protection of the right of journalist not to disclose their sources of information are the constitutional guarantee provided for in Articles 15 and 21 of the Italian Constitution. Article 15 affirms the freedom and confidentiality of any kind of communication, without any external interference. In the light of this article, there is not an effective freedom in communicating without the respect of secrecy and confidentiality. Article 21, instead, refers to the right to freedom of expression. It recognises the press as unconditioned, independent, uncensored and limitations are allowed exclusively in the cases prescribed by law. Article 21 grants especially to the press the right of freedom of expression, recognising it as the main right and duty holder in order to inform and critically argue the reality, in an unbiased way.

¹ Council of Europe, "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", appendix, Principle 1

Besides, Art. 21, as interpreted by the Constitutional Court, grants to journalists the right/duty to inform, also including the right to gather and receive information.²

Nevertheless, within the Italian Legal system the right of journalists not to disclose their sources is primarily the expression of a duty affirmed both on a professional and on a criminal law level. Before the reform of the Code of Criminal Procedure (hereafter CCP) in 1987, the criminal procedural legislation did not provide any possibility for journalists to protect the secrecy of their sources. Due to the lack of correspondence between the material and the procedural provisions, the reform acknowledged the right not to disclose sources to professional journalists and editors.³ The discipline introduced represents the result of a balancing, never attempted before, between the interest in justice and the interest of press freedom. However, the construction of the legislation gives priority to the former configuring an obligation for the journalists to disclose their sources, whenever the information is necessary for the ascertainment of the offence.⁴ Therefore, in the opinion of the majority of scholars, detecting the current contradiction between the duty to respect the professional secret on confidential sources laid down in Article 2 of the professional Law no. 69 of 1963 and the criminal procedural legislation, the issue of the journalistic secret on sources remains controversial.⁵

2.2 The Professional Duty of Journalists not to Disclose Confidential Sources

According to Article 2, paragraph 3 of Law no. 69 of 1963 on the Organisation of the Journalistic Profession, *journalists and editors are obliged to respect the professional secret on the source of information, when this is required by the confidential character of it [...]*.⁶ In light of the duty to respect the substantial truthfulness of facts, the provision aims to ensure a deeper control on the information flow.⁷ The right/duty of journalists to protect their confidential sources is also affirmed by the Ethics Charter.⁸ The violation of the professional duty entails the disciplinary liability of the journalist as established by Art. 48 of Law no. 69 of 1963, according to which:

² 1 [1981] Constitutional Court.

² Valeria Falcone., *Segreto giornalistico ed esigenze processuali* (Altalex, 25 January 2008) < <http://www.altalex.com/documents/news/2008/01/24/segreto-giornalistico-ed-esigenzeprocessuali#sdfootnote10sym> > accessed 10 January 2016.

⁴ Paolo Tonini, *Manuale di Procedura Penale* (14th edn, Giuffrè Editore 2013) 300.

⁵ Paolo Caretti, Ugo de Siervo, *Istituzioni di Diritto Pubblico* (10th edn, G.Giappichelli Editore) 482 [Italian]; see also Paolo Caretti, *I diritti fondamentali* (3th edn, G.Giappichelli Editore) 385 [Italian]; Franco Abruzzo, *Il Segreto Professionale dei Giornalisti* (2003) <http://www.diritto.it/articoli/editoria/abruzzo6.html> accessed 8 January 2016.

⁶ The Legislative Decree no 150 of 2011, modified Law no 69 of 1963 but did not influence the substantive content of the protection on journalistic sources.

⁷ Art. 2, Law no 63 (Organisation of the Journalistic Profession) 1969 [Ordinamento della Professione di Giornalista]: *[...] it is a binding duty to respect the material truthfulness of the facts, in compliance with the duties imposed by loyalty and good faith*; M. Pedrazza Gorlero, *Giornalismo e Costituzione* (Dott. Antonio Milani) 77 [Italian].

⁸ Interregional Code of Piemonte and Valle d'Aosta; Charter of Journalist's Duties, Protocol 1993.

‘Anyone registered on the list or on the registry, guilty of facts inconsistent with the decorum and the professional dignity, or guilty of facts compromising its reputation or the dignity of the Association, shall be subject to the disciplinary procedure. The procedure starts ex officio by the regional or the inter-regional Council or also on request of the general prosecutor competent according to Art. 44.’

2.3 The Protection of the Right of the Journalists not to Disclose their Sources and the Treatment of Personal Data

In relation to the treatment and the protection of personal data, Article 138 of the Data Protection Code of 2003, which reorganised the different laws enacted on the treatment of personal data,⁹ also repealing Article 13, paragraph 5, Law no 675 of 1996 which recognised to journalists the application of the provisions on the protection of the professional secret, with a limitation to the source of the information. The Data Protection Code acknowledges the journalists’ right not to disclose their sources as a prevalent right in respect of the right of the persons to know the origin of personal data related to them.¹⁰

2.4 The Protection of the Right of Journalists not to disclose their Sources Within the Criminal Procedural Law

Before the reform of the CCP was enabled, the debate focused on the contrast between Articles 351 and 348 of the former code. The former Art. 351 provided an exception from the general duty to witness established in Art. 348 Section II, without including journalists within the category of professionals entitled to abstain from testify.¹¹ Several Courts questioned the legitimacy of these provisions, noticing the violation of the principles of equality and freedom of expression, both protected respectively by Art. 3 and Art. 21 of the Italian Constitution. The Constitutional Court rejected the claim of the violation of the principle of equality relying on the structural and functional difference of the cases; whilst, in regard to the alleged prejudice to the freedom of expression the Constitutional Court acknowledged the existence of *‘a real press freedom of journalists – inclusive of the acquisition of information – as a passive aspect of freedom of expression’*, but assumed the interest in justice to be prevalent on freedom of expression, urging the legislator to

⁹ Legislative Decree no 196 (Data Protection Code) 2003 [Codice in Materia di Protezione dei Dati Personali].

¹⁰ Valeria Falcone, *Segreto giornalistico ed esigenze processuali*
<http://www.altalex.com/documents/news/2008/01/24/segreto-giornalistico-ed-esigenze-processuali#sdfootnote10sym> accessed 10 January 2016.

¹¹ Former Art. 351, CCP: *‘Cannot be compelled to give evidence of what they have learned by reason of their status, office or profession, except in cases in which they have an obligation to report to the Court: a) the ministers of religious denominations, whose statutes are not in conflict with the Italian legal system; b) lawyers, authorized private investigators, technical consultants and notaries; c) doctors and surgeons, pharmacists, midwives and any other conducting a health profession; d) conductors of other offices or professions to which the law recognizes the right to refuse to testify determined by legal privilege’.*

reasonably decide on the balance of the two interests.¹² Through the reform of the Code of Criminal Procedure, intervened with Law no 81 of 1987, the legislator affirmed a limited right of journalists not to disclose their sources.¹³ The provision contained in the first section of Art. 200 of the new CCP merely repeats the content of former Art. 351; even though, under paragraph 3, the right to abstain from witnessing conferred by the first section has been extended to *'professional journalists registered in their professional association, exclusively to the names of the person from whom they obtained confidential information while practicing the profession.'* The protection accorded finds its restraints in the following lines of the same article:

'If the information is essential to prove that the offence being prosecuted has been committed and its truthfulness may be ascertained only by identifying the source of information the judge shall order to the journalists to disclose its source.'

The majority of scholars recognize that Art. 200 ensures the protection of journalistic activities; and within this uniform evaluation some of them consider the requirement of confidentiality of the source as fully satisfied, to the extent to constitute a right to anonymity. Unlike, other scholars believe to be instead protected the interest of the carrier, specifically identified in the exercise of his profession: in this view the secret receives protection only if attacked through its holder.¹⁴

The discipline provided by Article 200, Section III, relies on the prevalence of the interest of justice over the interest of the journalist not to disclose the source; therefore, when the secret opposed by the journalist on his sources is deemed to be legitimate by the judge, the information disclosed by the journalist can be used within the trial for the purpose of the decision.

Materially, the right of journalists to abstain from witnessing covers only the identity of the source of the information, not its content, which is supposed to be already public.¹⁵ The Italian Supreme Court recently affirmed that *'the protection of the right of the journalist not to disclose its sources extends to all the information which is likely to facilitate the identification of the source of the confidential information'*.¹⁶ Nevertheless, Article 200, paragraph 2 allows the judge to overcome the right not

¹² 1 [1981] Constitutional Court: '[...] *The question posed in reference to Art. 3 of the Constitution, cannot be said in itself to have a basis, because the comparative situations are not equal, nor broadly homogeneous, but rather different in several aspects, structural and functional. And, indeed, already structurally it differs from the journalistic secrets listed in Art. 351 of the criminal procedural code, as it protects the sole source and not even the information: that indeed is confided to a journalist with the aim that he will disclose it. Even functionally, the comparison of journalistic secret with the cases provided for by Art. 351 has no consistency.*

In the latter can be raised, as has been mentioned, the consideration of the confidentiality requirement in correlation to the fulfilment of fundamental interests of the person providing the information...It is then up to the legislator to considering if the journalistic secret is so essential or has an effective instrumental utility for the freedom of expression to such an extent to prevail on the interest in justice [...].'

¹³ Luca Grilli, *La Pubblicazione degli Atti e il Segreto Professionale del Giornalista* [1990] Giust. Penale 565 [Italian].

¹⁴ The latter scholar's view has been affirmed taking into account the provision of Art. 200, paragraph 3, which restrains the protection exclusively to confidential sources. Cf. M. Di Camillo, *Segreto Giornalistico e Diritto di Cronaca nel Diritto Sostanziale e Processuale alla Luce della Riforma del 1988* [1999] Giur. Merito 668 [Italian]; Rarafaci, *Segreto del Giornalista e Processo Penale* [1991] Cass. Pen 919 [Italian].

¹⁵ 1 [1981] Constitutional Court [Italian].

¹⁶ 22397 [2004] Supreme Court of Cassation [2004] Giust Penale III, 282; Paola Spagnolo, *Il Segreto Giornalistico nel Processo Penale* (Giuffrè) 199 [Italian].

to disclose a source of information, by verifying the validity of the secret opposed, the registration to the order of the journalist and the circumstances under which the information was acquired.¹⁷

When the judge assesses the respect of the professional ethics and duties in gathering the information, he/she can order also the disclosure of the source under specific conditions which will be further explained in the sixth part of this report. Recent case-law of the District Court of Rome and the Criminal Court of Treviso demonstrated that Courts are in favor of the right of the journalists not to disclose their sources, supporting the existence of an absolute protection provided by the aforementioned provision. However, the Courts confirmed the exceptional character of the derogations, subjected to the strict fulfillment of the criteria which will be explained later in this report.¹⁸

The right of journalists not to disclose their sources is ensured also by other provisions. Article 271, paragraph 2 of CCP establishes the discipline of wiretapping of individuals identified by Article 200. The provision prohibits to use the content of the conversations concerning information or facts known by reason of profession or office, unless the person of interest disclosed the information in a deposition or in other ways. In relation to invasive measures ordered by the judicial authority, according to Article 256 CCP journalists are entitled to oppose the professional secrecy towards the request of public authorities to produce acts, documents, computer programs, data and information.

3. Is there, in domestic law, a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

3.1 National Provision Envisaging the Prohibition for Journalists from Disclosing their Sources

The main provisions of the Italian legal system on the disclosure of confidential sources by journalists were introduced in the previous chapter: Article 2, Law no. 69 of 1963, Organisation of the Journalistic Profession, Article 138, Data Protection Code, Charter of Duties of the Journalists published in 1983.¹⁹ These rules are enforced through a sanctioning system provided by articles 51 to 55, Law 63 of 1969 on the Organisation of Journalistic Profession, as already examined.

¹⁷ L. Biagioni, *Note sul riconoscimento del segreto professionale ai giornalisti professionisti nel nuovo C.p.p* [1991] Giur. It. 477 [Italian].

¹⁸ [21/02/1994] District Court of Rome; 252 [14/01/2000] Criminal Court of Treviso.

¹⁹ Boneschi, *La Deontologia del Giornalista*; Charter of the Duties of Journalist [1993] (Carta dei doveri del giornalista).

3.2 The Prohibition of Disclosure of Sources within the Italian Criminal Code

In addition to the aforementioned prescriptions, the Italian Criminal Code (hereafter CC) should be considered for the purpose of the analysis. Although it does not contain a specific provision prohibiting journalists to disclose their sources, the majority of scholars admit that the conduct of revealing a source of information held by the journalist falls within the applicability of Art. 622, CC,²⁰ which states as follows:

*'Whoever, having news of a secret, by reason of their status or office, or profession, or art, reveal it without a justified reason, or uses it in order to gain an advantage for himself or others, shall be punished, if his conduct causes a damage, with imprisonment up to one year or a fine ranging from EUR 30 to EUR 516.'*²¹

The disclosure of the professional secret is qualified as a crime against the individual freedom.²²

The duty was established principally in the interest of the client, aiming to protect the *'freedom and security of intimate and professional relations determined by necessity or almost necessity'*²³ of the client to enjoy the professional services provided by a precise category of individuals. Therefore, the prohibition assumes a general public relevance²⁴ on the ground of the trust relationship between a professional and his client. Since the purpose of the provision is the protection of personal freedom, the crime can be prosecuted exclusively upon complaint *ex parte*²⁵ and derogations are allowed solely with the *consensus* of the victim.²⁶

²⁰ Lonardo, *Informazione Giornalistica e Segreto Professionale* 367; Manzini, *Trattato di Diritto Penale Italiano* (5th edn, Torino 1986) 1019 [Italian]; Monaco, *Art. 622* (4th edn, Padova) 2065; Vigna, Dubolino, *Segreto* (Reati in Materia di) 1089 [Italian].

²¹ The crime encountered many difficulties in achieving a full recognition within the legal system. Ancient Roman criminal law used to include the crime under the sphere of *iniuria*. Later, the first Italian Criminal Code qualified it as a crime against the personal honor. Currently, the crime is envisaged as a crime against the inviolability of secrets.

²² Cesare Protetti, *Il Giornalismo nella Giurisprudenza* (CEDAM) 634 [Italian].

²³ The necessity of the client arises because of: a) the lack or insufficiency of technical competence, b) the material impossibility or juridical prohibition to satisfy personal needs, c) the duty or juridical burden of being subject to controls, d) the obligations deriving from religion. The distinction with other types of relationships is marked by the absolute or relative necessity of the professional intervention, which justifies the protection accorded by criminal law. See Mantovani, *Diritto Penale* 651; Manzini, *Trattato di Diritto Penale Italiano* (4th edn 1964) 1013-14.

²⁴ Protetti, *Il Giornalismo nella Giurisprudenza* 635; Cf. Lago, *Art. 622*, in Comm. Dolcini, Marinucci, Parte Speciale 4391 [Italian]; Vigna Dubolino, *Segreto* (reati in materia di) in ED XLI (1989) 1086 [Italian].

²⁵ *ibid* 635; Crespi, *La Tutela Penale del Segreto* 100; Giovanni Fiandaca, Enzo Musco, *Diritto Penale Parte Speciale, vol II, I delitti contro la Persona* (4th edn Zanichelli 2013) 219 [Italian].

²⁶ The consent must derive from the person to whom the secret refers to, and it prevents the occurrence of the offence. The consent can be also expressed after the professional gains knowledge of the secret. Furthermore, it can be replaced by the lack of complaints by the individual entitled to exercise his right to report. See Manzini, *Trattato di Diritto Penale Italiano* 1028-30.

Unlike, some scholars partially disagree on the extension of the provision to the conduct of journalists who disclose their sources because the *ratio* of the incrimination would be missing, if the information is provided to the journalist in order to be published.²⁷

3.2.2 The Substantial Regulation of the Crime of Secret Disclosure

In regard to the material discipline of the crime, Article 622 CC prescribes a necessary requirement for the realisation of the conduct: the cognition of a secret, whose knowledge must be necessary and causally connected with the exercise of the profession. The general reference to the exercise of the profession is linked to the protection of personal freedom: the legislator did not restrict the range of protection using strict categories, but decided to introduce notions, such as status, employment, arts, profession, capable to include uncountable professional activities.²⁸ Furthermore, the information *aliunde* known by the professional is excluded by the protection accorded,²⁹ since it must exist a strict functional connection between the knowledge of the secret and the exercise of the profession. The information protected as a secret can pre-exist respect the professional relation or arise after the trust relation is established.³⁰ Besides, the interest in personal freedom fulfilled by the provision may come into consideration only when the secret regards facts or relationships concerning the intimate sphere of the client.³¹ Furthermore, the information receives protection by Article 622 CC irrespectively of its lawfulness, while the disclosure shall always comply with the essential legal requirements.³² According to Article 2, Law no 69 of 1963 the journalistic secrecy applies only for '*confidential sources*'.

²⁷ *ibid* 965; Santucci, *Il Segreto Professionale* (1964) 645 [Italian]; Protetti, *Il Giornalismo nella Griurisprudenza* 635.

²⁸ Fiandaca, Musco, *Diritto Penale, Parte Speciale* (2006) 318 [Italian]. The notion of status is defined as the situation realized through the continuative exercise of a social activity, or as the juridical situation derived from family relationship. Employment means the private or public activity which is exercised temporarily or permanently by an individual, which does not constitute a profession in the strict sense. Public functions are excluded from the notion of employment. See Giuliano Marini, Mario la Monica e Leonardo Mazza, *Commentario al Codice Penale*, Vol. IV (UTET 2002) 3073 [Italian]; Guido Papa e Roberto Garofoli, *Manuale di Diritto Penale, Parte Speciale*, Vol. 3 (Nel Diritto Editore 2015) 713 [Italian]. Finally, the notions of profession and arts are defined as the habitual activities consistent in providing personal services or real performances for people who require or need them. The notions share some common features, such as a) the reception of confidential information or the cognition of secrets as a moment of the exercise of the activity, b) the continuity of the activity, c) the absence of profit, d) the morality or legitimacy of the activity. See Mantovani, *Diritto Penale, Parte Speciale, Delitti contro la Persona* 649.

²⁹ Professional secrecy does not apply when the information is obtained a) for extra-professional reasons, solidarity or friendship, b) when the person requires the aid of the professional to achieve an illegal purpose, c) when the information has been acquired unlawfully. See Mantovani, *Diritto Penale, Parte Speciale, Delitti contro la Persona* 651.

³⁰ Marini, la Monica, Mazza, *Commentario al Codice Penale*, 3073; Mantovani, *Diritto Penale, Parte Speciale, Delitti contro la Persona* 652; Manzini, *Trattato di Diritto Penale Italiano* 1020.

³¹ Such as honor, family, religion, politic opinion, body, property asset, etc. See Manzini, *Trattato di Diritto Penale Italiano* 1020; Cf Mantovani, *Diritto Penale, Parte Speciale, Delitti contro la Persona*; which affirms that the exercise of the profession may require the knowledge of information by third parties, who need the same protection accorded to clients.

³² Mutti, *Segreto Professionale* in *Digesto Pen.*, XIII, Torino, 1997, 128.

As a consequence of the combination of the two provisions, the protection is only accorded to information acquired by the journalist during the exercise of his profession, as long as they do not have a social and public relevance.³³ In order to protect the category, case-law has confirmed that when information is publicly available, the disclosure by the journalist does not have any criminal relevance. In this circumstance, the provision would no longer be applicable as the need of protection cease to exist. Along with this orientation, the Court of Naples specifically assessed that the knowledge of the secret by the professional does not undermine the obligations of loyalty and privacy imposed on him: these obligations terminate only because of the “notoriety” of the information.³⁴

The European Court of Human Rights (hereafter ECtHR) ruled on the situation of a journalist who published information of public relevance obtained as a consequence of the violation of professional secret committed by someone else.³⁵ The ECtHR defined the dissemination of information of general public interest as an inalienable right of the journalists. Additionally, it recognised as an unreasonable limit to the freedom of expression, the conviction of journalists for receiving stolen goods and publishing documents received as a result of the disclosure of professional secret perpetrated by someone else, when the journalist acts in accordance with ethical rules.³⁶ The Court urged States to extend the protection of freedom of expression, declaring incompatible with Article 10, ECHR searches within editorial offices and press rooms and seizures of informatics and printed material ordered by judges.

The abovementioned measures entail the conviction of a State before the Court.³⁷ In the case *Görmuş and others v. Turkey*, the ECtHR ruled against Turkey for the measures undertaken against a magazine that published confidential military information, probably gathered by a whistleblower.³⁸ In the view of the ECtHR, these measures are not only incompatible with the Convention, they also undermine freedom of expression. Moreover, the decision of the ECtHR underlined the importance of the evaluation of the public interest and general relevance of the information, regardless of its origins. Every restriction on press freedom should be exceptional and linked to an imperative social need which must be proved.

³³ The information having public social relevance falls under the right to freedom of expression, Article 21 of the Italian Constitution. See Manzini, *Trattato di Diritto Penale Italiano* 1019; Mantovani, *Diritto Penale, Parte Speciale, Delitti contro la Persona* 579.

³⁴ 1238 [15 January 2003] Tribunal of Naples.

³⁵ *Fressoz and Roire v. France* [1999] European Court of Human Rights. Legal summary : ‘In essence, that Article [10] left it for journalists to decide whether or not it was necessary to reproduce such documents to ensure credibility. It protected journalists’ rights to divulge information on issues of general interest provided that they were acting in good faith and on an accurate factual basis and furnished “reliable and precise” information in accordance with the ethics of journalism’.

³⁶ Art. 648 CC: ‘Except for the cases of concurring in crime, whoever purchases, receives, conceals money on things originating from any offence whatsoever, or in all cases meddles to have them purchased, received or concealed, in order to obtain an advantage for himself or others, shall be punished with imprisonment from two to eight years and a fine from 516 to 10.329 euros’.

³⁷ Marina Castellaneta, *Protezione delle fonti dei giornalisti blindata da Strasburgo*
<<http://www.marinacastellaneta.it/blog/protezione-delle-fonti-dei-giornalisti-blindata-da-strasburgo.html>>
accessed 23 April 2015.

³⁸ *Görmuş and others v. Turkey* [2016] European Court of Human Rights [French].

Article 622 CC punishes alternatively the disclosure of the secret whenever it is revealed or used to gain profits, to the advantage of the author of the crime or others. The crime does not exist if the information is disclosed to someone who already has knowledge of it. The offence refers to the act of disclosure and to the omission, the latter occurring when someone allows a third party to know the confidential information, being sufficient the extension of the information beyond the number of persons entitled to know it in order to incur in the criminal offence.³⁹

Article 200, CCP, must be recalled here, the provision acknowledges the right to abstain from witnessing on facts apprehended in the exercise of the profession to a wide range of professionals, including journalists. As mentioned at the beginning of this analysis, Article 622 of the Criminal Code should be also read in conjunction with Article 200 of the Code of Criminal Procedure. While scholars agree on the theoretical distance between the *ratio* of the two provisions, concrete issues arise as a consequence of the decision taken at a procedural level.⁴⁰ The procedural code envisages the attribution to witnesses with specific qualification, of a duty-power not to answer to questions during the criminal hearing whenever the answer would cause the violation of the professional secret.

4. Who is a “journalist” according to the national legislation? Is it in your view a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media actors? Is the protection of journalists’ sources extended to anyone else?

4.1 The Definition of Journalist

The Italian legal system does not provide a simple and sole definition of who is a journalist. The provisions on the topic create a system of definitions reciprocally linked, in most cases confusing or contradictory, which need to be coordinated. In order to build a definition of “journalist” the research should examine both legal provisions and self-regulatory mechanisms, having in mind the constitutional guarantees. Furthermore, the identification of a satisfactory definition has to consider also the reality of an evolving profession, as well as the definition of journalism itself. There is a methodological and logical difficulty in building the system of definitions, due to the fatal obsolescence, and consequential inefficacy, of the tools that can be used, which are dated back to the sixties, decades before the social media revolution.

³⁹ Lago, *Art. 622*, in Comm. Dolcini, Marinucci, Parte Speciale (2006) 4397; Mutti, *Segreto Professionale* 129.

⁴⁰ The *ratio* of Art. 200 was identified in the free exercise of professions directed to satisfy fundamental constitutional interests, which imply privacy instances.

As already explained at the beginning of this report, the main guarantee of freedom of expression in the Italian legislation is Article 21 of the Constitution, which refers mainly to the press and journalists.

4.1.2 The Definition Provided by the Law no. 69 of 1963: professional journalists and publicists

To assert that journalists are the ones who professionally carry out journalism would rightly seem tautological, but this is the case. Law no. 69 of 1963 established the Association of Journalists, explicitly referring to the figure of journalist in order to give a definition of it. Article 1 introduces the dichotomy between '*professional journalists and publicists*'. Accordingly, a professional journalist '*exercises exclusively and continuously the profession of journalist*'; while a publicist '*practice the journalistic activity not occasionally and upon payment, even though they exercise other professions or jobs*'. Both the mentioned figures of journalists have to be registered in the professional order.

To better understand the real impact of this legislation, it would be helpful to explain how individuals can gain the title of journalist, whether professional or publicists. As prescribed by the abovementioned law, the Association has the power to control the *iter* to be followed: in order to obtain the license as publicists, it is required to work for a period of two years, upon payment, and to write a fixed number of articles for a legally registered newspaper, with a certain frequency. Once the candidate obtains the license, he/she can enter an exam to become a professional journalist. The law created a system in which journalists are members of a closed order, which is divided into two main categories. The division is made on the basis of an exam, which does not deem seniority, nor years of experience or the position covered within the editorial staff of a newspaper.⁴¹

The difference between the two categories of journalists is relevant to the research theme, since professional journalists benefit of a broader protection of their sources than publicists. Indeed, Article 200 of the CCP⁴² provides limitations to the disclosure of sources only for professionals, while publicists can only rely on the guarantee and the duty affirmed by the third paragraph of Article 2, of the Law no 69 of 1963⁴³.

⁴¹ Nevertheless, the Constitutional Court equalised the main part of two classes' powers, during the years; it is remarkable the judgment of the Constitutional Court no. 98 of 1968 which recognized to the freelancer the possibility to cover also the position of managing director.

⁴² The Criminal Procedure reform provided by Law no. 81 of 1987 extended the right to abstain from witnessing, also to other categories of professional workers, than the ones identified in paragraph 1:

'The provisions referred to in paragraphs 1 and 2 shall apply to professional journalists registered in their professional association, exclusively to the names of the person from whom they obtained confidential information while practicing the profession. If the information is essential to prove that the offence being prosecuted has been committed and its truthfulness may be ascertained only by identifying the source of information the judge shall order to the journalists to disclose its source.'

4.1.4 The Definition Provided by Case-Law

The definition is not exhaustive, yet, indeed, it is useful to examine the case-law, in order to highlight the real implementation of the mentioned provisions. It is not possible to build a system of definitions basing it exclusively on the possession of a press card or the enrolment in a professional registry. An explicit definition is needed in order to better understand and complete the drawing of semantic boundaries, to find where the legislation must be corrected and implemented, to know the risks connected with a revision, and finally to enforce the protection of journalistic sources at a higher level.

During the debate on a labour case, by delivering the judgment no. 1827 of 1995, the Italian Supreme Court of Cassation affirmed that:

'Journalistic activity' is meant as an intellectual performance in order to gather, comment and elaborate news aimed to be the object of an interpersonal communication through the means of mass communication. Therefore, the journalist is a mediator between the fact and the dissemination of it [...], the difference with other professions is the promptness of information directed to stimulate citizens to be aware of important issues'.

The definition, as drawn by the Court, included journalism in the *genus* of intellectual activities, which aims to disseminate news and information, and identified it as a particular *species*, whose peculiarities are the promptness of information and the purpose of cultural stimulation. The combination of this definition with the disposition of Article 45 of the Law no. 69 of 1963, which prohibits anyone to use the title of journalist without being registered in the professional association, referring also to Articles 348⁴⁴ and 498⁴⁵ CC, provides the basis to build up a final definition of journalist. The journalist would be a professional figure in the broader sense who spreads its knowledge quickly, acting as a mediator between the facts and the audience, irrespectively of the qualification as publicist, gained after an apprenticeship, or professional in the strict sense, a status obtained by passing an exam. Clearly, there are two elements which are only partially coincident: one described by the legal provision, in which the discriminating factors are the legal thresholds, and the other one referred to reality, in which journalists' peculiarities can be distinguished on the ground of their actual activity.

⁴³ Art. 2, Law no 63 (Organisation of the Journalistic Profession) 1969 [Ordinamento della Professione di Giornalista] *"Journalists and editors are obliged to respect the professional secret on the source of information, when this is required by the confidential character of it"*.

⁴⁴ *"Whoever unlawfully exercises a profession, for which a special authorization of the State is required, shall be punished with imprisonment up to six months or with a fine from EUR 103 to EUR 516."*

⁴⁵ *"Whoever, apart from cases envisaged by Article 497-ter illegally holds public uniform or distinctive signs of an office or public employment, or a political body, administrative or judicial, or a profession for which a special authorization of the State is required, or improperly wears clerical garb in public, shall be punished with fine from 150 to 929 Euros."*

The sanctions are applied to anyone who arrogates dignity or academic degrees, titles, decorations or other public honorary insignia, ie qualities inherent to any of the offices, jobs or professions, indicated in the earlier provision. For violations referred to in this Article shall apply the sanction of the publication of the measure ensures that the violations in the manner established by art. 36 and do not qualify for reduced payment provisions of art. 16 of the Law 24 November 1981 no. 689."

4.1.3 The Definition of Journalist at European Level

Indeed, it is appropriate to compare this notion with the one provided by the Recommendation No. R (2000) 7. Rightly, the Council of Europe clarifies the term “journalist” as subject to the protection of sources. Firstly, the appendix to this recommendation “Principles concerning the right of journalists not to disclose their sources of information” illustrates at the letter a of Definitions section that, for the purposes of this Recommendation, *‘the term “journalist” means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any mean of mass communication’*. Point 11 (a) of the Explanatory Memorandum to the Recommendation provides that *‘it is generally understood that the right to freedom of expression implies free access to the journalistic profession, i.e. the absence of the requirement of an official admission by state organs or administrations.’* The Recommendation cites also the Recommendation No. R (96) 4 on the protection of journalists in situations of conflict and tension, which have the same *ratio*, a *fortiori* “in situations of conflict and tension”,⁴⁶ and also the Resolution No. 2 on Journalistic Freedoms and Human Rights by the 4th European Ministerial Conference on Mass Media Policy (Prague, 1994) that in Principle 3 (a) specifies the importance of an *‘unrestricted access to the journalistic profession’* for *‘journalism to contribute to the maintenance and development of genuine democracy.’* Looking also at the Goodwin case,⁴⁷ it should be noticed that the ECtHR defined Mr Goodwin as a journalist because he had been employed for three months within the editorial staff of a newspaper, even though he was just a trainee.

4.2 The Protection of Journalistic Sources Accorded to Professional Journalists and Publicists

Referring back to the Italian legal system, a particular attention should be paid on the free access to journalism, which is meant not only in the sense of freedom to start the journalistic career, but mostly as an extension of the protection accorded to professional journalists and their sources to everyone who practice journalism.

The original aim of the law founding the Association of Journalists was to protect the profession from abuses, and to constitute a status/shield that has fostered a professionalisation of media operators, which can be actually considered a prerequisite for the social, cultural and democratic development. There is no need to invoke the risks of a completely independent self-regulation of information, even for an advanced society. These risks are actual, since the social media evolution allowed an anarchy that has been producing an inflation of news and comments, whose truthfulness and accountability is too often hard to ensure.

⁴⁶ Indeed, it is clear that in situations hard for the intrinsic existence of democracy, these guarantee must be even more protected: a further confirmation of their social value.

⁴⁷ *Goodwin c. United Kingdom* [1996] European Court of Human Rights [English].

In order to achieve free access to journalism, a lot of prerogatives reserved for professionals were constitutionally extended to freelancers,⁴⁸ and there is a long history of case-law that requires the same contract as for journalists also to their employment relations. Furthermore, it appears logically inexplicable a real distinction *de facto* (*de jure*, as said, it is clear) between who has the title of “publicist” and who, simply, carries out an activity that may coincide to the definition of journalism made by the Italian Supreme Court of Cassation. The inconsistency between the legal truth and the real exercising of journalism is at this point irreconcilable. Moreover, the picture is complicated considering those parallel phenomena to journalism, like blogging or citizen journalism which are avoided or even openly ostracized.

The *Riolo* case⁴⁹ confirms the urgency of the problem. This relevant case had many consequences in the matter of equal balancing of interests in prosecuting defamation, and - more generally - for the implementation of Article 10, ECHR. Furthermore, it highlighted that the journalistic activity must be protected itself, without strict boundaries as the ones provided by the Italian system. Although Mr. Riolo is not a journalist regularly enrolled in the professional association, the fact that he wrote articles published on a newspaper was evaluated by the Court as a sufficient threshold to extend the protection on his activity, considered as journalistic.⁵⁰

For all these reasons, it is easy to understand the necessity to support the need to reform this closed system, also considering the legitimate fear for the consequences of de-professionalisation. As a matter of fact, the legal system as described so far is totally inefficient in containing the inflation of information, since it is sufficient to report and comment news to invoke the right to freedom of expression, without declaring oneself a journalist to remain in the legal boundaries. The Law no. 69 of 1963 did not established structures able to systematically control the truthfulness and accountability of the news or the validity of online means of mass communication. The efficacy of safeguards projected for the sixties is null and void for the millennials' necessities. Rather than unconditionally attack everyone who spreads news, it would be logical to distinguish rationally and legally the ones who propagate false or purposefully incorrect contents, from the one who, even in an amorous way, disseminate and comment real news. It would even be convenient to create and structure a semi-professional regime like the freelancer one: citizen journalism is a reality which cannot be ignored anymore.

Currently, the law is simply harmful, rather than a safeguard; in Italy, there is no protection of sources for who practices journalism without falling into the categories set out by the law, nor for anyone else, or any assurance from being acquitted if sued for defamation, even if the reported news corresponds to the truth. It is unequivocal the need to rethink an outdated system, ensuring the real and free access to journalism and its attached guarantees, being - on the other side - aware of the risks of de-professionalisation.

⁴⁸ 98 [1968] Constitutional Court [Italian]. It allowed to become newspaper managing directors also to publicists.

⁴⁹ *Riolo c. Italy* [2008] European Court of Human Rights [English].

⁵⁰ Marina Castellaneta, *Libertà di stampa nel diritto internazionale ed europeo* (Cacucci Editore, 2012) [Italian].

5. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

5.1 The Legal Safeguards on the Protection of Journalistic Sources

In the Italian legal system, the protection of journalistic sources is guaranteed on two different grounds: in the framework of criminal proceedings (Articles 200-205 CCP), and within the special protection accorded by the Law no. 69 of 1963 to the sources themselves, which seems to assign to journalists more of a duty than an entitlement of non-disclosure, enforcing it with administrative deterrents. That basic dichotomy of fields of application – whom is related a dichotomy of sanctioning methods – has the most important impact on the effective application of the protection. Therefore, only practical approach can clarify what are the legal safeguards, how the law is implemented, how the State tangibly operates.

5.2 The Implementation of the Laws

It is appropriate to analyse the case-law in its most meaningful tendency. As already mentioned, the most relevant field of application of the protection of the sources derives from the Code of Criminal Procedure. Summarising, Article 200 CCP prescribes that a judge can order the disclosure of sources only to a professional journalist,⁵¹ if this information is indispensable in order to prove the crime and its veracity can be ascertained only through the identification of the sources. It is already clear a key safeguard: only a judge can order the disclosure, in order to prevent arbitrary decisions which could be made by the prosecution, and to grant the right to defense in contradictory. Indeed, in front of a motion filed by the prosecutor, the defendant can oppose. Furthermore, the case-law established that the necessity has to be verified on the published news, in the sense that it must be present the urgency to ensure the truthfulness of the news, since it is a tool of last resort to prove the crime. This tendency was introduced by the District judge of Rome with the decision of 21 February of 1994 and reaffirmed, among others, by the Court of First Instance in Alba.⁵² The latter clearly specifies the two thresholds: the information provided by the source is necessary to prove the crime; and the veracity of the information can be ensured only through disclosure.⁵³

The respect of the rules established for criminal proceedings is necessary to ensure the protection of journalistic sources, as reaffirmed by many judgments of the Supreme Court. A lot

⁵¹ Professional journalists enjoy the protection provided by the Code on Criminal Procedure. Unlike, publicists are protected exclusively by Law no. 69 of 1963.

⁵² The registration to judicial authority no 601/2000 of 21 January 2001.

⁵³ Franco Abruzzo, *Il segreto professionale dei giornalisti* [2003].

of cases concern to the seizure of sensitive devices, to which the protection is extended when the information protected by the professional secret is stored there. However, Article 256 of the CCP requires the formal opposition of the secret in case of order of seizure or search warrant, through the exhibition of documents.⁵⁴ Beyond the necessary link between the seized object and the facts under investigation, the case-law has affirmed the necessary observance of the procedural *iter* (exhibition order – opposition of the secret – controls and examinations – eventual seizure), provided to grant the professional secret of journalists. This principle and the necessity to balance the right of non-disclosure with the procedural demands is further confirmed by the judgment no. 48587 of 2011 of the Supreme Court. The protection granted by Article 200 is also applicable to any kind of information acquired by the prosecutor through interrogations, according to Article 362 CCP.

The judgment no. 22397 of 2004 by the Supreme Criminal Court, VI section is crucial to better understand the scope of legislation. The Supreme Court implemented the provision⁵⁵ of Article 200, CCP which provides protection only on the disclosure of the name, through an extension also to '*any information capable to reveal the identity of the source*'. This means that the professional secret covers largely any type of disclosure and protects journalists from breaching their right in any way, even indirectly. The integration definitely strengthened the protection, finally allowing a broader application of a safeguard also recognised at the international level by the ECtHR.

Every time the disclosure of a source becomes necessary for the proceeding to continue, Articles 200-205, CCP act as a reservation clauses, enacting a cornerstone system in order to ensure the protection of journalistic sources. This kind of references operates for the inner coherence of the whole set of rules and it avoids legal safeguards to be bypassed.

5.3 Legal Safeguards and Self-Regulatory Mechanisms

Nevertheless, it is evident that the relation between the legislation and the self-regulatory mechanism can be dangerously asymmetrical. Firstly, it is appropriate to remember that the main journalistic institution, the Association of Journalists, has been established by the national Law no. 69 of 1963, which created the mechanisms of self-regulation, including the dichotomy professional/publicist, the organisation of the association, the basic ethics and sanctions. There is an inevitably original hybrid nature, which has its influence: established by a national law, the Association of Journalist is a professional organization of individuals, which operates on the base of a set of rules established by the Association itself. Obviously, it has operated as a formal independent institution during the years, but without the flexibility indispensable to adapt itself to the new needs of an evolving profession. The legal safeguards resulting from the application

⁵⁴ 144 [1997] Supreme Court of Cassation, II section [Italian].

⁵⁵ In the Italian system Courts do not have the power to create law, nor to amend the legislation; nothing similar to *stare decisis* exists. Nevertheless, the Supreme Court has a principal authority in the interpretation of laws. This phenomenon is even more incisive when the legislator lack of authority is more acute.

of the laws have to be coordinated with the rules provided by the Association, which often integrates them or obliges the interpreter to meditate to rebuild an organic system.

As said, the self-regulatory system provides more of a sources oriented protection rather than a right of non-disclosure for journalists. It is clear from the mentioned law,⁵⁶ but also from the Charter of Journalists, a code of ethics, entered into force in 1993, which affirms, under the title “Sources”, that: *‘When the sources request for non-disclosure, the journalist has the duty to respect the professional secret and shall inform the readers of that peculiar circumstance.’*

This duty/right of journalists binds both professional and publicists, without any distinction. It produces the main asymmetry from the legislation, since the protection granted by Article 200-205 CCP is reserved only to the professional. Whereas a publicist has the duty to protect his/her sources in the case of a trustworthy relation, in order not to incur in the penalties provided by Article 48 of Law no. 69 of 1963, he/she must disclose the identity of the sources during the trial. The results are even more paradoxical if a publicist and a professional are coauthors of an article where information provided by a secret source is published: on the ethics and self-regulatory ground neither of them must disclose the identity of the source; whilst during a proceeding the publicist has the duty to disclose the sources in any case, when required by a judge.

Article 622 CC and Article 48 of Law no. 69 of 1963 provide penalties for the violation of the professional secrecy by the journalists. The first operates as a stricter legal safeguard, establishing two types of punishments (fine from 30 to 516 euros or detention until 1 year). On the other side, Article 48, Law no. 69 of 1963, inflicts a disciplinary sanction, which produces consequences mainly in the field of the exercise of the profession. Accordingly, the disciplinary sanctioning procedure can be started by the Regional or Interregional Office or by the general prosecutor competent pursuant to Article 44; if the journalist’s responsibility is ascertained the sanctions provided by Article 51 of Law no. 69 of 1963 are: the warning; the censure; the suspension from the exercise of the profession for a period between two months and one year or the expulsion from the association.

If Article 622 would not apply to the secret of journalists, a precious safeguard would be lost, and the only deterrence to prevent violations of the journalists’ duty would be the administrative sanction. In that case, the role of self-regulatory mechanisms is evident: they intervene to cover a loophole in the legislation concerning ethical violations, under the authorisation of a State-law, in a contradictory framework that protects sources discontinuously.

⁵⁶ Art. 2, para 3, Law no 63 (Organisation of the Journalistic Profession) 1969 [Ordinamento della Professione di Giornalista]

6. In the Respective National Legislation, are the Limits of Non-Disclosure of the Information in Line with the Principles of the Recommendation No R (2000)7? What are the Procedures Applied? Is the Disclosure Limited to Exceptional Circumstances, Taking into Consideration Vital Public or Individual Interests at Stake? Do the Authorities First Search for and Apply Alternative Measures, which Adequately Protect their Respective Rights and Interests and at the Same Time are Less Intrusive with Regard to the Right of Journalists not to Disclose Information?

In the Italian legal system the limits of non-disclosure of the information are formally in line with the principles of the Recommendation No R (2000)7. A proof of this statement is the fact that Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides an explicit and clear protection on the right of journalists not to disclose information identifying a source, is well integrated into the Italian domestic law. Integration of this article in the domestic law is an explicit requirement of the Recommendation No R (2000)7, which in its first principle states that:

*'Domestic law and practice in member states should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms [...].'*⁵⁷

Due to the importance of the information released by media, which can be immediately transmitted on a global level thanks to the internet, in order to protect the confidentiality of journalistic sources the national legislation shall provide accessible, precise and predictable protection for whom is taking the risk to communicate any type of information and for the journalists that are receiving and disseminating them. Furthermore, it is in the interest of journalists and their sources, but also of public authorities, to have a clear and precise legislation on the topic. These standards should be based on Article 10, ECHR, as interpreted by the ECtHR in its judgments, in addition to this Recommendation.

A more extensive protection of the confidentiality of journalistic sources is not excluded by the Recommendation, since the principles established in it should be considered as minimum standards for the respect of this right.⁵⁸ If a right to non-disclosure exists, journalists should have the right/duty to refuse the disclosure of information and the identification of a source, without being exposed to any responsibilities on civil or criminal grounds, or to any penalty which may be inflicted for their refusal.

⁵⁷ Recommendation No R (2000)7 of the Committee of Ministers to member states

⁵⁸ Recommendation No R (2000)7, of the Committee of Ministers to member states.

Indeed, Article 21 of the Italian Constitution, which guarantees freedom of expression and press freedom, is perfectly in line with the principle of non-disclosure. Moreover the right to non-disclose the sources is very noticeable in the balancing with the fundamental right to privacy (Data Protection Code). Article 4, paragraph 1(b) of the Legislative Decree no. 196 of 2003 defines personal data as: '*any information concerning a natural person, legal person, institution or association, identified or identifiable, even indirectly, by reference to any other information including a personal identification number*'. Personal data are not only the identity and the image of an individual, but also the ID card number, the mobile number and the credit card number, the social security number, the e-mail address, the license plate, the voice, the fingerprints and so on.

With regard to the constitutional protection of the personality, scholars deployed on two opposing positions: on the one hand, the personality is protected as a unique and general right to which lead all aspects related to the human person (confidentiality, honor, decorum, the identity, the interest in the protection of personal data), on the other the autonomous consistency and protection must confer rights on individuals that contribute to tracing its outline.

On both sides, on jurisprudential level and on doctrinal level, we can see in the Article 2 of the Italian Constitution a general protection to the right of privacy.

In particular, if privacy is linked to personal freedom, this right covers two aspects: on one hand as a negative freedom, which is defined through the concept of non-interference, meaning that no one can interfere in the private sphere of the individual freedom. The aforementioned negative aspect shows a side of the right to privacy, which is the right to withhold certain information against any intrusion. On the other hand, as a positive freedom, which must be related to the power and control concepts in the sense of giving the subject the full autonomy granting him the opportunity to speak in front of others' actions which disturb, attack or falsify their lives in society.⁵⁹

Special rules are provided regarding the use of private data/information by the journalists instead. No authorisation of the Italian Data Protection Authority for the private data/information is required and the journalist who carries out actions regarding use of the private data has no obligation to obtain the consent of the person involved, even if the process concerns sensitive data.⁶⁰ This means that journalists can freely and independently create their own databases. However, at the time of gathering personal data, the journalist should be obliged to inform the person who is transmitting the information, on which personal data will be used by the journalist. The legal basis of the obligation of the journalist relies in article 13 of the Data Protection Code, even though it is a requirement certainly negligible when compared with the obligations that other kind of controllers should have on receiving personal information. Simplified forms taken by Article 2 of the Code of Ethics, which requires journalists to inform the person on his role as source of the information, to communicate only '*their own identity, their*

⁵⁹ A. Baldassarre, *Diritti della persona e valori costituzionali* (G. Giappichelli Editore 1997) [Italian].

⁶⁰ Art. 137, para 1 and 2 Legislative Decree No.196 (Data Protection Code) 2003 [Codice in materia di protezione dei dati personali].

profession and the purposes of the collection of the data and dispensing them from the obligation to provide all other elements as described in Article 13 of the Data Protection Code. The same rule also allows journalists not to identify themselves and not to inform the person on the data collection purposes when *'this could cause any risks to the safety of the source or make it impossible to exercise the informative function'*.

The only limits that journalists meet in processing personal data concern exclusively their communication and dissemination. It is not enough that the communication and the diffusion of the information are functional to the exercise of the work of the journalist and for the exclusive use of its purposes, as it is required for other types of treatment.

According to Article 137, paragraph 3 of the Data Protection Code, the communication and dissemination of personal data meet *'the limitations imposed on freedom of the press to protect the rights as per Article 2, in particular concerning materiality of the information with regard to facts of public interest, shall be left unprejudiced'*. It means that the dissemination of personal data, particularly the identity and the image of the person, must meet the traditional requirements on which freedom of the press is based. Consequently, in addition to being accurate and truthful, the dissemination of personal data must meet a real need for the interest of the public audience.

As matter of fact, if the disclosure is limited to exceptional circumstances, our legal system establishes some restrictions to the right to non-disclosure when it counteracts with the public interest in the administration of justice and in the repression of crimes.

The same criteria is also expressed by Article 10, paragraph 2, ECHR:⁶¹ when public security issues or situations that can be dangerous for the country or the Constitutional system arise exceptional measures shall be undertaken.

Therefore, as the right to freedom of expression is subjected to the respect of public order, the secrecy of the source of the information is not an absolute principle, as it seems. Indeed, Article 200 CCP demonstrates the relationship between the obligation to give evidence in front of the judge and the professional secrecy that the journalist may invoke on the names of the sources of the confidential information.⁶² However, if the information are essential to prove a crime and their veracity can be ascertained only through the identification of the source who has provided the confidential information, the judge can order to the journalist to reveal the his source of information. Thus, the professional secrecy can be removed with an order from the judge exclusively when meeting the following requirements: a) the information that comes from a

⁶¹ Art.10, para 2 [4 November 1950] Convention for the Protection of Human Rights and Fundamental Freedom: *'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'*.

⁶² Art.200, Code of Criminal Procedure.

trusted source is essential for the evidence of the crime; b) the veracity of the information can be determined by the identification of the source.

These are the major aspects that the Italian legal system provide concerning the disclosure of information, taking into consideration the rights and the interests of the institutions and of the journalists.

7. In the Recommendation No R (2000) 7, the Following Principles Should be Respected when the Necessity of Disclosure is Stated: Absence of Reasonable Alternative Measures, Outweighing Legitimate Interest (Protection of Human Life, Prevention of Major Crime, Defense of a Person Accused or Convicted of Having Committed a Major Crime). Under which Criteria can the Interest in the Disclosure Outweigh the Interest in the Non-Disclosure?

The identification of the criteria under which the interest in the disclosure outweighs the interest in the non-disclosure requires a careful analysis of national case-law and legislation. At the outset, the Italian legal system sets the right of the journalists not to disclose their sources as a fundamental right, warranted by the recall of Article 10 of the ECHR,⁶³ as well as by Article 21 of the Italian Constitution,⁶⁴ which recognises the right to freedom of expression and freedom of the press.⁶⁵

The essential nature of this right entails the recognition of its inviolability, thus it can be limited exclusively in the case it counteracts with other fundamental rights, which are considered as prevalent in a specific circumstance. The evaluation of prevalence identifies the legitimate exceptions to the right to non-disclosure and it is carried out with a judgment of weighting or balancing, in order to overcome the absence of a hierarchy of fundamental rights.⁶⁶ The judgment of balancing is based on the criterion of the ordinary prevalence of the right to non-

⁶³ 1418 [1989] Supreme Court of Cassation, Criminal chamber, *Rivista internazionale dei diritti dell'uomo* [1990] 419 [Italian]; 6672 [1998] Supreme Court of Cassation, Civil chamber, *Rivista italiana di Diritto Pubblico Comunitario* [1998] 1380 [Italian].

⁶⁴ According to which *'The right of journalists not to disclose their source is part of their right to freedom of expression under Article 10 of the Convention'*. See also Explanatory Memorandum to Recommendation no. R (2000) 7, Principle 1, *Right of non-disclosure of journalists*, paragraph 21.

⁶⁵ 31735 [2014] Supreme Court of Cassation, IV Criminal chamber [Italian] *'...the national legal system guarantees the professional confidentiality (of journalists) not as a personal privilege, but as a fundamental defence of information activities, that must be free and unreserved'*.

⁶⁶ R. Bin, *Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale* (Giuffrè 1992) 337 [Italian]; U. Natoli, *Conflitto di diritti* [1998] *Digesto Discipline Privatistiche - Sez. civile, III*, 447, 451 [Italian]; G. Pino, *Teoria e pratica del bilanciamento: tra libertà di manifestazione del pensiero e tutela dell'identità personale* [2003] *Danno e Responsabilità* 527 [Italian].

disclosure, therefore the restraints on the same right are entirely exceptional even on the domestic level.⁶⁷

7.1. Balancing with the Right to Privacy

The prevalence of the right to non-disclosure of journalistic sources is particularly noticeable in the balancing with the fundamental right to privacy.⁶⁸

The right to privacy is currently regulated by the Legislative Decree no. 196 of 2003, also known as the Privacy Code, which regulates the activity of processing personal data and provides certain rights to those whom such data relate. The legislation also recognises to the interested parties the right to obtain the indication ‘[...]of the source of the personal data...’⁶⁹ by the data controller, i.e. the source of the news disclosed.

Therefore, in a comparison between an individual’s right to the knowledge of the source (functional to the protection of privacy) and the right and duty of journalists to keep their sources confidential, the Italian law considered the latter clearly prevalent, expressly providing in the Privacy Law, that in the case of request about the origin of personal data under Article 7, paragraph 2, letter a) remain firm the rules on journalists’ professional secrecy, with reference to the sources of the news.⁷⁰ Accordingly, even in the case of a legitimate request by a private individual to know the source of their personal data, a journalist maintains the full right not to disclose those sources,⁷¹ without incurring in any criminal or disciplinary sanction.

7.2. Balancing with the Public Interest in the Administration of Justice and in the Repression of Crimes

On the other hand, the Italian legal system establishes some limited restrictions to the right to non-disclosure when such a right counteracts with the public interest in the administration of justice and in the repression of crimes.

⁶⁷ In accordance with Recommendation no. R (2000) 7, Principle 3, *Limits to the right of non-disclosure*. See also Explanatory Memorandum to Recommendation no. R (2000) 7, Principles 3, letter a), paragraph 28 ‘*The disclosure of information identifying the source should therefore be limited to exceptional circumstances where vital public or individual interests are at stake and can be convincingly established*’ (see *Goodwin v. the United Kingdom* [1996] ECtHR para. 37).

⁶⁸ The right to privacy is acknowledged in Articles 14, 15 and 21 of the Italian Constitution (respectively concerning the domicile, the secrecy of correspondence and freedom of expression), as well as in Article 8 of ECHR, Article 8 of the Charter of Fundamental Rights of the European Union and in the EU Directives no.95/46/EC and no.2002/58/EC.

⁶⁹ Article 7, para 2(a) Legislative Decree no. 196 (Data Protection Code) 2003 [Codice in materia di protezione dei dati personali]. The Article also provides the right to update, change or rectify data and the right to deny their use.

⁷⁰ See the repealed Law no 675 (Privacy Law) 1996 [Legge sulla Privacy] Article 13, para 5, which provided ‘*The provision on the professional secrecy of those exercising the journalist profession shall apply, limited to the source of information*’.

⁷¹ Although the protection of human life, to which the right to privacy relates, is included in the list referred to Article 10, para 2 of the Convention.

Firstly, the exceptions provided by the law are all formally legitimate and are also in compliance with the protection of interests included in the mandatory list referred to in Article 10, paragraph 2, ECHR. Furthermore, any restriction can be imposed exclusively by a Court, as stated in the Convention.⁷² The criteria for balancing between the right to non-disclose and the interest in the administration of justice are identified in the following Articles: Article 200, paragraph 1-3; Article 256, paragraph 2; Article 271, paragraph 2 and Article 362, CCP.⁷³

Article 200 CCP is the cornerstone of the system and it regulates the relationship between the duty to testify in criminal proceeding (prescribed in Article 198 CCP) and the professional secrecy, which is recognised also to journalists when they collect confidential information in the exercise of their profession.⁷⁴ This general rule⁷⁵ is limited by the second paragraph, which provides: *'If the information is essential to prove that the offence being prosecuted has been committed and its truthfulness may be ascertained only by identifying the source of information the judge shall order to the journalists to disclose its source.'* This provision sets out the conditions under which the interest in the repression of crime outweighs the interest in the non-disclosure of sources, thus stated the necessity of their revelation. These conditions are:

- the uncertain authenticity of the news (implicit requirement);
- the indispensability of the news for the evidence of crime;
- the impossibility to verify the authenticity of the information with other instruments than the identification of its source (procedural requirement).

Rebus sic stantibus, for the lawful imposition of the disclosure of sources *'it is not enough the simply nexus of "pertinence" between the news and the general theme of the investigation, but it is also necessary that the interference with the protection of sources represents the extrema ratio to achieve the evidence necessary to prove the crime'*.⁷⁶ Instead, the disclosure of sources must be excluded whenever the assessment of the crime can be based on other evidences and/or the veracity of the news can be ascertained with alternative instruments (eg, consultation of documents, spot checks, etc.).

⁷² Recommendation no. R (2000) 7, Principles 5, Conditions concerning disclosures. See also Explanatory Memorandum to Recommendation no. R (2000) 7, Principle 3 (a), paragraph 24; *Goodwin v. the UK* [1996] ECtHR, para. 31.

⁷³ Ex multis, Paolozzi G., Saracino N.G., *Tutela Processuale del Segreto* [1992], Enciclopedia Giuridica Treccani, XXVIII 4; Abruzzo, *Il Segreto Professionale dei Giornalisti* [2013]; Calderone R.C., *Segreto del Giornalista ed Essenzialità della Giustizia* [1986], Quaderni Giustizia, 58, 27; Gregori G., *Informazione e Segreto professionale: Tutela del Giornalista e del Cittadino* [1984], Diritto Radiodiffusioni, 505; Pisa P., *Il «Segreto Giornalistico» nel Processo Penale: Spazi Stretti per una Prospettiva di Riforma* [1982], Rivista italiana Diritto e Procedura Penale, 291; Conso G., *Il Segreto Giornalistico dopo la Sentenza della Corte Costituzionale (Nota a Corte costit., 28 gennaio 1981, n. 1, Massa)* [1981], Giurisprudenza costituzionale, I 8.

⁷⁴ Article 362 CCP extends the scope of the provision to the gathering of information by the public prosecutor during the preliminary investigation. With reference to the case-law of the Article see further Section no. 7.2.1.

⁷⁵ Which excludes the criminal responsibility of journalists for crimes of perjury or false information to the public prosecutor -provided by Articles 374 and 371 of the Criminal Code- whenever the refusal relates to the disclosure of the news's sources.

⁷⁶ 31735 [2014] Supreme Court, VI criminal chamber [Italian].

The aforementioned provision outlines a judgment of balancing in compliance with the principles of the ECHR, which evaluates the actual prevalence of the interest, the suitability of the source's disclosure to preserve the prevalent right and the lack of alternative measures to ensure an equivalent protection.⁷⁷ The only deviation from the conventional rules is the lack of provision on the right of journalist to be informed about its right to refuse to witness,⁷⁸ an exclusion which is set by the Italian law and also confirmed by national case-law.⁷⁹

Similar remarks may be carried out about Article 256, CCP which – still balancing the procedural requirements to testing with the protection of the confidentiality of sources – sets out the relationship between the duty of exhibition and the professional secrecy. According to this article, professionals identified in articles 200 and 201, including journalists, can legitimately oppose to the order to exhibit documents if *'if they declare in writing that they are covered by either State, public service or professional secrecy'*. This general rule can be waived within the limits specified in the second paragraph, according to which, if the declaration covers a professional secret, *'If the declaration involves a public service or professional secret, the judicial authority shall proceed with the necessary ascertainments if there are reasonable grounds to doubt about the legitimacy of the declaration and it believes it cannot proceed without gathering the documents and documentary evidence or the objects referred to in paragraph 1. If the declaration results groundless, the judge shall order the seizure.'*

The abovementioned provision identifies the conditions under which the interest in the repression of crime outweighs the interest in the non-disclosure of sources. These conditions are: the reasonable uncertainty about the truthfulness of the statement and the indispensability of the acquisition for the procedural purpose.

Furthermore, the occurrence of such conditions does not simply justifies the seizure, but also legitimates the judge to carry out investigations about the truthfulness of the declaration, which must be "appropriate" (i.e. fit for the purpose). The negative outcome of those investigations, highlighting the lack of any need for protection of sources, allows the seizure by the judicial authorities.

⁷⁷ See Recommendation no. R(2000)7, Principles 4, *Alternative evidence to journalists' sources*; Explanatory Memorandum to Recommendation no. R (2000) 7, Principle 3 (a), paragraphs 26-27, Principles 3 (b), paragraphs 29-34, 36-38, 44-45. See also ECHR *Sunday Times v. the United Kingdom (no. 2)* [1991] ECtHR [English], para. 50; *Fressoz and Roire v. France* [1999] ECHR [English] para. 51.

⁷⁸ Recommendation no. R (2000) 7, Principles 5 (b), *Conditions concerning disclosure* 'Journalists should be informed by the competent authorities of their right not to disclose information identifying a source as well as of the limits of this right before a disclosure is requested'. See also Explanatory Memorandum to Recommendation no. R (2000) 7, Principles 5 (b), para 47. In the Italian legal system the Procedural duty of information not foreseen for the professional secrecy, as well as for the other secrets referred Article 200 of the Italian Code of Criminal Procedure, in the supposed knowledge of the right to abstain by the professionals (unlike the provisions on the right to abstain of the close relatives, with respect to which the duty of information is fixed by law).

⁷⁹ Biagioni, *Note sul Riconoscimento del Segreto Professionale ai Giornalisti Professionisti nel Nuovo CPP* 477.

As a result, with the adoption of restraint measures the Court must strictly respect the principle of proportionality between the content of the ablativ order and the needs of the procedural investigations, aiming to the minimum limitation of the personal and professional freedom of the journalist.⁸⁰ Moreover, the Courts must prove the proper exercise of their ablativ powers with an adequate motivation of the adopted measure, which concerns the existence of a link between the news and the investigative theme, the essential needs of the news for the procedural and the respect of the proportionality test.⁸¹

As a conclusion, the criteria of balancing provided by Article 256 CCP complies with the conventional prescriptions.⁸² Also the judicial enforcement of such criteria highlights the full application – even at domestic level – of the principle of proportionality and of the duty of motivation,⁸³ allowing journalists to appeal against the unlawful measures.

Finally, Article 271 of the Italian Code of Criminal Procedure should be mentioned: it sets a general prohibition on the use of interceptions '*related to conversations or communications of the persons referred to in Article 200, paragraph 1[...] if they relate to facts known on account of their function, service or profession*'. This rule, which could only be derogated if '*the said persons have testified on these same facts or have disclosed them in some other way*', implements the protection of journalistic sources, in accordance with the principles of conventional law.⁸⁴

7.3. Concluding Considerations

In the light of the framework briefly outlined, the national criteria under which the interest in disclosure outweighs the interest in non-disclosure reveals the attention of the Italian Authorities for the protection of journalistic sources, which complies with the provisions of the Convention, the Principles of the Recommendation No. R (2000)7 and the provisions of the Explanatory Memorandum.

However, the Italian legal system only provides procedural criteria to set out the prevalence of the rights of journalists not to disclose their sources on the interest in the repression of crimes, without considering the substantial nature of the rights infringed by the crimes. In the absence of more stringent criteria depending on the severity of the offences, the procedural rules are applied in the same way for all crimes, irrespective of the violations prosecuted. Therefore, the Courts could cover the lack of substantial balancing only partially, by evaluating the importance of the rights infringed when all the legal requirements of the disclosure are set. In any other case, those rights could not be examined, whether the criminal proceeding concerns, for example, a murder

⁸⁰Castellaneta M., *Tutela delle fonti: contrarie alla Convenzione le perquisizioni nelle redazioni giornalistiche* [2012] Guida al Diritto – Il Sole 24 ore, n. 31 [Italian].

⁸¹ 31735 [2014] Supreme Court of Cassation, VI criminal chamber [Italian].

⁸² See notes 21-22-23.

⁸³ Explanatory Memorandum to Recommendation no. R (2000) 7, Principles 3 (b), paragraph 30, 33, 35.

⁸⁴ Recommendation no. R (2000) 7, Principles 6, *Interception of communication, surveillance and judicial search and seizure*; Explanatory Memorandum to Recommendation no. R (2000) 7, Principle 5, paragraph 55.

or a tax offence. In the light of those considerations, it might be desirable to identify criteria of balancing also related to the different nature of the interests protected by the criminal law, making at least a distinction between the crimes against person and the crimes against patrimony. Finally, the rigidity of the mentioned criteria -although is able to ensure the legal certainty and the protection of journalistic sources- bounds the Courts to such rules, so that there is not, in the national case-law, any other criteria that assist the judges to rule towards disclosure of sources.

8. In the Light of the Case Law of the European Court of Human Rights, how do National Courts Apply the Respective Law with Regard to the Right to Protect Sources? In Particular, how do they Balance the Different Interests at Stake?

A careful examination of national case-law on the protection of journalistic sources is necessary in order to assess the compliance of the Italian legal system with the ECHR's principles. Indeed, the legal provisions relating to the journalists secrecy are not sufficient to ensure the effective protection of the interest in the non-disclosure of sources. The material protection of that interest rather depends on how the national courts apply such legal provisions, thus outlining the *ubi consistam* of the protection instruments provided for under national law

8.1. National Case-law on the Balancing with the Right to Privacy

No major problems seem to exist concerning the balancing between the right to privacy and the interest in the non-disclosure of sources, which is covered by Article 138, Privacy Code.⁸⁵ The Italian courts, as well as the Data Protection Authority,⁸⁶ constantly held that the duty to discover the sources of personal data processed may be fulfilled by the journalists in two different ways: by communicating the sources to the interested parties, or by communicating to such parties *'that the source of the information is covered by professional secrecy based on the trust relationship existing between the journalist and the source'*.⁸⁷ The Data Protection Authority also clarified that the feedback received from the journalist must be in any case adequate to presumably demonstrate the lawfulness of the data acquisition and the existence of a trust relationship between the journalist and the source.⁸⁸

⁸⁵ Legislative Decree no. 196 (Data Protection Code) 2003 [Codice in materia di protezione dei dati personali].

⁸⁶ The Privacy Authority is an independent administrative authority set up by Law no. 675 (Privacy Act) 1996 [Legge sulla privacy] and currently governed by Legislative Decree no. 196 (Data Protection Code) 2003 [Codice in materia di protezione dei dati personali].

⁸⁷ Press release of Privacy Authority [2000] January 10, cit.

⁸⁸ See Privacy Authority, *Bollettino* 4 [24th March 1998] 50; Privacy Authority, *Bollettino* 8 [13th March 2008] 30.

As a result, it is possible to confirm that the Italian case-law outlines an equilibrate balance between the right to privacy and the right of the journalists not to disclose their sources, according to which:

- in the light of a legitimate private request to know the source of personal data processed, a journalist has the full right not to disclose his confidential sources;
- the acknowledgment of the right not to disclose the confidential sources does not dispense the journalist to provide an adequate response to the private request;
- the opposition of the professional secrecy relieves the journalist to disclose his/her sources only when such opposition is expressed, communicated to the interested parties and allegedly verifiable (in order to exclude spurious objections).

It follows that the right of journalists not to disclose their sources outweighs the right to privacy each time the first right exists and the existence of that right is shared with the interested parties (requirements under which the restriction of the fundamental right to privacy is lawful).

8.2 National Case-law on the Balancing with Public Interest in the Administration of Justice and the Repression of Crimes

On the other hand, the comparison between the right of journalists not to disclose their sources and the public interest in the administration of justice results more difficult.

The Italian case-law was focused on such comparison long before the adoption of any legislative act on the issue. Indeed, already in 1981,⁸⁹ the Italian Constitutional Court was recalled to decide on the exclusion of journalists from those professionals entitled to abstain from testifying under Article 351 of the former Italian Code of Criminal Procedure.⁹⁰ Particularly, three district courts⁹¹ raised a question of constitutional legitimacy of the combined provisions of Article 2 of Law no. 69 of 1963⁹² and Articles 348(2) and 351 of the former Code of Criminal Procedure,⁹³ related to the violation of Articles 3 and 21 of the Italian Constitution (respectively affirming the principle of equality and freedom of expression). Those cases highlighted that the exclusion of the right of

⁸⁹ 1 [1998] Constitutional Court [Italian].

⁹⁰ Code of Criminal Procedure (also known as *Codice Rocco*), adopted with Royal Decree of 19th October 1930.

⁹¹ [24th March 1976] District Judge of Cagliari [Italian]; [5th October 1976] District Judge of Rome [Italian]; [15th September 1977] District Judge of Sondrio 15 [Italian].

⁹² Law no. 69 (Organisation of the Journalistic Profession) 1963 [Ordinamento della Professione di Giornalista] Article 2, which provides the duty of journalists to keep the confidential of their sources.

⁹³ Article 348(2) CCP which provided the duty to testify in criminal proceedings, and Article 351, which identified a mandatory list of persons who were entitled to abstain from testifying, thus excluding the journalists from such guarantee.

the journalists to abstain from testifying in criminal proceedings could narrow the investigation activities, thus affecting the freedom of the press. In fact, the national legislation -while giving to journalists the option to disclose their sources (in breach of Article 2, Law no. 69 of 1963) or otherwise to be prosecuted for the criminal offence of perjury (according to Article 372 CC) - might lead the journalists not to publish a piece, as well as could lead the sources not to share their information.

The abovementioned considerations, although were not sufficient to establish a general prevalence of the interest in the non-disclosure of sources, seem to be in line with the subsequent case-law of the ECtHR, according to which:

*'[...] the protection of journalistic sources is one of the basic conditions for press freedom...without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undetermined and the ability of the press to provide accurate and reliable information may be adversely affected.'*⁹⁴

Furthermore, those considerations greatly influenced the new Italian Code of Criminal Procedure (currently in force),⁹⁵ which lays down the right of the journalists not to disclose their sources as usually dominant on the public interest in the administration of justice,⁹⁶ *'...in line with the constitutional case-law [...] and with the recent case-law of the European Court of Human Rights'*.⁹⁷ Nevertheless, the case-by-case evaluation involves a certain degree of discretion, which might lead to an inconsistent application of the journalists' rights.

8.2.1. Duty to Testify in Criminal Proceedings

The risk must be analysed with reference to Article 200, paragraph 3 CCP.⁹⁸ The already-mentioned disposition establishes the personal scope of the whole legal framework of journalistic secrecy,⁹⁹ limiting such scope to *'professional journalists registered in their professional registry'*. By applying this general rule, the national courts have strictly and literally interpreted the concept of "professional journalist",¹⁰⁰ thereby excluding publicists, trainees, those who are

⁹⁴ *Goodwin v. the UK* [1996] ECtHR para 39. See, *ex multis*, also, *Roemen e Schmit v. Luxembourg* [2003] ECHR [English]; ECHR, *Martin v. France* [2012] 20th March [English]; *Görmüş and others v. Turkey* [2016] ECtHR [French].

⁹⁵ Code of Criminal Procedure [1988] adopted with Royal Decree no. 447, effective from 24th October 1989.

⁹⁶ Articles 200 (1-3), 256(2), 271(2) and 362 CCP provide only exceptional restraints on the right of journalists not to disclose their sources and entrust to the courts, as independent and impartial bodies, the case-by-case evaluation of such legal exceptions. For a deeper analysis see Section no. 6.2.

⁹⁷ M. Cuniberti, B. Lamarque, B. Tonoletti, G.E. Vigevani, M.P. Viviani Schlein, *Percorsi di diritto dell'informazione* (3rd edn, Giappichelli, 2011) 218 [Italian].

⁹⁸ Italian Code of Criminal Procedure, Article 200, para 3 (*Professional secrecy*) [Segreto professionale]. It should be noted that the following considerations could be entirely applied with reference to the Article 362 CCP, which extends the right of the journalists to refuse to give evidence to the request of information from the Prosecutor.

⁹⁹ According to the reference provided by Articles 256(2), 271(2) and 362 CCP, which all establish their personal scope relating to *"...the persons referred to in Article 200 CCP"*.

¹⁰⁰ While adopting a subjective interpretation, also known as "functionalist". See C. Esposito, *La libertà di manifestazione del pensiero nell'ordinamento italiano* (Giuffrè 1958) 9 [Italian].

enrolled in the special lists referred to in Article 28, Law no. 69 of 1963 and more generally, anyone who objectively works as journalist (even not professionally or continuously).¹⁰¹

Such strict and subjective interpretation counteracts, however, with the settled case-law of the ECtHR, which ensured an objective and extensive interpretation of the concept of “journalist”, including but not limited to the “professional journalists” as intended by the Italian courts.¹⁰² According to the European case-law, the subjective scope of the right of the journalists not to disclose their sources exists whenever is found an objective link between the information activities and the need to protect the sources.¹⁰³

A revision of the settled case-law became increasingly necessary in order to ensure its compliance with ECHR standards, especially in view of new judicial practices, which exploit the subjective limits of the journalists' secrecy to avoid the legal protection of the sources. For example, the Italian courts sometimes order to produce the documents covered by the professional secrecy directly against the publishing or the broadcasting companies, which hold the materials required for the identification of the sources but cannot refuse to obey such order by opposing the professional secrecy. This practice has been recently adopted by the Public Prosecutor of Rome, which seized a video submitted by an Italian television network directly against the broadcasting companies. More specifically, such video contained the report of an Italian journalist that interviewed an anonymous policeman who deplored the inadequacy of the Italian anti-terrorism protection system. Therefore, the seizure was finalised to identify the policeman (i.e. the source of the information disclosed), by bypassing the right of the journalist not to disclose his sources.¹⁰⁴ Similar practices allow an indirect identification of the journalists' sources, counteracting with the ECHR's standards and involves the risk to “gag the journalists”, compromising the fundamental activities of the press.

Unlike, surely in compliance with the ECtHR judgments are the interpretation of the material scope¹⁰⁵ and of the limits of the right concerned.¹⁰⁶

¹⁰¹*Id est* foreign journalists and director of periodical journal on technical, professional or scientific issues, and also occasional employees, freelancer, blogger etc.

¹⁰²See *Goodwin c. United Kingdom* [1996] ECtHR which recognized the right not to disclose a source to the “journalist stagier” William Goodwin, who worked in a journal for only three months.

¹⁰³See *De Haes e Gijssels c. Belgium* [1997] ECtHR [English], which applied Article 10 of ECHR to an employee of a journal, even if he was not a journalist and due to his simple knowledge of the sources (acquired during the exercise of his job).

¹⁰⁴Prosecutor of Rome, order for seizure of 12th January 2016. The video, which contains a journalistic services of Antonino Monteleone, was submitted on 26th November 2015 by the television network La7, during the television programme *Piazzapulita*. Similar orders of seizure have been previously disposed against the television network Rai (related to a video submitted during the television programme *Ballarò*), as well as against the publishing companies *Il Fatto* o *Il Corriere della Sera* (related to some published interception).

¹⁰⁵The Italian Courts adopted an extensive and teleological interpretation of Article 200(3) CCP, thereby extending the field of its application according to the ECtHR standards. See, ex multis, 22397[2004] Supreme Court of Cassation, VI criminal chamber [Italian], according to which the professional secrecy concerns not only 'the name

8.2.2. Searches and Seizures

More complex issues are involved in the application of the judicial measures which could directly affect the confidentiality of the sources, such as searches, seizures or interception of communications. With specific regard to Article 256, paragraph 2, CCP¹⁰⁷ the courts established the general prohibition of search and seizure, which are unlawful whenever finalized to discover the sources of information. Therefore, the courts must strictly respect the principle of proportionality between the content of the ablativo order and the needs of the procedural investigations, and must prove the proper exercise of their ablativo powers with an adequate motivation of the measures adopted.¹⁰⁸

On this point, the decision no. 31735, 2014 of the Italian Supreme Court is exemplary.¹⁰⁹ The judgment concerned the lawfulness of the seizure order adopted against a journalist by the Prosecutor of the Court of Reggio Calabria, which established the confiscation of many professional goods, including personal computer, note-book, DVDs, pen-drives, smartphones, MP3 players and recorders. Such seizure was adopted in a criminal proceedings against persons unknown for the crimes referred to in Articles 416-*bis* and 326, CC¹¹⁰ and in Article 7 of the Law no. 203 of 1991¹¹¹ (relating to the disclosure of public documents covered by secret of office) and that no criminal charges was brought against the journalist, not even for concurrency. The mentioned seizure, confirmed by the Court of Reggio Calabria, was therefore challenged by the journalist for the violation of Articles 252, 253, 370, 256 e 200, CCP and of Article 10, ECHR.

The Supreme Court, recalling the ECtHR and national case-law,¹¹² upheld the appeal and clarified that the seizure order adopted by the Court of Reggio Calabria was unlawful, for the failure to previously identify the object of the ablativo measure and to prove the link existing

*of the persons which provide confidential information to the journalists' but also 'all the information that might lead to the identification of the sources'. Therefore, 'the information relating to the telephone lines used by the journalist' and 'any other element (ie the places where the journalist has been in such period) that might have a link with the source, thus helping its identification' are all covered by professional secrecy. See Chelo Manchia A., *Segreto giornalistico: un segreto davvero tutelato?* [2005] Cassazione Penale 5, 1548 [Italian].*

¹⁰⁶See 14 [2000] Court of Treviso [Italian]; [21st February 1994] District Judge of Rome [Italian]. For a deeper analysis of the criteria of balancing see Section no. 6.2.

¹⁰⁷Article 256, para 2 CCP *Duty of Exhibition and Secret* [Dovere di esibizione e segreti].

¹⁰⁸See, *ex multis*, 31735 [2014] Supreme Court of Cassation; 25755 [2007] Supreme Court of Cassation, I criminal chamber [Italian]; 48587 [2011] Supreme Court of Cassation, II criminal chamber [Italian]; 40380 [2007] Supreme Court of Cassation, VI criminal chamber [Italian].

¹⁰⁹See also, 48587 [2009] Supreme Court of Cassation, and 31735 [2014] Supreme Court of Cassation.

¹¹⁰ Article 416-*bis* Criminal Code *Mafia-type criminal association* [Associazione di tipo mafioso anche straniera] and Article 326 CC *Disclosure and use of secrets of office* [Rivelazione e utilizzazione di segreti di ufficio].

¹¹¹ Article 7 Law no. 203 (External participation in a mafia syndicate) 1991 [Concorso esterno in associazione mafiosa].

¹¹² *Martin c. France* [2012] ECtHR [English]; 48587 [2011] Supreme Court of Cassation; 40380 [2007] Supreme Court of Cassation.

between the goods seized and the procedural purpose (link that plays a particular role in the present case, not being the journalist a suspect or accused person).¹¹³

Another issue concerns the search of digital supports (i.e. personal computer, tablet, hard-disk, smart-phone etc.) and the subsequent seize of digital data. At the outset, the possibility to search and/or seize the digital data of journalists (indeed established by the national case-law since 2007)¹¹⁴ was expressly included in Article 251, paragraph 2 by Law no. 48 of 2008,¹¹⁵ which extends the material scope of this disposition to '*data, information and digital programs, also by copy on a support*'.¹¹⁶ However, the Italian courts increasingly provide the acquisition of journalists' digital data by print or copy on external support. Such acquisitions are made during the searches provided by the Prosecutor, without the adoption of any order to produce them. In the light of the above, it is therefore clear that similar practices - allowing the direct identification of the journalists' sources- are completely unlawful and they constitute in a violation of Article 251 paragraph 2, as well as the entire ECHR jurisprudence.

Such consideration has been recently confirmed by the Italian Supreme Court in the judgment delivered on the 25th October 2015.¹¹⁷ In a criminal proceeding for the crime referred to in Article 326 CC,¹¹⁸ the Prosecutor of the Court of Bari searched the office of a journalist, who was not investigated for the crime, in order to seize a specific document. During the search of a personal computer, the judicial police acquired, by printing them, four electronic mail messages and annexes not related to the document searched. The report of such acquisition was contested by the journalist, which highlighted that the search of his personal computer was indeed finalised to the identification of the journalistic sources. Thereby, the acquisition of his private mail messages imported the seizure of his personal data, with subsequent breach of the duty of motivation and violation of the professional secrecy covered by Article 200, 256 and 191 CCP. The Court of Appeal of Bari dismissed the motion presented, arguing that the print of the messages searched in the personal computer does not import the seizure of such data. Therefore, the decision was challenged before the Italian Supreme Court, which clarifies that:

- according to the Law no. 48 of 2008, it is possible to seize digital data, thereby the detection of a copy of such data involves their seizure, even when the original electronic storage medium has been returned to their owner;

¹¹³ For a deeper analysis of the procedural criteria of balancing see Section no. 6.2.

¹¹⁴ 40380 [2007] Supreme Court of Cassation. See also 25755 [2007] Supreme Court of Cassation, I criminal chamber [Italian].

¹¹⁵ Law no. 48 (Ratification and implementation of the Council of Europe's Convention on computer crime, executed in Budapest on November 23, 2001, and provisions updating Italian laws) 2008 [Ratifica ed esecuzione della Convenzione del Consiglio d'Europa sulla criminalità informatica, fatta a Budapest il 23 novembre 2001, e norme di adeguamento dell'ordinamento interno].

¹¹⁶ Article 256, para 2 CCP *Duty of Exhibition and Secret* [Dovere di esibizione e segreti].

¹¹⁷ 24617 [2015] Supreme Court of cassation, criminal chamber [Italian].

¹¹⁸ Article 326 Criminal Code *Disclosure and use of secrets of office* [Rivelazione e utilizzazione di segreti di ufficio].

- the right of the journalists not to disclose their sources, as provided by Article 200 CCP, excludes search and seizure in order to identify the source, unless the conditions of legal exceptions are *ex ante* fulfilled;
- the seizure of the entire computer or of the overall hardware, which leads to the apprehension of the entire information for evidential purpose, infringes the proportionality and adequacy principle, except when it has a specific justification.

8.3 Concluding Considerations

Although the Italian case-law quite complies with the ECHR framework it would be desirable to directly include the ECtHR principles in the Italian legal system, by undertaking a general revision of the national specific legislation on the protection of journalistic sources. Indeed, such revision might better ensure the right application of those principles, while eliminating the need of a strict control on the concrete enforcement of the European regulations made by the Courts.

9. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law clauses accessible, precise, foreseeable and include clear legislative provisions in the context of surveillance and anti-terrorism provisions?

9.1. Anti-terrorism Provisions

After the World Trade Centre attack in 2001, the Italian Criminal Code was amended by several legislative reforms, aimed at providing better legal instruments to fight the terroristic phenomena. Alongside the original crime of subversive association, provided by Article 270, CC, a new type of offence was introduced. Article 270-*bis* CC defines terrorist associations as '*aimed at committing acts of violence with the purpose of terrorism or subversion of democratic order*' but within the Italian legislative context no explicit definition of "terrorism" was provided, until Law no 155 of 2005 introduced Article 270-*sexies* CC, stating as follows:

'Any activity that, by its nature or context, may seriously damage a country or an international organisation [...] is considered as having a terroristic purpose, as well as any other conduct defined as terrorism of with terrorism purposes by conventions or other international laws binding for Italy.'

Nevertheless, even before the legislative intervention, the Italian Supreme Court tried to define terrorism in several occasions, as '*a fighting method aimed at spreading panic and disorder*',¹¹⁹ with the

¹¹⁹ [5 November 1987] Italian Supreme Court, I criminal chamber [Italian].

purpose of 'spreading terror within the community by means of indiscriminate criminal actions',¹²⁰ and characterised by 'the systematic adoption of especially violent means, such as excessive, ruthless, gratuitous violence'.¹²¹

Bearing this definition in mind, the first issue at stake is to identify the legal interests protected by Article 270-bis CC. Originally determined only by the Italian constitutional order, and consequently excluding any act of violence towards a foreign state, paragraph 3 of the abovementioned article was already rephrased by the Law no. 438 of 2001, which included in the definition 'acts of violence towards foreign states, institutions and international organisations'. As some scholars noticed, the aim of the provision could now be considered 'the safeguard of the international community'.¹²² However, this interpretation does not seem to be fully accepted by the Italian Supreme Court which, regarding this issue, held that 'founding an organisation aimed at subverting the constitutional order of a foreign state does not fall under the terms of Article 270-bis CC'.¹²³

In conclusion, the aforementioned provision only regards the conduct of association, but the Italian law provides also other types of offences, sanctioning any conduct aimed at assisting¹²⁴, recruiting¹²⁵ and training¹²⁶ with the purpose of terroristic offences. These provisions were recently integrated by Law no 43 of 2015, which introduced a new type of offence regarding the organization of transports with terroristic purposes.¹²⁷ The same law amended the previous articles and innovated in the field of precautionary injunctions and procedural rules regarding the topic, with the aim of providing better tools to contrast the foreign fighters phenomenon.

9.1.1 Terrorism and the Protection of Journalistic Sources

As in one of the latest decisions on the topic,¹²⁸ the Italian Supreme Court recognized Article 10 ECHR as a cornerstone for the protection of journalistic sources. This judgment can be considered as the starting point of the interference between anti-terrorism law and the exercise of this fundamental right. The right provided in Article 10 is a qualified right, since its paragraph 2 allows public authorities to lawfully interfere with the right to freedom of expression. The essence of those boundaries are better specified by Principle 7 of the Council of Europe Recommendation No R (96) 4, which states that any of such interferences must:

- be prescribed by law and formulated in clear and precise terms;
- pursue a legitimate aim as indicated in relevant provisions of human rights instruments [...]
- be necessary in a democratic society [...].

¹²⁰ [21st of October 1983] Italian Supreme Court [Italian].

¹²¹ [27th of October 1987] Italian Supreme Court [Italian].

¹²² Insolera, *Reati associativi, delitto politico e terrorismo globale* (2004) Dir. Pen. e proc. 1325 [Italian].

¹²³ [1st of July 2003] Italian Supreme Court, in Foro.it, 2004, II, 217 [Italian].

¹²⁴ Art. 270-ter Criminal Code [Italian].

¹²⁵ Art. 270-quater Criminal Code [Italian].

¹²⁶ Art. 270-quinquies Criminal Code [Italian].

¹²⁷ Art. 270-quater1 Criminal Code [Italian].

¹²⁸ 31735 [2014] Supreme Court of Cassation.

An overriding public interest, in the context of terrorism crimes, is likely to be invoked in order to ask the disclosure of the sources of information, and the issue at stake is whether and in which terms terrorism may be considered a legitimate aim to limit freedom of expression under Article 10 ECHR. The Council of Europe specifies, under Principle 5 of Recommendation No R(96) 4, that *'Having regard to the importance of the confidentiality of sources used by journalists in situations of conflict and tension, member states shall ensure that this confidentiality is respected'*. This means that *'this principles must be respected even in time of crisis'*¹²⁹ and that these requirements have to be *'strictly justified under Article 10(2) [ECHR] – for example as necessary to bring a serious criminal to justice'*.¹³⁰

Referring back to Italian law, Article 200 paragraph 3, CCP states that the journalists' right not to disclose the sources of their information is protected with the only exception which are explained in the previous sections. No particular exception is provided in case of terroristic offences, except by Article 204, paragraph 1, CCP which allows, the disclosure of information only with regard of official and state secrecy, in cases of proceedings involving crimes of subversion of the constitutional order. Therefore, it is clear that this provision excludes professional and journalistic secrecy.

9.2 Investigations and Search and Seizures Actions

In order to be substantially respected, the aforementioned necessity to defend the confidentiality of sources needs to be enforced also during the investigative phase. Under Italian law, Article 361 CCP extends the protection accorded by Art. 200 CCP also to the interrogation phase made by the judicial authority during the investigative stage of the proceedings, and Article 351, paragraph 1 CCP further extends these boundaries to police forces.

Regarding search and seizures actions, Article 256 CCP allows journalists to oppose to any request made by the judicial authority to release documents, items and information which may identify their sources.

As these provisions regulate the case of a direct violation of this fundamental guarantee, it is important to notice that there are many activities which may indirectly lead to the disclosure of sources of information during the investigations phase. The fear of terroristic offences arose concerns about public security, inducing EU member states to allow new means of investigation: a trend well displayed by Article 15 of Council of Europe Convention on the Prevention of Terrorism 196 of 2005, where each member state is asked to *'take such measures as may be necessary under its domestic law to investigate the facts'*.

A first issue involves the objective area of application which the protection of journalistic sources is subjected to, as the use of those means of investigation may prospect the danger that

¹²⁹ Directorate General of Human Rights and Legal Affairs Council of Europe, *Freedom of expression in time of crisis* [2008] Guidelines of the Committee of Ministers of the Council of Europe 26 [English].

¹³⁰ Ibid

interception of correspondence, surveillance of journalists or search and seizure of information could circumvent the protection of journalistic sources.

In the Italian legal system, the Supreme Court has established that it includes the name of the source and any information or circumstances which may lead to its identification.¹³¹ It is also relevant, for the purpose of the analysis, how the public interest to investigate crimes should be balanced with the right of journalists not to disclose their sources of information. In 2007, the Supreme Court stated that the seizure of the computer of a journalist could be allowed, against his opposition of professional secrecy, under the following conditions:

- by proving the groundlessness of his opposition
- by proving the relevance of the item for the investigation
- by conducting the investigation in such a way that does not compromise the journalist's confidentiality on his correspondence and sources.¹³²

A similar case was brought to the Supreme Court in 2014,¹³³ and the Court ruled that any interference of public authorities in the disclosure of journalistic sources are subjected to the following terms:

- a reasonable relationship of proportionality between the means employed and the investigations needs;
- appropriate guarantees, in particular with regard of the conduct of the investigation, by a third and impartial body;
- an appropriate balance between the public interest of conducting investigations and the need to protect freedom of information
- a specific duty of the judicial authority to motivate the adopted measures.

9.3 Interceptions of Communication

Interceptions of communications are regulated by Article 266 CCP. According to this article, interceptions of phone communications are allowed in order to prosecute specific crimes (in particular, intentional crimes under certain terms, crimes against public administration, crimes related to terrorism and mafia organizations). The same regulation applies also for digital communications. Further limits are provided in cases of the interceptions provided for in Article 614 CC. According to this article, interceptions in private residences are allowed exclusively when there is a reasonable ground to believe that a criminal activity is taking place in there.¹³⁴

Interceptions must be authorised either by a motivate decree released by the judicial authority, or by a provisional decree released by the public prosecutor, which has to be approved by a judge

¹³¹ 22397 [2004] Supreme Court of Cassation, VI criminal chamber [Italian].

¹³² 25755 [2007] Supreme Court of Cassation, VI criminal chamber [Italian].

¹³³ 31735 [2014] Supreme Court of Cassation [Italian].

¹³⁴ Article 266, para 2 Code of Criminal Procedure.

within 24 hours.¹³⁵ The Italian courts clarified that any defect concerning this decree must result in the irremediable illegitimacy of the interceptions, and that the duty of motivation needs to be substantially respected.¹³⁶

The Italian legislative body recognises also another mean of interception, as stated by Article 226 of the rules of implementation of the Code of Criminal Procedure. This article allows the Minister of Internal Affairs, in the position of the responsible for the security services and police officials, to enact preventive interception of communications, without the need of any crime report, under the an explicit authorisation of the public prosecutor, when investigations are related to the crimes of terrorism offences and criminal organizations. These interceptions should be limited to 40 days, but they may be further extended for 20 days, if the previous terms are still respected.

It is important to notice that this mean of interception can be used for investigative purposes only, which means that any information gathered under these terms can never be taken to court as an evidence. Furthermore, the records of such interceptions should be destroyed within 5 or 10 days, according to paragraph 4, of Article 226 CCP.

Concerning the protection of journalistic sources, the key provision is Article. 271 CCP, which according to paragraph 1 does not allow any use of interceptions outside the boundaries set by the law and, at paragraph 2, extends the previous boundaries to any information acquired in breach of the limits stated by Article 200 CCP.

Finally, it is important to point out that there is no provision explicitly allowing or limiting the use of illegitimate interceptions as a crime report, in order to start investigations, but such a limit was firstly provided in the decree¹³⁷ that, later converted in law, amended Article 240 CCP.¹³⁸

9.4 Electronic and Traffic Data Surveillance

Nevertheless, interceptions are not the only mean of surveillance. During the last 10 years, there have been many legislative interventions aimed at fighting the treat of terroristic offences by amending Article 132 of Legislative Decree no. 196 of 2003, which regulates the storage of traffic data record by network operators for investigative purposes. Article 132 of this Decree imposes network operators to save phone traffic data (including missed calls) up to 24 months, and digital traffic data up to 6 months. These time periods are doubled for investigative purposes

¹³⁵ Article 267, Code of Criminal Procedure.

¹³⁶ [29th of November 2005] Supreme Court of Cassation (2006) Campenni, Dir. Pen. Proc., , 330 [Italian].

¹³⁷ Legislative Decree n.259 (Urgent Measures on reformation of the regulations on phone tapping) 2006 [Disposizioni urgenti per il riordino della normativa in tema di intercettazioni telefoniche].

¹³⁸ Chukwuemeka Abiakam, Chiara Battistoni, Vincenzo Calabrese, Raffaele Caravella, Daniel Giuliano, Giovanni Lucantoni, *La disciplina delle intercettazioni Tra presupposti di legittimità, divieti d'uso e distruzione* [2012/2013] 21.

involving terrorism and crimes related to criminal organisations. The judicial authority may ask network operators, through a motivated decree, to provide these data.

The European Parliament has well perceived the need to protect the confidentiality of journalistic sources from such means of surveillance: in a parliamentary report on the issue has highlighted that: 'Internet service providers and telecommunication companies should not be obliged to disclose information which may lead to the identification of journalists' sources in violation of Article 10 of the European Convention on Human Rights'.¹³⁹ The same necessity is affirmed also by Recommendation No. R (87) 15 which reiterates that police forces are invoked to collect personal data only '*if it is necessary for the prevention of a real danger or the suppression of a specific criminal offence*'.

To conclude, it is important to notice here that the Italian Supreme Court through a decision released in 2004, has included the storage of phone calls among the items protected from the right of nondisclosure of journalists' sources of information.¹⁴⁰

9.5 Does the National Law Include Clear, Precise, Foreseeable and Accessible Legislative Norms in the Context of Electronic Surveillance?

Within the Italian legal system, the issue of Electronic Surveillance primarily concerns the definition of interception and consequently, the field of application of its regulation during the investigative phase. Article 617 of the Italian Criminal Code deals with the crime of illicit interception of communication but it does not provide a clear definition of what an interception is. In 1993, the national legislator introduced other four different provisions (Art. 617-*bis*, 617-*ter*, 617-*quarter* and 617-*quinquies* CC)¹⁴¹ by deteriorating even more the situation, since these articles included several definitions of interceptions regarding both investigative actions and substantive criminal type of offences.

This raised some difficulties of interpretation in the doctrine, and even though the Italian Supreme Court has defined interceptions as:

*'a means of investigation which involves an occult and simultaneous apprehension of the content of a conversation, such as a communication between two subjects, with means that are objectively suitable for the purpose and able to neutralise any caution which has been possibly taken in order to protect the confidentiality of the dialogue'*¹⁴²

¹³⁹ The protection of journalists' sources, Council of Europe, Committee of Culture, Science and Education, Doc. 12443 Report.

¹⁴⁰ 22397 [2004] Supreme Court of Cassation, VI criminal chamber [Italian].

¹⁴¹ Law no 547 (Modifications and integrations to the Criminal Code and the Code of Criminal Procedure on cybercrime) 1993 [Modificazioni ed integrazioni alle norme del codice penale e del codice di procedura penale in tema di criminalità informatica].

¹⁴² 36747 [2003] Supreme Court of Cassation, joined criminal chambers [Italian].

The final result should probably be considered not precise, according to the numerous jurisprudential debates and orientation changes which are latter exposed.

It has been discussed whether the seizure of correspondence should be considered as an interception, thus regulated by Article 266 CCP, or as a seizure measure falling under the provisions of Article 254 CCP. Initially the Italian Supreme Court agreed with the first hypothesis¹⁴³ but, later, with a joined chamber decision,¹⁴⁴ reverted its previous decision opting for the second opinion.

Capturing GPS data is unanimously excluded from the definition of interception and it has been regulated as another means of investigation under the terms of Art. 189 CCP.¹⁴⁵ Data records (such as phone or digital records) were previously included¹⁴⁶ and later excluded¹⁴⁷ from the boundaries of Article 266 and 267 CCP by the Italian Supreme Court. The Italian Constitutional Court also scrutinised the controversy at stake, affirming that external data are not directly addressed by interceptions but they rather fall under the terms of Article 254 CCP.¹⁴⁸ For example, filming should not be considered an interception of communications until it involves “communicational behaviours”.¹⁴⁹

Article 266 CCP paragraph 2 also includes two different provisions regarding eavesdropping, setting further limits when this action is done in a private place under the terms of Article 614 CC. The Italian case-law has peacefully agreed that it involves a greater extent, compared to the definition given by article 43 of the Italian Civil Code,¹⁵⁰ and that it includes ‘any place where an area of intimacy and privacy is temporarily guaranteed’.¹⁵¹ The Italian Supreme Court has excluded from the previous definition: car cabins, places which are open to the public in order to exercise a business, hospital rooms, public toilets, and jail cells.¹⁵²

Therefore, the Italian jurisprudence may be considered quite foreseeable with regard of electronic surveillance, given all the definitions of the controversies abovementioned.

A serious discussion concerns the provision of Article 240 CCP, by which the judicial authorities are apparently obliged to destroy any record coming from an illegitimate interception. The extent of this provision is argued, as it seems that the article was meant to include only illicit interceptions, the ones breaking the provisions stated by Article 617 to 617-*quinquies* CC. The term illegal, extending the field of application of this provision to any interception acquired in

¹⁴³ 20228 [1978] Supreme Court of Cassation, II criminal chamber [Italian].

¹⁴⁴ 28997 [2012] Supreme Court of Cassation, joined criminal chambers [Italian].

¹⁴⁵ 16130 [2002] Supreme Court of Cassation, V criminal chamber [Italian].

¹⁴⁶ 21 [1998] Supreme Court of Cassation, joined criminal chambers [Italian].

¹⁴⁷ 6 [2000] Supreme Court of Cassation, joined criminal chambers [Italian].

¹⁴⁸ 81 [1993] Constitutional Court [Italian].

¹⁴⁹ 135 [2002] Constitutional Court [Italian].

¹⁵⁰ Art. 43 paragraph 2 Civil Code: The residence is the place where the person set his habitual abode.

¹⁵¹ 7063 [2000] Supreme Court of Cassation, IV criminal chamber [Italian].

¹⁵² Abiakam, Battistoni, Calabrese, Caravella, Giuliano, Lucantoni, *La disciplina delle intercettazioni Tra presupposti di legittimità, divieti d'uso e distruzione* [2012/2013] 11

breach of any procedural regulation, is most probably the result of an error of transcription made during the parliamentary works, a thesis which is confirmed by paragraph 6 of the same article by which:

'The destruction shall be recorded in the dedicated minutes, which shall contain information on the illegal interception, holding or gathering of the documentary evidence, media and documents referred to in paragraph 2, as well as to the procedures or tools used and the persons concerned, without any reference whatsoever to the content of such evidence, media and documents.'

The topic has been discussed by the Constitutional Court, which interpreted the aforementioned provisions as involving any illegal interceptions.¹⁵³ The court contextually lifted the limits provided by paragraph 6, imposing the duty to write a legal record of the contents related to the circumstances of interception, detention or illicit acquisition of the evidences, to the safeguard of the interest of justice. This ruling has been severely criticised by the doctrine, as it would result in a report 'containing an evaluation of the illicit conduct, rather than the material evidence which have been destroyed'.¹⁵⁴

10. Can journalists Rely on Encryption and Anonymity Online to Protect Themselves and their Sources against Surveillance?

10.1 Anonymity and the Italian Constitution

The examination of the Italian constitutional law is the first step in order to determine whether anonymity is a legitimate tool to protect journalists and their sources against surveillance. Even though there is not an express provision on the issue, several rules concerning secrecy and right to privacy can be considered for the purpose of the analysis.

For instance, the Italian Constitution forbids secret associations by Article 18, but expressly allows and protects secrecy with regard to the right to vote,¹⁵⁵ which sometimes is set as a rule,¹⁵⁶ sometimes as an exception,¹⁵⁷ especially with regard to parliamentary voting and procedures.

Among those rules, Article 15 of the Italian Constitution provides the right to freedom and confidentiality of correspondence and communications, and the same article is commonly interpreted as a general protection of the right to privacy and personal data, when read in conjunction with Articles 2, 3, 13 and 14 of the Constitution. Furthermore, Article 22 protects

¹⁵³ 173 [2009] Constitutional Court [Italian].

¹⁵⁴ F. Palazzo, *Tolleranza zero per le intercettazioni illecite?* (2006) Dir. pen. Proc. 1326.

¹⁵⁵ Art. 48, para 2 Italian Constitution

¹⁵⁶ Art. 83 para 3 Italian Constitution, dealing with the elections of the President of the Republic

¹⁵⁷ Art. 64 para Italian Constitution, dealing with parliamentary works

the right to a name and, according to some legal theorists,¹⁵⁸ could provide the right not to be identified, neither to be linked with its own biographical data.

Clearly, the right to remain anonymous is not generally guaranteed, but it is considered as a mean to protect other constitutional rights.¹⁵⁹

10.1.1 Freedom of Expression and Anonymity

While the fundamental values of transparency and openness, shared by the Italian Constitution with regard of the political debate, surely would not suggest to promote or protect anonymity, freedom of expression is commonly considered crucial for the functioning of a democratic society and the issue at stake is whether anonymity could be allowed in order to protect this fundamental right. The cornerstone of the protection accorded by the Italian Constitution is Article 21, whose first paragraph states as follows: *'Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication.'*

The first point to highlight from this statement is the word "own", which establishes a link between freedom of expression and the assumption of responsibility,¹⁶⁰ a correlation further reinforced by paragraph 3 of the same provision by which *'Seizure may be permitted only by judicial order stating the reason and only for offences expressly determined by the law on the press or in case of violation of the obligation to identify the persons responsible for such offences.'*

Accordingly, the provisions with the aim of revealing the responsible or the author of an expressed thought are allowed, and even the protection accorded to freedom of press from actions of seizure is given under the condition that the responsible is identified. The same principle can be found in Article 57, CC, which appoints press directors as responsible for any content released within their publications, and further underlines the strong link between taking advantage of the guarantees provided by the law and assuming the duties which comes from the use of such a fundamental right. Finally, paragraph 4 of Art. 21, by asking editors to make their financial sources publicly available, shows once again a clear favour of the Italian constitutional law towards transparency over means of communication which may interfere within the free marketplace of ideas.

However, clearly the Constitution do not consider anonymity as a fundamental right, neither provides any protection, as well as any general prohibition towards secrecy or anonymity cannot be found as well. It means that any law imposing an indiscriminate obligation to individuals in order to expose their identity would not be constitutionally legitimate, but indeed any duty

¹⁵⁸ Giulio Enea Vigevani, *Anonimato, responsabilità e trasparenza nel quadro costituzionale italiano* (2014) 6 [Italian].

¹⁵⁹ G. M. Riccio, *Diritto all'anonimato e responsabilità civile del provider*, in L. Nivarra, V. Ricciuto, *Internet e il diritto dei privati* 26 [Italian].

¹⁶⁰ Marco Betzu, *Anonimato e responsabilità in rete* (2011) *Costituzionalismo.it* 4 [Italian].

regarding this matter should be allowed under the condition that this sacrifice is meant to protect other constitutional rights, such as honour, reputation or privacy.¹⁶¹

10.1.2 Anonymity Online and Responsibility

Finally, anonymity needs to be considered in relation with cyberspace. The importance of anonymity as a tool to protect individuals from undue interferences and breach of their own individual sphere is dramatically raising within the context of digital societies, a trend well displayed by the increasing number of authors¹⁶² which lead some scholars to define anonymity as a *'fundamental element of our digital citizenship'*.¹⁶³ Nevertheless, these conclusions are not shared by most Italian scholars, which position is well-synthesised by the following statement *'Freedom of the web, as the first realization of a free marketplace of ideas truly accessible to all in our society, would not be sustainable if this would be followed by a systematic breach of the principle of responsibility'*.¹⁶⁴

The Italian law does not provide any regulation on this problematic topic, except for Article 17, Legislative Decree no. 70, 9th of April 2003 which excludes a providers' general duty of gathering information regarding the contents transmitted towards their own services. This policy shows the well-known fear that giving any responsibility to the providers could lead to *'self-protective and over-broad private censorship, often without transparency and the due process of the law'*.¹⁶⁵ On the other side, some authors noticed that anonymity online, which may concern the authors of crimes, cannot be considered structurally different from the *'anonymity of someone throwing rocks from the top of an overpass'*¹⁶⁶ and that *'someone needs to be in charge of tracking the users of their services, either to be identified as responsible'*.¹⁶⁷

A solution to this issue is far from being established, however, a good starting point could be considered the principle that:

'Any regulation willing to truly respect the Constitutional provisions could not but equally be divided between the provider and the author, and with the full acknowledgement of the issues involving the matter at stake, the responsibility to allow the identification of the author of any content which may breach the law'.¹⁶⁸

10.2 Encryption and Protection from Surveillance

¹⁶¹ Vigevani, *Anonimato, responsabilità e trasparenza nel quadro costituzionale italiano* 10 [Italian].

¹⁶² G. Finocchiaro, *Conclusioni*, in *Ead (a cura di) Diritto all'anonimato* 414 [Italian].

¹⁶³ S. Rodotà, *Il diritto di avere diritti* (Editori Laterza 2013) 392 [Italian].

¹⁶⁴ G. Gardini, *Le regole dell'informazione* (3rd edn Torino 2013) 21 [Italian].

¹⁶⁵ Frank la Rue, *A/HRC/17/27* [2011] 40.

¹⁶⁶ S. Sica V. Zeno-Zencovich, *Legislazione, giurisprudenza e dottrina nel diritto dell'Internet*, (2010) *Dir. Informaz. e Informatica* 389 [Italian].

¹⁶⁷ *Ibid*

¹⁶⁸ M. Cuniberti, *Disciplina della stampa e dell'attività giornalistica e informazione in rete* (Giuffrè 2008) 234 [Italian].

The process of ‘*Converting information or data into a code, especially to prevent unauthorised access*’¹⁶⁹ lies far back in the past, as a military technology aimed at denying the content of the message to interceptors. Although, the so-called digital revolution gave access to this technology to a wider audience of users, thus raising the necessity to find a good balance between the opposite interests of privacy and IT security on one side, and the interest of law and national security on the other side.¹⁷⁰

Firstly considered exclusively as a military good, encryption was regulated with the purpose to limit the export of this technology to trusted national states, an aim pursued by different multilateral agreements such as the CoCom (Coordinating Committee for Multilateral Export Control, instituted in 1991), and then followed by the Wassenaar Arrangement established in 1996. Both these agreements were joined by Italy, and currently they fall under the provisions adopted by the EU with Council Regulation n. 1334/2000, by which the export of encryption technologies has been largely liberalized, and two different standards were set:

- *between member states, exporting encryption technologies is always allowed, with the only exception of sophisticated cryptanalysis tools;*
- *exporting encryption technologies towards other member states is allowed only if authorised by different kinds of licences, which may vary between different states’.*

Recently, the UN Human Rights Council stigmatized State regulations aimed at controlling import or export of encryption tools, affirming at paragraph 41 of A/HRC/29/32 (Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye), that ‘*By limiting encryption tools to government-approved standards and controlling the import or export of encryption technologies, States ensure encryption software maintains weaknesses that allow Governments to access the content of communications.*’ and later recommending at paragraph 60 A/HRC/29/32 that ‘*States should avoid all measures that weaken the security that individuals may enjoy online, such as backdoors, weak encryption standards and key escrows*’.

In relation to the private use of encryption as a mean of protecting from surveillance and access to information, the issue firstly appears in Regulation No. R (95) 13, whose Chapter V states that ‘*measures should be considered to minimize the negative effects of the use of cryptography on the investigation of criminal offences, without affecting its legitimate use more than it is strictly necessary*’. Encryption was then recognized as a technology aimed at protecting the privacy of the citizens and cyber security in 1997, when the European Commission will publish the communication ‘Ensuring Security and Trust in Electronic Communication. Towards a European Framework for Digital Signatures and Encryption’. Finally, the Council of Europe adopted in 2001 the Budapest Convention on Cybercrime, and at the same time published the Explanatory Report to the same convention in which it states that: ‘the modification of data for the purpose of secure communications (e.g. encryption), should in principle be considered a legitimate protection of privacy and, therefore,

¹⁶⁹ Oxforddictionaries.com, *Encryption*

¹⁷⁰ Giovanni Ziccardi, *Crittografia e diritto* (G.Giappichelli 2003) 22 [Italian].

be considered as being undertaken with right'.¹⁷¹ The Convention was ratified by Italy with the Law no. 48, 18th of March 2008 and came into effect in the same year.

In a wider perspective, it is a common opinion that the EU policy would consist in setting guidelines, leaving member states free to adopt different regulation concerning cryptography.¹⁷² However, it is important to notice that encryption is now commonly considered as a legitimate mean to protect the right of freedom of expression, as well shown by the UN Human Rights Council, which stated that:

'With respect to encryption and anonymity, States should adopt policies of non-restriction or comprehensive protection, only adopt restrictions on a case-specific basis and that meet the requirements of legality, necessity, proportionality and legitimacy in objective, require court orders for any specific limitation, and promote security and privacy online through public education'¹⁷³ and reporting that 'Discussions of encryption and anonymity have all too often focused only on their potential use for criminal purposes in times of terrorism. But emergency situations do not relieve States of the obligation to ensure respect for international human rights law'.¹⁷⁴

Within the context of the Italian legislation, Legislative Decree no 196 of 2003 regulates the protection of personal data and, for what it may concern cryptography, this mean is repeatedly set as a duty in order to ensure the safeguard of data storages: Article 22 explicitly refers at paragraph 6 to the use of '*encryption techniques or identification codes*' to protect sensitive and legal data, while Article 34 imposes the adoption of '*implementation of encryption techniques or identification codes for specific processing operations performed by health care bodies, in respect of data disclosing health and sex life*'.

11. Are Whistle-blowers Explicitly Protected Under Law Protecting Journalistic Sources? Is There Another Practice Protecting Whistle-blowers? Is the Legislation Prohibiting Authorities and Companies from Identifying Whistle-blowers?

11.1 The Definition of Whistle-blowers

The Recommendation R (2014) 7 of the Committee of Ministers to member States defines whistle-blowers as: "*any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector*".¹⁷⁵

¹⁷¹ Explanatory Report to the Convention on Cybercrime, paragraph 62, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cce5b>, accessed on 06/03/2016

¹⁷² Ziccardi, *Crittografia e diritto* 117.

¹⁷³ Para 57, A/HRC/29/32 [2015] [English].

¹⁷⁴ Para 58, A/HRC/29/32 [2015] [English].

¹⁷⁵ Recommendation CM/Rec (2014) 7 of the Committee of Ministers to member States on the protection of whistle-blowers.

This definition can identify “the legal institution” (Law on Whistleblowing) in charge to protect those citizens and workers who report irregularities or offences and eventually subjected to retaliation for their complaint.¹⁷⁶ It is clear that citizens and workers are the first to notice a malfunction of an organisation or of the public administration and are in the privileged position to propose corrective measures in relation to a large number of risks: environmental, economic, security, technical and many others.¹⁷⁷

The Transparency International Italy (TI-It) institute, a national branch of the world's leading organisation fighting against corruption and protecting whistle-blowers, provides benefits to all the community workers by guaranteeing them protection against penalties that may occur as a result of their reports. Indeed, the Transparency International Italy (TI-It) institute gives a more concrete support and help to the individuals denouncing situations such as corruption, bribes, etc., granting them the protection as whistle-blowers, because they might be in danger or, as in most of the cases, be suspended from work. Furthermore, thanks to the reporting of whistle-blowers, companies get aware of negligence or crimes committed inside their work places, thus they have the possibility to act quickly in order to avoid economical and image damages.

Whistleblowing is an act that requires the active participation of the civil society, in a context of a broader co-operation between citizens, institutions and organisations with the aim of reporting the irregularities and the risks to the security and life in order to prevent the occurrence of incidents with serious consequences for the community, for in the benefit of it.

One of the main challenges resulting from the existing high level of corruption is the emergence of the crime itself, which is characterised by a high index of occultation, for its own nature.¹⁷⁸ In most cases, an individual becomes a whistle-blower after witnessing cases of corruption occurring on the work place, involving colleagues or even their supervisors. In order not to be involved, they are obliged to notify the situation, to their supervisors (if any) or directly to the public authorities. Therefore, there is the need for a tool which encourages the individual will to report ambiguous situations, which are not following the daily work routine and which are explicitly against the honest and correct behavior that each worker should have. Indeed, by simplifying the procedure of reporting for whistle-blowers and at the same time having more efficient systems of protection from any type of retaliation (dismissal, harassment, transfer, etc.) would be certainly possible to encourage people to come forward.

11.2 The Regulation of Whistleblowing in the Italian System

¹⁷⁶M.CASTELLANETA, <http://www.marinacastellaneta.it> 16/04/2016

¹⁷⁷ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/ProtectionOfSources.aspx>, 16/4/2016

¹⁷⁸ P. Davigo, G. Mannozi, *Corruption in Italy. Social perception and criminal control* (Bari 2007) 34 [Italian].

The introduction into national law of adequate protection of the employees, both public and private, which are reporting abuses and illegal acts within the working environment is provided in general by international conventions ratified by Italy, as well as in the recommendations of the Parliamentary Assembly of the Council of Europe, such as the Recommendation No. R (2000) 7.

Whistleblowing is not adequately regulated within the national legal system yet, and in particular whistle-blowers working in public and private offices are treated differently. Each organization is free to decide whether to accept a procedure for whistleblowing. In most cases, there are no specific guidelines and the employee can decide to proceed in three different ways: making an internal report to the appropriate organ identified by the company itself, report to the judiciary administration or, as often happens, remain silent.

Indeed, the Italian legislation oblige public officers to report a crime, and although the standards established are poorly implemented, Article 361 CC is clear:

‘A public officer, who fails or delays to report to the judicial authorities, or to another authority, a complaint he has the obligation to report, regarding a crime for which he gained knowledge while exercising or because of its functions, shall be punished with a fine from 30 Euros up to 516 Euros.

If the offender is an officer or a judicial police officer, who in any event was informed of an offense which he must report, the punishment is the imprisonment up to one year.’¹⁷⁹

Article 2, Law No. 69 of 1963 requires journalists and editors to maintain the confidentiality on the sources, thus not to disclose the name of the person(s) who provided confidential information. This provision allows the journalist to receive news, while the sources are protected. Also, article 138, Data Protection Code ensures the protections of journalistic sources. The violation of the ethical rule on the secret of the sources, involves disciplinary responsibility (Article 48 of Law No.69 of 1963).

The Law no. 190 of 2012 (Regulations to prevent and suppress corruption and illegality in public administration, also known as the Anti-corruption Law) introduced a specific article on whistleblowing in the public sector to the Privacy Law, the Article 54-*bis* paragraph 1 states: *‘Except for the cases of responsibility of slander or libel, or for the same responsibilities expressed under the Article 2043 of the Civil Code, the public employee which reports to the judicial Authorities or to the Court of Auditors or rather refers to the supervisor an illegal conduct on which he has knowledge by reason of his employment relationship, cannot be sanctioned, dismissed or subjected to a discriminatory measure, whether direct or indirect, having effect on working conditions for reasons related directly or indirectly to the complaint’.*¹⁸⁰

¹⁷⁹ Art. 361, Criminal Code.

¹⁸⁰ Art. 54 bis, Legislative Decree no 165 (Consolidated Act on Civil Service) 2001 [Testo Unico sul Pubblico Impiego].

However, a single article is not sufficient to regulate such a complex issue and does not provide the tools or the necessary institutions that encourage the reports, which seem necessary in a cultural context such as the Italian one, traditionally not inclined to this type of reporting.¹⁸¹

Another aspect that this article does not address effectively concerns the protection of the whistle-blower. Very often employees do not give voice to their doubts, out of laziness, ignorance, selfishness and above all, for fear of retaliation (or even dismissal) or the frustration of not seeing a concrete and effective response to their complaints.¹⁸²

The law no. 190 of 2012, included this issues exclusively in relation to the field of the public administration, whose Art. 1, paragraph 51 focused on three aspects:

- the protection of anonymity;
- the prohibition of discrimination against the whistle-blowers;
- the right of access on the complaint filed is excluded, and the only derogation regard the exceptional circumstances described in paragraph 2 of the new Article 54-*bis* of the Legislative Decree No. 165 of 2001 it is necessary to reveal the identity of the complainant.

As it can be understood, the secrecy of the source of the information, is not an absolute principle. In fact, authorities and companies are prohibited by legislation to identify the source of information, except in some cases clearly explained by legislation.¹⁸³ Especially, as previously explained¹⁸⁴, Article 200 of CCP. prescribes the cases in which the disclosure of the name(s) from whom the journalist received the news is allowed.¹⁸⁵

11.2.1 Recent Case-Law on Whistleblowing

Recently, in Italy numerous cases of whistleblowing were brought before national Courts. The first case, *Vito Belfiore v. Ferrovie dello Stato*, before to the Court of Appeal of Genova, concerning one of the four employees of the State Railways Company who revealed some dangerous flaws of trains and tracks. Indeed, the employees anonymously share with the media the issue and allowed some journalists to board on trains and collect direct evidence of their malfunctioning. Later on, their identity was discovered and they were fired. One of them, Vito Belfiore, filed a lawsuit against his employer, managing to prove the illegitimacy of the dismissal on the ground of the absence of evidences on the reasons he was fired for. He obtained a compensation to restore the damage suffered and started working again at the same company.

¹⁸¹ Law no 190 (Regulations to prevent and suppress corruption and illegality in public administration) 2012 [Disposizioni per la prevenzione e la repressione della corruzione edell'illegalita' nella pubblica amministrazione].

¹⁸² Transparency International Italia, www.transparency.it, 4/2/2016

¹⁸³ M.Castellaneta, <http://www.marinacastellaneta.it>, 16/04/2016.

¹⁸⁴ See question 6 of this report.

¹⁸⁵ Article 200, Code of Criminal Procedure.

The second case, *Cronaglia v. Istituti Gaslini*, No. 2168, 5 February 2004, brought before the Supreme Court, involved a doctor who wrote a book reporting corruption in the hospital where he was working. After the publication of the book he was fired, therefore he sued the hospital. Later, he received a compensation for the damages suffered in addition to the amount of the missing salaries that he could not have. He was not hired again as a public manager because the “trust” relationship between the hospital and the manager was already missing.

The above-mentioned cases demonstrates that whistle-blowers can receive protection against unfair dismissals, especially on the basis of Article 18, Statute of Workers. Despite this, there still exist other issues concerning the protection of whistle-blowers, such as the cases when the reaction of employers does not consist in the dismissal, but in "minor" abuses, such as demotion, transfer, mobbing, etc.¹⁸⁶

11.3 Whistleblowing and the Protection of Journalistic Sources

The Italian legal system does not provide a specific protection for whistle-blowers under the laws that are protecting journalistic sources. In the Italian system, the figure of a whistle-blower is identified as an “informant”, protected under the rules established by Law No. 69 of 1963.

In the last years, due to the digital revolution that affected our daily routine, also for journalist, there is a less access to the “analogic” sources of information. In fact, in case of anonymity the digital source makes the information less reliable.

The use of digital sources, in combination with the risk of a misleading behavior, which does not pay attention to the reliability of the information entails enormous risks for the journalist, such as lawsuits, risk of disciplinary sanctions and risk of violation of the Privacy Law, action that can be easily brought before courts from the damaged part, victim of the publication of false information.

12. Conclusion

The analysis demonstrates that the Italian system sets a fragmented regulation on secrecy of sources, which is secured on different levels: civil, administrative, procedural and criminal, not to mention the self-regulatory mechanism created by the Association of Journalists.

The protection of journalistic sources is essential in order to grant the right to freedom of expression. Indeed, the disclosure of any information is the first step of a more complex path: it is the pillar on which the right to inform and be informed are based. The trust relation between

¹⁸⁶ Art.18, Law 30 (Provisions on the protection of the freedom and dignity of workers, trade union freedom and trade union activities at the workplace, and provisions on placement) 1970 [Norme sulla tutela della liberta' e dignita' dei lavoratori, della liberta' sindacale e dell'attivit  sindacale, nei luoghi di lavoro e norme sul collocamento].

journalists and their sources allows the dissemination of information and contributes to the emergence of the public opinions, and, consequently, to the development of the democratic process. Therefore, the intervention of the legislator is desirable to provide a consistent and coherent reform in order to reorganise the rules and to address the main controversial issues still at stake.

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13.2. Internet sources

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14. Table of English Legislation

<p>European Convention on Human Rights</p>	<p>Article 10 Freedom of expression</p> <p>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.</p> <p>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.</p>
<p>Recommendation CM/Rec(2014)7 of the Committee of Ministers to Member States on The protection of whistle-blowers</p>	
<p>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</p>	<p>Definitions</p> <p>a) the term "journalist" means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication;</p> <p>Principle 1</p> <p><i>Right of non-disclosure of journalists</i></p> <p>Domestic law and practice in member states should</p>

provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Principle 4

Alternative evidence to journalists' sources

In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of establishing the truth or otherwise of the allegation, all evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist.

Principle 5

Conditions concerning disclosures

- a. The motion or request for initiating any action by competent authorities aimed at the disclosure of information identifying a source should only be introduced by persons or public authorities that have a direct legitimate interest in the disclosure.
- b. Journalists should be informed by the competent authorities of their right not to disclose information identifying a source as well as of the limits of this right before a disclosure is requested.
- c. Sanctions against journalists for not disclosing information identifying a source should only be imposed by judicial authorities during court proceedings which allow for a hearing of the journalists concerned in accordance with Article 6 of the Convention.
- d. Journalists should have the right to have the imposition of a sanction for not disclosing their information identifying a source reviewed by another judicial

	<p>authority.</p> <p>e. Where journalists respond to a request or order to disclose information identifying a source, the competent authorities should consider applying measures to limit the extent of a disclosure, for example by excluding the public from the disclosure with due respect to Article 6 of the Convention, where relevant, and by themselves respecting the confidentiality of such a disclosure.</p> <p>Principle 6</p> <p><i>Interception of communication, surveillance and judicial search and seizure</i></p> <p>a. The following measures should not be applied if their purpose is to circumvent the right of journalists, under the terms of these principles, not to disclose information identifying a source:</p> <ul style="list-style-type: none">i. interception orders or actions concerning communication or correspondence of journalists or their employers,ii. surveillance orders or actions concerning journalists, their contacts or their employers, oriii. search or seizure orders or actions concerning the private or business premises, belongings or correspondence of journalists or their employers or personal data related to their professional work. <p>b. Where information identifying a source has been properly obtained by police or judicial authorities by any of the above actions, although this might not have been the purpose of these actions, measures should be taken to prevent the subsequent use of this information as evidence before courts, unless the disclosure would be justified under Principle 3.</p>
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<p>Explanatory Memorandum to Recommendation no. R (2000) 7</p>	<p>Definitions</p> <p><i>a. Journalists</i></p> <p>11. It is generally understood that the right to freedom of expression implies free access to the journalistic profession, i.e. the absence of the requirement of an official admission by state organs or administrations [...].</p> <p>Principle 1</p> <p>21. The right of journalists not to disclose their source is part of their right to freedom of expression under Article 10 of the Convention. Article 10 of the Convention, as interpreted by the European Court of Human Rights, is binding on all Contracting States. Due to the importance of the protection of the confidentiality of journalists' sources for the media in a democratic society, national legislation should provide an accessible, precise and foreseeable protection. It is in the interest of journalists, journalists' sources and public authorities alike to have precise and clear legislative norms in this field. These norms should be guided by Article 10, as interpreted by the European Court of Human Rights and this Recommendation. A stronger protection of the confidentiality of journalists' sources of information under domestic law shall not be excluded by this Recommendation. As far as a right of non-disclosure exists, journalists may lawfully refuse to disclose information identifying a source without being exposed to any civil or criminal liability or any penalty for their refusal.</p> <p>Principle 3</p> <p><i>a. legitimate aim under Article 10 of the Convention</i></p> <p>24. The European Court of Human Rights has repeatedly underlined the requirement under Article 10, paragraph 2 of the European Convention on Human Rights, that limitations to Article 10 must be "prescribed by law". The Court has held that "relevant national law must be</p>
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	<p>formulated with a sufficient precision to enable the persons concerned - if need be with appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail", and be formulated with sufficient clarity to provide the individual "adequate protection against arbitrary interference" by public authorities through an unlimited discretion (see, for instance, <i>Goodwin v. the United Kingdom</i>, 27 March 1996, para. 31). [...]</p> <p>26. Thirdly, when evaluating whether a particular legitimate interest under Article 10, paragraph 2 of the Convention justifies the restriction of the right to freedom of expression, the European Court of Human Rights applies a balancing test which determines whether a restriction is "necessary in a democratic society" (see, <i>Sunday Times v. the United Kingdom</i> (no. 2), 26 November 1991, para. 50). In order not to depart from Article 10, paragraph 2 of the Convention, the MM-S-HR</p> <p>decided not to list a set of specific legitimate interests which might justify mandatory source disclosure. Instead, the text of the Recommendation includes a series of checks and criteria which must be taken into account when assessing the legitimate interest.</p> <p>27. The Recommendation reaffirms the balancing test used by the European Court of Human Rights when determining whether a restriction is "necessary in a democratic society" under Article 10, paragraph 2 of the European Convention on Human Rights (see, <i>Sunday Times v. the United Kingdom</i> (no. 2), 26 November 1991, para. 50). The right of journalists not to disclose their source and the public's interest in being informed by the media are to be considered as essential in any democratic society. The European Court of Human Rights has held that the media do not only have the task of imparting information and ideas on matters of public interest, but the public has also a right to receive them (see, <i>Fressoz and Roire v. France</i>, 21 January 1999, para. 51). The chilling effect of the disclosure of a source by a journalist will impede this role of the media. Hence, national courts and authorities shall pay particular regard to the importance of the right of journalists not to</p>
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	<p>disclose their sources.[...]</p> <p><i>b. necessity of the disclosure</i></p> <p>29. As referred to in paragraph a of this Principle, competent national authorities are held to pursue an adequate balancing of a legitimate interest in the disclosure with the right of journalists to maintain the confidentiality of their sources and the public interest in the non-disclosure. Paragraph c sets out the requirements for determining the necessity of the disclosure.</p> <p>30. The need for any restriction on freedom of expression must be convincingly established, as the European Court of Human Rights has regularly held (see, <i>Sunday Times v. the United Kingdom</i> (no. 2), 26 November 1991, para. 50). Paragraph b therefore requires that it can be convincingly established that a legitimate interest in the disclosure exists which clearly outweighs the public interest in the non-disclosure. Convincingly in this respect shall refer to the requirement of evaluating the facts of a given case as well as the use of discretion established in a way which is open to later verification. It is recommended that the competent authorities specify the reasons why a serious interest outweighs the interest in the non-disclosure. This open balancing ensures not only public scrutiny, but enables also the possible later review of the imposition of a sanction on journalists for not disclosing their source under Principle 5, paragraph d of the Recommendation.</p> <p>Principle 8</p> <p><i>i. interception of communication</i></p> <p>55. In many cases, journalists have to correspond with their sources in writing or by using the telephone, telefax or E-mail or other means of telecommunications.</p> <p>Interception of such communication of journalists or their employers might disclose the identity of a source. The confidentiality of journalist's communications and</p>
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	<p>correspondence is protected by Article 8 as well as Article 10 of the European Convention on Human Rights. Judicial authorities ordering an interception of the communication or correspondence of journalists should limit their interception order so as to maintain the confidentiality of the journalist's source. The actual interception action should also respect the confidentiality. In practice, this might require that any interception be limited to communications or correspondence with other persons than journalistic sources, or special procedures be applied under which information identifying a source be separated from intercepted communications and not be registered.</p>
<p>Recommendation No. R (95) 13 of the Committee of Ministers to Member States concerning problems of criminal procedural law connected with information technology</p>	<p>Chapter V</p> <p><i>Use of encryption</i></p> <p>Measures should be considered to minimise the negative effects of the use of cryptography on the investigation of criminal offences, without affecting its legitimate use more than is strictly necessary.</p>
<p>Council of Europe Convention on the Prevention of Terrorism 196 of 2005</p>	<p>Article 15</p> <p><i>Duty to investigate</i></p> <p>1. Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in this Convention may be present in its territory, the Party concerned shall take such measures as may be necessary under its domestic law to investigate the</p>

	facts contained in the information.[...]
<p>Recommendation No. R (96) 4 of the Committee of Ministers to Member States on The Protection of Journalists in Situations of Conflict and Tension</p>	<p>Principle 5</p> <p><i>Confidentiality of sources</i></p> <p>Having regard to the importance of the confidentiality of sources used by journalists in situations of conflict and tension, member states shall ensure that this confidentiality is respected.</p> <p>Principle 7</p> <p>[...] 3. Member states should refrain from taking any restrictive measures against journalists such as withdrawal of accreditation or expulsion on account of the exercise of their professional activities or the content of reports and information carried by their media.</p>
<p>Regulation (EC) no 1334/2000 setting up a community regime for the control of exports of dual use items and technology</p>	
<p>Resolution No. 2 on Journalistic Freedoms and Human Rights by the 4th European Ministerial Conference on Mass Media Policy (Prague, 1994)</p>	<p>Principle 3</p> <p>The following enables journalism to contribute to the maintenance and development of genuine democracy:</p> <p>a) unrestricted access to the journalistic profession; [...].</p>
<p>Recommendation no. R (87) 15 of the Committee of Ministers to Member States regulating the use of personal data in the police sector</p>	

14.1. Table of English Case-Law

Case name	Judicial Body	Main content
<i>De Haes e Gijssels c. Belgium</i>	European Court of Human Rights	Art. 10, Freedom of Expression Judgment against journalists for defamation of <i>magistrats</i> : <i>violation</i> .
<i>Fressoz and Roire v. France</i>	European Court of Human Rights	Art. 10, Freedom of Expression Conviction for handling unlawfully obtained photocopies: <i>violation</i> .
<i>Goodwin c. United Kingdom</i>	European Court of Human Rights	Art. 10, Freedom of Expression Disclosure order granted to private company requiring a journalist to disclose the identity of his source and fine imposed upon him for having refused to do so: <i>violation</i> .
<i>Görmuş and Others v. Turkey</i>	European Court of Human Rights	Art. 10, Freedom of Expression Search and seizure operation conducted to identify journalistic source: <i>violation</i> .
<i>Martin c. France</i>	European Court of Human Rights	Art. 10, Freedom of Expression Reasons for search of <i>Midi Libre</i> premises were relevant but insufficient: <i>violation</i> .

<p><i>Riolo c. Italy</i></p>	<p>European Court of Human Rights</p>	<p>Art. 10, Freedom of Expression</p> <p>The applicant's conviction amounted to disproportionate interference with his right to freedom of expression and could not be said to have been "necessary in a democratic society": <i>violation</i>.</p>
<p><i>Roemen e Schmit c. Luxembourg</i></p>	<p>European Court of Human Rights</p>	<p>Art. 10, Freedom of Expression</p> <p>Major searches and seizures with a view to identifying journalists' sources: <i>violation</i>.</p>
<p><i>Sunday Times v. the United Kingdom (no. 2)</i></p>	<p>European Court of Human Rights</p>	<p>Art. 10, Freedom of Expression</p> <p>Interlocutory injunctions restraining a newspaper from publishing, pending trial of actions in which Attorney General sought permanent injunctions, details of unauthorised memoirs alleging unlawful conduct by Security Service and information obtained from their author, a former employee of the Service – whether these restrictions justified in period from July 1987 (when – after book had been published in United States and become available in United Kingdom – they had been maintained by courts) to October 1988 (conclusion of the trial): <i>violation</i>.</p>

14.2. Table of Relevant Italian Legislation

Charter of Journalists of 1993	
Code of Criminal Procedure	<p>Article 189</p> <p><i>Evidence not regulated by law</i></p> <p>1. If evidence not regulated by law is requested, the judge may introduce it if it is deemed suitable to determine the facts and does not compromise the moral freedom of the person. After hearing the parties on the methods for gathering evidence, the judge shall order the admission of evidence.</p> <p>Article 191</p> <p><i>Unlawfully gathered evidence</i></p> <p>1. Evidence gathered in violation of the prohibitions set by law shall not be used.</p> <p>2. The exclusion of evidence may be declared also ex officio at any stage and instance of the proceedings.</p> <p>Article 200</p> <p><i>Professional secret</i></p> <p>The following persons shall not be obliged to testify what they know on account of their function, service or profession, without prejudice to the cases in which they must report these facts to the judicial authority:</p> <p>a) ministers of the faiths whose charters do not contrast with the Italian legal system;</p>

	<p>b) attorneys, authorized private investigators, technical consultant and notaries;</p> <p>c) doctors and surgeons, pharmacists, obstetricians and any other person practicing a health profession;</p> <p>d) persons practicing different functions or professions to whom the law recognizes the right to abstain from testifying on account of their professional secret.</p> <p>2. If the judge is doubtful about the validity of the statement made by these persons in an attempt to be exempted from testifying, he shall order the necessary ascertainment. If the statement proves to be groundless, he shall order that the witness testify.</p> <p>3. The provisions referred to in paragraphs 1 and 2 shall apply to professional journalists registered in their professional association, exclusively to the names of the person from whom they obtained confidential information while practicing the profession. If the information is essential to prove that the offence being prosecuted has been committed and its truthfulness may be ascertained only by identifying the source of information the judge shall order to the journalists to disclose its source.</p> <p>Article 201</p> <p><i>Public service secret</i></p> <p>1. Public officials and employees, as well as persons in charge of a public service must abstain from testifying on the facts known on account of their function which must remain secret, with the exception of the cases in which they must report these facts to the judicial authority.</p> <p>2. The provisions of Article 200, paragraphs 2 and 3 shall apply.</p> <p>Article 204</p>
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	<p><i>Exclusion of the application of professional secrecy</i></p> <p>1. Facts, information or documentary evidence concerning offences aimed at the subversion of the constitutional system as well as the crimes provided for in articles 285, 416-<i>bis</i>, 416-<i>ter</i> and 422 of the Criminal Code shall not be covered by the secret provided for in Articles 201, 202, and 203. If the secret is declared, the judge shall define the nature of the offence. The preliminary investigation judge shall decide on the aforementioned issue upon request of a party prior to the criminal prosecution. [...]</p> <p>Article 240</p> <p><i>Anonymous documentary evidence and documents and records of illegal interceptions</i></p> <p>1. Documentary evidence containing anonymous statements shall neither be gathered nor used in any way whatsoever, unless they constitute the <i>corpus delicti</i> or originate in any way from the accused person. [...]</p> <p>6. The destruction shall be recorded in the dedicated minutes, which shall contain information on the illegal interception, holding or gathering of the documentary evidence, media and documents referred to in paragraph 2, as well as to the procedures or tools used and the persons concerned, without any reference whatsoever to the content of such evidence, media and documents.</p> <p>Article 254</p> <p><i>Seizure of correspondence</i></p> <p>1. In offices providing postal, telegraphic, electronic or telecommunication services, the seizure of letters, envelopes, parcels, valuables, telegrams, as well as other items of correspondence, even if forwarded electronically, is permitted if the judicial authority has reasonable grounds to believe that they were sent by or addressed to the accused, also under a different name or by means of a different person, or may</p>
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	<p>somehow be related to the offence.</p> <p>2. If the seizure is performed by a criminal police official, he must hand the seized correspondence to the judicial authority, without opening or altering them and without otherwise gaining cognizance of their content.</p> <p>3. Letters and other seized documents which cannot be object of a seizure shall be immediately returned to the person entitled to have them and shall not be used.</p> <p>Article 256</p> <p><i>Duty of exhibition of evidences and secrecy</i></p> <p>1. The persons referred to in Articles 200 and 201 must immediately hand to the judicial authority the documents and documentary evidences, even the original ones if ordered to do so, as well as data, information and software, also by copying them on a suitable medium, and anything else they possess by virtue of their function, job, service, profession or art, except if they declare in writing that they are covered by either State, public service or professional secrecy.</p> <p>2. If the declaration involves a public service or professional secret, the judicial authority shall proceed with the necessary ascertainments if there are reasonable grounds to doubt about the legitimacy of the declaration and it believes it cannot proceed without gathering the documents and documentary evidence or the objects referred to in paragraph 1. If the declaration results groundless, the judge shall order the seizure. [...]</p> <p>Article 266</p> <p><i>Limits on admissibility of interceptions</i></p> <p>1. Telephone conversation or communications and other forms of telecommunications may be intercepted in proceedings related to the following offences:</p> <p>a) international crimes punishable with the penalty of either</p>
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life sentence or imprisonment for a maximum term exceeding five years, established according to Article 4;

b) crimes against the public administration punishable with the penalty of imprisonment for a maximum term exceeding five years, established according to Article 4;

c) crimes concerning narcotic or psychotropic substances;

d) crimes concerning weapons or explosive substances;

e) smuggling crimes;

f) offences of insult, threat, usury, illegal financial activity, inside dealing, market manipulation, harassment or disturbance of persons by telephone;

f-*bis*) crimes referred to in Article 600-ter, paragraph 3, of the Criminal Code, even if related to the pornographic material referred to in Article 600-quarter of the same Code;

f-*ter*) crimes referred to in Articles 444, 473, 474, 515, 516 and 517-*quater* of the Criminal Code;

f-*quater*) the crime provided for in Article 612-*bis* of the Criminal Code.

2. In the aforementioned cases, the interception of face-to-face conversations is allowed. However, if communications to be intercepted occur in the places referred to in article 614 of the Criminal Code, they may be intercepted exclusively if there are justified reasons to believe that a criminal activity is occurring there.

Article 267

Preconditions and forms for the measures to authorize interceptions

1. The Public Prosecutor shall require the preliminary investigation judge to issue an authorization for ordering the activities referred to in Article 266. The authorization shall be

given by reasoned decree if there is serious suspicion that an offence has been committed and the interception is absolutely necessary to continue the investigation. [...]

2. In cases of urgency, if there are justified reasons to believe that any delay can seriously hamper the investigation, the Public Prosecutor shall order the interception by reasoned decree, which shall be forwarded immediately and, in any case, within twenty-four hours, to the judge referred to in para 1. Within forty-eight hours of the delivery of the decision, the judge shall decide on its validation by reasoned decree. If the decree of the Public Prosecutor is not validated within such time limit, the interception shall not be continued and its results shall not be used. [...]

Article 271

Prohibition of the use of interceptions

1. The results of interceptions shall not be used if the latter have been performed in cases other than those provided for by law or if the provisions of Article 267 and 268, paragraphs 1 and 3, have not been complied with.

2. Interceptions related to conversations or communications of the persons referred to in Article 200, paragraph 1, shall not be used, if they relate to facts known on account of their function, service or profession, unless the said persons have testified on these same facts or have disclosed them in some other way. [...]

Article 351

Other types of investigative questioning

1. The criminal police shall gather summary information from persons who may be able to provide information useful for the investigative purpose. The provisions of Article 362, para 1, second and third period shall apply. [...]

Article 361

	<p><i>Identification of persons and things during preliminary investigations</i></p> <p>1. The Public Prosecutor shall require the informal identification of persons, objects or anything else which may be sensorially perceived only if necessary to continue investigations. [...]</p> <p>Article 362</p> <p><i>Information gathering during preliminary investigations</i></p> <p>1. The Public Prosecutor shall gather summary information from persons who may be able to provide information useful for the investigation. Information about the question asked and the answers given shall not be asked to persons already heard by the lawyer or by his substitute. The provisions of Articles 197, 197-bis, 198, 199, 200, 201, 202 and 203 shall apply. [...]</p>
<p>Constitution of the Italian Republic</p>	<p>Article 2</p> <p>1. The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed.</p> <p>2. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.</p> <p>Article 3</p> <p>1. All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.</p> <p>2. It is the duty of the Republic to remove those obstacles of economic or social nature which constrain the freedom and equality of citizens, thereby preventing the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the</p>

country.

Article 13

1. Personal liberty is inviolable.
2. No one may be detained, inspected, or searched nor otherwise subjected to any restriction of personal liberty except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the law.
3. In exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by the law, the police may take provisional measures that shall be referred within 48 hours to the Judiciary for validation and which, in default of such validation in the following 48 hours, shall be revoked and considered null and void.
4. Any act of physical and moral violence against a person subjected to restriction of personal liberty shall be punished.
5. The law shall establish the maximum duration of preventive detention.

Article 14

1. The home is inviolable.
2. Personal domicile shall be inviolable.
3. Home inspections, searches, or seizures shall not be admissible save in the cases and manners complying with measures to safeguard personal liberty.
4. Controls and inspections for reason of public health and safety, or for economic and fiscal purposes, shall be regulated by appropriate laws.

Article 15

1. Freedom and confidentiality of correspondence and of every

	<p>other form of communication is inviolable.</p> <p>2. Limitations may only be imposed by judicial decision stating the reasons and in accordance with the guarantees provided by the law.</p> <p>Article 18</p> <p>1. Citizens have the right to form associations freely and without authorization for those ends that are not forbidden by criminal law.</p> <p>2. Secret associations and associations that, even indirectly, pursue political aims by means of organisations having a military character shall be forbidden.</p> <p>Article 21</p> <p>1. Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication.</p> <p>2. The press may not be subjected to any authorisation or censorship.</p> <p>3. Seizure may be permitted only by judicial order stating the reason and only for offences expressly determined by the law on the press or in case of violation of the obligation to identify the persons responsible for such offences.</p> <p>4. In such cases, when there is absolute urgency and timely intervention of the Judiciary is not possible, a periodical may be confiscated by the criminal police, which shall immediately and in no case later than 24 hours refer the matter to the Judiciary for validation. In default of such validation in the following 24 hours, the measure shall be revoked and considered null and void.</p> <p>5. The law may introduce general provisions for the disclosure of financial sources of periodical publications.</p> <p>6. Publications, performances, and other exhibits offensive to</p>
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	<p>public morality shall be prohibited. Preventive and repressive measure against such violations shall be established by law.</p> <p>Article 22</p> <p>No-one may be deprived of his legal capacity, citizenship, or name for political reasons.</p>
<p>Criminal Code</p>	<p>Article 57</p> <p><i>Offences committed by means of periodical press</i></p> <p>1. Without prejudice for the responsibility of the author of the publication and beside the cases of collusion, the director or the deputy director, who fails to adequately control the content of the periodical he directs in order to prevent that a crime is committed through its publication, is liable for recklessly, if a crime is committed, and is punished with the penalty established for the offence, reduced up to one third.</p> <p>Article 270-bis</p> <p><i>Associations for purposes of terrorism, including international terrorism, or subversion of democracy</i></p> <p>1. Anyone promoting, establishing, organizing, directing or financing associations aimed at committing acts of violence with the purpose of terrorism or subversion of democratic order shall be punished with imprisonment from seven to fifteen years.</p> <p>2. Anyone who participates in such associations shall be punished with imprisonment from five to ten years.</p> <p>3. For the purposes of criminal law, the terrorism aim arises also when the acts of violence are directed against a foreign State, an institution or an international organization.</p> <p>4. Towards the convicted person the confiscation of the assets that were used or aimed at committing the offense and of the</p>

assets being the price, product, profit, or which constitute the use of the crime, shall always be ordered.

Article 270-sexies

Activities with terrorism aims

1. Any activity that, by its nature or context, may seriously damage a country or an international organization and is committed for the purpose of intimidating a population or compelling a Government or an organization to perform or abstain from performing any act, or destabilizing or destroying the fundamental political, constitutional, economic and social structures of a country or of an international organization is considered as having a terrorist purpose, as well as any other conduct defined as terrorism or with terrorism purposes by conventions or other international laws binding for Italy.

Article 326

Disclosure and use of secrets of office

1. The public officer or anyone in charge of a public service who discloses confidential information or allows the dissemination of knowledge on them, violating the duties related to its functions or service, or abusing of its position, shall be punished with the imprisonment from six months up to three years.[...]

Article 348

Abusive practice of a profession

1. Whoever unlawfully exercises a profession, for which a special authorization of the State is required, shall be punished with imprisonment up to six months or with a fine from EUR 103 to EUR 516.

Article 361

1. A public officer, who fails or delays to report to the judicial

authorities, or to another authority, a complaint he has the obligation to report, regarding a crime for which he gained knowledge while exercising or because of its functions, shall be punished with a fine from 30 Euros up to 516 Euros.

2. If the offender is an officer or a judicial police officer, who in any event was informed of an offense which he must report, the punishment is the imprisonment up to one year.[...]

Article 417

Safety measures

1. In cases of conviction for the crimes provided by the two previous articles, a safety measure shall always be ordered.

Article 498

1. Whoever, apart from cases envisaged by Article 497-ter illegally holds public uniform or distinctive signs of an office or public employment, or a political body, administrative or judicial, or a profession for which a special authorization of the State is required, or improperly wears clerical garb in public, shall be punished with fine from 150 to 929 Euros.

2. The sanctions are applied to anyone who arrogates dignity or academic degrees, titles, decorations or other public honorary insignia, ie qualities inherent to any of the offices, jobs or professions, indicated in the earlier provision.

3. For violations referred to in this Article shall apply the sanction of the publication of the measure ensures that the violations in the manner established by art. 36 and do not qualify for reduced payment provisions of art. 16 of the Law 24 November 1981 no. 689.

Article 614

Breaking and entering

1. Whoever enters in the home of others, or in another private

building, or in the areas part of the above, against the express or implied will of those who have the right to prevent it, or who has entered clandestinely or with deception, shall be punished with imprisonment from six months to three years.

2.[...]

Article 617

Illicit acknowledgement, interruption and obstruction of communication and telephone conversations

1. Whoever has fraudulently knowledge of a communication or conversation, by means of telephone or telegraph, among other people or in any case not directed to him, or that interrupts or prevents it, is punished with imprisonment from six months to four years.

2. Unless the fact constitutes a more serious offense, the same penalty is applied to whoever reveals, through any means of public information, in whole or in part, the content of the communications or conversations considered in the first part of this article. [...]

Article 617-bis

Installation of devices to intercept or prevent telephone and telegraphic communications or conversations

1. Whoever installs devices, tools, part of devices or tools in order to intercept or prevent telephone or telegraphic communications or conversations among other people, other than in those cases permitted by the law, is punished with the imprisonment from one to four years. [...]

Article 617-ter

Falsifying, concealing or deleting the content of telephone and telegraphic communications or conversations

1. Whoever falsely forms the text of a telephone or telegraphic

communication or conversation, entirely or partially, otherwise conceals or delete, entirely or partially, the content of a real telephone or telegraphic communication or conversation, also if occasionally intercepted, in order to gain an advantage for himself or others, if using or allowing others to use these, is punished with imprisonment from one to four years. [...]

Article 617-*quater*

Illicit interception, prevention or interruption of computer or electronic communications

1. Whoever fraudulently intercepts communications concerning a computer or an electronic communication system or among several systems, or prevents or interrupts them, is punished with imprisonment from six months to four years.

2. Unless the fact constitutes a more severe offence, the same punishment shall apply to whoever entirely or partially disclose, by the mean of whatsoever mass communication tool, the content of the communications referred to in the first paragraph. [...]

Article 617-*quinquies*

Installation of devices to intercept, prevent or interrupt computer or electronic communications

1. Whoever installs devices to intercept, prevent or interrupt communications concerning a computer or an electronic communication system or among several systems, other than in those cases permitted by the law, is punished with the imprisonment from one to four years. [...]

Article 622

Disclosure of professional secret

1. Whoever having news of a secret, by reason of their status or office, or profession, or art, reveal it without a justified reason, or uses it in order to gain an advantage for himself or others, shall be punished, if his conduct causes a damage, with

	<p>imprisonment up to one year or a fine ranging from EUR 30 to EUR 516. [...]</p> <p>Article 648</p> <p><i>Stolen goods</i></p> <p>1. Except for the cases of concurring in crime, whoever purchases, receives, conceals money on things originating from any offence whatsoever, or in all cases meddles to have them purchased, received or concealed, in order to obtain an advantage for himself or others, shall be punished with imprisonment from two to eight years and a fine from 516 to 10.329 euros [...].</p>
<p>Law no. 190 of 2012 (Regulations to prevent and suppress corruption and illegality in the public administration)</p>	<p>Article 1</p> <p>[...]51. After Article 54 of the Legislative Decree 165 of 2001 shall be introduced the following Article</p> <p>“Article 54-<i>bis</i></p> <p>1. Except for the cases of responsibility of slander or libel, or for the same responsibilities expressed under the Article 2043 of the Civil Code, the public servant who reports to the judicial authorities or to the Court of Auditors or rather refers to the supervisor an illegal conduct on which he has knowledge by reason of his function, shall not be sanctioned, dismissed or subjected to a discriminatory measure, whether direct or indirect, having effect on working conditions for reasons related directly or indirectly to the complaint”.[...]</p>
<p>Law no. 300 of 1970 (Provisions on the protection of freedom and dignity of workers, and freedom of union association and union activity on the workplace) (also known as Charter of the</p>	<p>Article 18</p> <p><i>Protection of the employee in the case of unlawful dismissal</i></p> <p>1. The judge, with the judgment establishing the invalidity of the dismissal as provided for in the laws [...], shall order to the employer, whether or not an entrepreneur, the reintegration</p>

Workers)	into work of the employee, irrespectively of the reasons assumed for the dismissal and whatever is the number of his employees. [...]
Law no. 48, March 18 2008 Ratification and implementation of the Council of Europe's Convention on computer crime, executed in Budapest on November 23, 2001, and provisions updating Italian laws	
Law no. 675 of 1996 (Protection of personal data of persons and other entities)	<p>Article 13</p> <p><i>Rights of the data subject</i></p> <p>[...] 5. 1. The provision on the professional secrecy of those exercising the journalist profession shall apply, limited to the source of information¹⁸⁷.</p>
Law no. 69 of 1963 (Organisation of the Journalistic Profession)	<p>Article 1</p> <p><i>Association of Journalists</i></p> <ol style="list-style-type: none"> 1. It is founded the Association of Journalists. 2. The Association is composed by professional journalists and publicists, registered in the respective lists of the registries. 3. Professional journalists exercises exclusively and continuously the profession of journalist . 4. Publicists practice the journalistic activity not occasionally and upon payment, even though they exercise other professions or jobs'

¹⁸⁷ Article repealed by Article 183 Legislative Decree no. 196 of 2003, Data Protection Code

5. [...]

Article 2

Rights and duties of journalists

1. It is an irrepressible right of journalists the freedom of information and criticism, which are limited by the observance of the rules on the protection of others' personality, and it is a binding duty to respect the material truthfulness of the facts, in compliance with the duties imposed by loyalty and good faith.

2. Inaccurate news shall be amended, and possible mistakes shall be remedied.

3. Journalists and editors are obliged to respect the professional secret on the source of information, when this is required by the confidential character of it, and to promote the cooperation among colleagues, the cooperation among journalists and editors, and the trust relationship among press and readers.

Article 28

Special Lists

1. Annexed to the registries of journalists there are the lists of foreign journalists and the lists of the responsible managers of periodical or technical, professional or scientific magazines, with the exclusion of magazines related to sports or movies.
[...]

Article 45

Exercise of the profession

No one shall use the title of nor practice the profession of journalist, when not enrolled in the professional registry. The violation of this provision is punished with the penalties provided for in Articles 348 and 498 of the Criminal Code, except for the fact which constitutes a more severe offence.

Article 48

Disciplinary procedure

1. Anyone registered on the list or on the registry, guilty of facts inconsistent with the decorum and the professional dignity, or guilty of facts compromising its reputation or the dignity of the Association, shall be subject to the disciplinary procedure.
2. The procedure starts ex officio by the regional or the inter-regional Council or also on request of the general prosecutor competent according to Art. 44.

Article 51

Disciplinary sanctions

1. The disciplinary sanctions are inflicted by reasoned decision of the Council, following the hearing of the journalist under accusation.
2. The disciplinary sanctions are the following:
 - a) warning;
 - b) censorship;
 - c) the suspension from the exercise of the profession for a period between two months and one year;
 - d) the expulsion from the association.

<p>Legislative Decree no. 196 of 2003 (Data Protection Code)</p>	<p>Article 1</p> <p><i>Right to data protection</i></p> <p>1. Anyone has the right to the protection of its personal data.</p> <p>Article 4</p> <p><i>Definitions</i></p> <p>1. For the purpose of this Code:</p> <p>a)[...]</p> <p>b) personal data shall mean any information concerning a natural person, legal person, institution or association, identified or identifiable, even indirectly, by reference to any other information including a personal identification number;</p> <p>c)[...].</p> <p>Article 7</p> <p><i>Right to Access to Personal Data and Other Rights</i></p> <p>[...] 2. A data subject shall have the right to be informed</p> <p>a) of the source of the personal data;</p> <p>b) of the purposes and methods of the processing; [...]</p> <p>Article 22</p> <p><i>Principles Applying to the Processing of Sensitive Data as well as to Judicial Data</i></p> <p>[...]6. Sensitive or judicial data that are contained in lists, registries or data banks kept with electronic means shall be</p>
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processed by using encryption techniques, identification codes or any other system such as to make the data temporarily unintelligible also to the entities authorised to access them and allow identification of the data subject only in case of necessity, by having regard to amount and nature of the processed data. [...]

Article 34

Processing by Electronic Means

1. Processing personal data by electronic means shall only be allowed if the minimum security measures referred to below are adopted in accordance with the arrangements laid down in the technical specifications as per Annex B:

a) [...]

h) implementation of encryption techniques or identification codes for specific processing operations performed by health care bodies, in respect of data disclosing health and sex life. [...]

Article 132

Traffic data retention for other purposes

1. Without prejudice to Section 123(2), telephone traffic data shall be retained by the provider for twenty-four months as from the date of the communication with a view to detecting and suppressing criminal offences, whereas electronic communications traffic data, except for the contents of communications, shall be retained by the provider for twelve months as from the date of the communication with a view to the same purposes. [...]

Article 137

Provisions applicable to journalism and other forms of expression

1. The processing operations referred to in Section 136 shall not be subject to the provisions laid down in this Code

	<p>concerning any of the following:</p> <ul style="list-style-type: none">a) the authorisation granted by the Authority pursuant to Section 26;b) the safeguards referred to in Section 27 in connection with judicial data;c) cross-border data flows as per Title VII of Part I. 2. The data processing operations referred to in paragraph 1 may be performed also in the absence of the data subject's consent as per Sections 23 and 26. <p>3. If the data are communicated or disseminated for the purposes referred to in Section 136, the limitations imposed on freedom of the press to protect the rights as per Section 2, in particular concerning materiality of the information with regard to facts of public interest, shall be left unprejudiced. It shall be allowed to process the data concerning circumstances or events that have been made known either directly by the data subject or on account of the latter's public conduct.</p> <p>Article 138</p> <p><i>Professional secrecy</i></p> <p>1. The provisions concerning professional secrecy in the journalistic profession shall be left unprejudiced as related to the source of the information if a data subject requests to be informed of the source of the personal data in accordance with Section 7(2), letter a).</p>
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<p>Legislative Decree no. 70 of 2003 (Implementation of the Directive 2000/31/CE on the juridical profiles of information companies services, particularly e-commerce in the Italian market)</p>	<p>Article 17</p> <p><i>Lack of the general obligation to surveillance</i></p> <p>1. The provider, by providing the services referred to in Articles 14, 15 and 16, shall not be subjected to a general duty of surveillance on the information which are processed or stored, nor to a general duty to proactively investigate on facts or circumstances which may denote the presence of an unlawful activity. [...]</p>
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14.3. Table of Relevant Italian Case-Law

Case number	Judicial Body	Main content
1/1981	Constitutional Court	Although the Constitutional relevance, freedom of the press and freedom of information cannot be considered as generally dominant in respect of the administration of justice. The clash of the two values should be addressed by the legislator, with a balancing of the opposite interests.
144/1997	Supreme Court of Cassation, II Criminal Chamber	The lack of a formal opposition of the professional secrecy towards the request of the exhibition of documents as set by Art. 256 CCP allows the judicial authority to proceed to the seizure of the documentation required following the general rules provided by Art. 253 CCP. Article 256 CCP exclusively operates when a formal opposition of professional secrecy is filed and the judicial authority has reasonable doubts of its legitimacy.

15 th January 2003	Court of first instance of Naples	The obligations of loyalty and confidentiality imposed on professionals by Art. 622 CCP, which penalizes the disclosure of professional secrets in order to protect the personal freedom and security of the source, cease to apply exclusively when the information becomes renown, thus excluding the need to protect the secret.
16130/2002	Supreme Court of Cassation, V Criminal Chamber	The remote surveillance of the movements of an individual on the territory, performed by satellite navigation system devices, should not be considered as an interception of communication (since, materially, it is a mean of tracking), and do not require the authorization imposed by Article 266 CCP.
1827/1995	Supreme Court of Cassation, Labor Section	'Journalistic activity' is meant as an intellectual performance in order to gather, comment and elaborate news aimed to be the object of an interpersonal communication through the means of mass communication. Therefore, the journalist is a mediator between the fact and the dissemination of it, and its function is to acquire knowledge of the fact, evaluating its relevance in regard to the addressees and tailoring the message with a subjective and inventive contribution. [...] The difference between the journalistic activity and other professions is the promptness of information directed to stimulate citizens to gain knowledge and be aware of important issues.
20228/2012	Supreme Court of Cassation,	The control and the use of mail correspondence as evidentiary material do not fall under the rules provided for interception of conversations and communications. It is evaluated as a mean of

		seizure of correspondence regulated by Articles 254 and 353 CCP. [...]
21 st February 1994	District Judge of Rome	The exclusion of the right of the journalists to abstain from testifying in criminal proceedings could narrow the investigation activities, thus affecting the freedom of the press.
22397/2004	Supreme Court of Cassation, VI Criminal Chamber	The protection of the professional secrecy accorded to journalists, provided by Art 200 paragraph 3 CCP, also applies to all indications which may lead to the identification of the source.
24617/2015	Supreme Court of Cassation, Criminal Chamber	The judicial measure which orders the search and seizure of documents to identify the source of a journalist is not legitimate when the particular circumstance prevailing on the right of journalists to the confidentiality of sources is not provided by the judge.
25755/2007	Supreme Court of Cassation, VI Criminal Chamber	The seizure of the personal computer data of a journalist, who filed the opposition of professional secrecy, is only allowed when the secret is deemed ill-founded and there is the need to acquire information for the purpose of the investigation. The investigation should not compromise the right of the journalists to privacy and confidentiality of their sources.
31735/2014	Supreme Court of Cassation, IV Criminal Chamber	The respect of the principle of proportionality between the professional secrecy, accorded to journalists in order to protect the freedom of information, and the need to ascertain the facts under

		investigation requires a specific motivation for the order of exhibition ex Article 256 CCP and the subsequent seizure, with particular regard to the pinpointing of the items to be secured and the absolute need of the apprehension of the item to ascertain the crime.
36747/2003	Supreme Court of Cassation, Joined Criminal Chamber	Interception, as regulated by Article 266 CCP, is a mean of investigation which involves an occult and simultaneous apprehension of the content of a conversation, such as a communication between two individuals, with means that are objectively suitable for the purpose and able to neutralize any caution which has been possibly taken in order to protect the confidentiality of the dialogue
40380/2007	Supreme Court of Cassation, VI Criminal Chamber	The seizure order adopted against a journalist should strictly respect the principle of proportionality between the ablativo order and the need to ascertain the facts under investigation, avoiding as much as possible indiscriminate and invasive interventions within the journalists professional activity.
48587/2011	Supreme Court of Cassation, II Criminal Chamber	Article 200, paragraph 3, CCP sets the legal boundaries of interference by the judicial authority. Accordingly, the judge can order the disclosure of the journalistic sources exclusively when the disclosure is necessary to prove the crime against which the authority is proceeding, referring to specific facts under investigation, and when the information cannot be otherwise ascertained.

6/2000	Supreme Court of Cassation, Joined Criminal Chamber	A reasoned order of the judicial authority is sufficient to acquire the external data identifying the telephone communications stored in the electronic archives of the provider. It is not required, because of the different level of interference with the privacy which follows, to fulfill the procedural rules on interception of communications or conversations as set out in Article 266.
6672/1998	Supreme Court of Cassation	The provisions of the European Convention of Human Rights, as well as those of the First Additional Protocol, which were introduced in the Italian legal system by the Law no. 48 of 1955, do not have a purely political effectiveness. Indeed, they impose to States party actual juridical obligations immediately binding, and, once introduced within the National system, they are sources of obligation for all subjects.
978/1996	Supreme Court of Cassation, I Civil Chamber	The right to report news can prevail on the right to personal identity when the following requirements are met: a) the information is of public interest; b) the facts are true; c) the information is presented and evaluated objectively with the aim to inform, not to disparage.
98/1968	Constitutional Court	Constitutional illegitimacy of Article 46, para 1, Law 63 of 1963 for the violation of Article 21 of the Constitution. The article excluded the possibility to run the editorial staff of a newspaper, magazine or press agency for publicists, in an unjustified breach of the freedom granted by Article 21 of the Constitution.

ELSA LATVIA

Contributors

National Coordinator

Jūlija Terjuhana

National Academic Coordinator

Anrijs Šimkus

National Researchers

Madara Meļņika

Alīna Kalviša

Līva Rudzīte

Oļegs Sedjamins

Anrijs Šimkus

National Linguistic Editors

Mārtiņš Birģelis

Krišjānis Bušs

National Academic Supervisor

Asoc.prof. Artūrs Kučs

1. Introduction

1. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

The Council of Europe, in various recommendations and resolutions,¹ the European Court of Human Rights (hereinafter – ECHR) in its case-law², as well as legal scholars³ acknowledge that the right to source protection is an inherent part of freedom of expression that allows journalists to effectively gather and disseminate news on matters of public interest. The Council of Europe recommendation Nr. R(2000)7, clearly states that member states should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source.⁴ Moreover, the UN Special Rapporteur on issues of freedom of expression has urged States to adopt legislative acts that guarantees the right to source protection of journalists.⁵

Right to Source Protection and its Scope under Latvian Law

Although the Constitution of Latvia guarantees everyone the right to freedom of expression, it does not explicitly recognize the right to source protection. However, this privilege is explicitly provided in the Law on the Press and Other Mass Media (hereinafter – Press Law).⁶ Article 22 of the Press Law provides that “A mass medium may choose to not indicate the source of information. If the person who has provided the information requests that his or her name is not to be indicated in a mass medium, this request shall be binding upon the editorial board. For the

¹ Council of Europe, "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"; Council of Europe, "Recommendation CM/rec (2011) 7 of the Committee of Ministers to member states on a new notion of media"; CoE Parliamentary Assembly draft resolution, 1 December 2010, doc.12443, para.2; CoE Parliamentary Assembly recommendation 1950 (2011) on the protection of journalists' sources, para.2

² *Goodwin v. the United Kingdom* App no 17488/90 (ECtHR, 27 March 1996); *Nagla v. Latvia* App no 73469/10 (ECtHR, 16 July 2013); *Sanoma Uitgevers B.V. v the Netherlands* App no 38224/03 (ECtHR, 14 September 2010)

³ Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006), p.811; David Banisar, *Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources* (Privacy International 2006-2007), p.8

⁴ Council of Europe, "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", appendix, Principle 1

⁵ Promotion and protection of the right to freedom of opinion and expression Report of the Special Rapporteur, Mr. AbidHussain, submitted pursuant to Commission on Human Rights resolution 1997/26, E/CN.4/1998/40, 28 January 1998

⁶ Law on the Press and Other Mass Media. Adopted by the Supreme Council of the Republic of Latvia on 20 December 1990, entered into force of 1 January 1991

purpose of protecting vital interests of other persons or the public, only a court, in accordance with the principle of proportionality, may request to produce the source of information.”⁷

The wording of this Article might lead one to presume that the Press Law does not guarantee the right to source protection to a journalist, but only to a mass medium. According to Article 2 of the Press Law, mass media “are newspapers, magazines, newsletters and other periodicals (published not less frequently than once every three months, with a one-time print run exceeding 100 copies), as well as television and radio broadcasts, newsreels, information agency announcements, audio-visual recordings, and programmes intended for public dissemination”. Whereas a journalist, according to Article 23 of the Press Law, is “a person who gathers, compiles, edits or in some other way prepares materials for a mass medium and who has entered into an employment contract or performs such work upon the instruction of a mass medium, or is a person who is a member of the Journalists’ Union”.⁸

However, Paragraph 1 of Article 154 of the Criminal Procedure Law indicates a broader understanding of the right to source protection, stating that “a court may assign a mass-media journalist or editor to indicate the source of published information.”⁹ Case-law of the domestic courts also shows that journalists themselves may directly rely on Article 22 of the Press Law and claim the right to source protection. For example, in 2006 Mr. Uldis Dreiblats, a journalist for the newspaper “*Neatkarīgā Rīta Avīze*”, published transcripts of a certain telephone conversation, which had been tapped by the Security Police. The Security Police went before an investigative judge to request that Mr. Dreiblats be ordered to reveal his source of information. Although this request was approved by the investigative judge,¹⁰ and later by the Riga Centre district court¹¹ on grounds of an overriding public interest, both decisions expressly acknowledged that Mr. Dreiblats, being a journalist, did have a right to source protection under Article 22 of the Press Law. This case later went before the ECtHR. In its judgment, the Court itself interpreted Article 22 of the Press Law as providing the right to source protection directly to journalists.¹²

To summarise, the law in Latvia provides the right to source protection to the mass media and their journalists. Nevertheless, the question remains whether journalists, who are not working in or for a mass medium, may claim this privilege. The grammatical interpretation of the above mentioned legal provisions yields a negative answer. To the best of ELSA Latvia’s Legal Research Group’s knowledge, there is also no domestic case-law that would clarify this issue in some way.

⁷ Law on the Press and Other Mass Media. Adopted by the Supreme Council of the Republic of Latvia on 20 December 1990, entered into force of 1 January 1991, article 22

⁸ Law on the Press and Other Mass Media. Adopted by the Supreme Council of the Republic of Latvia on 20 December 1990, entered into force of 1 January 1991, article 23

⁹ Criminal Procedure Law. Adopted by the Parliament of the Republic of Latvia on 21 April 2005, entered into force on 1 October 2005, Article 154(1)

¹⁰ 5 September 2006 decision of the Riga Centre District investigative judge in case No. KPL-27040006/3

¹¹ 20 September 2006 decision of the Riga Centre District court in case No. KPL27040006

¹² *Dreiblats v. Latvia* App no 8283/07 (ECtHR, 4 June 2013), para.24

The Elements of the Right to Source Protection

Although national law provides a right to source protection, there are, however, no legal provisions in Latvia's legal system that explain the underlying elements of this right. Namely, there are no provisions that have implemented the definitions of a "source" and "information identifying a source" set out in the Council of Europe Recommendation Nr. R(2000)7.¹³ A recent case in Latvia showed that national authorities do not have a clear understanding of these concepts.

Thus, in 2010 police authorities searched the home and seized data storage devices of Ms. Ilze Nagla, a journalist and producer of the investigative news programme "*De Facto*". These actions were followed after Ms. Nagla had reported on a security breach of the State Revenue Service (hereinafter – SRS), in which private information of taxpayers had been leaked. An anonymous source had contacted Ms. Nagla, giving her the leaked information and explaining how this was accomplished. Before the domestic courts, Ms. Nagla argued that the seizure of her data storage devices was an attempt to discover the source that leaked the information from SRS. Furthermore, the seizure could also disclose other sources used by the journalist. The domestic courts acknowledged that Ms. Nagla has the right to source protection, but sided with the arguments of the police, namely, that the search and seizure was not aimed at finding a source, but to merely stop the further unlawful dissemination of private information. Therefore, the right to source protection and its safeguards did not apply.¹⁴ The case went before the ECtHR, which found a violation of Ms. Nagla's freedom of expression. The Court noted that the seized data storage devices contained information capable of identifying other sources of Ms. Nagla.¹⁵ Accordingly, it concluded, *inter alia*, that the national authorities had not struck a fair balance between the need to investigate the leaked information from the SRS and Mrs. Nagla's right to source protection.¹⁶

Although it is debatable, whether clear legal provisions setting out the definitions of a "source" and "information identifying a source" would have prevented the infringement of Mrs. Nagla's rights, the Government of Latvia, in its action report on the execution of this judgment, concluded that the violation was an isolated failure of investigative authorities to substantiate their actions.¹⁷ Therefore, no improvements or amendments to the legislation are necessary, and continuous legal education of State officials regarding ECtHR case-law would suffice to prevent such violations in the future.¹⁸

¹³ Council of Europe, "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", appendix, definitions c. and d.

¹⁴ 14 June 2010 decision of the Rīga Centre District Court in case No. KPL-27029710

¹⁵ *Nagla v. Latvia* App no 73469/10 (ECtHR, 16 July 2013), para.82

¹⁶ *Nagla v. Latvia* App no 73469/10 (ECtHR, 16 July 2013), paras.101, 102

¹⁷ Action report of the Government of the Republic of Latvia on the execution of the judgement of the ECHR in the case of *Nagla v. Latvia* App no 73469/10 (ECtHR, 16 July 2013), adopted on 25 November 2015, para.15

¹⁸ *Ibid.*, para.26

2. Is there, in domestic law, a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

Considering that the main task for democratic state is to respect human rights, each of the individual rights which are included in international human rights documents should also be recognized under the constitution.¹⁹ Therefore, from Article 89 of the Constitution of the Republic of Latvia (hereinafter – the Constitution)²⁰ stems the binding nature of the international human rights instruments, including the principle that the provisions of the Constitution must be interpreted in the light of the Convention for the Protection of Human Rights and Fundamental Freedoms²¹ (hereinafter – ECHR). Although Article 100 of the Constitution protects the right to freedom of expression, Article 116 stipulates:

The rights of persons set out in Articles (..), one hundred (..) of the Constitution may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals. On the basis of the conditions set forth in this Article, restrictions may also be imposed on the expression of religious beliefs.

Thus, freedom of expression can be restricted in several situations. However, journalists have the right not to disclose their sources, especially when disclosure of sources is related to criminal charges against the journalist. At such an occasion the right not to incriminate oneself, as stipulated in the Criminal Procedure Law,²² can be invoked. Nevertheless, this is only a right and not an obligation.

The functioning of an active, professional and independent media plays an important role in society²³ and is closely linked to access to information²⁴ because the right to freedom of expression derives from the right to receive information.²⁵ The possibility to receive information, especially classified information, will exist only if journalists are able to guarantee confidentiality and anonymity of their sources.²⁶ Therefore, strict conditions are laid down in order to protect journalist's sources. For instance, Article 22 of the Law on Press and Other Mass Media²⁷ stipulates that only a court may decide whether to restrict the right of source protection.

¹⁹ Pleps J., Pastars E., Plakane I. Constitutional Law. Supplemented and Revised Edition. Riga: VAS 'Latvijas Vēstnesis', 2014, p.140.

²⁰ The Constitution of the Republic of Latvia. Published: Latvijas Vēstnesis, 1 July 1993, No. 43.

²¹ Goodwin v The United Kingdom App no 28957/95 (ECHR 27, March 1995), para 28.

²² The Criminal Procedure Law. Published: Latvijas Vēstnesis, 11 May 2005, No. 74, article 19

²³ Kučs A., Bīriņa L. Protection of Sources of Journalists in ECHR Case Law and the case 'Nagla v. Latvia'. Published: „Jurista Vārds”, 27.08.2013, no. 35 (786).

²⁴ Martin and others v. France [ECHR 12, April 2012], App. no. 30002/08.

²⁵ Judgment no. 2003-02-0106 of the Constitutional court of the Republic of Latvia, 05.06.2003, para 1.

²⁶ Judgment no. SKA-194/2007 of the Administrative Department of the Supreme court Senate, 08.06.2007.

²⁷ Law on Press and Other Mass Media. Published: Ziņotājs, 14 February 1991, No. 5.

Furthermore, Recommendation No. R (2000) 7²⁸ establishes more detailed conditions for restrictions, emphasizing, inter alia, the binding nature of the ECHR. In addition, the Latvian Code of Ethics of Journalists²⁹ stipulates that journalists cannot publish the name of the source without its consent, except in cases when requested by a court. Although journalists are not legally bound by the Code of Ethics,³⁰ they enjoy the protection under Article 10 of the ECHR only if they act in a good faith.³¹ That also means that they have to inform the society about important aspects even if it requires disclosure of confidential information.³²

The Latvian Code of Ethics further stipulates that the Commission of Ethics of Journalists' Association of the Republic of Latvia supervises compliance with the Code of Ethics. According to the Provision of the Commission of Ethics,³³ sanctions applicable for breach of the Code of Ethics may include the following: 1) personal remark published on the Commission's Internal correspondence; 2) personal remark published on the Commission's public announcement for the media; 3) proposal to the Board of the Association to decide on the exclusion of a member from the Association in a case of serious breach of the Code of Ethics. Nevertheless, these sanctions may only be placed on those journalists, who are members of the Association (membership in the Association is voluntary). Therefore, there are no comprehensive sanctions for unlawful disclosure of a source's identity in Latvia's legal system that would apply to all journalists.

Furthermore, although the Criminal Law³⁴ establishes liability only for breach of secrecy of correspondence (Article 144), illegal spread of personal data (Article 145), and defamation in mass media (Article 157(2)) without specifying the liability for special subjects – journalists, a person whose rights have been violated is entitled to claim damages (Section 8) from the journalist under the Civil Law of the Republic of Latvia,³⁵ either as a tort (Article 1635), or for the retraction of information that injures reputation and dignity, if the disseminator of the information does not prove that such information is true (Article 2352¹).

In conclusion, even if there is no de jure prohibition for journalists to disclose their sources of information, the strict conditions for restricting these rights essentially amount to a de facto prohibition, except in cases where this is requested by a court.

²⁸ Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information. Committee of Ministers of the Council of Europe, 8, March 2000, appendix, article 3 of the explanatory memorandum

²⁹ Code of Ethics. Association of Journalists of the Republic of Latvia, 14, March 2014, article 3

³⁰ Judgment no. 2003-05-01 of the Constitutional court of the Republic of Latvia, 29.10.2003, para 31.3.

³¹ Kučs A. The Article 100 of the Constitution of the Republic of Latvia. Commentary of the Constitution of the Republic of Latvia. Section VIII Human Rights. Collective of authors. Riga 'Latvijas Vēstnesis', 2011, p. 367.

³² Editions Odile Jacob SAS v. European Commission [ECJ 9, June 2010], App. no. T237/05, para 41.

³³ The Provision of the Commission of Ethics. Association of Journalists of the Republic of Latvia, article 12

³⁴ Criminal Law. Published: Latvijas Vēstnesis, 8 July 1998, No.199/200.

³⁵ Civil Law of the Republic of Latvia. Published: Valdības Vēstnesis, 26 February 1937, No.46.

3. Who is a “journalist” according to the national legislation? Is it in your view a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media actors? Is the protection of journalists’ sources extended to anyone else?

Definition of a “Journalist” Under Latvian Law

In the legal system of the Republic of Latvia, the definition of a journalist is provided in the Law on the Press and Other Mass Media (hereinafter – Press Law).³⁶ Article 23 states that “a journalist is a person who gathers, compiles, edits or in some other way prepares materials for a mass medium and who has entered into an employment contract or performs such work upon the instruction of a mass medium, or is a person who is a member of the Journalists’ Union.”³⁷ The wording of this Article shows that at the core of this definition is the institutional element, namely, the requirement that a person not only performs journalistic activities, but is also either affiliated with a registered mass medium, or is himself/herself registered as a member of the Journalists’ Union. Therefore, Article 23 of the Press Law implies a very restrictive definition of a “journalist”.

However, a case before the domestic courts has demonstrated a wider approach when defining someone a journalist and implying that, in certain situations, the institutional element may not be needed. Thus, in 2009 Mr. Lato Lapsa, a well-known journalist in Latvia, brought a request before the administrative courts to order the Central Bank of Latvia to give information regarding its board members’ salaries. The Supreme Court, in its judgment, noted that it is beyond doubt that the applicant is a member of the press who frequently writes about matters of public interest.³⁸ Therefore, it upheld the journalist’s request, concluding that in the present case the media’s right to receive information outweighed the Central Bank’s board members’ right to privacy.³⁹ This judgment is noteworthy for the reason that the Supreme Court did not use the definition of a journalist laid down in Article 23 of the Press Law, but rather referred to the case-law of the ECtHR regarding rights of the media. Furthermore, if it had relied on the Press Law, the Supreme Court would have probably found that Mr. Lapsa would not fit the definition laid down in this law, because at the time he was neither a member of the Journalists’ Union, nor working in or for a mass medium.

³⁶ Law on the Press and Other Mass Media. Adopted by the Supreme Council of the Republic of Latvia on 20 December 1990, entered into force of 1 January 1991

³⁷ Law on the Press and Other Mass Media. Adopted by the Supreme Council of the Republic of Latvia on 20 December 1990, entered into force of 1 January 1991, article 23

³⁸ 26 May 2011 judgment of the Supreme Court of Latvia No. SKA-421/2011, para. 6

³⁹ Ibid., paras. 8 and 9

The aforementioned Supreme Court judgment shows a progressive approach towards the notion of a “journalist” that is also more in line with the opinion of the Council of Europe, namely, that the definition of a journalist should not exclude those persons who work freelance or part-time, are at the beginning of their professional career, or those who work on an independent investigation over some time.⁴⁰ The definition offered in Recommendation Nr. R(2000)7 only requires the functional element, i.e. that a journalist can be any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication.⁴¹ As can be seen, no institutional element is required by the Council of Europe, because it was concluded that professional accreditation or membership should not be necessary in order to acknowledge someone as a journalist.⁴² Such reasoning is also supported by the ECtHR⁴³, the United Nations⁴⁴, the Inter-American Court of Human Rights⁴⁵, and others.⁴⁶

The Scope of Protection of Other Media Actors

Protection of persons, who acquire knowledge of the source due to professional relations with the journalist

As described previously in Question 1, the Press Law provides the right to source protection to a mass medium itself.⁴⁷ This implies that the privilege is guaranteed to all staff working for the mass medium. Support for such interpretation can be found in Paragraph 4 of Article 154 of the Criminal Procedure Law which states that “a decision of a judge [on indication of the source of information] may be appealed by the submitter of a proposal, or a mass-media journalist or

⁴⁰Council of Europe, "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", explanatory memorandum, para.13(ii)

⁴¹ Council of Europe, "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", appendix, definition a.; see also, Council of Europe, "Recommendation CM/rec (2011) 7 of the Committee of Ministers to member states on a new notion of media"

⁴² Council of Europe, "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", explanatory memorandum, para.13(ii)

⁴³*Vides Aizsardzības Klubs v. Latvia* App no 57829/00 (ECtHR, 27 May 2004), para.40; *Társaság a Szabadságjogokért v. Hungary* App no 37374/05 (ECtHR, 14 April 2009), para.27; *Steel and Morris v. the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005), para.89

⁴⁴ HRC "General comment no 34: Article 19, Freedoms of opinion and expression" (2011) UN Doc CCPR/C/GC/34; La Rue F. (11 August 2011), *Report of the Special Rapporteur on the promotion and protection of the right of opinion and expression*, UN Doc. A/65/284, para.61

⁴⁵ IACHR, Advisory Opinion OC-5/85 of November 13, 1985, Compulsory Membership in an association prescribed by law for the practice of journalism (arts. 13 and 29 American Convention on Human Rights), para.71

⁴⁶ Article 19, Licensing of Media Workers, available at: <www.article19.org/pages/en/licensing-of-media-workers.html>

⁴⁷ Law on the Press and Other Mass Media. Adopted by the Supreme Council of the Republic of Latvia on 20 December 1990, entered into force of 1 January 1991, article 22

editor, and such appeal shall be examined within 10 days by a higher-level court judge in a written procedure the decision of which shall not be subject to appeal.”⁴⁸

Such an approach would at least to some extent conform with Council of Europe Recommendation Nr. R(2000)7, which states that “other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established herein.”⁴⁹ However, it is unclear whether other persons outside the mass medium, for instance, Internet service providers, would also be protected under Latvian law.⁵⁰ To the knowledge of the ELSA Latvia research group, there is no domestic case-law or other examples of practice that would shed some light on these issues.

Protection of non-journalists

Latvian law does not provide the right to source protection to persons who are not considered journalists. Although the above mentioned case concerning Mr. Lapsa showed that domestic courts might characterise a person as a journalist even if he/she would not fit the general definition laid down in Article 23 of the Press Law, there is no case-law where domestic courts have acknowledged such a person as a journalist not only for the purpose of acquiring information in order to further inform the public of important matters, but also to afford the right to source protection.

Indeed, the Council of Europe, in wake of the ever-rising influence of Internet, has expressed the need to rethink the notion of a “journalist” and called for a debate on whether non-journalists, such as bloggers, podcasters and citizen journalists, should also be afforded the right to source protection.⁵¹ However, it has also admitted that non-journalists cannot benefit from the right of journalists not to reveal their sources, due to the reason that they would not be able to develop a relationship of trust to encourage sources to provide journalists with important information.⁵² Subsequently, the idea that a person must receive acknowledgment, under law or by domestic courts, that he/she is a journalist does not necessarily run contrary to international standards in media protection. Even the ECtHR⁵³, the Inter American Court of Human Rights⁵⁴

⁴⁸Criminal Procedure Law. Adopted by the Parliament of the Republic of Latvia on 21 April 2005, entered into force on 1 October 2005, Article 154(4)

⁴⁹ Council of Europe, "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", appendix, principle 2

⁵⁰CoE Parliamentary Assembly recommendation, 1 December 2010, doc.12443, explanatory note, para.41

⁵¹CoE Parliamentary Assembly recommendation, 1 December 2010, doc.12443, explanatory note, paras.38, 39; CoE Parliamentary Assembly recommendation 1950 (2011) on the protection of journalists' sources, para.11

⁵²CoE Parliamentary Assembly recommendation, 1 December 2010, doc.12443, explanatory note, para.40; CoE Parliamentary Assembly recommendation 1950 (2011) on the protection of journalists' sources, para.15; see also, Council of Europe, "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", explanatory memorandum, para.10

⁵³*Groppera Radio AG and others v. Switzerland* App no 10890/84 (ECtHR, 28 March 1990); Clare Ovey, Robin White, *The European Convention on Human Rights* (4th edn, OUP 2006), p.331; see also, Pieter van Dijk, Fried van

and the United Nations⁵⁵ have submitted that the requirement of journalists and mass mediums to register may encourage more responsible journalism and higher professional standards, and protect other persons from abusive freedom of expression.

4. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

Besides Article 100⁵⁶ of the Constitution of the Republic of Latvia, the starting point of the legal safeguards for the protection of journalist sources in national level is the previously mentioned Article 22 of the Law on Press and Other Mass Media⁵⁷. It is important to point out that this article refers to “a mass medium”, not “a journalist”, but Article 27 of the Law on Press and Other Mass Media defines that “A person committing a breach of confidence with respect to a source of information... shall be held liable in accordance with laws of the Republic of Latvia”. Therefore, it can be concluded that the right and duty to protect information sources applies both to mass mediums and journalists.

The duty not to disclose a source is also implemented in the Code of Ethics of the Journalist Association of Latvia⁵⁸. Section 3.1 stipulates that “A journalist has no right to disclose the information source without his conduct”. Thus, non-disclosure of sources is not only a right, but also a duty. The Council of Europe has stated that “Professional ethical standards ensure that sources may rely on confidentiality and decide to provide journalists with information which may be of public concern.”⁵⁹ When a journalist or media will rather receive a fine or even go to prison than disclose their source, it can be looked upon as professional maturity and not as arbitrariness to the rule of law.⁶⁰ The European Court of Human Rights pays due regard to the chilling effect

Hoof, Arjen van Rijn, Leo Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006), p.808

⁵⁴ IACHR, Advisory Opinion OC-5/85 of November 13, 1985, Compulsory Membership in an association prescribed by law for the practice of journalism (arts. 13 and 29 American Convention on Human Rights)

⁵⁵ HRC "General comment no 34: Article 19, Freedoms of opinion and expression" (2011) UN Doc CCPR/C/GC/34, para.39

⁵⁶ “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.”

⁵⁷ “A mass medium may choose to not indicate the source of information. If the person who has provided the information requests that his or her name is not to be indicated in a mass medium, this request shall be binding upon the editorial board. The source of information shall only be produced at the request of a court or a prosecutor.”

⁵⁸ Code of Ethics of the Latvian Journalists' Association, adopted with amendments by the Latvian Journalists' Association on 14 March, 2014

⁵⁹ The Council of Europe Parliamentary Assembly 25 January, 2011 Recommendation (1950) 2011, para 14 <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17943&lang=en>> accessed January 31 2016.

⁶⁰ Dimants A. ‘*Privileģija klusēt*’ <<http://providus.lv/article/privileģija-kluset>> accessed February 1 2016.

that 'arises whenever journalists were seen to assist in the identification of anonymous sources'.⁶¹ Both the Law on Press and Other Mass Media and the Journalists Code of Ethics do not allow a journalist to disclose his source, for example, if no authority asks him to but he just feels that he should tell someone. It is a journalist's duty to protect his sources and his source relies on it, so there is no place for a journalist's own thoughts of what he should or should not do.

The legal safeguards for protection of a journalist's sources are implemented in the Criminal Procedure Law⁶². Article 12 of the Criminal Procedure Law lays down a general obligation for the State authorities to respect human rights when conducting criminal proceedings, and a prohibition to arbitrarily interfere with these rights. This entails respecting the right to source protection. The European Court of Human Rights in *Goodwin v. United Kingdom*,⁶³ recognized this right as part of the broader right to freedom of expression. Regarding Article 12 of the Criminal Procedure Law, human rights (in this case - freedom of expression) may be restricted only in accordance with the Law. The procedure is laid down in Article 154 of the Criminal Procedure Law:

“A court may assign a mass-media journalist or editor to indicate the source of published information. An investigating judge shall decide on the proposal of an investigator or public prosecutor, having listened to the submitter of the proposal, or a mass-media journalist or editor, and having familiarised him or herself with the materials. An investigating judge shall take a decision on indication of the source of information, complying with the proportionality of the rights of the person and the public interest. A decision of a judge may be appealed by the submitter of a proposal, or a mass-media journalist or editor, and such appeal shall be examined within 10 days by a higher-level court judge in a written procedure the decision of which shall not be subject to appeal”.

According to Article 154 of the Criminal Procedure Law, there are two situations in which the right not to indicate the source could be violated:

- it could be violated by the investigator or prosecutor when forcing a journalist to disclose his source without a judge's decision; or
- it could be violated by the judge who inadequately weights the proportionality of the rights of the person and the public interest.

In the first scenario, a procedural breach made by an investigator or prosecutor can be easily determined, but it is more complex in the second situation, as it is difficult to assess whether the judge reached a fair balance between the competing interests. The case of *Nagla v. Latvia*⁶⁴ demonstrates this perfectly.⁶⁵

⁶¹ The European Court of Human Rights, *Financial Times Ltd and Others v. the United Kingdom* (application no. 821/03)

⁶² Criminal Procedure Law. Adopted by the Parliament of the Republic of Latvia on 21 April 2005, entered into force on 1 October 2005

⁶³ The European Court of Human Rights, *Goodwin v. United Kingdom* (application no. 17488/90)

⁶⁴ The European Court of Human Rights, *Nagla v. Latvia* (application no. 73469/10)

⁶⁵ For an outline of this case, see Question 1 of this report.

The ECtHR shed some light on the previously outlined issue – what the judge should take into account when balancing between the public interests and the rights of an individual. In this case there was no sufficient substantiation on allowing State authorities to search the home of Ilze Nagla.

In addition to *Nagla*, a few other domestic cases from 2006, dealing with the issues of source disclosure, are worth mentioning. The first case was regarding a journalist who worked for a newspaper 'Neatkarīgā Rīta Avīze', Uldis Dreibats. He wrote an article about telephone conversations between the chairman of the board of a limited liability company, 'Rezeknes galas kombinats', Guntis Piteronoks who was also a deputy of the Rezekne municipality and a member of a political party 'Jaunais Laiks' and several of his co-members from the 'Jaunais Laiks'. This shed light on the corruption of the individuals and other possible crimes. "The investigating authorities searched the office of the newspaper concerned and seized an audiotape of the impugned conversations."⁶⁶ The journalist was asked to reveal his source by the Security Police, but he refused. Later the investigative judge of Riga City Centre District Court and the Riga City Centre District Court upheld the request concerning the disclosure of the source of the published telephone conversations.⁶⁷ Mr. Dreibats still refused to disclose his source and criminal charges were brought against him. He was charged under Article 296 of the Criminal Law⁶⁸ for refusal to comply with a court order. The case reached the Supreme Court, which in 2013 overturned the lower court's decision, terminated the criminal proceedings and Mr. Dreibats was informed by the Office of the Prosecutor General of his right to institute civil proceedings for non-pecuniary damages in accordance with the Law on Compensation for Damage caused by State Institutions.⁶⁹

The second case concerns Mrs. Ilze Jaunalksne, who at the time was a journalist for a television broadcasting programme "De Facto". Her phone was tapped by State authorities. The situation raised question on whether it can lead to disclosure of journalist's sources. Four police officers related to tapping journalists' phone were found guilty of abuse of power and imprisoned.

Shortly after Ms. Nagla's case, on December 15 2011, the authorities made a search at journalist's Leonids Jakobsons apartment, took his laptop and other data storage devices. The Journalist Association of Latvia asked the Ombudsmen of Latvia to assess the facts in this case. The Ombudsmen refused to start an investigation, pointing out that the facts of the case were very similar to the situation of Ilze Nagla and he has already given his opinion in that matter.⁷⁰ This opinion referred to the need to find a fair balance between the competing interests, and a

⁶⁶ The European Court of Human Rights, *Dreiblats v. Latvia* (Application no. 8283/07), paragraph 6

⁶⁷ The European Court of Human Rights, *Dreiblats V. Latvia* (Application no. 8283/07), paragraphs 5-9

⁶⁸ For a person who commits intentionally failing to execute a court judgment or decision or delaying the execution thereof, the applicable punishment is a fine up to 60 minimum salaries.

⁶⁹ The European Court of Human Rights, *Dreiblats V. Latvia* (Application no. 8283/07), paragraph 18

⁷⁰ Conclusion of the Ombudsmen of the Republic of Latvia: <www.diena.lv/upload/manual/atzinums_par.doc> accessed 1 February, 2016

judge needs a sufficient substantiation to force a journalist to disclose its source.

The Ombudsmen of Latvia has also pointed out that these cases, where authorities potentially violates journalists rights, indicates that the Article 121 of Criminal Procedure Law, which refers to professional secrets that are protected by criminal procedure, should be amended in order to apply to journalists, as well.⁷¹ However, no amendments have been made in this regard.

5. In the respective national legislation are the limits of non-disclosure of the information in line with the principles of the Recommendation No R (2000) 7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

The Criminal Procedure Law lays down a general obligation to conduct criminal proceedings in compliance with internationally recognized human rights (including article 10 of the ECHR). The article contains one exceptional circumstance under which the rights (including a right to not disclose journalists` source) can be restricted – public safety reasons. Furthermore, the previously mentioned article 154 of the Criminal Procedure Law lays down safeguards for situations when an investigating judge takes the decision to order the reveal of the source of information. Therefore, the Criminal Procedure Law contains general duties, which authorities must follow with reference to the international standards, regarding the restriction of the human rights.

The Explanatory Memorandum of the Recommendation No R (2000) 7 analyses decisions of the European Court of Human Rights. It examines whether reasonable alternative measures to disclosure exist and have been exhausted and if the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure. The main circumstances in which the disclosure of journalist source could be justified are:

- protection of human life;
- prevention of major crime;
- defence of a person accused or convicted of having committed a major crime.⁷²

⁷¹ The Office of the Ombudsman, “*Policijai ir jārespektē vārda brīvība un informācijas avotu aizsardzība*” <<http://www.tiesibsargs.lv/petijumi-un-publikacijas/relizes/policijai-ir-jarespekte-varda-briviba-un-informacijas-avotu-aizsardziba>> accessed February 1, 2016

⁷² The Explanatory Memorandum of the Recommendation No R (2000) 7 of the Committee of Ministers of Member States on the Right of Journalists not to Disclose their Sources of Information,

Public safety reasons that are mentioned in the Criminal Procedure Law covers all of these that are mentioned in the Explanatory Memorandum of the Recommendation No R (2000) 7. The downside is that this is a broad term, which can be interpreted arbitrarily. Also, Article 110 of the Criminal Procedure Law can be used as a way to evade the procedure laid down in Article 154 and act as if there is an emergency situation where the search is needed immediately.

We can conclude that the Criminal Procedure Law, in general, tries to comply with the principles of the Recommendation No R (2000) 7 related to the question, but the Law is not detailed enough and as we can see from the cases mentioned in the answer to the question 4, where Latvian authorities have tried to compel journalists to disclose their sources, in practice everything is not as clear. Because no exhaustive list of exceptions is provided in the Criminal Procedure Law, authorities sometimes interpret the law arbitrarily. Including the list of circumstances in the law would help to clarify the reasons that are sufficient enough for restricting journalists' right and duty to protect their sources.

6. In the Recommendation No R (2000) 7 the following principles should be respected when the necessity of disclosure is stated: absence of reasonable alternative measures, outweighing legitimate interest (protection of human life, prevention of major crime, defence of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the disclosure outweigh the interest in the non-disclosure?

6.1. Fundamental Criteria for the Disclosure

Already in 2001, the Bureau of the Ombudsman in Latvia indicated the need for a change of Part 2 of Section 22 on Law on Press⁷³ so it would include the possible reasoning for the demand to reveal the sources of information. In their redaction, those reasons could be State security, fairness and the prevention of crime. However, it has not been done and, theoretically, the law still gives the court unlimited rights to ask for the revealing of sources.

Nevertheless, certain limitations are found in other laws. Firstly, it is established that this information is protected under law⁷⁴ and a mass media can only be forced to disclose their sources in criminal proceedings. Therefore, the case has to be important enough for society to be dealt with within the criminal sphere and then in the case the interests of disclosure again

<[http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec\(2000\)007&expmem_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(2000)007&expmem_EN.asp)> accessed 29 January, 2016

⁷³Tiesībsargabiņojums, 'Latvijas cilvēktiesību joma. 2000.gada 4.ceturksnis' [2001] JuristaVārds No 12(205), [Latvian].

⁷⁴GunārsKūtris, 'Rokasgrāmatatīesnešiemkrimīnālprocesā' [2010] TNA [Latvian], 39.

have to be important enough to outweigh the non-disclosure. Additionally, in the making of the decision, the principle of proportionality as recognised by the ECHR has having to be respected – the limitation has to be 1) appropriate and suitable for achieving the legitimate objective, 2) the most lenient way how to achieve the objective and 3) mutually proportionate with the benefit the society gains from setting the restriction on fundamental rights.⁷⁵

Already in 2007 the Committee of Law in the Parliament of Latvia had the idea that Section 154 of the Criminal Procedure Law has to be supplemented with the criteria for the analysis of the pleas according to the Recommendation (2000) 7 as right now the law allows too wide interpretations.⁷⁶ Yet neither in 2007,⁷⁷ nor in 2008,⁷⁸ the Law Commission developed possible appendixes to the law, thus the problem was left unresolved.

The prevailing interests established in the Constitution of Latvia are arguably the rights of other people, the democratic structure of the State, and the public safety, welfare and morals.⁷⁹ Those criteria have to be directly stated in Law. As the Criminal Procedure Law anticipates the limitation of the freedom of speech of the journalists and the Constitution has to be seen as the highest law in the state, applicable through the understanding of Article 10 of the Convention in any case when it is needed, these criteria through the principle of proportionality, theoretically, can be applicable for the demand to reveal the source of information and the possible restrictions on the Freedom of Expression.⁸⁰

6.2. The Case Law

The cases and the rulings by the courts concerning the revealing of the journalistic information sources are mostly confidential and not available to the public. Thus it is difficult to understand the criteria under which the court works in determining the importance of the plea to reveal the source. However, most of those cases are favourable for the journalists, so it is clear that the bar for the disclosure is high.

⁷⁵GrundgesetzKommentar, Band I, Präambelbis Art. 20, Aufl. 4. vonMünch / Kunig (Hrsg.). München: C.H.Beck'scheVerlagsbuchhandlung, 1992, [German] 54.

⁷⁶LieneBarisa, NRA, '*Saeimalabosotlikumapantu par žurnalistaavotuatklāšanu*' (TvNet.lv, 16 May 2007) <http://www.tvnet.lv/zinas/latvija/216990-saeima_labosot_likuma_pantu_par_zurnalista_avotu_atklasanu> accessed February 13 2016 [Latvian].

⁷⁷'Apkopojums par 9. Saeimaskomisijudarbu 2007.gada rudenssesijā (no 2007.gada 4.septembra līdz 20.decembrim)' (20 December 2007).<<http://www.saeima.lv/documents/3bad5684a6bb465c53be89b00692f9b7af73f520>>accessed February 2 2016 [Latvian].

⁷⁸'LatvijasRepublikasSaeimasPubliskaisPārkats 2008' (2008) <<http://www.saeima.lv/documents/717e6615164717eca72c7ebb2cf8a7b44112d9a7>> accessed 2 February 2016 [Latvian].

⁷⁹The Constitution of the Republic of Latvia 1992 [LatvijasRepublikasSatversme], s 116.

⁸⁰*Nr.2003-05-01* [2003] Constitutional Court on the Republic of Latvia [Latvian], para 22; *Nr.2009-45-01* [2010] Constitutional Court on the Republic of Latvia [Latvian], para 9.

The first time the court was asked to demand the journalist to reveal the information source was in 2006, in the 'NRA–Repše' case – and then the court was on the journalist's side,⁸¹ ruling that the rights of KNAB to know how the journalists got to know about the deals and trades of a certain politician are less important than the rights of the society to know about suspicious politicians' operations with money.⁸²

The loudest case, when the journalist was demanded to reveal the source of the information, was soon after this, in 2007. After the plea of the Security Police, a journalist, Dreiblats, was asked to reveal the source of information of his publication as the records of the calls published have contained the state secret.⁸³ This reasoning for the demand, even though not mentioned in Section 116 of the Constitution or the Recommendation, might comply with both, as the security of the state secret can be considered as an important legitimate interest. However, Dreiblats refused to reveal the source of information, arguing that the Security Police has other ways how to find out the people who could have been the sources of information as only a limited amount of people has the access to the state secret. Therefore, as there were alternative measures possible, the demand was not proportional according to the Recommendation.⁸⁴ Also, publishing those calls was the only way, and the best way, to solve and stop the crimes. Thus, the Principle 3 (d) of Resolution No. 2 on journalistic freedoms and human rights (1994) has ensured that the rights of the journalists to be 'public-watchdogs' were basically denied.⁸⁵ Additionally, on 19 April 2007, the Parliamentary Assembly of the Council of Europe, in its Assembly debate on fair trial issues in criminal cases concerning espionage or divulging state secrets, agreed that a state's legitimate interest in protecting official secrets must not become a pretext to unduly restrict the freedom of expression and of information.⁸⁶ Therefore, the reasoning of the court did not comply with the Recommendation or the Constitution.

The second loudest case with the journalist of the regional newspaper "Zemgales Ziņas" in 2013, the police had asked the court to demand the journalist to reveal the source of their

⁸¹Kamenska A. *Pilsoniskās un politiskās tiesības* (Cik demokrātiskairLatvija? : Demokrātijas audits, 2005–2014. Zin.red. Rozenvalds J.) [Latvian] 73;

Skudra O, Šulmane I, Dreijere V. *Plašsaziņas līdzekļu demokrātiskā sabiedrība* (ibid.) 204.

⁸²Delfi.lv *Tiesanēliek NRA atklātinformācijasavotusRepšeslieta* (Delfi.lv, May 23 2006), <<http://www.delfi.lv/news/national/politics/tiesa-neliek-nra-atklāt-informācijas-avotus-repses-lieta.d?id=13980196>>accessed February 13 2016, [Latvian].

⁸³LETA, *Žurnālistamprasāpiespriestnaudasodu par informācijasavotaneatklāšanu* (TvNet.lv, May 10 2007)

<http://www.tvnet.lv/zinas/kriminalzinas/281441-zurnalistam-prasa-piespriest-naudas-odu-par-informācijas-avota-neatklāšanu>, accessed 13 February 2013, [Latvian].

⁸⁴Explanatory Memorandum on the Committee of Ministers Recommendation No. R (2000) 7 (On the right of journalists not to disclose their sources of information) 2000 Part II para 33.

⁸⁵*Goodwin v. the United Kingdom* ECHR 1996 [39].

⁸⁶Resolution 1551 (2007).Parliamentary Assembly debate on 19 April 2007 (17th Sitting) (Fair trial issues in criminal cases concerning espionage or divulging state secrets), s 1.

information.⁸⁷ This suggestion was inspected in a closed court session where the journalist had the right to express his opinion and after this session the court denied the plea of the police⁸⁸ as the journalist had explained that the information was taken from the public trial transcript⁸⁹ and there was no need for revealing the transferor of this transcript. The argument by the complainant that this information may be defamatory and that the way the journalist got the transcript may jeopardize the judicial system were not considered important enough.

This practice directly complies with Principle 4 of the Recommendation as well as the ECtHR judgment, *De Haes and Gijssels v. Belgium*, where the court agreed that the national courts may not reject an application from an accused journalist to consider alternative evidence beside the disclosure of the source of information by this journalist, if such alternative evidence for the proof of the journalist's statements is available to the judiciary.⁹⁰ Therefore, it can be seen that the court has analysed the necessity of the source detection through the weighing of the interests, so the plea was not satisfied automatically. The president of the Journalist Association of Latvia, Jānis Paiders, in 2013, also agreed that there are many cases when the police or other directors of the proceedings ask the court for the demand to disclose the sources, but the court usually analyses the social necessity of such demand and their rejection to satisfy the plea does not get appealed.⁹¹ Thus, mostly the court chooses to protect the journalists and their sources by agreeing that the reasons for the demand to reveal the sources are not important enough in comparison to the rights of the journalist and the source and that there are alternative measures available.

6.3. The Overall Criteria Weighing Consistency with the Recommendation

The situation in Latvia only partly complies with the Recommendation – even though there have been several debates that the laws should be made clearer and with a criteria that would establish when the interests of the society could outweigh the interests of the journalists.

The system concerning disclosures is consistent with Recommendation Principle 5. Even though it has been agreed by the journalists that the authorities trying to ask the court to demand the journalists to disclose the sources almost in every case,⁹² these authorities do have a direct legitimate interest and their right to ask it is established in law. Additionally, the Senate has

⁸⁷ LETA „Pēcpolicijasierosinājumatiesajelgavasžurnālistamlūgsatklāttiesassēdesprotokolakopijasiesniedzēju”, (*ZemgalesZiņas*, November 29 2013), <<http://zz.diena.lv/vietejas-zinas/jelgava/pec-policijas-ierosinajuma-tiesa-jelgavas-zurnalistam-lugs-atklat-tiesas-sedes-protokola-kopijas-ies-170867>> accessed February 13 2016 [Latvian]

⁸⁸ AtisRožentāls, „Izmanto, lai tiktu pie avota” (*Diena.lv*, 6 December 2013) <<http://www.diena.lv/sodien-laikraksta/izmanto-lai-tiktu-pie-avota-14035717>> accessed 13 February 2013 [Latvian].

⁸⁹ LETA „Pēcpolicijasierosinājumatiesajelgavasžurnālistamlūgsatklāttiesassēdesprotokolakopijasiesniedzēju”, (*ZemgalesZiņas*, November 29 2013), <<http://zz.diena.lv/vietejas-zinas/jelgava/pec-policijas-ierosinajuma-tiesa-jelgavas-zurnalistam-lugs-atklat-tiesas-sedes-protokola-kopijas-ies-170867>> accessed February 13 2016 [Latvian].

⁹⁰ *De Haes and Gijssels v. Belgium* ECHR 1997 [55], [58].

⁹¹ AtisRožentāls, „Izmanto, lai tiktu pie avota” (*Diena.lv*, December 6 2013) <<http://www.diena.lv/sodien-laikraksta/izmanto-lai-tiktu-pie-avota-14035717>> accessed February 13 2016 [Latvian].

⁹² Private interview with one of the journalists of Latvian National Television Inga Šņore, January 26 2016.

agreed that the journalists cannot be punished under the Criminal Law for the failure to comply with a court decision for the disclosure;⁹³ only the sanctions can be imposed. Also, as mentioned in Principle 5(d) of the Recommendation and also Section 154(3) of the Criminal Procedure Law, the journalists have the right to appeal the imposition of a sanction. The cases, involving the disclosure of the sources, are not open to public, thus also Principle 5 (e) of the Recommendation has been implemented.⁹⁴

The principle of proportionality, which is stressed both by ECHR and the Recommendation Principle 3, is included in the Criminal Procedure Law and also protected by the Constitution as well.

However, there is no relevant national provision in law which clearly establishes that the investigative judge, police and/or prosecutors have to substantiate and pass a proportionality (*latus sense*) test before they can request for a disclosure of a journalistic source. What is more, the courts have sometimes failed to recognise the alternative measures available (*Dreiblats* case). Additionally, the legitimate interests established in the Constitution only partly comply with the interests mentioned in the Recommendation.⁹⁵

The courts have also used other justifications for the demand, such as the state secret that could maybe be justified under the “democratic structure of the State” – but not under the Recommendation. Also there has not been the analysis under subparagraph (ii) of paragraph (b) of Principle 3 of the Recommendation. These criteria could somehow comply with the principle of proportionality, for example, when analyzing the necessity of the disclosure as responding to the pressing social need; yet there is no proof that the courts would have directly analysed, for example, the nature of the circumstances.

Thus, the criteria for the determination which norms are outweighing the interests of the journalists should be set clearly in the Criminal Procedure Law in Latvia as soon as possible, following the Recommendation, so that both the journalists and the court can be sure of their actions.

⁹³SKK - 668/2007 [2007] Supreme Court of Latvia [Latvijas Republikas Augstākā tiesas Senāta Kriminālietudepartamenta 2007. gada 4. decembrālēmums Lietā SKK - 668/2007].

⁹⁴Explanatory Memorandum on the Committee of Ministers Recommendation No. R (2000) 7 (On the right of journalists not to disclose their sources of information) 2000, Part II Para 50.

⁹⁵Ibid para 38.

7. In light of the case law of the European Court of Human Rights, how do national courts apply the respective laws with regard to the right to protect sources? In particular, how do they balance the different interests at stake?

A particularly important case in the matter at issue in the Republic of Latvia is the ECtHR judgement *Nagla v Latvia*.⁹⁶ In this judgement, the ECtHR, for the first time, evaluated whether the respective laws of searching journalist's home are in conformity with the right to freedom of expression and the right to protect sources in light of Article 10 of the ECHR.

The case concerned the search by the police of a well-known journalist's home and their seizure of data storage devices following a broadcast she had aired informing the public of an information leak from the State Revenue Service database based on the information spread by an anonymous source. After this broadcast, her source began to spread the above mentioned information on his Twitter account. The criminal proceedings were initiated, during which the journalist, as a witness, was asked to disclose the identity of her source. After she denied to reveal the source, according to her right, the source was arrested and a warrant to search her home was authorised under the procedure for urgent situations. During the search, the journalist's laptop, an external hard drive, a memory card, and four flash drives were seized.⁹⁷

The judgement and the ECtHR conclusions are based on two significant aspects – 1) lawfulness of searching the journalist's home in connection with Article 10 of the ECHR; 2) rights of journalist not to disclose their sources. Regarding the second aspect, according to Section c of Recommendation No.R (2000) 7,⁹⁸ the term 'source' relates to any person who provides information to a journalist. The interpretation of the source must include not only active spread but also when a source remains passive. The potential to identify a source determines the type of protected information and the range of such protection.⁹⁹

In summarizing the above mentioned, it can be seen that the understanding and protection of sources is extremely ample, namely, the ECtHR stands at the position that not only present information is considered a journalist's source but also that which may relate, or lead to, a journalist's source in the future. Therefore, the question appears to what extent or how strong that future possibility should be to reach the level of protection. Does this possibility need to be only hypothetical or should it at least include some minimum level of success in the future?

Principle 3 of the Recommendation No. R (2000) 7 stipulates that the right of non-disclosure may be restricted only when other remedies are exhausted, when the legitimate aim is superior: when there is sufficiently vital and serious nature of circumstances, when there is pressing social

⁹⁶ *Nagla v Latvia* App no 73469/10 (ECHR 16, July 2013).

⁹⁷ *Nagla v Latvia*, paras 5-28.

⁹⁸ Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information. Committee of Ministers of the Council of Europe, 8, March 2000.

⁹⁹ *Ibid.*

need and an overriding requirement of the need for disclosure is proved. Member States have a certain margin of appreciation in assessing this need. Similarly, Article 22 of the Law on Press and Other Mass Media stipulates that an order to disclose a source may be made only by a court taking into account considerations of proportionality.

Article 154 of the Criminal Procedure Law of the Republic of Latvia stipulates conditions under which a journalist or an editor is obliged to disclose a source of information. Such an order may be made only by a court. The investigating judge, upon application by an investigator or a public prosecutor, assesses the proportionality of the measure. The decision is amenable to judicial review. Whereas, Article 180 lays down the procedure for issuing a court warrant in urgent cases and stipulates that when a delay could allow the relevant documents or objects to be destroyed, hidden the search warrant may be issued by the competent investigating authority, approved by a prosecutor and submitted to the investigating judge, who then examines the lawfulness of and the grounds for the search.

In the present case, despite the fact that during the search the journalist had still remained the witness in criminal proceeding; despite the fact that the search was initiated only three months after information was known and the fact that during search several data carriers containing also the journalist's private information not related to the case had been taken, the investigating judge approved the search and afterwards the Supreme Court judge admitted lawfulness of the search. Both authorities concluded that necessity of the search was urgent, interests of the society surpassed interests of the journalist and the aim of the search was not to disclose journalist's source but to find an evidence for investigation.

Similarly, the Government argued that the application must be dismissed because the applicant has not exhausted all the domestic remedies, namely, the applicant should have lodged a complaint to the Constitutional Court if she considered that the procedure under Article 180 of the Criminal Procedure Law as applied to her lacked sufficient procedural guarantees, or that the failure to provide additional statutory safeguards in respect of journalists regarding non-disclosure privilege had interfered with her human right (see also *Grišankova and Grišankovs v. Latvia*¹⁰⁰). Furthermore, the interference had been "necessary in a democratic society" (see also *Kasabova v. Bulgaria*¹⁰¹, *Axel Springer AG v. Germany*¹⁰²) because states have a margin of appreciation and in the present case the applicant's right to freedom of expression was against the right of wide range of individuals in Latvia to the protection of their personal data. The Government affirmed that the aim of the search had not been to reveal journalistic sources, and argued that the present case should be distinguished from such cases as *Goodwin v. the United Kingdom*.

By contrast, the Ombudsman, at the end of his inquiry, concluded that the wording of the search warrant demonstrated that the aim of the search was to identify the journalist's source.

¹⁰⁰ *Grišankova and Grišankovs v. Latvia* [ECHR, 2003], App. no. 36117/02.

¹⁰¹ *Kasabova v. Bulgaria* [ECHR, 19, April 2011], App. no. 22385/03, paras 54.

¹⁰² *Axel Springer AG v. Germany* [GC, 7, February 2012] App. no. 39954/08, paras 85-86.

Although the Supreme Court mentioned that the urgent procedure was necessary to take into account the specifics of cybercrimes, the inquiry did not contain any evidence of attempts by the journalist to continue unlawfully processing and further distributing the data, or to destroy such information. Therefore, the Ombudsman concluded that the competent investigating authority did not sufficiently evaluate the threat to freedom of expression.

Whereas the law does not state explicit conditions for restriction the right of journalists to freedom of expression, and law enforcement authorities have different interpretation for their margin of appreciation (see also *Valenzuela Contreras v. Spain*¹⁰³), therefore amendments in the law should be initiated.¹⁰⁴

Similarly, the ECtHR concluded that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources (see also *Financial Times Ltd and Others v. the United Kingdom*¹⁰⁵). Where the seized data storage devices contained also information capable of identifying her other sources of information, there was no necessity to demonstrate that the search yielded any results or indeed proved otherwise productive (see also *Roemen and Schmit v. Luxembourg*¹⁰⁶, *Ernst and Others v. Belgium*¹⁰⁷). Furthermore, the ECtHR had already dismissed a similar preliminary objection by the Latvian Government as for exhaustion of national legal remedies (see also *Liepājnieks v. Latvia*¹⁰⁸, *Savičs v. Latvia*¹⁰⁹). Conversely, the ECtHR differentiate this case from the previous cases, for instance, *Sanoma Uitgevers v. the Netherlands*¹¹⁰ and *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*.¹¹¹ Furthermore, the ECtHR noted, that this case is fundamentally different from previous cases related to disclosure of journalist's sources, for example, the *Goodwin* and *Telegraf* cases because the source was already known. Nevertheless, it does not remove the protection under Article 10 of the ECHR. Moreover, the ECtHR underlined that it had already held that a search conducted with a view to identifying a journalist's source is a more drastic measure than an order to divulge the source's identity.¹¹² The right of journalists not to disclose their sources cannot be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but is part and parcel of the right to information, to be treated with the utmost caution, therefore it was the investigating judge's responsibility to carry out the necessary assessment of the conflicting interests.¹¹³

¹⁰³ *Valenzuela Contreras v. Spain* [ECHR 30, July 1998], App no. 58/1997/842/1048, para 61.

¹⁰⁴ *Nagla v Latvia*, paras 29-31.

¹⁰⁵ *Financial Times Ltd and Others v. the United Kingdom* [ECHR 15, December 2009], App. no.821/03, para 70.

¹⁰⁶ *Roemen and Schmit v. Luxembourg* [ECHR 25, February 2003], App. no. 51772/99, para 57.

¹⁰⁷ *Ernst and Others v. Belgium* [ECHR 15, July 2003], App. no. 33400/96, para 103.

¹⁰⁸ *Liepājnieks v. Latvia* [ECHR 2, November 2010], App no.37586/06, paras 73-76.

¹⁰⁹ *Savičs v. Latvia* [ECHR 27, November 2012], App. no. 17892/03, paras 113-117.

¹¹⁰ *Sanoma Uitgevers v. the Netherlands* [ECHR 14, September 2010], App. no. 38224/03, para 91.

¹¹¹ *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* [ECHR 22, November 2012], App. no.39315/06, para 120.

¹¹² *Roemen and Schmit v. Luxembourg*, para 57.

¹¹³ *Nagla v. Latvia*, para 101.

From the outline of the case it can be concluded that there was no consensus among the law enforcement authorities for the importance to protect journalist's sources. Despite the fact that this was the first case when the ECtHR examined whether the respective laws of searching journalist's home are in conform with the right to freedom of expression and right to protect sources in the light of Article 10 of the ECHR, the highest law enforcement authorities and the Government as the ECtHR emphasized had not taken into account not only the conclusions of the Ombudsman but also previous case-law of the ECtHR in various aspects. Conversely, the authorities avoided from nonconvenient evaluation procedure of proportionality of restriction of human rights and automatically have chosen the most convenient measures which guaranteed the quickest results. The activities of the authorities also reflected and approved that similarly as with granting limited access status for documents which do not qualify as such the authorities prioritize their interests rather than interests of an individual or the society.

As it can be seen also from the national case-law which were made before the judgment (analyses stipulated in the question 6 of the research), the judgment in the above mentioned case has a great impact to awareness and comprehension of authorities about importance of right to freedom of expression and extremely high standart of restriction. For instance, in the case where the journalist was accused of libel for writing an article that referenced the transcript of a court hearing, he was required by the Security Police to disclose his source. Despite of the request, the court did not accepted necessity to disclose journalist's source.¹¹⁴ Furthermore, the judgment has caused ample discussions among the public of the Republic of Latvia¹¹⁵ and has left an impressive legacy for the future case-law, not only in national level but also internationally (for instance, *Bureau of Investigative Journalism and Alice Ross v. The United Kingdom*¹¹⁶, *Szabó and Vissy v. Hungary*¹¹⁷, case no.133018914¹¹⁸).

Moreover, the ECtHR emphasized the conclusion that the fact that an applicant did not launch a claim in the Constitutional court of the Republic of Latvia is not a sufficient argument to dismiss an application, it has caused discussions among judges and experts of Constitutional Law that it should be considered whether to expand the competence of the judges of Constitutional court allowing to withdrawn unconstititutional acts made by law appliers including courts.¹¹⁹ Conversely, in the case *Dreiblats v. Latvia*,¹²⁰ the ECtHR dismissed an application on the grounds of non-exhaustion of national sources. The applicant complained that he, as a journalist, was asked to disclose his source. The investigating judge approved only disclosure of a half of information and so did the District Court in a similar fashion. When the applicant refused to

¹¹⁴ Freedom of the Press 2014. Published: <https://freedomhouse.org/report/freedom-press/2014/latvia>.

¹¹⁵ Reine I. Commentary for the judgment 'Nagla v. Latvia'. "Jurista Vārds", 17.10.2013, no. 38 (789); Insight of the European Court of Human Rights judgment 'Nagla v. Latvia'. "Jurista Vārds", 27.08.2013, no. 35 (786).

¹¹⁶ Bureau of Investigative Journalism and Alice Ross v. The United Kingdom [ECHR 11 September, 2014], App. no. 62322/14, p. 4.

¹¹⁷ Szabó and Vissy v. Hungary [ECHR 12 January, 2016], App. no.37138/14, para. 36.

¹¹⁸ Riga District court case of 14, November 2014, App. no. 133018914, p. 9, 12.

¹¹⁹ Dubava I. Whether Competence of the Constitutional Court should be Expanded. Journal "Jurista Vārds", 15.10.2013, no. 42 (793).

¹²⁰ Dreiblats v. Latvia [ECHR 4 June, 2013], App. no. 8283/07.

follow the decision, he was fined. Afterwards the appellate court concluded that criminal liability for nonfulfillment of court order cannot be related to journalists.

It can be concluded that although there is absolute right of non-disclosure of journalist's sources, the ECtHR, with its binding case-law *ipso facto*, predicting almost *de jure* absolute status. In addition, from the analyses of the above mentioned cases seem that although it took some time for the national courts to acquire an interpretation of the ECtHR of non disclosure of sources, the national courts have learned to apply the given standard and endeavor to adopt more weighed and justified decisions relating to the disclosure of journalists' sources.

8. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

In accordance with Article 96 of the Constitution of the Republic of Latvia, 'everyone has the right to inviolability of his or her private life, home and correspondence'. At the same time, the Constitution does not provide any special protection for journalists: therefore Article 96 could be defined as a common framework for legal protection of correspondence, including journalistic correspondence, which could contain data about sources of information.

Article 100 defines components of "freedom of expression" as the right to freely receive, keep and distribute information; and the right to express own views.

In addition to the definition of "freedom of expression" mentioned in Article 100, Article 89 of the Constitution notices that 'the State recognises and protects fundamental human rights in accordance with the Constitution, laws and international treaties binding upon Republic of Latvia'. This Article provides opportunity to extend a definition of "freedom of expression" by international legal acts.

Freedom of expression may be subjected to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals.¹²¹ Such restrictions could be justified only by law. For example, *Kriminālprocesa likums* (Criminal Procedure Law) provides that 'a court may order a mass-media journalist or editor to reveal the source of published information'. Such an order should be decided by an investigating judge, taking into account the principle of proportionality.

¹²¹ The Constitution of the Republic of Latvia 1922 [Latvijas Republikas Satversme], Art. 116.

Furthermore, a journalist or editor of a mass media has a right to appeal such decision before a court.¹²²

However, the above described legislative framework only applies to criminal proceedings. As researchers have noticed: 'In the second group (the second group relates to procedural measures) from Criminal Procedure Law's 10th Chapter, in our opinion, there should be a referable obligation to reveal the source of information (this Article regulates in which way an obligation applies in the revelation of the information source)' (*Pie otrajām (otrā grupa – procesuālie pasākumi), mūsu prāt, no KPL 10. nodaļā reglamentētajām darbībām būtu pieskaitāms informācijas avota norādīšanas pienākums (pantā reglamentēts tikai tas, kādā veidā uzliekams pienākums izpaust informācijas avotu)*).¹²³ Surveillance activity is not always connected with criminal procedure and therefore this regulation of activity is wider.

Security services, in its activities, should always have a legal basis, prescribed by Article 3 of Operational Activities Law. The Operational Activities Law can be described as a framework for activity of investigation. From Article 6 it can be seen that investigatory surveillance (tracing), investigatory monitoring of correspondence and investigatory wiretapping of conversations are investigatory measures that are prescribed by law (besides, other investigatory measures are available: inquiring; inspection; acquisition of samples and research; examination of a person; entry; experiment; controlled delivery; detective work; acquisition of information expressed or stored by a person through technical means; video surveillance of a place not accessible to the public). These measures can be performed only in accordance with the special method (special method is used for operational activities measures, in the course of which there is significant infringement of the constitutional rights and freedoms)¹²⁴ and with the approval of the Chief of Supreme Court or a Judge of a Supreme Court specially authorised by him or her.¹²⁵ This statement is not contradicted with the Constitution (because of Articles 96 and 100 provide rights and freedoms; and Article 116 allows to limit it in some cases in order to protect the rights of other people, a democratic state system, the safety of society, welfare and morals).¹²⁶

In addition, foreseeable criterion should be mentioned. As noticed, in a recent case of ECtHR: 'Foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. <...> The domestic law must be sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are

¹²² Criminal Procedure Law 2005 [Kriminālprocesa likums], Art. 154.

¹²³ Meikališa Ā., Strada-Rozenberga K., *Kriminalprocess. Raksti. 2005 – 2010* (Rīga Latvijas Vēstnesis 2010) 128 [Latvian].

¹²⁴ Operational Activities Law 1993 [Operatīvas darbības likums], Art. 7 (3).

¹²⁵ *ibid*, Art. 7 (4).

¹²⁶ The Constitution of the Republic of Latvia 1922 [Latvijas Republikas Satversme], Art. 116.

empowered to resort to any such measures.¹²⁷ Looking into Operational Activity Law cannot be found any plain definition of object of operational activities measures, but it is clear that persons are potentially objects of operational measures through tasks of operational activities. For example, activities can be applied for searching missing persons, for protecting of official secrets, for searching persons who are suspected of, have been accused of or have been convicted of committing a criminal offence and so on.¹²⁸

The operational activities measures can be performed with approval of a prosecutor in case where immediate actions are required. This includes actions to avert, detect terrorism, murder, riots, and other serious crimes, or situations where the lives, health or property of persons are in real danger.¹²⁹ Approval of a judge must be obtained on the following working day, but not later than within seventy-two hours, even after prosecutor approval in the case of immediate actions. The necessity for an operational measure must be justified. Otherwise it can be deemed unlawful, and the relevant authorities shall immediately destroy all information obtained in the process of performing the operational measure.¹³⁰

An operational measure is initially approved to be carried out in 3 months, but this time-limit may be extended.¹³¹ The period of extension is not limited directly by duration: only for the period of time that the exercising of operational activities is being carried out with respect to the person. Limitation of this term could be found in Article 22, which regulates exercising of operational activities. The basic time for exercising of operational activity is six months; this period could be extended up to six months with the approval of the *vadītājs* (head) or *vietnieks* (deputy head) of the body performing operational activities (summarized term is 12 (twenty) months); the last extension may be done only with the Approval of the Prosecutor General or a Prosecutor specially authorised by the Prosecutor General, but shall not extend the limitation period of the crime in relation to which the exercising of operational activities is being conducted.¹³² No any additional condition, for example approval of a judge, is necessary.

In order to conduct an investigatory surveillance (tracing) of a person, the relevant body performing the operational activities must have reasonable and sufficient information that this person is planning or attempting to commit a criminal offence, or otherwise threatens the State's interests. Investigatory monitoring of correspondence, investigatory acquisition of information expressed or stored by a person from technical means, investigatory wiretapping of conversations and investigatory video surveillance can only be carried out on persons involved in crime, or otherwise posing a threat to the security and defence of the State.¹³³

¹²⁷ *Case of Roman Zakharov v. Russia* (application No. 47143/06) [2015] Reports of Judgments and Decisions 2015 [English], para 229.

¹²⁸ Operational Activities Law 1993 [Operatīvas darbības likums], Art. 2 (1).

¹²⁹ Operational Activities Law 1993 [Operatīvas darbības likums], Art. 7 (5).

¹³⁰ *ibid*, Art. 7 (5).

¹³¹ *ibid*, Art. 7 (4).

¹³² *ibid*, Art. 22 (5).

¹³³ *ibid*, Art. 17.

The Operational Actions Law further provides that operational activities cannot be used to obtain information from sworn advocates, sworn notaries, doctors, teachers, psychologists and clergy regarding their professional duties, except in cases where these persons themselves are suspected of being involved in a crime.¹³⁴ Although this provision essentially safeguards professional secrecy of specific persons, the law does not provide any criteria on how the authorities must prove their suspicions against the said persons to the judge, who may authorise operational measures. For instance, what if a protected person obtains information relating to his or her professional secrecy, but which is also connected to a crime? Therefore, it is possible to conclude that protection of professional secrecy is regarded more to information than to person; and regulation restricts from usage of the information in advance.

Existing provisions do not establish any special protection of professional activity of journalists in the same manner as for advocates and notaries. This may contradict the Council of Europe Recommendation No. R 2000 (7), especially Principle 6. As stated in the explanatory memorandum: 'principle 6 aims at ensuring that a mere interception order, surveillance order or search and seizure order does not circumvent the protection of journalist' sources...'¹³⁵ But at the same time 'this should not exclude, however that national authorities may apply measures of interception of communication, surveillance or judicial search and seizure for other lawful reasons in accordance with Articles 8 and 10 of the European Convention on Human Rights'.¹³⁶ Therefore, lack of this protection explains the analysis of common principles of Operational Activity, and requires extending of journalistic' sources protection in Operational Activities Law in accordance with these provisions.

Anti-Terrorism Laws

National anti-terrorism legislation does not explicitly refer to journalists and their sources of information, as it is mostly related to prevention of terrorism financing and money laundering (for example, the law on the prevention of money laundering and terrorism financing). And of course, the definition of terrorism is mentioned in Criminal Law: '[For a person, who commits a crime with] the use of explosives, use of fire, the use of nuclear chemical, chemical, biological, bacteriological, toxic or other weapons of mass destruction, mass poisoning, spreading of epidemics and epizootic diseases, kidnapping of persons, taking of hostages, hijacking of air, land or sea means of transport or other activities if they committed for the purpose of intimidating inhabitants or with the purpose of inciting the State, its institutions or international organizations to take any action or refrain therefrom, or for purposes of harming the State or the inhabitants thereof or the interests of international organizations (terrorism) <...>'.¹³⁷

¹³⁴ *ibid*, Art. 24 (5).

¹³⁵ Appendix to Recommendation No. R (2000) 7 Principles concerning the right of journalists not to disclose their sources of information, principle 6; Explanatory Memorandum to Recommendation No. R (2000) 7, para 53.

¹³⁶ *ibid*, para 54.

¹³⁷ The Criminal Law 1998 [Krimināllikums], Art. 88 (1, 2).

To summarize, operational activities measures in Latvia may be applied to any person. The legal system does not provide a special status for journalists, but at the same time it does provide protection for journalists' sources. Operational activities measures are applied both for surveillance and for investigation purposes. Accessibility of legislative norms is well established. However, certain improvements could be made regarding the precisability, foreseeability and clearance of legal norms. For example, it needs to be ensured that national legislation is in conformity with international human rights standards (especially taking into account ECtHR case-law). Regarding foreseeability, it is necessary to prevent all forms of arbitrary surveillance. To achieve this, legal norms should have clear conditions for the use of surveillance measures. If one of the defining criteria for execution of surveillance actions is committing of crime, it is necessary not only to enhance regulation on surveillance, but also keep legislation in line with the latest developments in the field, in order to avoid unlimited expansion of surveillance and violations of human rights. It is worth to mention that the basis for protection against violation of human rights by unlawful surveillance already exists in procedural law (both in civil and criminal). It is not allowed to use any facts that have been obtained by allowing procedural violations – this evidences shall be considered restrictedly inadmissible.^{138,139} It is also very important to mention about a lack of wide legal regulation in anti-terrorism sphere.

9. Can journalists rely on encryption and anonymity online to protect themselves and their sources against surveillance?

Encryption and anonymity, although used for both harm and benefit, can nevertheless greatly contribute to improving and strengthening the right to source protection. For example, a report on the promotion and protection of the right to freedom of opinion and expression by the Special Rapporteur David Kayne indicates that encryption could be viewed as part of human rights.

Journalists have to understand a difference between encryption and anonymity: encryption protects the content of communications (“material” criteria), but anonymity protects identifying factors, for example Internet Protocol (IP) address, known as metadata (“procedural” criteria).¹⁴⁰ Also, it is quite important to know that different ways and measures exist for reaching anonymity (from fake accounts to Virtual Private Networks, VPNs).

Application of different measures of encryption such as “text-encryption” (e-mails, documents) and sound-encryption (conversations record with voice distortion) allow journalists to protect not only their sources, but also any other information. Such measures are applied in the activities

¹³⁸ Criminal Procedure Law [Kriminālprocesa likums], Art. 130 (3).

¹³⁹ Civil Procedure Law [Civilprocesa likums], Art. 95.

¹⁴⁰ Report of the Special Rapporteur (David Kaye) on the promotion and protection of the right to freedom of opinion and expression, para 9.

of local mass media. Of course a lot of other measures exist, like anonymization of documents, which can help achieve the aim of encryption.

The question of encryption is closely connected with cyber security – if any devices which has been used for encryption (no matter at which stage: sending, receiving, transmission) have malicious software in its “realm” that could be reasonable enough to suggest that security of information is shattered. It can lead to any number of consequences: illegal access to data, illegal interception of data, data interference which are cybercrimes.¹⁴¹

Relating to anonymity, a description of special features of activity in the cyberspace can be found in writings of Latvian legal scholars. One of the main “features” of activity is conditional anonymity. The Vice-President of the Constitutional Court, Mr. Uldis Ķinis, believes that activity in cyberspace can be identified because of architecture of Internet and cookie-files. The existence of cookie-files in the cyberspace can help to identify user, who performed actions in the network.¹⁴² Therefore, it cannot be said that journalists can feel completely anonymous in cyberspace or while using electronic devices. For example, in the handbook for journalists of digital source protection, described that anonymization services are not so safe, because they can see source of connection; it is proposed to use “Tor” browser.¹⁴³

Furthermore, it is required to analyse a legal regulation related to encryption and anonymity. Any enterprise which provides electronic connection services to persons is subjected to the laws on Electronic Communications. One of the obligations for such enterprises (electronic communications merchants) is to be ensured, in accordance with procedures laid down in Article 71¹ of this Law, the storage of data to be retained for eighteen months, as well as the transfer thereof to pre-trial investigation institutions, bodies performing investigatory operation, State security institutions, the Office of the Public Prosecutor, the court if these institutions request such.¹⁴⁴

Therefore this Article allows us to state that merchants have to collect information and if there is some kind of request from authorities (listed above) it must transfer this information to the authorities. The Law does not precisely describe a full list of information that should be collected, but mentioned regulation for location data processing,¹⁴⁵ for processing of traffic data,¹⁴⁶ and so on. But, two things should be noticed: first, the authorities can receive this information only after proper request, and second, the Law prescribes that all stored data must be deleted after the expiry of the eighteen-month time-limit.¹⁴⁷

¹⁴¹ Convention on cybercrime 2001, Arts. 2 – 4.

¹⁴² Ķinis Uldis, *Informācijas un Komunikāciju Tiesības*. (2nd edition Rīga Biznesa augstskola Turība 2002) 68 – 69 [Latvian].

¹⁴³ Praktiskā digitālo avotu aizsardzība, 6.

¹⁴⁴ Electronic Communications Law 2004 [Elektronisko sakaru likums], Art. 19 (1, sub. 11).

¹⁴⁵ *ibid*, Art. 71.

¹⁴⁶ *ibid*, Art. 70.

¹⁴⁷ Electronic Communications Law 2004 [Elektronisko sakaru likums], Art. 71¹ (8).

Also, it is worth mentioning that in the Latvian legal system, there are special procedural rules of request from authorities and transfer by merchants.¹⁴⁸ These rules provide a special request form, where a justification of such request should be given.¹⁴⁹ This can be counted as a mechanism which strengthens data protection on the one hand, and on the other – provides an opportunity for authorities to request such information for the needs of justice.

Regarding encryption, its aim should be mentioned. Put simply, encryption allows a sender to be sure that only the exact and intended recipient will have access to transmitted information. In addition, such information will not be the object of any interference or alteration.¹⁵⁰ The phenomenon of encryption can also be analysed by taking into account the balance between public interests and human rights. Namely, any person and civil society as a whole are subjected to interference and attacks by State and non-State actors.¹⁵¹ Of course, the existence of legislation, which provides right to a remedy for a violation of privacy, is welcomed. But, in practice, a problem still exists where victims of such violations, in most cases, are not able to provide any evidence of a violation (see, *Zakharov v. Russia*).¹⁵² The existence of such situations, in our opinion, demonstrates that encryption should be a part of privacy and should not be restricted.

With regard to the situation in Latvia, there is no special legislation of encryption and anonymity in cyberspace. This, being a problem, was previously noted in 2004,¹⁵³ but has not been solved as of yet.

Although the issue of anonymity was touched upon in the *Nagla* case,¹⁵⁴ there is no other domestic case-law relating to these topics.

10. The Protection of Whistle-blowers

Are whistle-blowers explicitly protected under the laws protecting journalistic sources? Is there another practice protecting whistle-blowers? Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

¹⁴⁸ Procedures by which Pre-trial Investigative Institutions, Bodies Performing Investigatory Operations, State Security Institutions, Office of the Prosecutor and Court Request and a Merchant of Electronic Communications Transfers Data to be Retained, and Procedures by which Statistical Information regarding Requests of Data to be Retained and Issuing thereof is Compiled, 2007

¹⁴⁹ Ibid., Annex 1 (Section 2)

¹⁵⁰ Report of the Special Rapporteur (David Kaye) on the promotion and protection of the right to freedom of opinion and expression, para 17.

¹⁵¹ Ibid, para 18.

¹⁵² *Case of Roman Zakharov v. Russia* (application No. 47143/06) [2015] Reports of Judgments and Decisions 2015 [English], para 165.

¹⁵³ Ķiniš Uldis, *Patvaļīga Piekļūšana Datorsistēmai: kā Piemērot Krimināllikumu*. [2004] Jurista Vārds 23/24 (328/329) [Latvian]

¹⁵⁴ *Case of Nagla v. Latvia* (application No. 73469/10), [2013] ... [English], para 80.

10.1. The Protection of Whistle-blowers under Law Protecting Journalistic Sources

Whistle-blowers are indirectly protected through the protection of journalistic sources in Section 22 (1) of the Law on the Press and Other Media, which states that the media is allowed not to specify the identity of whistle-blowers in any case, and is prohibited to reveal the identity of a person if he or she has explicitly expressed the will to stay anonymous.¹⁵⁵

Thus, however, Section 22(2) states that in order to protect the important interests of the society or the person and the court, it is possible for a court to ask to indicate the source of information. This implies that a court may also order to reveal the identity of the whistle-blower, regardless of whether anonymity was requested by this person. If such an order is made, the principle of proportionality nevertheless has to be taken into account. It is important to note that a court may order to reveal a whistle-blower's identity only in criminal proceedings.

Whistle-blowers will not be protected under the Law on the Press if they have decided to publish the information themselves, and not via the mass media, for example, by creating a personal blog. Such an approach is compatible with Recommendation No. R(2000) 7, according to which the protection of journalistic sources a certain occupational tendency is required and individuals who otherwise would not regard themselves as being journalists shall not qualify as journalists.¹⁵⁶ Additionally, not all whistle-blowers who have submitted their information to somebody receive protection, as specific criteria need to be fulfilled in order to qualify as a 'mass medium'.¹⁵⁷

10.2. Other Practices for Protecting Whistle-blowers

10.2.1. The Project of the Law Protecting Whistle-blowers and its Compliance with the Recommendation CM/Rec(2014)7

The Law Protecting Whistle-blowers in Latvia is currently being drafted and is expected to enter into force at the beginning of 2017.¹⁵⁸

This draft law defines whistle-blowers as natural persons, who in good faith, have submitted a report or information on any possible detected, past or future law violations in the work of public institutions and governmental, local government or private legal entities that causes or may cause damage to any group in society or the general public.¹⁵⁹ A whistle-blower must also be sure about the truthfulness of the reported news in order to be protected.¹⁶⁰

¹⁵⁵Law on the Press and Other Media 1990 [Par presiuncitiemmasuinformācijaslīdzekļiem], s 22.

¹⁵⁶Explanatory Memorandum of the Recommendation No.R. (2000), Part II, section 13 (ii).

¹⁵⁷ See Section 2 of the Law on the Press

¹⁵⁸The Project of the Law Protecting Whistle-blowers in Latvia 2015 [Trauksmescēlējulumprojekts].

¹⁵⁹Ibid., s 1.(1), 1(2).

¹⁶⁰Ibid., s 4.

Section 5 of the draft explicitly prohibits the punishment a whistle-blower or the creation of any adverse consequences for him or her because of the use of his or hers rights in the scope of this law in connection to the relation to the service or employment relationship. Thus, the protection is defined in its narrowest scope only for employees and people working in public institutions.

According to the draft law, whistle-blowers will be able to report to the Corruption Prevention and Combating Bureau (*KNAB*) or to any other institution according to its competence established in law – or to both of the institutions at the same time.¹⁶¹ Thus, clear channels are established for public interest reporting.¹⁶² What is missing, however, is the possibility to report the information to journalists (Recommendation, Section 14.3). This question is not mentioned at all in the draft law, even though the scope of the Law on the Press and Other Media is not enough. Also, the reports within the organisations/enterprises without the influence of an outside organisation (Recommendation, Section 14.1.) are left out.

In the report to the KNAB or other institutions, whistle-blowers will have to explicitly state if he or she wants their personal information and the information about the whistleblowing not to be revealed.¹⁶³ Thus, Principle 18 of the Recommendation is fulfilled – whistle-blowers are entitled to have their confidentiality of the identity maintained, however, not automatically. Whistle-blowers should be entitled to have their identities kept confidential by those to whom they report, unless they agree otherwise (subject to fair trial guarantees)¹⁶⁴ as it has been done in the Law on Submissions,¹⁶⁵ not *vice versa*.

Under the Draft Law, the KNAB will be responsible for the protection of the whistle-blowers and be competent to evaluate the complaints about the influencing of the whistle-blowers.¹⁶⁶ The protection of whistle-blowers is indented through determining the status of the report and also the initiated case files as a restricted access.¹⁶⁷ Also, the information about the whistleblowing fact will be allowed to be disclosed only with a written consent from the whistle-blower.¹⁶⁸ The information about the person will not be allowed to be published at least one year after the end of the examination period, initiated by the report of the whistle-blower.¹⁶⁹ The protection of the identity and the facts of the report, however, when looked in context of Section 6 (2) of the draft law, still apply only to the cases when a whistle-blower has asked for protection.

¹⁶¹The Project of the Law Protecting Whistle-blowers in Latvia, s 6(1).

¹⁶²Appendix to Recommendation CM/Rec (2014)7 s 13.

¹⁶³The Project of the Law Protecting Whistle-blowers in Latvia, s 6(2).

¹⁶⁴Leaflet by the Council of Europe on whistleblowing and the Recommendation, 2015, 3.

¹⁶⁵Law on Submissions 2000 [Iesniegumlikums] s 9.

¹⁶⁶The Project of the Law Protecting Whistle-blowers in Latvia, s 7.

¹⁶⁷*ibid*, s 9(1)(1).

¹⁶⁸*ibid*, s 9(1)(2).

¹⁶⁹*ibid*, s 9(3).

The KNAB will have the right to issue binding orders to the employers of the whistle-blowers in relation to their legal protection.¹⁷⁰ Thus, the Principle 21 of the Recommendation is implemented and the whistle-blowers get protected against any retaliation by the employers and the persons working and acting on behalf of the employer. If the KNAB finds a causal link between the report and the counteractions, it will have the right to request in writing the employer or the institution to immediately stop those counteractions.¹⁷¹ In case it would not be possible for a whistle-blower to continue work even after this request, to protect the right of the whistle-blower to work unaffectedly, he or she will personally have the right to ask the head of the institution to transfer him to an equivalent post¹⁷² in 90 days' time.¹⁷³ The KNAB will also have the right to raise the issue of the prosecution of officials who were affecting the whistle-blowers and, if necessary, also to participate in the work of the disciplinary investigation commissions.¹⁷⁴ Hence, the scope and the possibilities of the protection will be quite wide in order to encourage reporting and to limit the possibility of retaliation from the employers.

If a whistle-blower demonstrates the factors, which could be the basis for influencing him/her because of his/hers report, the burden of the rebuttal of those conditions rests with the employer or the institution.¹⁷⁵ Thus, a whistle-blower will have the possibility to defend his rights in a fair trial before a court, as required by Section 10 of the Recommendation. The court will have the duty to evaluate the reasonableness of the disciplinary punishment and the connection between it and the report.¹⁷⁶ Additionally, whistle-blowers will have the right to ask compensation for damages from the employer if the counteractions, following the report, have led to violations of personal rights and legal interests of the whistle-blower.¹⁷⁷ So the rights of a person to have the appropriate remuneration after the violation of his/hers rights are again stressed.

The Draft Law states that the protection will not be applicable in the cases when the whistleblowing happens contrary to good faith or when the whistle-blowers have submitted the report in order to avoid responsibility for the consequences of the harm caused by their actions or inaction, and liability is inevitable due to the fact finding of infringement before the whistleblowing.¹⁷⁸ However, nothing is mentioned about the cases when the information in the report of a whistle-blower is accidentally wrong or the perceived threat to the public interest has not materialised (Section 22 of the Recommendation), even though this question was also stressed by the Cabinet of Ministers as an important problem that should be solved by

¹⁷⁰ibid, s 8(4).

¹⁷¹ibid, s 9(6).

¹⁷²ibid, s 9(7).

¹⁷³ibid, s 9(8).

¹⁷⁴The Project of the Law Protecting Whistle-blowers in Latvia, s 8(6).

¹⁷⁵ibid., s 10(1).

¹⁷⁶ibid., s 10(2), s 10(3).

¹⁷⁷ibid., s 9.

¹⁷⁸ibid., s 9(11).

adoptingspecific regulations.¹⁷⁹ In those cases also the principle of proportionality should be applied alongside the assessment of potential benefits to society and the damages caused to other through the misinformation.¹⁸⁰

10.2.2. The Existing Protection of Whistle-blowers under other Legal Acts

At the moment, before the Law on the Protection of Whistle-blowers has come into force, the existing legislation is distorted and fragmented both in the material and personal scope.¹⁸¹ Many of the protections are general and applicable not only to whistle-blowers. Nevertheless, at least some kind of security, especially for the employees, is established.

The fundamental protection is Section 100 of the Constitution on the Republic of Latvia (*Latvijas Republikas Satversme*) that states that ‘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.’ Secondly, the Law on Submissions explicitly protects the identity of a person, who submits a request, a complaint, a proposal or a matter within the competence of the institution.¹⁸² It is prohibited to disclose information revealing the submitters identity without his or hers consent, except the case when the institution must disclose such information in accordance with the law. If the submitter does not want that the facts referred to in the submission are disclosed, he or she shall specify it in the submission.¹⁸³ A similar provision found in the Administrative Procedure Law reads as follows: ‘Information regarding the private life of a natural person, except in cases provided for in the norms of law, may be given only with the consent of such person.’¹⁸⁴ The Supreme Court of Latvia has held that the goal of such regulation is to ensure that private persons who face the breaches of law in the work of governmental institutions or courts would report on those breaches without fearing from the revenge from the officials or any other adverse treatment.¹⁸⁵

Furthermore, from a more specific point of view the Law On Prevention on Conflict of Interest in Activities of Public Officials prohibits the head of a State or local government authority or a collegial authority to disclose the information, which has become known thereto, concerning which a public official or employee of the relevant authority has informed regarding conflicts of interest, and to cause any direct or indirect unfavourable consequences to such a person without any objective reason.¹⁸⁶ Slightly similar, the Labour Law forbids sanctioning an employee or otherwise directly or indirectly cause adverse consequences for him or her because the employee

¹⁷⁹Cabinet of Ministers Order No. 393 on Anti-Corruption Guidelines 2015-2020 2000 [Ministru kabineta rīkojums Nr.393 Par Korupcijas novēršanas un apkarošanas pamatnostādņem 2015.-2020.gadam] Division 8.

¹⁸⁰ibid.

¹⁸¹Kristīne Dupate, *Trankums cēle jūtiesiskā aizsardzība Latvijā* („Sabiedrība par atklātību – Delna”, 2012) 6 [Latvian].

¹⁸²Law on Submissions 2000 [Iesniegumlikums], s 2(1).

¹⁸³ibid., s 9.

¹⁸⁴Administrative Procedure Law 2001 [Administratīvā procesa likums], s 54(2)

¹⁸⁵SKA-87/201 [2014] Supreme Court of Latvia [AT 2014. g. 30. Maija spriedums lietā Nr. SKA-87/2014], [4], [7].

¹⁸⁶The Law On Prevention on Conflict of Interest in Activities of Public Officials | 2002 | Par interešu konfliktu novēršanu valsts amatpersonu darbībā, s 20(7).

informs competent institutions or officials regarding suspicions with respect to the committing of criminal offences or administrative violations in the workplace.¹⁸⁷

Additionally, Section 11 Part 6 of the Freedom of Information Law states that the correspondence between an institution and an applicant and information regarding this person shall be deemed to be restricted access information. Whistle-blowers are also protected under the Special Protection of Persons Law when they are taking part in the criminal proceedings as witnesses or other persons, who have given a testimony about a serious or a particularly serious crime, or when taking part in the detection or investigation of such crimes¹⁸⁸ if there is a legal ground for such protection.¹⁸⁹ The whistle-blowing, however, is not mentioned as one of the circumstances, which excludes criminal liability under the Criminal Law,¹⁹⁰ despite its societal value, and there also are no cases when the defendant would have been excluded from criminal liability through the need for the specific whistle-blower protection and the acquittal.¹⁹¹

10.3. The Prohibition of Identifying Whistle-Blowers

Under Section 6 of the Personal Data Protection Law, every natural person has the right to protection of his or her personal data. This 'personal data' is defined as any information related to an identified or identifiable natural person¹⁹² as the Supreme Court has acknowledged that it is prohibited not only to reveal such information about the person that directly is connected to its identity (name, surname, the title, etc.), but also reveal the information from which it would be possible to deduce the identity of the person.¹⁹³

However, there is no specific normative act that would generally prohibit the identifying of the whistle-blowers. Natural persons and companies can still somehow try identifying whistle-blowers there is no penalty for trying to find out the identity of the whistle-blower.

The Law Protecting Whistle-blowers, when adopted, will also prohibit only the affecting of whistle-blowers because of their reports. It is not specifically mentioned that the identification of a whistle-blower as such, as long as it does not have any negative effect of the person, would be prohibited.

¹⁸⁷Labour Law 2001 [Darbalikums], s 9(1).

¹⁸⁸Special Protection of Persons Law 2005 [Personuspeciālāsaizsardzībaslikums], s 4.

¹⁸⁹ibid. s 6.

¹⁹⁰Criminal Law 1998 [Krimināllikums], s 28.

¹⁹¹Dupate., *Trauksmesceļjutiesiskā aizsardzība Latvijā* 9

¹⁹²Personal Data Protection Law 2000 [Fiziskopersonudatuaizsardzībaslikums], s 2(3).

¹⁹³SKA-87/2014 [2014] Supreme Court of Latvia [AT 2014. g. 30. Maijaspriedumslietā Nr. SKA-87/2014], [8].

12. Conclusion

The duty not to disclose journalists source can be found in both – state legislative acts and journalists ethic norms. Criminal procedure law lays down a general obligation for state authorities to respect human rights, including the right to source protection.

There are two main situations in which the right not to indicate the source could be violated: 1) it could be violated by the investigator or prosecutor when forcing a journalist to disclose his source without a judge's decision; or 2) it could be violated by the judge who inadequately weights the proportionality of the rights of the person and the public interest.

Criminal Procedure Law in general tries to comply with the principles of the Recommendation No R (2000) 7 related to the question, but the Law is not detailed enough. It allows to restrict human rights in a case when public safety is in concern. As we can see from the cases mentioned in the answer to the question 4 where Latvian authorities have tried to compel journalists to disclose their sources, in practice everything is not as clear. Because no exhaustive list of exceptions when the restriction of human rights is allowed is provided in the Criminal Procedure Law, authorities sometimes interpret the law arbitrarily. Including the list of circumstances in the law would help to clarify the reasons that are sufficient enough for restricting journalists' right and duty to protect its source.

The Ombudsmen of Latvia has also pointed out that these cases, indicates that the Article 121 of Criminal Procedure Law, which refers to professional secrets that are protected by criminal procedure, should be amended in order to apply to journalists, as well. However, no amendments have been made in this regard.

The current redaction of the Law on Press does not include the possible reasoning for the demand to reveal the sources of information, even though there have been several debates on changing it. Nevertheless, certain limitations are found in other laws. It is stated, that a mass media can only be forced to disclose their sources in criminal proceedings and also only if it is in compliance with the proportionality principle and according to the prevailing interest established in Constitution. The legitimate interests mentioned in Constitution do not comply with the ones mentioned in Recommendation

The cases and the rulings by the courts concerning the revealing of the journalistic information sources are mostly confidential and not available to the public.. However, in most of the known cases the court has ruled in favour of the journalist and only one decision had to be overruled in ECHR. Usually the sources of the journalist were not forced to be revealed because there were alternative measures possible for the complainant. Only in one case the Court did not weigh the interests and stated that the protection of the state secret is more important than the rights of the journalist; however, this was a controversial ruling that was later reversed in ECHR. Additionally the Senate has agreed that the journalists cannot be punished under the Criminal Law for the failure to comply with a court decision for the disclosure and the journalists can appeal the decision of the Court.

Thus the situation in Latvia only partly complies with the Recommendation; nevertheless the right of journalists to protect their sources is basically almost incontestable.

Currently the whistle-blowers are protected only through the distorted and fragmented general laws. The Law Protecting Whistle-blowers in Latvia is currently being drafted, and it defines whistle-blowers and also states the protection when the whistle-blowers get influenced after their report. The special institution will be responsible for protection of the whistle-blowers and competent to evaluate the complaints about the influencing of the whistle-blowers with the ability to issue binding orders to the employers. However, the whistle-blowers will have to explicitly state if he or she wants the personal information and the information about the whistle-blowing as such not to be revealed; the scope of possible whistle-blowers is very narrow (only employees and people working in public institutions) and the possibility to report the information to journalists and within the organisations/enterprises without the influence of an outside organisation are left out completely.

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14. Table of Provisions

Provisions in native language	Corresponding translation
<p>Latvijas Republikas Satversme, 89. pants: Valsts atzīst un aizsargā cilvēka pamattiesības saskaņā ar šo Satversmi, likumiem un Latvijai saistošiem starptautiskajiem līgumiem.</p>	<p>The Constitution of the Republic of Latvia, Article 89: The State shall recognise and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia.</p>
<p>Latvijas Republikas Satversme, 96. pants: Ikvienam ir tiesības uz privātās dzīves, mājokļa un korespondences neaizskaramību.</p>	<p>The Constitution of the Republic of Latvia, Article 96: Everyone has the right to inviolability of his or her private life, home and correspondence.</p>
<p>Latvijas Republikas Satversme, 100. pants: Ikvienam ir tiesības uz vārda brīvību, kas ietver tiesības brīvi iegūt, paturēt un izplatīt informāciju, paust savus uzskatus. Cenzūra ir aizliegta.</p>	<p>The Constitution of the Republic of Latvia, Article 100: 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.</p>
<p>Latvijas Republikas Satversme, 116. pants: Personas tiesības, kas noteiktas Satversmes deviņdesmit sestajā, deviņdesmit septītajā, deviņdesmit astotajā, simtajā, simt otrajā, simt trešajā, simt sestajā un simt astotajā pantā, var ierobežot likumā paredzētajos gadījumos, lai aizsargātu citu cilvēku tiesības, demokrātisko valsts iekārtu, sabiedrības drošību, labklājību un tikumību. Uz šajā pantā minēto nosacījumu</p>	<p>The Constitution of the Republic of Latvia, Article 116: The rights of persons set out in Articles ninety-six, ninety-seven, ninety-eight, one hundred, one hundred and two, one hundred and three, one hundred and six, and one hundred and eight of the Constitution may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the</p>

<p>pamata var ierobežot arī reliģiskās pārliecības paušanu.</p>	<p>democratic structure of the State, and public safety, welfare and morals. On the basis of the conditions set forth in this Article, restrictions may also be imposed on the expression of religious beliefs.</p>
<p>Elektronisko sakaru likums, 19. panta pirmā daļas 11 punkts: Elektronisko sakaru komersantam ir šādi pienākumi: <...> Regulatora noteiktajā kārtībā, apjomā un atbilstoši Regulatora nosacījumiem sniegt informāciju par kabeļu kanalizācijas izvietojumu, pieejamo ietilpību un citiem fiziskiem parametriem, kuri ir nepieciešami citiem operatoriem nākamās paaudzes piekļuves (NGA) kabeļtīklu ierīkošanai. Šī informācija nav uzskatāma par komercnoslēpumu. Elektronisko sakaru komersants nesniedz informāciju par publisko elektronisko sakaru tīklu un tā elementiem, kurus aizsargā nacionālo drošību un informācijas tehnoloģiju drošību reglamentējoši normatīvie akti. Informācijas sniegšanas maksa, ja tāda tiek piemērota, ir tuvināta izmaksām.</p>	<p>Electronic Communications Law, Section 19 (1.11): Electronic communications merchants have the following duties, to: <...> establish a separate electronic communications merchant for the utilisation and provision of services of cable television networks if an electronic communications merchant has a significant influence in the provision of an electronic communications network or the voice telephony services market, or if it is controlled by the State or local government or if it ensures an electronic communications network, which is established and operated in the same geographic territory on the basis of special rights.</p>
<p>Elektronisko sakaru likums, 70. pants: (1) (Izslēgta ar 03.05.2007. likumu.)</p> <p>(2) Noslodzes datus apstrādā laikposmā, kurā lietotājs vai abonents var apstrīdēt rēķinu un veikt maksājumus normatīvajos aktos noteiktajā kārtībā. Atsevišķos gadījumos noslodzes datu apstrāde un uzglabāšana ir atļauta, kamēr tiek izskatīta un atrisināta pretenzija, kā arī līdz laikam, kad tiek piedzīts neveiktais maksājums.</p> <p>(3) Elektronisko sakaru komersants ir tiesīgs apstrādāt noslodzes datus bez iepriekšējas saskaņošanas ar lietotāju vai abonentu tikai maksas uzskaitē par sniegtajiem elektronisko</p>	<p>Electronic Communications Law, Section 70: (1) [3 May 2007]</p> <p>(2) Traffic data shall be processed in a time period, in which the user or subscriber may dispute the bill and perform payments according to the procedures laid down in laws and regulations. In individual cases, it is allowed to process and store the traffic data while objections are being examined and resolved, as well as until the time when unpaid payments are recovered.</p> <p>(3) An electronic communications merchant is entitled to process traffic data without</p>

sakaru pakalpojumiem, maksājumu piedziņai, pretenziju izskatīšanai vai starpsavienojumu nodrošināšanai, izņemot šā panta septītajā, astotajā un devītajā daļā, kā arī šā likuma 68., 71.1 un 71.2 pantā paredzētos gadījumus.

(4) Noslodzes datu apstrāde ir atļauta elektronisko sakaru pakalpojumu izplatīšanas un papildvērtības pakalpojumu sniegšanas nolūkos, ja lietotājs vai abonents, uz kuru šie dati attiecas, pirms noslodzes datu apstrādes ir devis piekrišanu saskaņā ar noslēgto elektronisko sakaru pakalpojumu līgumu. Lietotājam vai abonentam ir tiesības jebkurā laikā atsaukt piekrišanu noslodzes datu apstrādei.

(5) (Izslēgta ar 03.05.2007. likumu.)

(6) Lietotājam vai abonentam nav tiesību piekļūt noslodzes datiem un izdarīt tajos labojumus.

(7) Regulatoram ir tiesības no elektronisko sakaru komersanta pieprasīt un saņemt noslodzes datus, kas nepieciešami, lai izskatītu strīdu, jautājumu par starpsavienojumu vai krāpniecību, kas veikta, izmantojot numerāciju, kā arī attiecīgā iesnieguma izskatīšanai nepieciešamos noslodzes datus par lietotāju, kas Regulatoram iesniedzis iesniegumu.

(8) Lai veiktu normatīvajos aktos noteikto uzraudzību elektronisko sakaru, personas datu aizsardzības un informācijas sabiedrības pakalpojumu aprītes jomā, Datu valsts inspekcijai ir tiesības pieprasīt un elektronisko sakaru komersantiem ir pienākums 15 dienu laikā sniegt noslodzes datus.

previous co-ordination with the user or subscriber only for payment accounting regarding the electronic communications services provided, recovery of payments, examination of objections or provision of interconnections, except in the cases provided for in Paragraphs seven, eight and nine of this Section, as well as in Sections 68, 71.1 and 71.2 of this Law.

(4) Processing of traffic data is permitted for the distribution of electronic communications services and provision of value added services if a user or subscriber to whom such data relates has given a consent before processing of traffic data in accordance with an entered into electronic communications services contract. The user or subscriber has the right to revoke at any time his or her consent to the processing of traffic data.

(5) [3 May 2007]

(6) A user or subscriber does not have the right to access traffic data and to make corrections therein.

(7) The Regulator has the right to request and receive from an electronic communications merchant traffic data which is necessary in order to examine a dispute, an interconnection issue or fraud performed using numbering, as well as the traffic data regarding the user who has submitted an application to the Regulator, necessary for examination of the relevant application.

(8) In order to perform the supervision in the field of circulation of electronic communications, personal data protection and information society services laid down in laws and regulations, the Data State

<p>(9) Finanšu un kapitāla tirgu reglamentējošu normatīvo aktu pārskatīšanu izmeklēšanas nolūkos Finanšu un kapitāla tirgus komisijai ir tiesības, pamatojoties uz tiesneša lēmumu, pieprasīt un no elektronisko sakaru komersanta saņemt noslodzes datus, kas minēti šā likuma 1.pielikuma 1.punktā un 2.punkta 1., 2., 3., 4., 5. un 6.apakšpunktā, kā arī datus, kas minēti šā likuma 2.pielikuma 1., 2., 3., 4., 5., 6., 7. un 8.punktā.</p> <p>(10) Elektronisko sakaru komersantam nav pienākuma veikt papildu pasākumus šā panta astotajā un devītajā daļā minētās informācijas iegūšanai, ja, sniedzot elektronisko sakaru pakalpojumu, elektronisko sakaru komersanta tehniskās iekārtas to neģenerē, neapstrādā un neregistrē.</p> <p>(11) Ministru kabinets nosaka noslodzes datu pieprasīšanas un nodošanas kārtību šā panta astotajā un devītajā daļā minētajām institūcijām.</p>	<p>Inspection has the right to request and electronic communications merchants has a duty to provide traffic data within 15 days.</p> <p>(9) For the purpose of investigating violations of the laws and regulations governing the financial and capital market, the Financial and Market Capital Commission has the right, on the basis of a decision of a judge, to request and receive from an electronic communications merchant the traffic data referred to in Paragraph 1 and Paragraph 2, Sub-paragraphs 1, 2, 3, 4, 5 and 6 of Annex 1 to this Law, as well as the data referred to in Paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of Annex 2 to this Law.</p> <p>(10) An electronic communications merchant has no duty to take additional measures for obtaining the information referred to in Paragraphs eight and nine of this Section, if in providing the electronic communications service technical equipment of the electronic communications merchant does not generate, process and record it.</p> <p>(11) The Cabinet shall determine the procedures for requesting and transfer of the traffic data to the institutions referred to in Paragraphs eight and nine of this Section.</p>
<p>Elektronisko sakaru likums, 71. pants: (1) Atrāšanās vietas datu apstrāde, ņemot vērā šajā pantā paredzētos izņēmumus, ir atļauta tikai elektronisko sakaru pakalpojumu sniegšanas nodrošināšanai.</p> <p>(2) Atrāšanās vietas datu apstrāde citam mērķim bez lietotāja vai abonenta piekrišanas ir atļauta tikai tādā gadījumā, ja lietotāju vai abonentu nav</p>	<p>Electronic Communications Law, Section 71: (1) The processing of location data, taking into account the exceptions specified in this Section shall be permitted only to ensure the provision of electronic communications services.</p> <p>(2) The processing of location data for other purposes without the consent of a user or</p>

<p>iespējams identificēt, izmantojot šos atrašanās vietas datus.</p> <p>(3) Atrašanās vietas datu apstrāde citam mērķim ir atļauta ar lietotāja vai abonenta piekrišanu laikposmā, kas nepieciešams, lai sniegtu papildvērtības pakalpojumus.</p> <p>(4) Pirms saņemta piekrišana par atrašanās vietas datu apstrādi citam mērķim, elektronisko sakaru komersantam ir pienākums informēt lietotāju vai abonentu par apstrādājamo datu veidu, apstrādes mērķi un termiņu, kā arī par to, vai atrašanās vietas dati tiks nodoti trešajām personām papildvērtības pakalpojumu sniegšanai.</p> <p>(5) Lietotājam vai abonentam ir tiesības jebkurā laikā atsaukt piekrišanu atrašanās vietas datu apstrādei citam mērķim, par to paziņojot attiecīgajam elektronisko sakaru komersantam.</p> <p>(6) Lietotājam vai abonentam, kas ir piekritis atrašanās vietas datu apstrādei citam mērķim, ir tiesības bez maksas pieprasīt, lai atrašanās vietas datu apstrāde uz noteiktu laiku tiek pārtraukta, par to paziņojot attiecīgajam elektronisko sakaru komersantam.</p> <p>(7) Elektronisko sakaru komersants drīkst apstrādāt atrašanās vietas datus bez lietotāja vai abonenta piekrišanas, ja atrašanās vietas datu apstrāde ir nepieciešama Valsts ugunsdzēsības un glābšanas dienestam, Valsts policijai, neatliekamās medicīniskās palīdzības un gāzes avārijas dienestiem, Jūras meklēšanas un glābšanas dienestam, kā arī Iekšlietu ministrijas Informācijas centram tā pienākumu veikšanai un šo datu nodošanai šajā panta daļā minētajiem dienestiem.</p>	<p>subscriber shall be permitted only in such cases if it is not possible to identify the user or subscriber utilising such location data.</p> <p>(3) The processing of location data for other purposes with the consent of a user or subscriber is permitted in the time period, which is necessary to provide value added services.</p> <p>(4) Before the receipt of consent regarding the processing of location data for other purposes, an electronic communications merchant has an obligation to inform the user or subscriber regarding the type of data to be processed, the purpose and time periods of the processing, as well as regarding the fact of whether the location data will be transferred to third persons for the provision of value added services.</p> <p>(5) A user or subscriber has the right to revoke his or her consent for the processing of location data for other purposes at any time, notifying the relevant electronic communications merchant of this revocation.</p> <p>(6) A user or subscriber who has consented to the processing of location data for other purposes has the right to request free of charge that the processing of location data be suspended for a specific time, notifying the relevant electronic communications service provider of this suspension.</p> <p>(7) An electronic communications merchant may process location data without the consent of the user or subscriber if the processing of location data is necessary for the State Fire-Fighting and Rescue Service, the State Police, the Emergency Medical Service and the gas emergency services, the Maritime Search and Rescue Service or the</p>
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	<p>number “112” service, as well as the Information Centre of the Ministry of the Interior for the performance of the duties thereof and the transfer of such data to the services referred to in this Paragraph of this Section.</p>
<p>Elektronisko sakaru likums, 71¹. panta astotā daļa: Saglabājamie dati ir izdzēšami pēc šā likuma 19.panta pirmās daļas 11.punktā noteiktā termiņa beigām, izņemot tos datus, kurus šā panta pirmajā daļā minētās institūcijas ir pieprasījušas līdz datu saglabāšanas termiņa beigām, bet kuri vēl nav sniegti, kā arī datus, kas turpmāk nepieciešami pakalpojumu sniegšanai, maksas uzskaitē par sniegtajiem pakalpojumiem, pretenziju izskatīšanai, maksājumu piedziņai vai starpsavienojumu nodrošināšanai.</p>	<p>Electronic Communications Law, Section 71¹ (8): Data to be retained shall be extinguished at the end of the time period specified in Section 19, Paragraph one, Clause 11 of this Law, except for the data, which the institutions referred to in Paragraph one of this Section have requested up to the end of the time period for the retention of data, but which have not yet been issued, as well as data, which is necessary for the provision of further services, payment accounting for services provided, the examination of claims, recovery of payments or ensuring interconnections.</p>
<p>Krimināllikums, 7. panta ceturtnā daļa: Smags noziegums ir tīšs nodarījums, par kuru šajā likumā paredzēta brīvības atņemšana uz laiku, ilgāku par trim gadiem, bet ne ilgāku par astoņiem gadiem, kā arī nodarījums, kurš izdarīts aiz neuzmanības un par kuru šajā likumā paredzēta brīvības atņemšana uz laiku, ilgāku par astoņiem gadiem.</p>	<p>The Criminal Law, Section 7 (4): A serious crime is an intentional offence for which this Law provides for deprivation of liberty for a term exceeding three years but not exceeding eight years, as well as an offence, which has been committed through negligence and for which this Law provides for deprivation of liberty for a term exceeding eight years.</p>
<p>Krimināllikums, 7. panta piektā daļa: Sevišķi smags noziegums ir tīšs nodarījums, par kuru šajā likumā paredzēta brīvības atņemšana uz laiku, ilgāku par astoņiem gadiem, vai mūža</p>	<p>The Criminal Law, Section 7 (5): An especially serious crime is an intentional offence for which this Law provides for deprivation of liberty for a term exceeding</p>

<p>ieslodzījums.</p>	<p>eight years or life imprisonment.</p>
<p>Krimināllikums, 88. panta pirmā daļa: Par spridzināšanu, dedzināšanu, kodolķīmisko, ķīmisko, bioloģisko, bakterioloģisko, toksisko vai citu masveida iznīcināšanas ieroču lietošanu, masveida saindēšanu, epidēmiju, epizootiju izplatīšanu, personas nolaupīšanu, ķīlnieku sagrābšanu, gaisa, sauszemes vai ūdens transportlīdzekļu sagrābšanu vai citādām darbībām, ja tās veiktas nolūkā iebiedēt iedzīvotājus vai piespiest valsti, tās institūcijas vai starptautiskas organizācijas izdarīt kādu darbību vai atturēties no tās, vai kaitēt valsts, tās iedzīvotāju vai starptautiskas organizācijas interesēm (terorisms), —</p> <p>soda ar mūža ieslodzījumu vai brīvības atņemšanu uz laiku no astoņiem līdz divdesmit gadiem, konfiscējot mantu vai bez mantas konfiskācijas, un ar probācijas uzraudzību uz laiku līdz trim gadiem.</p>	<p>The Criminal Law, Section 88 (1): For a person who commits the use of explosives, use of fire, the use of nuclear chemical, chemical, biological, bacteriological, toxic or other weapons of mass destruction, mass poisoning, spreading of epidemics and epizootic diseases, kidnapping of persons, taking of hostages, hijacking of air, land or sea means of transport or other activities if they committed for the purpose of intimidating inhabitants or with the purpose of inciting the State, its institutions or international organisations to take any action or refrain therefrom, or for purposes of harming the State or the inhabitants thereof or the interests of international organisations (terrorism), —</p> <p>the applicable punishment is life imprisonment or deprivation of liberty for a term of eight and up to twenty years, with or without confiscation of property and with probationary supervision for a term up to three years.</p>
<p>Krimināllikums, 88. panta otrā daļa: Par valsts teritorijā vai kontinentālajā šelfā izvietotu fizisku objektu, automatizēto datu apstrādes sistēmu, elektronisko tīklu, kā arī citu objektu, kuru mērķis ir nodrošināt valsts drošību, iznīcināšanu vai bojāšanu, ja šādas darbības veiktas šā panta pirmajā daļā paredzētajā nolūkā, —</p> <p>soda ar mūža ieslodzījumu vai brīvības atņemšanu uz laiku no desmit līdz divdesmit gadiem, konfiscējot mantu vai bez mantas konfiskācijas, un ar probācijas uzraudzību uz</p>	<p>The Criminal Law, Section 88 (2): For a person who commits destruction or damage to physical objects, automated data processing systems, electronic networks, as well as other objects located in the territory or the continental shelf of the State, if such activities are committed for the purpose provided for in Paragraph one of this Section, —</p> <p>the applicable punishment is life imprisonment or deprivation of liberty for a</p>

<p>laiku līdz trim gadiem.</p>	<p>term of eight and up to twenty years, with or without confiscation of property and with probationary supervision for a term up to three years.</p>
<p>Krimināllikums 144. pants Korespondences un pa elektronisko sakaru tīkliem pārraidāmās informācijas noslēpuma pārkāpšana</p> <p>(1) Par personas korespondences noslēpuma tīšu pārkāpšanu —</p> <p>soda ar brīvības atņemšanu uz laiku līdz diviem gadiem vai ar īslaicīgu brīvības atņemšanu, vai ar piespiedu darbu, vai ar naudas sodu.</p> <p>(2) Par prettiesisku publiski nepieejamu datu pārraides vai signālu pārtveršanu elektronisko sakaru tīklos, kā arī par prettiesisku publiski nepieejamu elektromagnētisku datu iegūšanu no elektronisko sakaru tīkla, kurā atrodas šādi dati, —</p> <p>soda ar brīvības atņemšanu uz laiku līdz trim gadiem vai ar īslaicīgu brīvības atņemšanu, vai ar piespiedu darbu, vai ar naudas sodu.</p> <p>(3) Par šā panta pirmajā vai otrajā daļā paredzētajām darbībām, ja tās izdarītas mantkārīgā nolūkā, —</p> <p>soda ar brīvības atņemšanu uz laiku līdz pieciem gadiem vai ar īslaicīgu brīvības atņemšanu, vai ar piespiedu darbu, vai ar naudas sodu.</p>	<p>Criminal Law Section 144 Violating the Confidentiality of Correspondence and Information to be Transmitted over Telecommunications Networks</p> <p>(1) For a person who commits intentional violation of the confidentiality of personal correspondence,</p> <p>the applicable punishment is deprivation of liberty for a term up to two years or temporary deprivation of liberty, or community service, or a fine.</p> <p>(2) For a person who commits unlawful interception of publicly unavailable data transmissions or signals in telecommunications networks, as well as unlawful acquisition of publicly unavailable electromagnetic data from a telecommunications network in which such data is present, the applicable punishment is deprivation of liberty for a term up to three years or temporary deprivation of liberty, or community service, or a fine.</p> <p>(3) For committing the acts provided for in Paragraph one or two of this Section, if such are committed for purposes of acquiring property, the applicable punishment is deprivation of liberty for a term up to five years or temporary deprivation of liberty, or community service, or a fine.</p>

<p>Krimināllikuma 145. pants Nelikumīgas darbības ar fiziskās personas datiem</p> <p>(1) Par nelikumīgām darbībām ar fiziskās personas datiem, ja ar to radīts būtisks kaitējums, —</p> <p>soda ar brīvības atņemšanu uz laiku līdz diviem gadiem vai ar īslaicīgu brīvības atņemšanu, vai ar piespiedu darbu, vai ar naudas sodu.</p> <p>(2) Par nelikumīgām darbībām ar fiziskās personas datiem, ja tās izdarījis personas datu apstrādes pārzinis vai operators atreibības, mantkārīgā vai šantāžas nolūkā, —</p> <p>soda ar brīvības atņemšanu uz laiku līdz četriem gadiem vai ar īslaicīgu brīvības atņemšanu, vai ar piespiedu darbu, vai ar naudas sodu.</p> <p>(3) Par personas datu apstrādes pārziņa vai operatora vai datu subjekta ietekmēšanu, pielietojot vardarbību vai draudus vai ļaunprātīgi izmantojot uzticību, vai ar viltu nolūkā veikt nelikumīgas darbības ar fiziskās personas datiem —</p> <p>soda ar brīvības atņemšanu uz laiku līdz pieciem gadiem vai ar īslaicīgu brīvības atņemšanu, vai ar piespiedu darbu, vai ar naudas sodu.</p>	<p>Criminal Law Section 145. Illegal Activities Involving Personal Data of Natural Persons</p> <p>(1) For illegal activities involving personal data of a natural person, if it has caused substantial harm,</p> <p>the applicable punishment is deprivation of liberty for a term up to two years or temporary deprivation of liberty, or community service, or a fine.</p> <p>(2) For illegal activities involving personal data of a natural person, if they have been performed by a personal data processing administrator or operator for the purpose of vengeance, acquisition of property or blackmail,</p> <p>the applicable punishment is deprivation of liberty for a term up to four years or temporary deprivation of liberty, or community service, or a fine.</p> <p>(3) For influencing a personal data processing administrator or operator or the data subject, using violence or threats or using trust in bad faith, or using deceit in order to perform illegal activities involving personal data of a natural person,</p> <p>the applicable punishment is deprivation of liberty for a term up to five years or temporary deprivation of liberty, or community service, or a fine.</p>
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<p>Krimināllikuma 157. pants Neslavas celšana</p> <p>(1) Par apzināti nepatiesu, otru personu apkaunojošu izdomājumu tīšu izplatīšanu iespiestā vai citādā veidā pavairotā sacerējumā, kā arī mutvārdos, ja tā izdarīta publiski (neslavas celšana), —</p> <p>soda ar piespiedu darbu vai ar naudas sodu.</p> <p>(2) Par neslavas celšanu masu saziņas līdzeklī —</p> <p>soda ar īslaicīgu brīvības atņemšanu vai ar piespiedu darbu, vai ar naudas sodu.</p>	<p>Criminal Law Section 157</p> <p>Defamation</p> <p>(1) For a person who knowingly commits intentional distribution of fictions, knowing them to be untrue and defamatory of another person, in printed or otherwise reproduced material, as well as orally, if such has been committed publicly (defamation),</p> <p>the applicable punishment is community service or a fine.</p> <p>(2) For defamation in mass media,</p> <p>the applicable punishment is temporary deprivation of liberty or community service, or a fine.</p>
<p>Kriminālprocesa likuma 19. pants Nevainīguma prezumpcija</p> <p>(1) Neviena persona netiek uzskatīta par vainīgu, kamēr tās vaina noziedzīga nodarījuma izdarīšanā netiek konstatēta šajā likumā noteiktajā kārtībā.</p> <p>(2) Personai, kurai ir tiesības uz aizstāvību, nav jāpierāda savs nevainīgums.</p> <p>(3) Visas saprātīgās šaubas par vainu, kuras nav iespējams novērst, jāvērtē par labu personai, kurai ir tiesības uz aizstāvību.</p>	<p>Section 19. Presumption of Innocence</p> <p>(1) No person shall be considered guilty until the guilt of such person in the committing of a criminal offence has been determined in accordance with the procedures laid down in this Law.</p> <p>(2) A person who has the right to assistance of a defence counsel shall not need to prove his or her innocence.</p> <p>(3) All reasonable doubts regarding guilt that it is not able to eliminate shall be evaluated as beneficial for the person who has the right to defence.</p>

<p>Kriminālprocesa likums, 154. pants: (1) Tiesa var uzdot plašsaziņas līdzekļa žurnālistam vai redaktoram norādīt publicētās informācijas avotu.</p> <p>(2) Par izmeklētāja vai prokurora ierosinājumu lemj izmeklēšanas tiesnesis, uzklausījis ierosinājuma iesniedzēju, plašsaziņas līdzekļa žurnālistu vai redaktoru un iepazinies ar materiāliem.</p> <p>(3) Lēmumu par informācijas avota norādīšanu izmeklēšanas tiesnesis pieņem, ievērojot personas tiesību un sabiedrības interešu samērīgumu.</p> <p>(4) Tiesneša lēmumu var pārsūdzēt ierosinājuma iesniedzējs, plašsaziņas līdzekļa žurnālists vai redaktors, un to izskata 10 dienu laikā augstāka līmeņa tiesas tiesnesis rakstveida procesā, kura lēmums nav pārsūdzams.</p>	<p>Criminal Procedure Law, Section 154: (1) A court may assign a mass-media journalist or editor to indicate the source of published information.</p> <p>(2) An investigating judge shall decide on the proposal of an investigator or public prosecutor, having listened to the submitter of the proposal, or a mass-media journalist or editor, and having familiarised him or herself with the materials.</p> <p>(3) An investigating judge shall take a decision on indication of the source of information, complying with the proportionality of the rights of the person and the public interest.</p> <p>(4) A decision of a judge may be appealed by the submitter of a proposal, or a mass-media journalist or editor, and such appeal shall be examined within 10 days by a higher-level court judge in a written procedure the decision of which shall not be subject to appeal.</p>
<p>Latvijas Republikas likums „Par presi un citiem masu informācijas līdzekļiem”, 22. pants: Masu informācijas līdzeklis var nenorādīt informācijas avotu. Ja persona, kura sniegusi informāciju, prasa, lai tās vārds netiktu norādīts masu informācijas līdzeklī, šī prasība redakcijai ir saistoša.</p> <p>Lai aizsargātu personas vai sabiedrības būtiskas intereses, tikai tiesa, ievērojot samērīgumu, var uzdot norādīt informācijas avotu.</p>	<p>Law of the Republic of Latvia “On the Press and other Mass media”, Section 22: A mass medium may choose to not indicate the source of information. If the person who has provided the information requests that his or her name is not to be indicated in a mass medium, this request shall be binding upon the editorial board.</p> <p>The source of information shall only be produced at the request of a court or a prosecutor.</p>

<p>Operatīvas darbības likums, 2. panta pirmā daļa: (1) Operatīvās darbības uzdevumi ir:</p> <ol style="list-style-type: none">1) personu aizsargāšana pret noziedzīgiem apdraudējumiem;2) noziedzīgu nodarījumu profilakse, to novēršana un atklāšana, noziedzīgu nodarījumu izdarījušo personu un pierādījumu avotu noskaidrošana;3) to personu meklēšana, kuras likumā noteiktajā kārtībā tiek turētas aizdomās, ir apsūdzētas vai notiesātas par noziedzīga nodarījuma izdarīšanu;4) noziedzīga nodarījuma rezultātā nodarītā kaitējuma atlīdzināšanas nodrošināšana;5) to personu meklēšana, kuras pēkšņi un bez acīmredzama iemesla pametušas savu pastāvīgo vai pagaidu uzturēšanās vietu, neievēro savu ierasto dzīvesveidu un sazināšanās ar tām nav iespējama, kā arī nepilngadīgo un to personu meklēšana, kuras vecuma, to fiziskā, garīgā stāvokļa vai slimības dēļ ir aprūpējamas, bet aizgājušas no mājām, ārstniecības iestādēm vai citām uzturēšanās vietām (bez vēsts pazudušās personas);6) politiskas, sociālas, militāras, ekonomiskas, zinātniskas, tehniskas, kriminālas un citas ar noziedzības sfēru un tās infrastruktūru, ar valsts drošības, aizsardzības un ekonomiskās suverenitātes apdraudējumiem saistītās informācijas iegūšana, uzkrāšana, analīze un izmantošana likumā noteiktajā kārtībā;7) valsts noslēpumu un citu valstij svarīgu interešu aizsardzība, kā arī likumā noteiktajos gadījumos — personu speciālās aizsardzības	<p>Operational Activities Law, Section 2 (1): (1) The tasks of operational activities are:</p> <ol style="list-style-type: none">1) the protecting of persons against criminal threats;2) preventing, deterring and detecting of criminal offences, and the determining of persons committing criminal offences and the sources of evidence;3) searching for persons who, in accordance with procedures laid down in law, are suspected of, have been accused of or have been convicted of committing a criminal offence;4) ensuring compensation for damages resulting from a criminal offence;5) searching for such persons who have left their permanent or temporary place of residence suddenly and without obvious reason, deviate from their usual lifestyle and it is not possible to reach them, as well as searching for minors and such persons who are to be taken care of because of their age, physical or mental condition or illness, but who have left home, medical treatment institutions or other places of residence (missing persons);6) obtaining, accumulating, analysing and utilising, in accordance with procedures laid down in law, of political, social, military, economic, scientific and technical, criminal, and other information related to the criminal sphere and its infrastructure, and threats against State security, defence and economic sovereignty;
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<p>nodrošināšana;</p> <p>8) informācijas iegūšana par konkrētām personām, ja izlemjams jautājums par to atbilstību darbam svarīgos valsts amatos un institūcijās, vai personām, kurām pieejami valsts vai citi ar likumu aizsargāti noslēpumi.</p>	<p>7) the protecting of official secrets and other interests important to the State, and, in cases laid down in law, the providing of special protection to persons;</p> <p>8) gathering of information about specific persons, if decisions must be taken on their suitability for work in important State offices and for authorities, or regarding persons who have access to official secrets or other secrets protected by law.</p>
<p>Operatīvas darbības likums, 3. pants: (1) Operatīvās darbības tiesiskais pamats ir Latvijas Republikas Satversme, Kriminālprocesa likums, šis likums, kā arī citi likumi un starptautiskie līgumi, kas reglamentē valsts drošības, aizsardzības, ekonomiskās suverenitātes un sabiedriskās kārtības nodrošināšanas subjektu uzdevumus, tiesības un pienākumus.</p> <p>(2) Valsts institūcijas, kurām ar likumu ir noteiktas tiesības veikt operatīvo darbību, savas kompetences ietvaros un atbilstoši šim likumam izdod iekšējos normatīvos aktus par šīs darbības organizāciju, metodēm, taktiku, līdzekļiem un uzskaiti. Šie normatīvie akti stājas spēkā tikai pēc tam, kad tos akceptējis ģenerālprokurors.</p> <p>(3) Šā panta otrajā daļā minētie iekšējie normatīvie akti nav jāaskaņo ar Tieslietu ministriju.</p>	<p>Operational Activities Law, Section 3: (1) The legal basis of operational activities is the Constitution of the Republic of Latvia, the Criminal Procedure Law, this Law, as well as other laws and international agreements which govern the tasks, rights and duties of the bodies that ensure State security, defence, economic sovereignty and public order.</p> <p>(2) State authorities, which by law have been assigned the right to conduct operational activities, shall within their competence and in accordance with this Law issue internal laws and regulations with respect to the organisation, methods, tactics, means and recording of such activities. Such laws and regulations shall come into force only after the Prosecutor General has approved them.</p> <p>(3) The internal laws and regulations referred to in Paragraph two of this Section need not be co-ordinated with the Ministry of Justice.</p>
<p>Operatīvas darbības likums, 6. pants: (1) Operatīvās darbības saturs ir operatīvie pasākumi un to īstenošanas metodes. Operatīvie pasākumi</p>	<p>Operational Activities Law, Section 6: (1) The substance of operational activities is investigatory measures and the methods of their implementation. Investigatory measures</p>

<p>ir:</p> <ol style="list-style-type: none"> 1) operatīvā izzināšana; 2) operatīvā novērošana (izsekošana); 3) operatīvā apskate; 4) operatīvā paraugu iegūšana un operatīvā izpēte; 5) personas operatīvā aplūkošana; 6) operatīvā iekļūšana; 7) operatīvais eksperiments; 7¹) kontrolētā piegāde; 8) operatīvā detektīvdarbība; 9) operatīvā korespondences kontrole; 10) operatīvā personas paustās vai uzglabātās informācijas satura iegūšana no tehniskajiem līdzekļiem; 11) operatīvā sarunu noklausīšanās; 12) operatīvā publiski nepieejamas vietas videonovērošana. <p>(2) Šajā pantā dots pilnīgs operatīvās darbības pasākumu uzskaitījums, un to var grozīt vai papildināt tikai ar likumu.</p> <p>(3) Operatīvās darbības pasākumu gaitā var izdarīt ierakstus ar video un audio, kino un foto aparāturu, kā arī izmantot dažādas informācijas</p>	<p>are:</p> <ol style="list-style-type: none"> 1) investigatory inquiring; 2) investigatory surveillance (tracing); 3) investigatory inspection; 4) investigatory acquisition of samples and investigatory research; 5) investigatory examination of a person; 6) investigatory entry; 7) investigatory experiment; 7¹) controlled delivery; 8) investigatory detective work; 9) investigatory monitoring of correspondence; 10) investigatory acquisition of information expressed or stored by a person through technical means; 11) investigatory wiretapping of conversations; 12) investigatory video surveillance of a place not accessible to the public. <p>(2) This Section provides a complete listing of operational activities measures, and it may be modified or expanded only by law.</p> <p>(3) In the course of operational activities</p>
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<p>sistēmas, tehniskos, ķīmiskos un bioloģiskos līdzekļus. Šo līdzekļu izmantošana nedrīkst nodarīt kaitējumu iedzīvotāju veselībai un apkārtējai videi. To izmantošanas kārtību nosaka operatīvās darbības subjekts.</p>	<p>measures, recordings may be made with video and audio, cinematography and photography equipment, and various information systems and technical, chemical and biological means may be utilised. Such means shall be utilised so as to not cause harm to the health of the population or the environment. The procedures for utilising such means shall be determined by the body performing operational activities.</p>
<p>Operatīvas darbības likums, 7. panta trešā daļa: Operatīvās darbības pasākumi, kuru gaitā tiek būtiski aizskartas personu konstitucionālās tiesības, veicami sevišķajā veidā.</p>	<p>Operational Activities Law, Section 7 (3): Operational activities measures, in the course of which there is significant infringement of the constitutional rights of persons, shall be conducted in accordance with the special method.</p>
<p>Operatīvas darbības likums, 7. panta ceturtnā daļa: Operatīvā korespondences kontrole, operatīvā personas paustās vai uzglabātās informācijas satura iegūšana no tehniskajiem līdzekļiem, operatīvā nepublisku sarunu slepena noklausīšanās (arī pa tālruni, ar elektroniskajiem un cita veida sakaru līdzekļiem), operatīvā publiski nepieejamas vietas videonovērošana un operatīvā iekļūšana veicama tikai sevišķajā veidā un ar Augstākās tiesas priekšsēdētāja vai viņa īpaši pilnvarota Augstākās tiesas tiesneša akceptu. Atļauju veikt šos operatīvās darbības pasākumus var izsniegt uz laiku līdz trim mēnešiem un pamatotas nepieciešamības gadījumā to var pagarināt, taču tikai uz to laiku, kamēr attiecībā uz personu tiek veikta operatīvā izstrāde.</p>	<p>Operational Activities Law, Section 7 (4): Investigatory monitoring of correspondence, investigatory acquisition of information expressed or stored by a person by technical means, investigatory covert monitoring of non-public conversations (including by telephone, by electronic or other means of communication), investigatory video surveillance of a place not accessible to the public and investigatory entry shall be performed only in accordance with the special method and with the approval of the Chief Justice of the Supreme Court or a Justice of the Supreme Court specially authorised by him or her. Permission to perform such operational activities measures may be issued for a period of up to three months and may be extended where it is substantiated that it is necessary, but only for the period of time that exercising of operational activities is being carried out with</p>

	respect to the person.
<p>Operatīvas darbības likums, 7. panta piektā daļa: Gadījumos, kad jārikojas nekavējoties, lai novērstu vai atklātu terorismu, slepkavību, bandītismu, masu nekārtības, citu smagu vai sevišķi smagu noziegumu, kā arī tad, ja reāli ir apdraudēta personas dzīvība, veselība vai īpašums, šā panta ceturtajā daļā minētos operatīvās darbības pasākumus var veikt ar prokurora piekrišanu. Nākamajā darb dienā, bet ne vēlāk kā 72 stundu laikā, jāsaņem tiesneša akcepts. Tiesnesis, akceptējot operatīvās darbības pasākumu, lemj par tā neatliekamas uzsākšanas pamatotību, kā arī turpināšanas nepieciešamību, ja tas nav pabeigts. Ja tiesnesis atzinis operatīvās darbības pasākuma veikšanu par nepamatotu vai prettiesisku, operatīvās darbības subjekts iegūto informāciju nekavējoties iznīcina.</p>	<p>Operational Activities Law, Section 7 (5): In cases where immediate action is required in order to avert or detect terrorism, murder, gangsterism, riots, other serious or especially serious crime, as well as where the lives, health or property of persons are in real danger, the operational activities measures referred to in Paragraph four of this Section may be performed with the approval of a prosecutor. Approval of a judge must be obtained on the following working day, but not later than within 72 hours. Upon approving the operational activities measure, the judge shall decide on the validity of commencing it immediately, as well as the necessity to continue it, if it has not been finished. If the judge has recognised the performance of the operational activities measure as unjustified or unlawful, the subject of operational activities shall immediately destroy the information obtained.</p>
<p>Operatīvas darbības likums, 10. panta pirmā daļa: Ja operatīvās darbības subjekta rīcībā ir pamatota informācija par personu gatavotu vai izdarītu noziedzīgu nodarījumu vai citu prettiesisku rīcību, vai valstij svarīgu interešu apdraudējumu, ir atļauta šo personu un ar tām saistīto personu novērošana (izsekošana).</p>	<p>Operational Activities Law, Section 10 (1): If a body performing operational activities has available well-founded information regarding a criminal offence in preparation or having been committed by persons, or regarding other unlawful acts, or a threat to interests of importance to the State, the surveillance (tracing) of such persons and persons associated with them is permitted.</p>
<p>Operatīvas darbības likums, 10. panta otrā</p>	<p>Operational Activities Law, Section 10</p>

<p>daļa: Lai iegūtu vai pārbaudītu ziņas par prettiesisku rīcību vai valstij svarīgu interešu apdraudējumu, ir atļauta dažādu stacionāro un mobilo objektu novērošana un ar tiem saistīto personu novērošana (izsekošana).</p>	<p>(2): In order to obtain or verify information regarding unlawful acts or a threat to interests of importance to the State, the surveillance of various stationary and mobile facilities and surveillance (tracing) of persons associated with such is permitted.</p>
<p>Operatīvas darbības likums, 17. pants: Ja operatīvās darbības subjekta rīcībā ir pamatotas ziņas par personu saistību ar noziegumu, kā arī par valstij svarīgu interešu, valsts drošības un aizsardzības apdraudējumu, ir atļauta:</p> <p>1) operatīvā korespondences kontrole — tas ir, drīkst kontrolēt šo personu nosūtāmo un saņemamo pasta, telegrāfa un cita veida korespondenci un tās rīcībā esošās elektrosakaru un cita veida sistēmas šādas korespondences nosūtīšanai un saņemšanai;</p> <p>2) operatīvā personas paustās vai uzglabātās informācijas satura iegūšana no tehniskajiem līdzekļiem - tas ir, informācijas noņemšana vai kopēšana no personu īpašumā vai rīcībā esošajām elektroniskajām un cita veida informācijas glabāšanas ierīcēm un informācijas kanāliem;</p> <p>3) operatīvā sarunu noklausīšanās — tas ir, to sarunu noklausīšanās, kuras notiek starp šīm personām un citām personām (arī pa tālruni, ar elektroniskajiem un cita veida sakaru līdzekļiem);</p> <p>4) operatīvā publiski nepieejamas vietas videonovērošana — tas ir, publiski nepieejamā vietā notiekošo norišu videonovērošana bez šīs vietas īpašnieka, valdītāja un apmeklētāju ziņas.</p>	<p>Operational Activities Law, Section 17: If a body performing operational activities is in possession of well-founded information with respect to the involvement of persons in crime, as well as regarding threats to interests of importance to the State, State security and defence, the following is permitted:</p> <p>1) investigatory monitoring of correspondence – that is, it is permitted to monitor the outgoing and incoming postal, telegraphic and other types of correspondence of such persons, and electronic communications and other types of systems that are at their disposal for the sending and receipt of such correspondence;</p> <p>2) investigatory acquisition of information expressed or stored by a person from technical means – that is, downloading of information or copying thereof from electronic and other types of information storage devices and information channels owned by or at the disposal of persons;</p> <p>3) investigatory wiretapping of conversations – that is, the wiretapping of such conversations as take place between such persons and other persons (including by telephone, and by electronic and other types of means of communication);</p> <p>4) investigatory video surveillance of a place not accessible to the public – that is, the</p>

	<p>video surveillance of the ongoing processes at a place not accessible to the public without the awareness of the owner, possessor and visitors of such place.</p>
<p>Operatīvās darbības likums, 22. panta piektā daļa: Operatīvās izstrādes termiņš šajās lietās ir seši mēneši, un to vēl uz sešiem mēnešiem var pagarināt ar operatīvās darbības iestādes vadītāja vai viņa vietnieka akceptu. Vēlreizējs termiņa pagarinājums iespējams tikai ar ģenerālprokurora vai viņa speciāli pilnvarota prokurora akceptu, bet ne ilgāk par tā noziedzīga nodarījuma noilguma termiņu, sakarā ar kuru operatīvā izstrāde tiek veikta.</p>	<p>Operational Activities Law, Section 22 (5): The term for exercising of operational activities in such matters is six months, which may be further extended for six months with the approval of the head or deputy head of the body performing operational activities. A further extension of the term may be done only with the approval of the Prosecutor General or a prosecutor specially authorised by the Prosecutor General, but it shall not be for more than the limitation period of the crime in relation to which the exercising of operational activities is being conducted.</p>
<p>Operatīvās darbības likums, 24. panta piektā daļa: Aizliegts ar operatīvās darbības pasākumiem mērķtiecīgi iegūt informāciju zvērinātu advokātu, zvērinātu notāru, ārstu, pedagogu, psihologu un garīdznieku profesionālās palīdzības sniegšanas laikā, izņemot gadījumus, kad minētās personas pašas ir operatīvās izstrādes objekti.</p>	<p>Operational Activities Law, Section 24 (5): It is prohibited to purposefully obtain, through operational activities measures, information at the time professional assistance is being provided by sworn advocates, sworn notaries, doctors, teachers, psychologists and clergy, except in cases when the persons mentioned are themselves being subjected to an exercising of operational activities.</p>
<p>Par Presi un citiem masu informācijas līdzekļiem, 22. pants</p> <p>Informācijas avota noslēpums</p>	<p>Law on the Press and Other Media, Section 22.</p> <p>Secrecy of the Source of Information</p>

<p>Masu informācijas līdzeklis var nenorādīt informācijas avotu. Ja persona, kura sniegusi informāciju, prasa, lai tās vārds netiktu norādīts masu informācijas līdzeklī, šī prasība redakcijai ir saistoša.</p> <p>Lai aizsargātu personas vai sabiedrības būtiskas intereses, tikai tiesa, ievērojot samērīgumu, var uzdot norādīt informācijas avotu.</p> <p>(Ar grozījumiem, kas izdarīti ar 13.12.2001. likumu, kas stājas spēkā 01.07.2002.)</p>	<p>A mass medium may choose to not indicate the source of information. If the person who has provided the information requests that his or her name is not to be indicated in a mass medium, this request shall be binding upon the editorial board.</p> <p>The source of information shall only be produced at the request of a court or a prosecutor.</p> <p>[1 July 2002]</p>
<p>Kriminālprocesa likums, 154 pants</p> <p>Informācijas avota norādīšanas pienākums</p> <p>(1) Tiesa var uzdot plašsaziņas līdzekļa žurnālistam vai redaktoram norādīt publicētās informācijas avotu.</p> <p>(2) Par izmeklētāja vai prokurora ierosinājumu lemj izmeklēšanas tiesnesis, uzklaušijis ierosinājuma iesniedzēju, plašsaziņas līdzekļa žurnālistu vai redaktoru un iepazīies ar materiāliem.</p> <p>(3) Lēmumu par informācijas avota norādīšanu izmeklēšanas tiesnesis pieņem, ievērojot personas tiesību un sabiedrības interešu samērīgumu.</p> <p>(4) Tiesneša lēmumu var pārsūdzēt ierosinājuma iesniedzējs, plašsaziņas līdzekļa žurnālists vai redaktors, un to izskata 10 dienu laikā augstāka līmeņa tiesas tiesnesis rakstveida procesā, kura lēmums nav</p>	<p>Criminal Procedure Law, Section 154.</p> <p>Duty to Indicate the Source of Information</p> <p>(1) A court may assign a mass-media journalist or editor to indicate the source of published information.</p> <p>(2) An investigating judge shall decide on the proposal of an investigator or public prosecutor, having listened to the submitter of the proposal, or a mass-media journalist or editor, and having familiarised him or herself with the materials.</p> <p>(3) An investigating judge shall take a decision on indication of the source of information, complying with the proportionality of the rights of the person and the public interest.</p> <p>(4) A decision of a judge may be appealed by the submitter of a proposal, or a mass-media journalist or editor, and such appeal</p>

<p>pārsūdzams.</p> <p>(Ar grozījumiem, kas izdarīti ar 12.03.2009. likumu, kas stājas spēkā 01.07.2009.)</p>	<p>shall be examined within 10 days by a higher-level court judge in a written procedure the decision of which shall not be subject to appeal.</p> <p>[12 March 2009]</p>
<p>Par Presi un citiem masu informācijas līdzekļiem, 2. pants.</p> <p>Prese un citi masu informācijas līdzekļi</p> <p>Saskaņā ar šo likumu prese un citi masu informācijas līdzekļi (turpmāk tekstā — masu informācijas līdzekļi) ir avīzes, žurnāli, biļeteni un citi periodiskie izdevumi (iznāk ne retāk kā reizi trīs mēnešos, vienreizējā tirāža pārsniedz 100 eksemplārus), kā arī elektroniskie plašsaziņas līdzekļi, kinohronika, informācijas aģentūru paziņojumi, audiovizuāli ieraksti, kas paredzēti publiskai izplatīšanai. Interneta vietni var reģistrēt kā masu informācijas līdzekļi.</p> <p>Šā likuma noteikumi neattiecas uz valsts varas un pārvaldes institūciju instrukcijām, normatīvajiem aktiem, tiesu un arbitražas prakses periodiskajiem biļeteniem, mācību un zinātnisko iestāžu izdotajiem materiāliem.</p> <p>(Ar grozījumiem, kas izdarīti ar 22.09.2011. likumu, kas stājas spēkā 20.10.2011.)</p>	<p>Law on the Press and Other Media, Section 2.</p> <p>The Press and Other Mass Media</p> <p>In accordance with this Law the press and other mass media (hereinafter – mass media) are newspapers, magazines, newsletters and other periodicals (published not less frequently than once every three months, with a one-time print run exceeding 100 copies), as well as television and radio broadcasts, newsreels, information agency announcements, audio-visual recordings, and programmes intended for public dissemination.</p> <p>The provisions of this Law shall not apply to instructions of State authorities and administrative bodies, regulatory enactments, official bulletins of the courts and arbitration practices, and materials issued by educational and scientific institutions.</p> <p>[20 October 2011]</p>
<p>Personu speciālās aizsardzības likums, 4. pants</p>	<p>Special Protection of Persons Law, Section 4.</p>

<p>Tiesības uz speciālo aizsardzību</p> <p>(1) Tiesības uz speciālo aizsardzību ir šādām personām, kas liecina vai ir liecinājušas kriminālprocesā (turpmāk— kriminālprocesā liecinošā persona):</p> <p>1) cietušajam, lieciniekam vai citai personai, kura liecina vai ir liecinājusi par smagu vai sevišķi smagu noziegumu;</p> <p>2) nepilngadīgai personai, kura liecina par Krimināllikuma 161., 162. un 174.pantā paredzētajiem noziegumiem;</p> <p>3) personai, kuras apdraudējums var ietekmēt kriminālprocesā liecinošo personu.</p> <p>(2) Tiesības uz speciālo aizsardzību ir arī personai, kura neliecina kriminālprocesā, bet piedalās smaga vai sevišķi smaga nozieguma atklāšanā, izmeklēšanā vai iztiesāšanā, kā arī personai, kura sakarā ar minēto personu darbībām ir apdraudēta (turpmāk — cita aizsargājamā persona).</p>	<p>Rights to Special Protection</p> <p>(1) The following persons testifying in criminal proceedings (hereinafter – person testifying in criminal proceedings) have the right to special protection:</p> <p>1) a victim, witness or another person who is testifying or has testified regarding a serious or especially serious crime;</p> <p>2) a minor who is testifying regarding the crimes provided for in Sections 161, 162 and 174 of the Criminal Law; and</p> <p>3) a person the danger to whom may influence the person testifying in criminal proceedings.</p> <p>(2) A person who is not testifying in criminal proceedings, but participates in the uncovering, investigation or adjudication of a serious or especially serious crime, as well as a person who is in danger due to the activities of the referred to persons (hereinafter – another person to be protected), has the right to special protection.</p>
<p>Personu speciālās aizsardzības likums, 6. pants</p> <p>Speciālās aizsardzības iemesls un pamats</p> <p>(1) Iemesls noteikt speciālo aizsardzību ir reāli noticis personas dzīvības, veselības vai citu likumisko interešu apdraudējums, izteikti reāli draudi vai pietiekams pamats domāt, ka</p>	<p>Special Protection of Persons Law, Section 6.</p> <p>Reason and Grounds for Special Protection</p> <p>(1) A reason for prescribing special protection shall be a threat that has actually occurred to the life, health or</p>

<p>apdraudējums var notikt sakarā ar sniegto liecību vai piedalīšanos nozieguma atklāšanā, izmeklēšanā vai iztiesāšanā.</p> <p>(2) Pamats speciālās aizsardzības noteikšanai ir:</p> <p>1) kriminālprocesā liecinošās personas vai tās pārstāvja vai aizstāvja rakstveida iesniegums un procesa virzītāja ierosinājums;</p> <p>2) tiesas iniciatīva, ja iztiesāšanas procesā rodas iemesls noteikt speciālo aizsardzību;</p> <p>3) citas aizsargājamās personas vai tās likumiskā pārstāvja rakstveida iesniegums.</p>	<p>other legal interests of a person, expressed imminent threats, or sufficient grounds for believing that the danger may be imminent due to a provided testimony or participation in the uncovering, investigation or adjudication of a crime.</p> <p>(2) The grounds for the prescription of special protection shall be:</p> <p>1) a written submission of a person testifying in criminal proceedings or his or her representative or counsel and a proposal of the performer of procedures</p> <p>2) the initiative of a court, if a reason for prescribing special protection has arisen during the course of adjudication; or</p> <p>3) a written submission of another person to be protected or his or her legal representative.</p>
<p>Iesniegumu likums, 9. pants</p> <p>Informācijas izpaušanas ierobežojumi</p> <p>(1) Aizliegts bez iesnieguma iesniedzēja piekrišanas izpaust informāciju, kas atklāj viņa identitāti, izņemot gadījumu, kad iestādei saskaņā ar likumu šāda informācija ir jāizpauž.</p> <p>(2) Ja iesniedzējs nevēlas, lai iesniegumā minētie fakti tiktu izpausti, viņš to norāda iesniegumā. Ja iesniegumā nav ietverta norāde par aizliegumu izpaust tajā minētos faktus, iestāde tos ir tiesīga izpaust, ievērojot šā panta</p>	<p>The Law on Submissions, Section 9. Restrictions for Disclosure of Information</p> <p>(1) It is prohibited to disclose information without the consent of the submitter of information revealing his or her identity, except the case when the institution must disclose such information in accordance with the law.</p> <p>(2) If the submitter does not want that the facts referred to in the submission are disclosed, he or she shall specify it in the submission. If the indication regarding prohibition to disclose the facts referred in the submission is not included therein,</p>

<p>pirmās daļas un citu normatīvo aktu prasības.</p>	<p>the institution is entitled to disclose them, taking into account the requirements of Paragraph one of this Section and other regulatory enactments.</p>
<p>Administratīvā procesa likums, 54. Pants</p> <p>Informācijas sniegšana</p> <p>(1) Privātpersonai un iestādei, kas nav administratīvā procesa dalībnieks, informāciju sniedz saskaņā ar Informācijas atklātības likumu, Fizisko personu datu aizsardzības likumu un citiem normatīvajiem aktiem.</p> <p>(2) Informāciju, kas atklāj tās personas identitāti, kura ziņojusi par tiesībpārkāpumu, var sniegt tikai ar šīs personas piekrišanu, izņemot tiesību normās noteiktos gadījumus.</p> <p>(26.10.2006. likuma redakcijā, kas stājas spēkā 01.12.2006.)</p>	<p>Administrative Procedure Law, Section 54.</p> <p>Provision of Information to Private Persons</p> <p>(1) To a private person and an institution, which is not a participant of the administrative proceedings, the information is provided according to the Freedom on Information Law, Personal Data Protection Law and other normative acts.</p> <p>(2) Information regarding the identity of a person, who has reported on the violation of the law, may be given with the consent of such person.</p> <p>[1 December 2006]</p>
<p>Informācijas Atklātības likums, 11. panta 6. daļa</p> <p>Informācijas pieprasījuma forma un reģistrēšanas kārtība</p> <p>(6) Iestādes sarakste ar informācijas pieprasītāju un ziņas par šo personu uzskatāmas par ierobežotas pieejamības informāciju.</p>	<p>Freedom of Information Law, Section 11, Paragraph 6.</p> <p>Form for Requesting Information and Registration Procedures</p> <p>(6) Correspondence between an institution and an applicant and information regarding this person shall be deemed to be restricted access</p>

	information.
<p>Par interešu konflikta novēršanu valsts amatpersonu darbībā, 20. panta 7. daļa</p> <p>Publiskas personas institūcijas vadītāja pienākumi</p> <p>(7) Publiskas personas institūcijas vadītājam, personai, kurai institūcijas vadītājs uzdevis pildīt interešu konflikta un korupcijas novēršanas pienākumus attiecīgajā institūcijā, vai koleģiālai institūcijai aizliegts izpaust informāciju, kas tai kļuvusi zināma, par to, kura attiecīgās publiskas personas institūcijas amatpersona vai darbinieks informējis par interešu konfliktiem, un bez objektīva iemesla radīt šādai personai tiešas vai netiešas nelabvēlīgas sekas. Aizliegums izpaust informāciju neattiecas uz informācijas sniegšanu Korupcijas novēršanas un apkarošanas birojam, Valsts policijai, Satversmes aizsardzības birojam, tiesai un prokuratūrai.</p>	<p>The Law On Prevention on Conflict of Interest in Activities of Public Officials, Section 20, Paragraph 7.</p> <p>Duties of the Head of a State or Local Government Authority</p> <p>(7) The head of a State or local government authority, a person whom the head of an authority has entrusted fulfilment of duties related to the prevention of a conflict of interest and corruption in the relevant authority, or a collegial authority are prohibited from disclosure of information, which has become known thereto, concerning which public official or employee of the relevant State or local government authority has informed regarding conflicts of interest, and from causing any direct or indirect unfavourable consequences to such a person without any objective reason. The prohibition to disclose information shall not apply to the provision of information to the Corruption Prevention and Combating Bureau, the State Police, the Constitution Protection Bureau, the court and the Prosecutor's Office.</p>
<p>Darba likums, 9. pants</p> <p>Aizliegums radīt nelabvēlīgas sekas</p> <p>(1) Aizliegts sodīt darbinieku vai citādi tieši vai netieši radīt viņam nelabvēlīgas sekas tāpēc, ka darbinieks darba tiesisko attiecību</p>	<p>Labour Law, Section 9.</p> <p>Prohibition to Cause Adverse Consequences</p> <p>(1) It is prohibited to apply sanctions to an employee or to otherwise directly or</p>

<p>ietvaros pieļaujamā veidā izmanto savas tiesības, kā arī tad, ja viņš informē kompetentās iestādes vai amatpersonas par aizdomām par noziedzīga nodarījuma vai administratīva pārkāpuma izdarīšanu darbavietā.</p> <p>(2) Ja strīda gadījumā darbinieks norāda uz apstākļiem, kas varētu būt par pamatu darba devēja radītajām nelabvēlīgajām sekām, darba devējam ir pienākums pierādīt, ka darbinieks nav sodīts vai viņam nav tieši vai netieši radītas nelabvēlīgas sekas tāpēc, ka darbinieks darba tiesisko attiecību ietvaros pieļaujamā veidā izmanto savas tiesības.</p> <p>(Ar grozījumiem, kas izdarīti ar 22.04.2004. un 21.09.2006. likumu, kas stājas spēkā 25.10.2006.)</p>	<p>indirectly cause adverse consequences for him or her because the employee, within the scope of employment legal relationships, exercises his or her rights in a permissible manner, as well as when if he or she informs competent institutions or officials regarding suspicions with respect to the committing of criminal offences or administrative violations in the workplace.</p> <p>(2) If in the case of a dispute, an employee indicates conditions, which could be a basis for the adverse consequences caused by the employer, the employer has a duty to prove that the employee has not been punished or adverse consequences have been directly or indirectly caused for him or her because the employee, within the scope of employment legal relationships, exercises his or her rights in a permissible manner.</p> <p>[22 April 2004; 21 September 2006]</p>
<p>Fizisko personu datu aizsardzības likums, 6. pants</p> <p>Ikvienai fiziskajai personai ir tiesības uz savu personas datu aizsardzību.</p>	<p>Personal Data Protection Law, Section 6.</p> <p>Every natural person has the right to protection of his or her personal data.</p>
<p>Latvijas Republikas Satversme, 110. pants</p> <p>Ikvienam ir tiesības uz vārda brīvību, kas ietver tiesības brīvi iegūt, paturēt un izplatīt informāciju, paust savus uzskatus. Cenzūra ir aizliegta.</p>	<p>The Constitution of the Republic of Latvia, Section 110.</p> <p>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</p>

	views. Censorship is prohibited.
<p>Latvijas Republikas Satversme, 116. Pants</p> <p>Personas tiesības, kas noteiktas Satversmes deviņdesmit sestajā, deviņdesmit septītajā, deviņdesmit astotajā, simtajā, simt otrajā, simt trešajā, simt sestajā un simt astotajā pantā, var ierobežot likumā paredzētajos gadījumos, lai aizsargātu citu cilvēku tiesības, demokrātisko valsts iekārtu, sabiedrības drošību, labklājību un tikumību. Uz šajā pantā minēto nosacījumu pamata var ierobežot arī reliģiskās pārliecības paušanu.</p>	<p>The Constitution of the Republic of Latvia, Section 116.</p> <p>The rights of persons set out in Articles ninety-six, ninety-seven, ninety-eight, one hundred, one hundred and two, one hundred and three, one hundred and six, and one hundred and eight of the Constitution may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals. On the basis of the conditions set forth in this Article, restrictions may also be imposed on the expression of religious beliefs.</p> <p>[15 October 1998; 30 April 2002; 23 September 2004; 15 December 2005]</p>
<p>Latvijas Administratīvo pārkāpumu kodekss, 166.³³ panta 2. daļa</p> <p>Valsts un pašvaldību institūciju vadītājiem noteikto pienākumu nepildīšana</p> <p>Par likumā noteiktā aizlieguma izpaust informāciju attiecībā uz personu, kura informējusi par citas valsts amatpersonas interešu konfliktu, pārkāpšanu vai par nelabvēlīgu seku radīšanu šai personai bez objektīva iemesla —</p> <p>uzliek naudas sodu valsts amatpersonai no septiņdesmit līdz septiņsimt euro, atņemot</p>	<p>Administrative Violations Code, section 166³³ (2)</p> <p>Breach of the duties by the state and local government leaders</p> <p>For the breach of the statutory prohibition of disclosure of information concerning the person who notified the other public officials a conflict of interest, or for causing adverse effects to that person without an objective reason -</p> <p>fine on public officials from seven to seventy euro, with deprivation of the right</p>

<p>tiesības ieņemt valsts amatpersonas amatu vai bez tā.</p> <p>(19.06.2003. likuma redakcijā ar grozījumiem, kas izdarīti ar 16.06.2011. un 26.09.2013. likumu, kas stājas spēkā 01.01.2014.)</p>	<p>to hold public office or officials without it.</p> <p>(01.01.2014.)</p>
<p>Par Presi un citiem masu informācijas līdzekļiem, 23. Pants</p> <p>Par žurnālistu šajā likumā tiek uzskatīta persona, kura vāc, apkopo, rediģē vai citādā veidā sagatavo materiālus masu informācijas līdzeklim un kura ar to noslēgusi darba līgumu vai veic šo darbu masu informācijas līdzekļa uzdevumā, kā arī žurnālistu apvienību biedrs.</p>	<p>Law on the Press and Other Media, Section 23</p> <p>Under this Law, a journalist is a person who gathers, compiles, edits or in some other way prepares materials for a mass medium and who has entered into an employment contract or performs such work upon the instruction of a mass medium, or is a person who is a member of the Journalists' Union.</p>
<p>Par presi un citiem masu informācijas līdzekļiem, 27.pants</p> <p>Par informācijas avota noslēpuma izpaušanu, žurnālista pienākumu izpildes traucēšanu vai šā likuma 7.pantā noteiktās informācijas publicēšanu vainīgās personas atbild Latvijas Republikas likumos noteiktajā kārtībā.</p> <p>Par masu informācijas līdzekļu izgatavošanu un izplatīšanu bez reģistrācijas vai pēc to darbības izbeigšanas vainīgās personas atbild Latvijas Republikas likumos noteiktajā kārtībā.</p>	<p>Law on Press and Other Mass Media, Article 27</p> <p>A person committing a breach of confidence with respect to a source of information, interference with the performance of the duties of a journalist, dissemination of information injuring human honour and dignity or disclosure of an official or other secret protected by law shall be held liable in accordance with laws of the Republic of Latvia.</p> <p>Persons at fault for the creation and dissemination of a mass media without registration or after termination of their activity shall be held liable in accordance with the procedures prescribed by laws of the Republic of Latvia</p>

<p>Latvijas Žurnālistu asociācijas ētikas kodekss, 3.1.pants</p> <p>Žurnālistam nav tiesību atklāt informācijas avotu bez tā piekrišanas</p>	<p>Code of Ethics of the Journalist Association of Latvia, Section 3.1.</p> <p>A journalist has no right to disclose the information source without his conduct</p>
<p>Latvijas Žurnālistu asociācijas Ētikas komisijas Nolikuma 12.punkts:</p> <p>“Komisija Ētikas kodeksa pārkāpuma gadījumā var paust aizrādījumu LŽA iekšējā sarakstē, kā arī LŽA mājas lapā vai LŽA publiskajā paziņojumā masu medijiem. Sevišķi smagu Ētikas kodeksa pārkāpumu gadījumā komisija LŽA valdei var rosināt LŽA biedra izslēgšanu no organizācijas.”</p>	<p>The Provision of the Commission of Ethics. Association of Journalists of the Republic of Latvia Article 12</p> <p>The Commission in cases of a breach of the Code of Ethics may express a remark in LJA internal correspondence, as well as in LJA website or public communication media. In cases of especially serious breaches of the Code of Ethics the Commission may encourage to the Board of LJA an expulsion of a member of the organization.</p>
<p>Kriminālprocesa likums, 12.pants</p> <p>(1) Kriminālprocesu veic, ievērojot starptautiski atzītās cilvēktiesības un nepieļaujot neattaisnotu kriminālprocesuālo pienākumu uzlikšanu vai nesamērīgu iejaukšanos personas dzīvē.</p> <p>(2) Cilvēktiesības var ierobežot tikai tajos gadījumos, kad to prasa sabiedrības drošības apsvērumi, un tikai šajā likumā noteiktajā</p>	<p>Criminal procedure law, Article 12</p> <p>(1) Criminal proceedings shall be performed in conformity with internationally recognised civil rights and without allowing for the imposition of unjustified criminal procedural duties or excessive intervention in the life of a person.</p> <p>(2) Civil rights may be restricted only in</p>

kārtībā atbilstoši noziedzīgā nodarījuma raksturam un bīstamībai.

(3) Piemērot ar brīvības atņemšanu saistītu drošības līdzekli, pārkāpt publiski nepieejamas vietas neaizskaramību, korespondences un sakaru līdzekļu noslēpumu drīkst vienīgi ar izmeklēšanas tiesneša vai tiesas piekrišanu.

(4) Amatpersonai, kura veic kriminālprocesu, ir pienākums aizsargāt personas privātās dzīves noslēpumu un komercnoslēpumu. Ziņas par to drīkst iegūt un izmantot tikai tad, ja tas ir nepieciešams pierādāmo apstākļu noskaidrošanai.

(5) Fiziskajai personai ir tiesības pieprasīt, lai krimināllietā netiek iekļautas ziņas par šīs personas pašas vai tās saderinātā, laulātā, vecāku, vecvecāku, bērnu, mazbērnu, brāļu un māsu, kā arī tās personas, ar kuru attiecīgā fiziskā persona dzīvo kopā un ar kuru tai ir kopīga (nedalīta) saimniecība (turpmāk — tuvinieki) privāto dzīvi, komercdarbību un mantisko stāvokli, ja tas nav nepieciešams krimināltiesisko attiecību taisnīgai noregulēšanai.

cases where such restriction is required for public safety reasons, and only in accordance with the procedures laid down in this Law according to the character and danger of the criminal offence.

(3) The application of safety measures related to the deprivation of liberty, the infringement of the immunity of publicly inaccessible places, and the confidentiality of correspondence and means of communication shall be permitted only with the consent of the investigating judge or court.

(4) An official, who performs the criminal proceedings, has a duty to protect the confidentiality of the private life of a person and the commercial confidentiality of a person. Information regarding such confidentiality shall be obtained and used only in the case where such information is necessary in order to clarify conditions that are to be proven.

(5) A natural person has the right to request that a criminal case does not include information regarding the private life, commercial activities, and financial situation of such person or the betrothed, spouse, parents, grandparents, children grandchildren, brothers or sisters of such person, as well as of the person with whom the relevant natural person is living together and with whom he or she has a common (joint) household (hereinafter — the immediate family), if such information is not necessary for the fair regulation of criminal legal relations.

Kriminālprocesa likums 180.pants

Lēmums par kratīšanu

(1) Kratišanu izdara ar izmeklēšanas tiesneša vai tiesas lēmumu. Izmeklēšanas tiesnesis lēmumu pieņem, pamatojoties uz procesa virzītāja ierosinājumu un tam pievienotajiem materiāliem.

(2) Lēmumā par kratīšanu norāda, kas, kur, pie kā, kādā lietā un kādus priekšmetus un dokumentus meklēs un izņems.

(3) Neatliekamajos gadījumos, kad novilcināšanas dēļ meklējamie priekšmeti vai dokumenti var tikt iznīcināti, noslēpti vai sabojāti vai arī meklējamā persona var aizbēgt, kratīšanu var izdarīt ar procesa virzītāja lēmumu. Ja lēmumu pieņem izmeklētājs, tad kratīšanu izdara ar prokurora piekrišanu.

(4) Lēmums par kratīšanu nav nepieciešams, izdarot aizturamās personas kratīšanu, kā arī šā likuma 182.panta piektajā daļā noteiktajā gadījumā.

(5) Par šā panta trešajā daļā norādīto kratīšanu procesa virzītājs ne vēlāk kā nākamajā darba dienā pēc tās izdarīšanas paziņo izmeklēšanas tiesnesim, uzrādot materiālus, kas pamatoja izmeklēšanas darbības nepieciešamību un neatliekamību, kā arī izmeklēšanas darbības protokolu. Tiesnesis pārbauda kratīšanas tiesiskumu un pamatotību. Ja izmeklēšanas darbība izdarīta prettiesiski, izmeklēšanas tiesnesis iegūtos pierādījumus atzīst par nepieļaujamiem kriminālprocesā un **lemj par rīcību ar izņemtajiem priekšmetiem.**

Criminal Procedure Law, Section 180

Decision on a Search

(1) A search shall be conducted with a decision of an investigating judge or a court decision. An investigating judge shall take a decision based on a proposal of a person directing the proceedings and materials attached thereto.

(2) A decision on a search shall indicate who will search and remove, where, with whom, in what case, and the objects and documents that will be sought and seized.

(3) In emergency cases where, due to a delay, sought objects or documents may be destroyed, hidden, or damaged, or a person being sought may escape, a search shall be performed with a decision of the person directing the proceedings. If a decision is taken by an investigator then a search shall be performed with the consent of a public prosecutor.

(4) A decision on a search shall not be necessary in conducting a search of a person to be detained, as well as in the case determined in Section 182, Paragraph five of this Law.

(5) A person directing the proceedings shall inform an investigating judge regarding the search indicated in Paragraph three of this Section not later than the next working day after conducting thereof, presenting the materials that justified the necessity and emergency of the investigative action, as well as the minutes of the investigative

	<p>action. The judge shall examine the legality and validity of the search. If the investigative action was conducted illegally, the investigating judge shall recognise the acquired evidence as inadmissible in criminal proceedings, and shall decide on the actions with the seized objects.</p>
<p>Krimināllikums, 296.panta pirmā daļa</p> <p>Par tiesas nolēmuma vai prokurora priekšraksta par sodu neizpildīšanu vai izpildes kavēšanu, ja to izdarījusi persona, kurai tas pēc likuma vai uzlikta uzdevuma bija jāizpilda, —</p> <p>soda ar īslaicīgu brīvības atņemšanu vai ar piespiedu darbu, vai ar naudas sodu.</p>	<p>Criminal law, Article 296, Section 1</p> <p>For a person who commits intentionally failing to execute a court judgment or decision, or a public prosecutor's penal order, or delaying the execution thereof,</p> <p>the applicable punishment is temporary deprivation of liberty or community service, or a fine.</p>
<p>Civillikuma 1635. pants</p> <p>Katrs tiesību aizskārums, tas ir, katra pati par sevi neatļauta darbība, kuras rezultātā nodarīts kaitējums (arī morālais kaitējums), dod tiesību cietušajam prasīt apmierinājumu no aizskārēja, ciktāl viņu par šo darbību var vainot.</p> <p>Ar morālo kaitējumu jāsaprot fiziskas vai garīgas ciešanas, kas izraisītas ar neatļautas darbības rezultātā nodarītu cietušā nemantisko tiesību vai nemantisko labumu aizskārumu. Atlīdzības apmēru par morālo kaitējumu nosaka tiesa pēc sava ieskata,</p>	<p>Civil Law, Section 1635</p> <p>Every delict, that is, every wrongful act per se, as a result of which harm has been caused (also moral injury), shall give the person who suffered the harm therefrom the right to claim satisfaction from the infringer, insofar as he or she may be held at fault for such act.</p> <p>By moral injury is understood physical or mental suffering, which are caused as a result of unlawful acts committed to the non-financial rights or non-financial benefit delicts of the person</p>

<p>ņemot vērā morālā kaitējuma smagumu un sekas.</p> <p>Ja šā panta otrajā daļā minētā neatļautā darbība izpaudusies kā noziedzīgs nodarījums pret personas dzīvību, veselību, tikumību, dzimumneaizskaramību, brīvību, godu, cieņu vai pret ģimeni, vai nepilngadīgo, pieņemams, ka cietušajam šādas darbības rezultātā ir nodarīts morālais kaitējums. Citos gadījumos morālais kaitējums cietušajam jāpierāda.</p> <p>P i e z ī m e. Darbība šeit jāsaprot plašākā nozīmē, aptverot ne vien darbību, bet arī atturēšanos no tās, tas ir, bezdarbību.</p>	<p>who suffered the harm. The amount of compensation for moral injury shall be determined by a court at its own discretion, taking into account the seriousness and the consequences of the moral injury.</p> <p>If the unlawful acts referred to in Paragraph two of this section are expressed as criminal offences against a person's life, health, morals, inviolability of gender, freedom, honour, dignity or against the family, or minors, it is presumed that the person who suffered the harm as a result of such acts has been done moral injury. In other cases moral injury shall be proved by the person who suffered the harm.</p> <p>Note. The term act is used here within the widest meaning, including not only acts, but also the failure to act, that is, inaction.</p>
<p style="text-align: center;">Civillikums 2352¹ pants</p> <p>Katram ir tiesības prasīt tiesas ceļā atsaukt ziņas, kas aizskar viņa godu un cieņu, ja šādu ziņu izplatītājs nepierāda, ka tās atbilst patiesībai.</p> <p>Ja personas godu un cieņu aizskarošās ziņas izplatītas presē, tad gadījumā, kad tās neatbilst patiesībai, šīs ziņas presē arī jāatsauc. Ja personas godu un cieņu aizskarošās ziņas, kas neatbilst patiesībai, ietvertas dokumentā, šāds dokuments jāapmaina. Citos gadījumos atsaukšanas kārtību nosaka tiesa.</p> <p>Ja kāds prettiesiski aizskar personas godu un cieņu mutvārdiem, rakstveidā vai ar darbiem,</p>	<p style="text-align: center;">Civil Law, Section 2352¹</p> <p>Each person has the right to bring court action for the retraction of information that injures his or her reputation and dignity, if the disseminator of the information does not prove that such information is true.</p> <p>If information, which injures a person's reputation and dignity, is published in the press, then where such information is not true, it shall also be retracted in the press. If information, which injures a person's reputation and dignity, is included in a document, such document shall be replaced. In other cases, a court shall</p>

<p>tad viņam jānodod atlīdzība (mantiska kompensācija). Atlīdzības apmēru nosaka tiesa.</p>	<p>determine the procedures for retraction.</p> <p>If someone unlawfully injures a person's reputation and dignity orally, in writing or by acts, he or she shall provide compensation (financial compensation). A court shall determine the amount of the compensation.</p>
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ELSA REPUBLIC OF MACEDONIA

Contributors

National Coordinator

Maja Veljanova

National Academic Coordinator

Professor Daniela Blazevska

National Researchers

Ratko Ajcev

Sara Kajevikj

Ivan Durgutov

Vasilij Berzetski

National Linguistic Editors

Olgica Jankulovska

1. Introduction

The freedom in journalism, to a great extent, depends on the free flow of information from the media to the citizens. However, it also depends on the flow of information from the citizens to the media. The protection of the source of information is necessary in order to establish trust between the “source” and the journalist when the public is being informed on matters of public interest. In this time of modern media, a system of provision of information that will provide quick, accurate and relevant information is required. This same challenge applies for many countries, one of which is Macedonia – the existence of free media and free access to information for journalists. The truth is that this is not an easy thing to do, especially if one considers the tradition of the past, when information was reached through connections and links, or when specific information was presented to a specific target.

The right to protection of the source of information among journalists is recognised in the Macedonian legislation, as well as in international law. Statistically, more than 100 countries worldwide have implemented and protected this right in their legislations, and this right enjoys absolute protection in 20 countries.

Each person who provides information to a journalist is considered a “source”. Journalists may get information from all types of sources. When obtaining information from the protected source, the very journalist should provide appropriate protection of all other information that would probably lead to identification of the source.

In the Republic of Macedonia, the right to protection of the source of information is primarily guaranteed in Article 16, paragraph 6 of the Constitution (*Устав*). The Constitution guarantees the journalists the right to protect their sources, thereby enabling free exchange of information between citizens and journalists. This is particularly important, because the lack of such a protection may discourage the sources to help the media in the process of informing the public on matters of public interest.

The issue of protection of the source of information is also addressed in the Law on Media (*Закон за медиуми*). According to this law, the journalist has the right not to disclose the source of the information, that is, data that may reveal the source in accordance with the international law and the Constitution of the Republic of Macedonia.

When it comes to the Law on Civil Liability for Insult and Defamation, journalists are provided special protection. Namely, in such proceedings, the journalist cannot be requested to reveal the secret source of information about the facts that he/she is obliged to prove. The court may ask the defendant to disclose relevant information for the purpose of determination of the trustworthiness of the published information, without an identification of the source of information.

Furthermore, the Law on the Prevention of Corruption (*Закон за спречување на корупцијата*) prohibits any coercion, deterrence or other form of influence on the media, to publish or not to publish cases of corruption. Nobody may ask the journalist who published information on an act

of corruption, to disclose the source of the information, except during a proceeding before a court.

The European Convention on Human Rights, through article 10, provides extensive protection of the freedom of expression, including the protection of the source of information through the freedom to obtain and to transfer information or ideas, without the interference of public authorities and regardless of borders. According to this convention, which is ratified by our country, the journalist enjoys full protection in terms of the reception and the transfer of information of public interest. Courts in no event may threaten the right of journalists to protect their sources, and an appropriate indicator in this regard includes the numerous judgments by the European Court of Human Rights in favour of journalists. However, the Convention does not provide absolute right not to disclose the source. The conditions when this right may be restricted are specifically indicated.

The European Convention on Human Rights indicates that the exercise of these freedoms may be subject to specific formalities, conditions, limitations and sanctions stipulated by law, which in a democratic society, are measures required for state security, territorial integrity and public security, protection of the order and prevention of disorder and crime, protection of health or morale, reputation or rights of the others, for prevention of the spread of confidential information or for preservation of the authority and the impartiality of the judiciary. Therefrom, the court may order disclosure of the source of information if there is a prevailing demand of public interest and if the circumstances are of sufficiently vital and serious nature.

The indicated legal protections in this paper are of vital importance for the free flow of information in the society and the protection of the source of information for journalists. This encourages individuals to share information and reduces their fear. Otherwise, the public would be deprived of vital information and many relevant news, data and information about our society, the functioning of the government and politics in general, the conduct of trade, all economic and financial affairs etc. The provision of such information is what people need and what they are willing to learn at all times, and the source of such information should be protected.

2. Does the national legislation provide (explicit or otherwise) protection of the right of journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

In the Republic of Macedonia the right of journalists not to disclose their source of information is primarily provided in the highest legal act – the **Constitution of the Republic of Macedonia** (*Устав на Република Македонија*) in article 16 (paragraph 6) where the right to protect a

source of information in the media is guaranteed.¹ With this, not only the right not to disclose the source of information is protected, but also free exchange of information between citizens and journalists is allowed. The right to protect a source of information in Macedonia is regulated with several legal acts.

- **The Law on Media (*Закон за медиуми*)** guarantees this right in article 12, where it provides that a journalist has the right not to disclose a source of information, or the data that can reveal the source of information. According to international law and the Constitution of the Republic of Macedonia, however, in order to use this right, the journalist must notify the main editor.²
- With the decriminalisation of insult and defamation, **the Law on Civil Liability for Insult and Defamation (*Закон за граѓанска одговорност за навреда и клевета*)** was adopted in 2012. This Law regulates civil liability for damage to the reputation of a natural person or a legal entity caused with an insult or defamation. One of the fundamental principles that guide the law is the guarantee of freedom of expression and information as one of the essential foundations of a democratic society. This law applies to everyone, not only to journalists, however the Law on Civil Liability for Insult and Defamation provides special protection for journalists. According to this law, in court proceedings for an insult or defamation that a journalist might have committed, journalists cannot be requested to reveal their secret source of information in regard to the facts that he/she is obliged to prove.³ Article 12 (paragraph 2) provides that the Court may request from the defendant to disclose relevant information in order to determine the authenticity of the published information, without identifying the source of the information. Paragraph 3 of the same article provides that the refusal of the defendant to reveal the secret source of information cannot be interpreted as any admission of guilt, or based on the conclusion that it did not prove the truthfulness of the facts.
- **The Law on Prevention of Corruption (*Закон за спречување на корупцијата*)**. Investigative journalism is an important segment and a main ally of the society in detection of these occurrences. For this reason, with the adoption of the Law on Prevention of Corruption, it was processed and a part of the law that allow protection for the Journalists when they detect corruption scandals.⁴ According to article 56 of this law, any enforcement, prevention or other form of influence on media to publish or not to publish information on a case of corruption, is prohibited. Nobody can request from a journalist who published information on acts of corruption, to reveal the source of information, except in proceedings before court. Article 65 provides a fine of 500 to 1,000 Euros in MKD for a person who performed coercion or in any manner prohibited

¹Constitution of the Republic of Macedonia (“Official Gazette” no.52/1991).

²Law on Media (“Official Gazette” no. 184/2013 and 13/2014).

³Law on Civil Liability for Insult and Defamation (“Official Gazette” no. 143/2012).

⁴Law on Prevention of Corruption (“Official Gazette” no.28/2002, 46/2004, 126/2006, 10/2008, 161/2008, 145/2010, 47/2015, 145/2015).

to publish or not to publish information on cases of corruption, and to a person who hinders access to sources of information, contrary to Article 56 of this law.

In this context, it is necessary to mention the 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,⁵ which predicts that domestic law and practice of the Member States should provide explicit and clear protection of the right of journalists not to disclose information that identify the source in accordance with Article 10 of the European Convention on Human Rights and the principles established by it, which should be regarded as minimum standards in terms of the law.

In order to define the term “journalistic source”, first we should make a distinction between investigative journalism and daily reporting. The reporting on daily events usually does not have a research component because it is based on information derived from official institutions or as a response to official announcements. Daily reporting mainly refers to events where journalists themselves or the interviewed witnesses testify, and journalists rarely resort to more detailed research than what is said or seen. The texts are mostly based on one source, or anonymous sources, and there is no answer to the questions why and how, but only to the questions who, what, where and when. Investigative journalism does not imply mere reporting on what others communicate (governmental institutions, political parties, companies etc.). It requires more comprehensive and substantial involvement of the journalist, who on his own initiative, goes beyond what is said and seen, in order to expose more facts and to discover something new, previously unknown to the public. The research story aims to initiate a certain action, to cause changes, to disclose something that is done in an inappropriate way, for which the public was not informed.

In any case, the **Journalist Guide** (*Прирачник зановинари*) and the **Journalist Code** (*Новинарски кодекс/законик*) provide the elements on the basis of which we can get to the definition of this right.⁶ As a rule:

- The source of information should be identified unless it can affect the safety of the source, or due consideration to a third party;
- One must be critical in the selection of the source and one should always check that the provided information is correct;
- A good practice is to insist the sources to be diverse and relevant while they are being chosen;

⁵Recommendation no.R (2000) 7 of the committee of ministers to member states on the right of journalists not to disclose their sources of information, Adopted by the Committee of Ministers on March 8 2000, at the 701st meeting of the Ministers' Deputies [http://www.ravnopravnost.gov.rs/jdownloads/files/COE_R%20\(2000\)%207.pdf](http://www.ravnopravnost.gov.rs/jdownloads/files/COE_R%20(2000)%207.pdf) .

⁶ <http://civil.org.mk/wp-content/uploads/2013/05/Journalist-Manual-inside-MK-4web.pdf> and <http://www.znm.org.mk/drupal-7.7/mk/node/440> .

- Special attention should be dedicated when it comes to information from anonymous sources, information from sources which themselves offer exclusivity, as well as information provided by sources in exchange for compensation;
- The name of the person who provided confidential information shall not be disclosed except with the express consent provided by this person;
- When reporting is a direct viewpoint, journalists are obliged to publish in quotes. Direct references/citations must be correct;
- Journalistic research should be carefully conducted;
- Special attention should be dedicated to people who are not expected to be aware that their statements could have consequences;
- Emotions or feelings of people, their ignorance or inability of reasoning, should never be abused;
- Hidden camera/microphone or false identity may only be used in special circumstances. These assets can be used only if such methods are the only way to identify cases that are of crucial importance for the society.

In our opinion, the fact that the code does not enumerate the special circumstances is a big disadvantage.

As a rule, journalists do not pay to the sources or interviewees for the provided information. It is incompatible with good practice to introduce a payment system in order to attract people because of two reasons: because of the invasion of privacy of others or disclosure of sensitive personal information.

According to the laws indicated above, we can conclude that our national legislation on this issue is harmonised with the European Convention on Human Rights. This is also observable in article 3 of the Law for Civil Liability for Insult or Defamation, which provides that if the court, by applying the provisions of this law, cannot resolve a certain issue related to the determination of liability for an insult or defamation, or considers that there is a legal emptiness or conflict of provisions of this law with the provisions of the ECHR, it shall apply the provisions of the ECHR and the views of the European Court of Human Rights, contained in its judgments.

On this basis, we can say that the laws are good and they provide sufficient protection of journalists in regard to disclosure of the sources of information, however the problem arises in their practical application and implementation, which is observable in the case against the journalist Tomislav Kezarovski that shall be highlighted below.

The case against the journalist was waged under the name “Liquidation”. Kezarovski was accused because he revealed the identity of an allegedly protected witness “Birch” for the murder case from 2005 in Oreshe, a village near Veles, in two texts published in the magazine “Reporter 92” eight years ago. During the investigation, the police, the prosecutors and the investigative judge questioned him about the source of the information he published in the magazine “Reporter 92” or who gave him the documents - minutes of the hearing of the protected witness? He was sentenced to four years and six months in prison, even though three key issues were not clarified. First, does the witness in the case *Oreshe*, Zlatko Arsovski, really had the

status of a protected witness as it is claimed by the prosecution and the court, or by his own admission, agreement for protected witness he signed in January 2010, two years after publishing the texts? Second, was the witness Arsovski genuine, authentic or false witness in the case *Oreshe* set by the police, as he himself said? And third, whether, in light of all these considerations, and controversy about the case *Oreshe*, the journalist Kezarovski represented the public interest when he published information that allegedly revealed his identity, writing it exactly – do the people from the police sets the witness? Because of pressure from the international community and journalists' associations, the higher court reduced his sentence to 2 years. In this context, the International Federation of Journalists and the European Federation of Journalists condemned the arrest of Tomislav Kezarovski and they stated that the arrest is contrary to his right as a journalist to provide information of public interest.

This judgment is not only a violation of Article 16 of our Constitution, but also of Article 10 of the ECHR. This, we can conclude from the case *Goodwin v The United Kingdom*, where the journalist published information about the financial condition of a prominent company in the UK. The company requested the court to issue an order that would oblige a journalist to disclose the source of information. Goodwin refused it and was fined £5,000 for disobeying a court order. After the complaint of Goodwin, the Strasbourg Court held that this infringed the right to freedom of expression, with the explanation that the published data about the financial situation of the company is of greater public interest than its reputation.⁷

What is relevant in our case is the standard which established the Court “If journalists are forced to reveal the source of information, their role as "guardians of the public" may be seriously undermined and it would have a chilling effect on the flow of information”, in the abovementioned case, if we consider the fact that during the investigation, the police, the prosecutors and the investigative judge questioned him about the source of the information he published in the magazine.

In this context, after the process against the journalist Tomislav Kezarovski, the retired Professor of Constitutional Law, Svetomir Shkarich, stated: the Constitution guarantees the right to information, and guarantees the right to protect a source of information. However Kezharovski is held accountable before the law, and he is condemned. In fact, this is inadmissible, because he has the constitutional right to information and the right not to disclose the source of the information. If journalists disclose their sources, then no journalism exists.⁸

⁷ Goodwin v UK, app no. 17488/90, Judgment of 27.03.1996 ([http://hudoc.echr.coe.int/eng#{"fulltext":\["goodwin"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-57974"\]}](http://hudoc.echr.coe.int/eng#{)).

⁸<http://www.telma.com.mk/node/8851>.

3. Is there a provision, in domestic law, that prohibits a journalist to disclose his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

Although the protection of the source of information is the first and the most important rule in the journalistic profession (which is also demonstrated by the judgment of the European Court of Human Rights in the case of the British journalist Goodwin, who in 1996 published information about the financial condition of a prominent company in the UK), however, in some cases this rule may be prohibited.⁹ This issue is not precisely regulated in our legislation. According to Article 8 of the Constitution of the Republic of Macedonia, one of the fundamental values of the Constitution includes human rights that are acknowledged by the international law and the Constitution of the Republic of Macedonia. In that context, the matter regarding the prohibition to publish certain information is elaborated in some national laws and ratified conventions, such as the following:

1) The Law on Media (*Закон за медиуми*) prohibits the journalists to publish or broadcast content in the media that may endanger national security, may foster violent overthrow of the constitutional order of the Republic of Macedonia, may refer to military aggression or armed conflict, may incite or spread discrimination, hostility or hatred based on race, sex, religion or nationality.

2) The Law on Prevention of Corruption (*Закон за спречување на корупцијата*) in Article 65 provides penalties in an amount between 500 and 1000 Euros for anyone who performs enforcement or in any way prohibits publishing or non-publishing of information about a case of corruption, thereby hindering access to sources of information about corruption.

3) The Criminal Law (*Кривичен Законик*) in Article 281 provides that the person which will tell, hand over or otherwise make available information which by law are declared confidential to an unauthorised person, and who acquires such information with the intention to hand over to an unauthorised person, shall be punished with imprisonment of one to five years. In paragraph 3 of the same article, it is provided that if the information from the paragraph 1 are of particular importance or if disclosing or collection the information was done because of carrying them abroad, shall be punished with imprisonment of one to ten years.

4) In the Labor Law (*Закон за работните односи*) in Article 35 it is provided that employee may not use for their own purposes or to give to a third party information that are considered confidential by the employer. In paragraph 2 of the same Article it is provided that he employee is responsible for issuing a trade secret, if he knew or should have known of the information status.

⁹[http://hudoc.echr.coe.int/eng#{"itemid":\["001-60596"\]}](http://hudoc.echr.coe.int/eng#{).

In Article 82 it is provided that, the employer can cancel the employment contract without a notice period in case of violation of the working order and discipline or failure to fulfill work obligations stipulated by this or other laws, collective agreements, rules on working order and discipline and the employment contract, especially if the employee embarked business, official or state secret.

Although, as mentioned above, the European Convention on Human Rights provides that courts in any case should not threaten the right of journalists to protect their sources, however it does not give an absolute right not to disclose their source. Specifically, there are specific conditions when this right must be limited. The European Convention on Human Rights indicates that the realization of freedom may be subject to such formalities, conditions, restrictions or penalties as provided by law, which represent some necessary measures in a democratic society. This right can be limited in three cases:

- When it should protect the public interest (national security, territorial integrity, public safety, prevention of disorder or crime, protection of health or morals);
- When the goal is to protect individual rights (protect the reputation or rights of others, preventing the disclosure of confidential information);
- Restrictions which are necessary in order to maintain the authority and the impartiality of the judiciary.

Hence, the court may order disclosure of the source of information if there is a prevailing public interest and if circumstances are of sufficiently serious nature. It is important to note that journalists should primarily be informed by the competent authorities about their right not to disclose information that is identifying a source, and about the limits of this right before the disclosure request. If journalists are forced to disclose their sources of information, despite of the absence of any of the three characteristics indicated above, their role as “guardians of the public” may be seriously undermined. It would have a chilling effect on the information flow.

The problem (the practical application of the law and its implementation) that we noted in the first question is manifested in this issue as well. We can use the case of the journalist Natasha Janchikj, which is not taken to court, however it is a strong indicator of the situation with journalists on one side and “powerful fishes” on the other side. The case actually starts with the publication of a text with negative context in regard to an influential national company. The company sought to reveal the source through which the journalist reached the information (because the source is an employee in the company), otherwise it was facing a criminal complaint. The main editor asked the journalist to reveal the source, however she refused, so later on she was fired.¹⁰ It is undisputed that the law is violated and this tells us that very often opinions and other characteristics are considered, which are not provided in the laws that I mentioned above.

¹⁰Statement of the journalist Natasha Janchikj
(<http://infomax.mk/wp/?p=22794#>).

4. Who is a “journalist” according to the national legislation? Do you consider that the definition on the purpose of protection of journalistic sources is restricted? What is the scope of protection of other media actors? Is the protection of journalists’ sources extended to anyone else?

The national legislation of the Republic of Macedonia, apart from the Media Law, does not provide a specific definition of a “journalist” in another regulation. In this context, we should note that there is no generally accepted definition of a journalist in Europe.

The Law on Media, as mentioned before, in Article 2 (paragraph 5) defines that a journalist is a person who performs activities of collection, analysis, processing, and/or classification of information published in the media, and is employed by the media publisher or has concluded an agreement with the media publisher, or is a person who performs journalistic activities as an independent profession (a free journalist).

In the next paragraph (paragraph 6) of the same law, there is a provision which says that the journalist has the right to refuse to produce, write or take part in the compiling of the text whose content is against the professional rules of the journalistic profession and in such case he/she has the obligation to submit his/her own written statement to the editor.

A definition of the term journalism is provided in the **Statute of the Association of Journalists (Статут на Здружението на новинари)** of Macedonia. According to Article 17 of the Statute, the term “journalism” means:¹¹

- Published written, spoken, pictured or online articles: written reports, news, commentary (note or review, social chronicle article, review) criticism, cartoon, essay, interview, reportage, travelogue, hyphens;
- Text arrangement and editing;
- Editorial work in editorial rooms on print and broadcast media, news agencies, and web portals;
- Provision of information by means of photography, electronic image, movie and cartoons which are published by professional photographers, cameramen and cartoonists, but only if this is their main occupation.

On this basis, we can conclude that a journalist would be a person who:

- Publishes written, spoken, pictured or online articles, reports, news, commentary, criticism, cartoons, essays, interviews, stories, travelogues, hyphens;
- Arranges and edits texts;

¹¹<http://www.znm.org.mk/drupal-7.7/mk/docs/statut>.

- Performs editorial work in printed and electronic media, news agencies and internet portals;
- Informs by means of photography, electronic image, film, cartoon etc.

This, not so long, definition may be updated with the provision of the journalists guide in the section “the principles of conduct” which provides that a journalist is a person who transmits information, ideas and opinions, and has the right to comment. Respecting the ethical values and professional standards when transmission of information is conducted, the journalist is honest, objective and accurate. The right and duty of journalists is to strive to prevent censure and distortion of news. Following their role in building democracy and civil society, journalists must respect human rights, dignity and freedom, they must respect pluralism of ideas and attitudes, they must contribute to the strengthening of the rule of law and the control of the government and other entities of public life.

On the basis of what is written above, the members of the national team of ELSA Macedonia, consider that the definition provided in the Law on Media, and the definitions derived from other regulations are quite limited for the purposes of protection of journalistic sources, because they do not mention journalistic sources in any particular point, or protection of these sources. According to the Law on Media, as it is mentioned in the first question, the journalist is guaranteed the right not to disclose the source of information, however in the main, poor definition of what the term journalist should represent, journalistic sources are not mentioned anywhere in particular, nor the protection of such a source.

In regard to the question, who can be a journalist in our country, it is very important to emphasise that journalism in our country is not a regulated profession. Accordingly, every person in the Republic of Macedonia who wants to be engaged in this activity, can be a journalist. Regarding the membership in the Association of Journalists of Macedonia, according to Article 11 of the Statute of the Association, a member of the Association of Journalists can be every journalist in the country who meets the requirements on membership in accordance with this Statute and other documents of the Association, so in that direction the Association has regular, honorary and associate members. According to Article 12 of the same Statute, a regular member can be a journalist who is engaged in journalism for at least one year. Associate members may be persons employed in public services, educational, scientific, cultural, business and other institutions, publicists, etc. who are occasionally engaged in journalism. Honorary member can be selected only by a majority decision of the Board members.

In regard to the other media actors, or whether the protection of sources expands to them, we think that the right to protection of journalists' sources must be applicable not only to journalists. This right must be extended to any other individual who is professionally related to the specific journalist, and as a result of this relation, he/she is informed and familiar with all the data that originate from specific sources.

The Law on Media in article 12 (paragraph 1) provides that the Journalist has the right not to disclose the source of information or data that may reveal the source in accordance with the international law and the Constitution, as we mention in the first question. Relevant for this question is paragraph 2 of the same article which says “the right under paragraph (1) of this Article shall apply to other persons who due to their professional relationship with the journalist

are familiar with the data that may reveal the source, through the collection, editorial framing or disseminated information”. With that provision we can conclude that we have accepted the recommendations of the European Union that overlook the adoption of legislation that provides adequate protection of journalists and other whistle-blowers/informants/informers and the provision of legal protection of the right to non-disclosure of sources of information.

5. What are the legal safeguards for the protection of journalistic sources? How are the laws being implemented? How are the legal safeguards combined with self-regulatory mechanisms?

Every information given to the journalist is the source the needs to be protected. Having in mind the importance of the journalistic source and the fact that it needs to be protected, Republic of Macedonia has regulated this topic in several Laws which are the legal safeguards for the protection of journalistic sources and those are:

The Constitution of the Republic of Macedonia was adopted by the Parliament of the Republic of Macedonia on November 17 1991. A handful of countries in Europe have set the highest recognition of the importance of protection of journalistic sources by including this as a constitutional right. The Republic of Macedonia is one of them. One of the legal safeguards for the protection of journalistic sources is contained in Article 16 of the Constitution which states “The right to protect a source of information in mass media is guaranteed”.¹² With this article, the Constitution guarantees the right for protecting the source of the information of the journalist. This article also makes the communication between journalists and the citizens easier, because it gives courage for movement of the information from the ones that have it to the journalists who can publish it.¹³

Another legal safeguard is contained in the Law on Media. The Law of Media contains the foundation principals and conditions that every media needs to take in consideration while working. One of the topics that is being discussed in this Law is the protection of journalistic sources and in Article 12, it is stated that journalists have a right not to disclose a certain source of information in accordance with the international law and the Constitution of the Republic of Macedonia. Before publishing an information whose source is not disclosed, the journalist must inform the responsible editor in the media.¹⁴

This institute is as well regulated in the Law on Civil Liability for Insult and Defamation¹⁵ in Article 12 in which it is noted that by a journalist who is accused in a procedure for civil liability for insult and defamation it cannot be asked from him to disclose the secret source of the information about the facts that he needs to prove in the procedure. The court can request

¹²Constitution of the Republic of Macedonia (“Official Gazette” no.52/1991).

¹³ <http://www.pravdiko.mk/zakonska-ramka-na-pravoto-na-zashtita-na-izvorot-na-informatsii/>

¹⁴Law on Media (“Official Gazette” no. 184/2013 and 13/2014)

¹⁵Law on Civil Liability for Insult and Defamation (“Official Gazette” no.143/2012)

information which are relevant and will lead to proving the truth of the information by the accused without disclosing the source of the information itself. If it is asked by the accused to disclose the source of the information and he denies doing that- that fact cannot be taken as confession of guilty.¹⁶

The implementation of the laws in the Republic of Macedonia, in general, is problematic, which means that there are good laws, but sometimes there seem to be laws that are written only in books, and not laws in practice. In other words, there is a lot to be done in this field the purpose of which is appropriate implementation of the laws, but speaking on the field of protection of journalistic sources we can conclude that the laws are respected. One of the latest cases dealing with this topic is the case “Affair about identity cards” (Афера за личните карти). In this case, one journalist whose name is Ljubisha Arsikj (Љубиша Арсиќ) and works in Focus published an information in which he claims that there are 3,000,000 fake identity cards which have been made in secret locations in Shuto Orizari and Shtip.¹⁷ Ljubisha Arsikj is a journalist who has been writing about that topic and as well as researching on that field (fake identity cards in Republic of Macedonia), so as a result of that the secret source of the information has contacted him and given a set of 105 fake identity cards. Ljubisha has immediately given the fake identity cards to the authorities and later on he was called as a witness in the procedure that was going on about that issue. He says that most of the questions that the police has asked him were about the source of the information, but that he didn't disclose the source. The source has told Ljubisha that the fake identity cards have been used for elections and that crimes related with elections have been made. Some of the cards have had same picture and different address just for the elector to have the right to vote several times. The source has given many arguments to Ljubisha and he relied on them, so he published that information. The Prosecutor has asked Ljubisha about the source of the information, but he didn't disclose it.¹⁸ In the Republic of Macedonia, there no formal regulated procedure in which you can request disclosing the source of the information. However, the journalists can be called as witnesses in procedures and can be asked to disclose the source of the information, but they can't force him to disclose the source. Everything is up to the journalist. If he wants- he can disclose the source and if not, he can't be forced to do it as noted in the legal documents in which this topic is regulated. Additionally, there is no written rule about voluntarily disclosing the source by the journalist, but in the practice there is a general rule that he needs to obtain consent from the boss.

The Association of Journalists in Republic of Macedonia has conducted a body, The Council of Honour (Совет на честа). The Council is self-regulatory mechanism which cares about the appreciation of the Journalist Code. There is a procedure in which if someone thinks that someone (a journalist or the place where he works) doesn't respect the principles noted in the Journalistic Code can file a complaint to the Council. One of the principles is the one about non-

¹⁶<http://www.pravdiko.mk/zakonska-ramka-na-pravoto-na-zashtita-na-izvorot-na-informatsii/>

¹⁷<http://novatv.mk/arsikj-izvorot-prenese-vazhni-informacii-za-30-000-lazhni-lichni-karti/>

¹⁸ <http://proverkanafakti.mk/dimitrovski-obvinitelot-barashe-od-novinarot-da-go-otkrie-izvorot-za-falsifikuvanite-lichni-karti/>

disclosing of the source of the information. After that compliant is sent, the Council takes measures to correct the mistake that has been done (if any).¹⁹

6. Are the limits of non-disclosure of information in the respective national legislation, in line with the Recommendation No R (2000) 7? What procedures are being applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do authorities first search and apply alternative measures, which adequately protect their respective rights and interests, and at the same time they are less intrusive in regard to the right of journalists not to disclose information?

The respective national legislation and the limits of non-disclosure of information within the legislation are mostly in line with the Recommendation No R (2000) 7.

Firstly, in that recommendation is provided that the right to freedom of expression and information are one of the essential foundations of a democratic society and one of the basic conditions for its progress and the development of every individual. In that line the Law on Media in article 2 provided that one of the target of this Law is to provide freedom of expression and free medias²⁰.

Next, in the recommendation is provided the need for democratic societies to secure adequate means of promoting the development of free, independent and pluralist media. Article 4 of the Media law guaranties this rights, especially free media, independence in the media, freedom of gathering, research, publishing information and pluralism in the medias. With that, we can conclude that our legislation on that issue is in line with the recommendation no. R(2000)7, but there is a big problem with this provision in reality. In last years the medias are fully dictated from the government party, so this article that provide independence and freedom of medias is just a dead word in a letter which is not viewable in the reality and practice.

As regards to disclosure of information, the recommendation provide that that the protection of journalists' sources of information constitutes a basic condition for journalistic work and freedom as well as for the freedom of the media and that there is an obligation not to disclose their sources of information in case they received the information confidentially. As it is mention in the first question, in Macedonia this right is protected in many Laws. Firstly this right is guaranteed in the article 6, paragraph 12 in the Constitution of the Republic of Macedonia.

¹⁹

<http://www.znm.org.mk/drupal-7.7/sites/default/files/Priracnik%20za%20etika%20vo%20novinarstvoto%20maj%202012.pdf>

²⁰ Law on Media ("Official Gazette" no. 184/2013 and 13/2014).

Then, this right is guaranteed in the Law on media in article 12, which provides that the journalist has the right not to disclose a source of information, or the data that can reveal the source of information, The Law on preventing of corruption which provided that nobody can request from the journalist who published information on acts of corruption, to reveal the source of information, except in proceedings before court²¹ and The Law for civil liability for insult and defamation in article 12 which provides that the Court may request from the defendant to disclose relevant information in order to determine the authenticity of the published information, without identifying the source of the information.²² On that basis, we can conclude that our legislation on this issue is in line with the recommendation.

The recommendation also provided that the exercise by journalists of journalistic right not to disclose their sources of information carries with it duties and responsibilities as expressed in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. As it is mention in the first question, our legislation is harmonised with the ECHR, but the problem is in their practical implementation.

The limits are indicated in a such a way that the right of journalists not to disclose their sources can be limited in an event when there are exceptional circumstances such as when reasonable alternative measures for the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure. Another limitation is the situation when the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that an overriding requirement of the need of disclosure is proved, the circumstances are of a sufficiently vital and serious nature, the necessity of the disclosure is identified as responding to a pressing social need, and member states enjoy a certain margin of appreciation in assessing this need, however this margin goes hand in hand with the supervision by the European Court of Human Rights.

As regards to the issue about using alternative measures from the authorities to protect the right of the journalists, there is not a specific provision that predicts this. With the next changes of the Law on media it is planned to be insert new chapter that will be named “Protection of a journalist”. Article 8 of this Law will provide that:

- (1) Every journalist must be protected against physical threats or attacks.
- (2) Where there are serious indications that the journalist may be jeopardised its safety should be provided police protection.
- (3) The public prosecutor and the courts in the country timely and appropriate act in cases where the journalist got physically threatened or physically attacked.

²¹ Law on Prevention of Corruption (“Official Gazette” no.28/2002, 46/2004, 126/2006, 10/2008, 161/2008, 145/2010, 47/2015, 145/2015.

²² Law on Civil Liability for Insult and Defamation (“Official Gazette” no. 143/2012).

With this we can see that there will be provided a general protection of the journalist as regards to the possible attacks, but in the national legislation there is not provided a specific provisions that regulates taking the alternative measures from the authorities to protect the journalist rights, especially the right of journalists not to disclose information, as it is provided in the Resolution that is adopted from the Security Council of the United Nations²³ and in the jurisdiction of the European Court of human Rights.²⁴

These requirements are in line with adequate protection of the respective rights and interests and are being applied in all stages of any proceedings where the right to non-disclosure might be invoked.

7. In the Recommendation No R (2000) 7, the following principles should be respected when there is a stated necessity of disclosure: absence of reasonable alternative measures, outweighing legitimate interest (protection of human life, prevention of major crime, defense of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the disclosure outweigh the interest in the non-disclosure?

The motion or request to initiate any action by competent authorities aimed at disclosure of information wherewith a source is identified, should only be introduced by persons or public authorities that have a direct legitimate interest in the disclosure.

Journalists should be informed by competent authorities of their right not to disclose information wherewith a source is identified, as well as of the limits of this right before a disclosure is requested.

Sanctions against journalists for not disclosing information that identify a source should only be imposed by judicial authorities during court proceedings which allow a hearing of the concerned journalists in accordance with Article 6 of the Convention.

Journalists should have the right to an imposition of a sanction for the non-disclosure of their information wherewith a source is identified as a source, reviewed by another judicial authority.

In an event when journalists respond to a request or an order to disclose information where a source is identified, the competent authorities should consider the application of measures to limit the extent of a disclosure, for example by excluding the public from the disclosure with due respect to Article 6 of the Convention, where relevant, and by respecting the confidentiality of such a disclosure themselves.

²³ <http://lokalno.mk/on-usvoi-rezolucija-za-zashtita-na-novinarite/>

²⁴ Thoma v. Luxembourg, judgment of 29.03.2001, no. 38432/97 &58

8. In the light of the case law of the European Court of Human Rights, how do national courts apply the respective laws in regard to the right to protect sources?

The right to protect the source of information is recognized in international law as well as is in the law in Macedonia. Any person who provides valuable information to a journalist is considered a source of information. The legal protection of the source of information begins from the highest legal act in Macedonia, The Constitution (*Устав*) in article 16 paragraph 6 which guarantees the right to protect a source of information in the media.²⁵ This gives journalists the ability to protect their source of information. The legal protection of the source provides the sources a freedom of provision of information to the journalist, whereby this information is of interest to the people and the public.

The media in Macedonia and their work are regulated with the Law on Media, where the following is indicated in Article 12 “the journalist has the right not to reveal the identity of the person who is their source of information, or to give information that can be used in order to find the identity of the source, guaranteed by the international law and the Constitution of the Republic of Macedonia”.²⁶ In addition, this right provides protection to a person who is not a journalist, however who works with the media or in the media, to protect the identity of the source. The journalist who is not going to publish the source of information, is obligated to inform his editor of his intent (Law on Media, article 12 paragraph 2).

The legal protection for non-disclosure of their sources is particularly important for obtaining information from the involved people, without being afraid for their jobs, the jobs of their family members, lawsuits for an insult or defamation. The politicians in Macedonia often take the journalists to court because they think that the news are not true, so there are numerous lawsuits issued by politicians against journalists, and if they were informed about the source of that information, this source would be sued same as the journalist. According to a research, politicians have the role of plaintiffs who sue journalists or other people who are not politicians, in 25 cases or 58% of all legal cases for an insult or defamation.²⁷

Crime committed through a newspaper, radio, television, etc., the editor will be held criminally responsible, if the author of the information remains unknown (article 1 paragraph 1 of the Criminal Code, Article 26), thus the Criminal Code (*Кривичен законик*) provides the right of a journalist or an editor to protect the source of the information even in an event of a criminal offence produced by this information.²⁸ In this case, if the statement is false, abusive or

²⁵Constitution of the Republic of Macedonia – Official Gazette of the Republic of Macedonia number 1/1992.

²⁶Law on Media, 2013.

²⁷ Report, Politicians and Court Cases of Defamation, January 2013-2015, published 2015.

²⁸Criminal Code (Official Gazette of the Republic of Macedonia no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 87/07, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 42/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14 and 196/15).

defamatory, pursuant to the Constitution and the law, the journalist has the right to protect the source of the information. In an event when the editor or the journalist reveals the identity of the source in the first instance of the court proceeding, it will have no effect in the procedure and will not affect the final decision. If the author of the text is unknown or the author's identity is protected, in regard to criminal responsibility the criminal acts of Macedonia regulate that the responsibility is transferred to the editor.²⁹

In order to enrich this research on issues that are beyond the legal norms in Macedonia, I will indicate a court example from the current topic.

8.1 Operation Liquidation

In this case it was a matter of a crime where judges, public prosecutors, lawyers, and a journalist, committed several crimes such as accepting bribes, misuse of official position and authority, unauthorised publication of information and data of a protected witness and other criminal acts. In particular, the journalist in this case was charged for revealing the identity of a protected witness, and he was in custody. During the procedure, the journalist was repeatedly been queried by the police, the prosecutor and the investigative judge in order to indicate the protected source of the information which he published in the newspaper "Reporter 92" or who gave the recorded documents from the investigative judge from the hearing of the protected witness.³⁰ However, during the procedure the journalist did not reveal the identity of the source of his information, because he said that the intention was to reveal that there was an illegal act in the court procedure, and not to reveal the identity of a protected witness, which he did not do in his newspaper. The journalist was arrested in May and was detained for 6 months without clear judicial grounds, despite protests by non-government organisations. Then he was moved to a house arrest in November.³¹ The journalist was initially sentenced to 4 years and 6 months for unauthorised disclosure of information and data about the protected witnesses and members of their families, however in the end he was sentenced to two years in prison, with a judgment of the Appellate Court.³² This does not seem to be in conflict with the right of a journalist provided in Article 12 of the Law on Media where it is indicated that a journalist has the right to refuse to reveal the identity of the source of information in accordance with international law and the Constitution, a single objection would be that the investigative judge should not have asked questions with the intent to find out the identity of the source, but only to establish the credibility of the information.

²⁹Commentary of the Criminal Code of the Republic of Macedonia by Professor VladoKambovski, 2011.

³⁰ Newspaper Nova Makedonija-Www.novamakedonija.com.mk /NewsDetal.asp?vest=610131032302&id=9&setIzdanie=22900.

³¹Notes for the work of courts and media according to domestic and foreign organizations, 2014 – Association of Journalists of Macedonia.

³² Legal site „academic,, -<http://www.akademik.mk/presuda-likvidatsija-sudot-gi-proglasi-site-osummina-obvineti-za-vinovni-najvisoki-zatvorski-kazni-dobija-zafirov-i-kezharovski-4/>.

9. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable, and do they include clear legislative norms in the context of surveillance and anti-terrorism provisions?

The Constitution of the Republic of Macedonia, as the supreme law of the country, guarantees protection of confidential information, freedom and confidentiality of correspondence and other forms of communication. However, there are certain exceptions to this generally applicable rule. Under the conditions and in accordance with the procedure prescribed by law, non-application of the principle of inviolability of correspondence and other forms of communication may be authorised, in cases where it is indispensable to prevent or to reveal criminal acts, to a criminal investigation or where required in the interests of the security and the defence of the Republic³³.

A criminal act is defined as an act performed by a human, proclaimed as a criminal act by law, where a punishment or other sanction is stipulated for its perpetrator.

A criminal investigation is a stage of a regular criminal proceeding and it is initiated against a person when a reasonable doubt exists that the person has committed a crime.

The exception to the right to privacy is further regulated in the Code of Criminal Procedure (*Закон за кривична постапка*) (Official Gazette of the Republic of Macedonia no. 150/10, 5/11 and 100/2012), which provides special investigative measures as a part of the established criminal procedure.³⁴ These measures have a specific purpose and can only be implemented in exceptional circumstances – when it is likely that by using them, the authorities will be able to obtain data and evidence that are necessary for a successful criminal procedure, and which cannot be obtained by other means.

There are several investigative measures that may be ordered, including but not limited to:

- Monitoring and recording of telephone and other electronic communications;
- Surveillance and recording in homes, closed up or fenced space that belongs to the home or office space designated as private or in a vehicle and the entrance of such facilities in order to create the required conditions for monitoring of communications;
- Secret monitoring and recording of conversations with technical devices outside the residence or the office space designated as private;
- Secret access and search of computer systems;
- Inspection of telephone or other electronic communications.

³³Amendment 19, Constitution of the Republic of Macedonia.

³⁴Article 252, paragraph 1 – Code of Criminal Procedure (Official Gazette of the Republic of Macedonia no. 150/10, 5/11 and 100/2012).

The special investigative measures may be ordered when there are grounds for suspicion that a crime has been committed. However, the list of crimes³⁵ for which special investigative measures can be ordered is limited, mostly to severe crimes such as: organized crime, corruption, money laundering, human trafficking, drug trafficking, crimes against the state, crimes against humanity and international law.

Regarding the persons against whom special investigative measures may be ordered - pursuant to the conditions listed above, the order may pertain to a person who:³⁶

- committed a criminal offense as stipulated in article 253 of the Code of Criminal Procedure;
- undertakes activities in order to commit a criminal offense as stipulated in article 253 of the Code of Criminal Procedure;
- is preparing the commission of a criminal offense as stipulated in Article 253 of the Code of Criminal Procedure, when such preparation is punishable according to the provisions of the Criminal Code.

The order may also pertain to a person who receives or relays shipments to and from the suspect or if the suspect uses his or her communication device.

The measure Surveillance and recording in homes, closed up or fenced space that belongs to the home or office space designated as private or in a vehicle and the entrance of such facilities, in order to create the required conditions for monitoring of communications, may only be directed towards the suspect and implemented only in the home of the suspect. The measure shall be allowed in other persons' homes, only if it is based on a reasonable suspicion that the suspect resides there.³⁷

As soon as the objectives, for which the special investigative orders have been established, have been achieved, or the reasons due to which they have been approved cease to exist, the entity that issued or extended the order shall be obliged to immediately order termination of the measures.³⁸ This provision ensures that the measures will last only as long as it is really necessary – not longer than necessary for the objectives to be achieved.

Additionally, there are certain provisions which aim to ensure time limits for the existence of the measures, and therefore strengthen the protection of the rights that the suspect is entitled to.

³⁵Article 253 – Code of Criminal Procedure (Official Gazette of the Republic of Macedonia no. 150/10, 5/11 and 100/2012).

³⁶Article 255 - Code of Criminal Procedure (Official Gazette of the Republic of Macedonia no. 150/10, 5/11 and 100/2012).

³⁷Article 268, paragraph 1 - Code of Criminal Procedure (Official Gazette of the Republic of Macedonia no. 150/10, 5/11 and 100/2012).

³⁸Article 261 - Code of Criminal Procedure (Official Gazette of the Republic of Macedonia no. 150/10, 5/11 and 100/2012).

Any special investigative measure may not last longer than 4 months.³⁹ An extension for a maximum additional period of up to 4 months, regarding the measures referred to in Article 252, paragraph 1, items 1-4 of the Code of Criminal Procedure may be approved by the preliminary procedure judge.⁴⁰

This period may be additionally extended for another 6 months, for criminal offenses that entail a prison sentence of at least four years and which are suspected to have been committed by an organised group, gang or other criminal enterprise, upon a written request by the public prosecutor, and based on the assessment of the usefulness of the data obtained through the use of the measure and with a reasonable expectation that the measure may continue to result with data of interest for the procedure.⁴¹

Some of the special investigative measures, specifically those referred to in article 251, paragraph 1, items 9-12 of the Code of Criminal Procedure, may be extended until the goal for which the measure has been introduced is fulfilled, but until the completion of the investigation at the latest.⁴²

Since monitoring and recording of telephone and other electronic communications is one of the frequently used measures for investigation because of its suitability and additionally due to the acknowledgement of the fact that this measure is basically an invasion of privacy, the use of this measure is regulated under a procedure stipulated with a separate law - Law on Interception of Communications (Official Gazette of the Republic of Macedonia no.121/06, 110/08, 4/09 and 116/2012).

The criteria on the use of electronic surveillance, consistent with the provisions of the Code of Criminal Procedure are as follows:⁴³

The court may order interception of communications for a person for whom there is a reasonable doubt that he/she is preparing to commit a criminal act against the state, armed forces or against humanity and international law.

Apart from these cases, the court may order interception of communications when an armed attack against the Republic of Macedonia is being prepared, incited, organised or participated in, or its security system for performance of its own functions is being disabled, if there is no other

³⁹Article 258, paragraph 1 - Code of Criminal Procedure (Official Gazette of the Republic of Macedonia no. 150/10, 5/11 and 100/2012).

⁴⁰Article 258, paragraph 2 - Code of Criminal Procedure (Official Gazette of the Republic of Macedonia no. 150/10, 5/11 and 100/2012).

⁴¹Article 258, paragraph 3 - Code of Criminal Procedure (Official Gazette of the Republic of Macedonia no. 150/10, 5/11 and 100/2012).

⁴²Article 258, paragraph 4 - Code of Criminal Procedure (Official Gazette of the Republic of Macedonia no. 150/10, 5/11 and 100/2012).

⁴³ Article 29 - Law on Interception of Communications (Official Gazette of the Republic of Macedonia no.121/06, 110/08, 4/09 and 116/2012).

way to discover data for such an activity in order to stop the committing of the crime, armed attack or disablement of the security system.

Reasonable doubt is defined as findings that are based on the knowledge of a crime and experience, and can be assessed as an evidence of a committed crime – implying the lowest level of doubt. The criminal acts against the state, armed forces, humanity and international law are contained in chapters 28, 29 and 34 of the Criminal Code, respectively.

Even though the identified legislations are accessible since they are all published in the Official Gazette of the Republic of Macedonia and are also available online, one can conclude that they are not as precise and clear as they should be, especially taking into consideration the fact that they regulate intrusive measures.

There are several reasons for this, the first one being the fact that even though the acts are all formally consistent with the Constitution and with each other, cumulatively speaking, there is a wide range of exceptional circumstances.

Furthermore, clear definitions of the criteria are formally not provided. It is only stipulated that there has to be a reasonable doubt for an existence of a potential threat that can be prevented or a reasonable expectation that crucial evidence will be obtained, regardless of the fact that it is understood that these measures can only be used as a last resort.

For the purpose of implementation of special investigative measures, the existence of a court decision or a written order by the public prosecutor is necessary, since these are the only authorised bodies to order special investigative measures.⁴⁴ Therefore, the interpretation of the elements that are a part of the provided provisions, as well as the assessment of the necessity of an implementation measure is solely in the hands of the judges and sometimes even in the hands of public prosecutors. This implies that the control of the potential misuse and discrimination depends on individual judges and public prosecutors themselves, thus, foreseeability cannot be guaranteed as well.

According to the current situation, the terminological confusion, the numerous ambiguities, the wide scope of exceptions, the low threshold for an approval of invasion of privacy and the unlikelihood for the existence of an efficient control, all imply that the arbitrary invasion of privacy will not reduce, on the contrary, it will be legalised.⁴⁵

According to the provided relevant legislations and regardless of the fact that they are not clear enough, a conclusion can be drawn that electronic surveillance and similar measures cannot be used against journalists **in order to identify their sources of information**. This is due to the fact that the special investigative measures can only be ordered against suspects or persons who committed a crime (pursuant to the conditions listed above), while a journalist cannot be

⁴⁴Article 256, Code of Criminal Procedure (Official Gazette of the Republic of Macedonia no. 150/10, 5/11 and 100/2012).

⁴⁵Code of Criminal Procedure, N. Matovski, G. Lazhetikj-Buzharovska and G. Kalajdziev, 2009, page 288.

referred to as a suspect, but simply as someone who informs the public. This is consistent with the Constitutional and other legislations which guarantee the protection of the journalists' sources, especially in light of the relevant instruments of the Council of Europe, such as the Recommendation 1950 (2011) of the Parliamentary Assembly on the protection of journalists' sources, which reaffirms that the protection of journalists' sources of information is a basic condition for both the full exercise of the journalistic work and the right of the public to be informed on matters of public concern.

As a conclusion, in relation to the answers of the previous question, even though in certain situations journalists can be asked to reveal their source, still, intrusive measures such as surveillance and seizure actions may not be legally invoked.

Regarding the practical applications of the provisions, it has to be noted that lawsuits for non-disclosure of the sources of information are not recorded; however, again, there are cases when journalists were sued for defamation and an insult, and plaintiffs have requested that they reveal their sources of information.⁴⁶

Anti-terrorism legislation

The anti-terrorism legislation of the Republic of Macedonia mostly relies on international legislation due to the strong and efficient long-term collaboration with relevant international stakeholders such as the Council of Europe, OSCE, NATO, Europol, and the EU.

National policies such as the National Programme for Adoption of the Acquis Communautaire and the Revised National Strategy against Money Laundering and Terrorism Financing are therefore drawn from relevant international conventions and treaties. The Republic of Macedonia is also a party to several bilateral agreements with countries from the region and other countries and international organisations. These agreements refer to co-operation, inter alia, in the fields of fight against terrorism, organised crime, money laundering and other criminal acts pertaining to terrorism.

Furthermore, the National Security Strategy from 2008 and the Strategy on defence from 2010, emphasize that terrorism has the greatest influence on the national security policy.⁴⁷

In terms of the national laws, terrorism is regulated with:

- the Criminal Code (*Кривичен законик*) (Official Gazette of the Republic of Macedonia no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 87/07, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 42/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14 and 196/15);

⁴⁶ Analysis: The Development of Media in Macedonia according to the UNESCO Indicators, Macedonian Institute for Media (MIM), 2012, page 18.

⁴⁷ http://www.coe.int/t/dlapil/codexter/country_profiles.asp.

- Code of Criminal Procedure (*Закон за кривична постапка*) (Official Gazette of the Republic of Macedonia no. 150/10, 5/11 and 100/2012); and
- Law on Prevention of Money Laundering and Financing of Terrorism (*Закон за спречување перење на пари и финансирање на тероризам*) (Official Gazette of the Republic of Macedonia no. 130/2014).

The provisions of these laws are mostly focused on the definition of the terms terrorism⁴⁸, international terrorism⁴⁹, terroristic organisation⁵⁰, and financing terrorism⁵¹, as well as prescribing of punishments for such committed acts. The definitions are quite extensive, covering a significant number of actions that can be a part of terrorism. They are also focused towards the realization of the following activities:⁵²

- Prevention of the use of the financial system for the purpose of money laundering and terrorist financing;
 - Harmonisation of the legislation with the regulations of the European Union and relevant international standards on prevention of money laundering and financing of terrorism;
 - Harmonisation of the domestic legislation with the EU legislation;
 - An effective system of inter-institutional cooperation;
 - Strengthening of international co-operation; and
 - Raising public awareness about the necessity to take measures to prevent money laundering and terrorism financing.

10. Can journalists rely on encryption and anonymity online to protect themselves and their sources against surveillance?

The primary purpose of encryption is to protect the confidentiality of digital data stored on computer systems or transmitted via the Internet or other computer networks. Modern encryption algorithms play a vital role in the security assurance of IT systems and communications as they can provide not only confidentiality, but also the following key elements of security:

- Authentication: the origin of a message can be verified;

⁴⁸ Article 394-b - Criminal Code (Official Gazette of the Republic of Macedonia no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 87/07, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 42/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14 and 196/15).

⁴⁹ Article 419 - Criminal Code (Official Gazette of the Republic of Macedonia no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 87/07, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 42/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14 and 196/15).

⁵⁰ Article 394-a - Criminal Code (Official Gazette of the Republic of Macedonia no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 87/07, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 42/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14 and 196/15).

⁵¹ Article 394-c - Criminal Code (Official Gazette of the Republic of Macedonia no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 87/07, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 42/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14 and 196/15).

⁵² http://www.coe.int/t/dlapil/codexter/country_profiles.asp.

- Integrity: proof that the contents of a message have not been changed since it was sent;
- Non-repudiation: the sender of a message cannot deny the sending of the message.⁵³

In the modern society, a fact is that a significant part of the communications between people and organizations takes place online, on a daily basis.

Individuals developed a need of security online, so that they could seek, receive and impart information without the risk of repercussions, disclosure, surveillance or other improper use of their opinions and expression.⁵⁴

However, by interpreting the Constitution of the Republic of Macedonia, several findings can be made. First, one pillar of the fundamental values of the constitutional order of the Republic of Macedonia includes the fundamental freedoms and rights of the individual and citizen, recognized in international law and determined by the Constitution.

Regarding the legislation of the Republic of Macedonia, so far, no specific legislation has been enacted in order to forbid or limit specific subjects to use encryption and anonymity online in specific situations. In addition, no specific legislation has been enacted in order to promote, protect and preserve encryption and anonymity online as a tool that enables people to exercise their rights to freedom of opinion and expression.

However, by interpreting the Constitution of the Republic of Macedonia, several findings can be made. First, one pillar of the fundamental values of the constitutional order of the Republic of Macedonia includes the fundamental freedoms and rights of the individual and citizen, recognized in international law and determined by the Constitution.⁵⁵

Thus, the Constitution recognises and reaffirms the right to privacy as set in the Universal Declaration of Human Rights⁵⁶ and the International Covenant on Civil and Political Rights⁵⁷, protecting journalists' privacy against arbitrary interference.

Moreover, several instruments that have emerged in this area came originally from the Council of Europe and the European Union. For example, the Committee of Ministers of the Council of Europe adopted the Declaration on Freedom of Communication on the Internet in May 2003. Principle 7 on anonymity provides that: In order to ensure protection against online surveillance and to enhance the free expression of information and ideas, member states should respect the will of users of the Internet not to disclose their identity. This does not prevent member states

⁵³<http://searchsecurity.techtarget.com/definition/encryption>.

⁵⁴Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, 2015.

⁵⁵Article 8, Constitution of the Republic of Macedonia.

⁵⁶Article 12, Universal Declaration of Human Rights.

⁵⁷Article 17, International Covenant on Civil and Political Rights.

from taking measures and co-operating in order to trace those responsible for criminal acts, in accordance with national law, the Convention for the Protection of Human Rights and Fundamental Freedoms and other international agreements in the fields of justice and the police.⁵⁸

Additionally, the European Court of Human Rights recognized the importance of anonymity to the rights to privacy and freedom of expression, but also has been clear that anonymity is not absolute and may be limited for the protection of other legitimate interests, especially the protection of vulnerable groups. Specifically, it stated that anonymity and confidentiality on the internet must not lead states to refuse to protect the rights of potential victims, especially where vulnerable people are concerned.

Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such a guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others.⁵⁹

The European Court expressed a similar view in the case of *Delfi v Estonia* when it noted that it was: [M]indful, in this context, of the importance of the wishes of Internet users not to disclose their identity in exercising their freedom of expression. At the same time, the spread of the Internet and the possibility – or for some purposes the danger – that information once made public will remain public and circulate forever, calls for caution.⁶⁰

Furthermore, in its explanatory report, OECD also notes the importance of cryptography to the protection of the fight to privacy, declaring that cryptography forms the basis for a new generation of privacy enhancing technologies.⁶¹

Taking into consideration what is previously mentioned, Amendment 19 of the Constitution also guarantees the freedom of correspondence and other forms of communication, and it can be concluded that the Constitution does provide a guarantee for journalists to rely on online encryption and anonymity in order to protect themselves and their sources against surveillance and other measures that are intrusive to their right to privacy.

In light of the media, it is a notorious fact that media depend to a large extent on members of the public for the supply of information. However, anonymity is often a precondition for the source's willingness to speak, especially when citizens come forward with information of a highly sensitive nature.

⁵⁸https://www.article19.org/data/files/medialibrary/38006/Anonymity_and_encryption_report_A5_final-web.pdf.

⁵⁹Article 8, European Convention on Human Rights.

⁶⁰ https://www.article19.org/data/files/medialibrary/38006/Anonymity_and_encryption_report_A5_final-web.pdf.

⁶¹ <http://www.oecd.org/sti/ieconomy/guidelinesforcryptographypolicy.htm>.

Because of these reasons, while taking into consideration the fact that encryption and anonymity enable individuals to exercise their rights to freedom of opinion and expression in the digital age, strong protection is encouraged.

This will enable not only journalists, but other people as well, to share and receive information that they need in order to form opinions on certain matters, especially in a society where access to information is crucial.

11. Are whistle-blowers explicitly protected under the law on protection of journalistic sources? Is there another practice that protects whistle-blowers? Does the legislation prohibit identification of whistle-blowers by authorities and companies?

Whistle-blowers are considered civil servants that indicate corruption, violation of laws, abuse of official position etc. Such people are described as courageous individuals that act on moral grounds, regardless of the risk imposed on their own career publicly, and determined to object to the illegal conduct of state authorities.

A law on whistle-blowers exists in many countries and aims to protect the suppliers of information, people who want to reveal corruption in state bodies, who are employed in the administration and provide information on abuse of power and crime.⁶² EU requests for this law, together with the law against posting “bombs”, to be agreed not later than October 20 2015, and the need for its legal act is even in the report Priebe.

So far, in Macedonia, there is no official information on whether an employee in the administration reported to the State Anti-Corruption Commission, a minister, director or mayor on abuse or bribery.⁶³ The conference for “whistle-blowers” addressed the time and the capacity of the law to protect whistle-blowers, organised in order to make recommendations and conclusions on whether there is a need to adopt this law. The Minister of Justice Jashari stressed that now persons will be encouraged to report crime and abuse of power, and that they are protected under the law on prevention of corruption. He also stated that the procedure for adoption of the Law on Whistle-blowers (*Закон за пријавувачи на кривични дела/свиркачи*) already started, which will be on the basis of a detailed analysis and an opinion from the European Commission, and comparative analysis of the EU law, and finally Jashari added that although this law is not yet applicable in Macedonia, there are other laws that provide basic protection in the reporting of crime, corruption and abuse of power.⁶⁴ At the same time, at the conference, the EU Ambassador Aivo Orav emphasised that the state has a key task in the adoption of the Law

⁶² <http://www.telegraf.mk/aktuelno/makedonija/ns-newsarticle-311776-zakon-za-svirkaci-potkazuvacite-na-korupcija-ke-dobijat-pravna-zastita.nspx>.

⁶³ Ibid.

⁶⁴ <http://fokus.mk/konferentsija-za-svirkachi-ima-li-vreme-i-ka-patsitet-za-zakonot-za-prijavuvachi/> 14.10.2015.

on Whistle-blowers, which will instigate a feeling of real protection in people, pursuant to the law and the freedom to report crime and abuse of power anonymously.⁶⁵

Currently, only the Law on Prevention of Corruption has the main objective to establish measures to prevent corruption in the exercise of power and the assigned public authorities.⁶⁶ The following is stipulated in Article 19 of this law: “a person who provided information that indicates corruption cannot be prosecuted and liability of this person will not be invoked”. According to paragraph 2 “protection shall be provided to a person who has testified or gave a statement about a corruption procedure, also he or a member of his family are entitled to compensation for damages which he or the members of the family may suffer because of the statement or the testimony”. If the person really suffers some sort of damage, he may submit a request for compensation to the competent authority, which shall be paid from the state budget according to the act to the Minister of Justice.

It seems that the lack of court cases on corruption or abuse of power provided by whistle-blowers is due to the lack of an effective act on the protection of whistle-blowers in Macedonia, as well as means to guarantee an effective court procedure. Macedonia should fulfil the recommendations stated by Bailey and Aivo Orav, and the law that will be in accordance with the EU law should be adopted, and whistle-blowers should be given the freedom to report on cases of corruption.

12. Conclusion

Protection of the sources of journalists is one of the basic prerequisites for the freedom of media, as determined in laws and in the professional codes of conduct in many countries, and it is confirmed in several international instruments on the freedoms of journalists... A free democratic society needs a press and media that must be maximally protected in their reporting. Hence, when it comes to regulation – the basic measure would be to protect the press and the media against restrictions. This is also accompanied by the provision of access to information, which means that the country and the institutions must make available to journalists all the information they need.

The national law and the practice of the member states of the European Union should provide explicit and clear protection of the right of journalists not to disclose information that identify the source in accordance with Article 10 of the Convention on the Protection of Human Rights and Fundamental Freedoms, and the principles determined with this convention, which should be considered minimum standards in regard to this law.

⁶⁵ Ibid.

⁶⁶ Law on the Prevention of Corruption, Official Gazette no. 07-1733/1, no.07/4460/1, April 18 2012.

The most important conclusion that can be drawn from this paper is that the familiarity of journalists with their legally guaranteed rights would help them to protect themselves against possible pressures. What is even more important is that journalists should be primarily informed by the competent authorities about their right not to disclose information that identify the source, as well as about the limitations of this right before the disclosure is requested.

13. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

13.1. Legislation

- Constitution of the Republic of Macedonia (“Official Gazette” no.52/1991)
- Criminal Code ("Official Gazette" no. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139 / 2008 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 196/2015 and 226/2015)
- Criminal Code of Macedonia - Official Gazette of the Republic of Macedonia no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 7/08, 139/08, 114/09, 51/11
- Commentary of the Criminal Code of the Republic of Macedonia by Professor VladoKambovski, 2011.
- Law on Media (“Official Gazette” no. 184/2013 and 13/2014).
- Law on Civil Liability for Insult and Defamation (“Official Gazette” no. 143/2012).
- Law on Prevention of Corruption (“Official Gazette” no.28/2002, 46/2004, 126/2006, 10/2008, 161/2008, 145/2010, 47/2015, 145/2015)
- Code of Criminal Procedure (Official Gazette of the Republic of Macedonia no. 150/10, 5/11 and 100/2012)
- Law on Interception of Communications (Official Gazette of the Republic of Macedonia no.121/06, 110/08, 4/09 and 116/2012).
- Law on the Prevention of Corruption, Official Gazette no. 07-1733/1, no.07/4460/1, April 18 2012

13.2. Books and articles

- Analysis: The Development of Media in Macedonia according to the UNESCO Indicators, Macedonian Institute for Media (MIM), 2012, page 18
- Analysis of the Law on Civil Liability for Insult and Defamation provided by the Centre for Media Development <http://mdc.org.mk/uploads/2014/03.Експертиза-клевета-и-навреда.pdf>
- David Kaye, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 2015.

13.3. Internet sources

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- http://www.echr.coe.int/Documents/Convention_ENG.pdf
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- [http://hudoc.echr.coe.int/eng#{"itemid":\["001-60596"\]}](http://hudoc.echr.coe.int/eng#{)

- <http://www.znm.org.mk/drupal-7.7/mk/docs/statut>
- http://www.coe.int/t/dlapil/codexter/country_profiles.asp
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- Legal site- <http://www.akademik.mk/presuda-likvidatsija-sudot-gi-proglasi-site-osummina-obvineti-za-vinovni-najvisoki-zatvorski-kazni-dobija-zafirov-i-kezharovski-4/>
- Newspaper Nova Makedonija www.novamakedonija.com.mk/NewsDetal.asp?vest=610131032302&id=9&setIzdanie=22900
- Report, Politicians and Court Cases of Defamation, January 2013-2015, published 2015
- Statement of the journalist Natasha Janchikj (<http://infomax.mk/wp/?p=22794#>)

14. Table of Provisions

Used provisions
<p>The Universal Declaration of Human Rights</p> <p>Article 12</p> <p>No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.</p>
<p>International Covenant on Civil and Political Rights</p> <p>Article 17</p> <p>1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.</p> <p>2. Everyone has the right to the protection of the law against such interference or attacks.</p>
<p>The Law on Civil Liability for Insult and Defamation</p> <p>Article 12</p> <p>1. The Court may request from the defendant to disclose relevant information in order to determine the authenticity of the published information, without identifying the source of the information.</p> <p>2. The refusal of the defendant to reveal the secret source of information cannot be interpreted as any admission of guilt, or based on the conclusion that it did not prove the truth of the facts.</p>

The Law on Prevention of Corruption

Article 56

Any enforcement, prevention or other form of influence on media to publish or not to publish information on a case of corruption, is prohibited. Nobody can request from a journalist who published information on acts of corruption, to reveal the source of information, except in proceedings before court.

Article 65

A fine of 500 to 1,000 Euros in MKD will pay that person who carried coercion or in any manner prohibited to publish or not to publish information on cases of corruption, and to that one who hinders access to sources of information, contrary to Article 56 of this law.

The Law on Media

Article 2 (paragraph 5)

A journalist is a person who performs activities of collection, analysis, processing, molding and/or classification of information published in the media, and is employed by the media publisher or has concluded an agreement with the media publisher, or is a person who performs journalistic activities as an independent profession.

Article 12 (paragraph 1)

The Journalist has the right not to disclose the source of information or data that may reveal the source in accordance with international law and the Constitution, as we mention in first question.

Article 12 (paragraph 2)

Right under paragraph (1) of this Article shall apply to other persons who due to their professional relationship with the journalist are familiar with the data that may reveal the source, through the collection,

editorial framing or disseminate information

European Convention on Human Rights

Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Constitution of the Republic of Macedonia

Article 8

- (1) The fundamental values of the constitutional order of the Republic of Macedonia are:
- the fundamental freedoms and rights of the individual and citizen, recognized in international law and determined by the Constitution;
 - the free expression of national identity;
 - the rule of law;
 - the separation of state powers into legislative, executive and judicial;
 - political pluralism and free, direct and democratic elections;
 - the legal protection of property;
 - the freedom of the market and entrepreneurship;

- humanity social justice and solidarity;
- local self-government;
- space development based on urban and rural planning to promote and improve social wellbeing and protection and promotion of the environment and nature;
- respect for the generally accepted norms of international law.

(2) Anything that is not prohibited by the Constitution and by law is permitted in the Republic of Macedonia.

Article 16

The right to protect a source of information in mass media is guaranteed.

Amendment XIX

1. The freedom and inviolability of correspondence and other forms of communication is guaranteed. Only a court decision may, under conditions and in procedure prescribed by law, authorise non-application of the principle of inviolability of correspondence and other forms of communication, in cases where it is indispensable to preventing or revealing criminal acts, to a criminal investigation or where required in the interests of security and defence of the Republic.

2. This amendment replaces Article 17 of the Constitution of the Republic of Macedonia. Pursuant to Article 131, paragraph 5 of the Constitution of the Republic of Macedonia, the Assembly of the Republic of Macedonia, at its session held on December 7 2005 adopted the following.

Article 16 (paragraph 6)

The right to protect a source of information in the mass media is guaranteed.

Code of Criminal Procedure (Official Gazette of the Republic of Macedonia no. 150/10, 5/11 and 100/2012)

Article 252

Purpose and types of special investigative measures

(1) If likely to obtain data and evidence necessary for successful criminal procedure, which cannot be obtained by other means, the following special investigative measures may be ordered:

- 1) Monitoring and recording of the telephone and other electronic communications under a procedure as stipulated with a separate law;
- 2) Surveillance and recording in homes, closed up or fenced space that belongs to the home or office space designated as private or in a vehicle and the entrance of such facilities in order to create the required conditions for monitoring of communications;
- 3) Secret monitoring and recording of conversations with technical devices outside the residence or the office space designated as private;
- 4) Secret access and search of computer systems;
- 5) Automatic or in other way searching and comparing personal data of citizens;
- 6) Inspection of telephone or other electronic communications;
- 7) Simulated purchase of items;
- 8) Simulated offering and receiving bribes;
- 9) Controlled delivery and transport of persons and objects;
- 10) Use of undercover agents for surveillance and gathering information or data;
- 11) Opening a simulated bank account; and
- 12) Simulated incorporation of legal persons or using existing legal persons for the purpose of collecting data.

(2) In case when no information is available on the identity of the perpetrator of the criminal offence, the special investigative measures as referred to in paragraph 1 of this Article may be ordered also in respect of

the object of the criminal offense.

Article 253

Crimes for which special investigative measures may be ordered

Special investigative measures may be ordered, when there are grounds for suspicion:

(1) for criminal offenses that entail a prison sentence of at least four years, and which have been prepared, are being committed or have been committed by an organized group, gang or other criminal enterprise;

(2) for the criminal offences of homicide as per Article 123;

abduction as per Article 141;

mediation in prostitution as per Article 191, paragraphs 1, 3 and 4;

showing pornographic materials to a juvenile from article 193, production and distribution of child pornography from 193 –a , luring to an intercourse or other sexual acts against a juvenile who has not turned 14 years of age from article 193-b, unauthorized production and selling of narcotic drugs, psychotropic substances and precursors as per Article 215, paragraphs 1 and 3; damaging and unauthorized entry in computer systems as per Article 251, paragraphs 4 and 6; extortion as per Article 258, blackmail as per Article 259, paragraph 2; appropriation of goods under temporary protection or cultural heritage or natural rarities as per Article 265; taking out, i.e. exporting abroad goods under temporary protection or cultural heritage or natural rarities as per Article 266, paragraph 1; sale of cultural heritage of special importance owned by the state as per Article 266-a; money laundering and other proceeds from a punishable act as per Article 273, paragraphs 1, 2 and 3 and paragraphs 5, 6, 8 and 12; smuggling as per Article 278, paragraphs 3 and 5; customs fraud as per Article 278-a; misuse of an official position and authority as per Article 353; defalcation in official service as per Article 354; fraud in official service as per Article 355; stealing in official service as per Article 356; accepting a bribe as per Article 357, paragraphs 1, 4, 5 and 6; giving a bribe as per Article 358, paragraphs 1 and 4; illegal mediation as per Article 359, paragraph 6; illegal influence on witnesses as per Article 368-a, paragraph 3; establishing a criminal enterprise as per Article 394, paragraph 3; terrorist organization as per Article 394-a, paragraphs 1, 2 and 3; terrorism as per Article 394-b and financing terrorism as per Article 394-c, all of those from the Criminal Code; or

(3) for criminal offenses against the state (Chapter XXVIII), crimes against humanity and the international law (Chapter XXXIV) from the Criminal Code.

(2) In case when no information is available on the identity of the perpetrator of the criminal offence, the special investigative measures as referred to in paragraph 1 of this Article may be ordered also in respect of the object of the criminal offense.

Article 255

Persons against whom special investigative measures may be ordered

(1) Pursuant to the conditions listed in Article 252, paragraph 1 of this Law, the order may pertain to a person:

- 1) who committed a criminal offense as stipulated in article 253 of this Law;
- 2) who undertakes activities in order to commit a criminal offense as stipulated in article 253 of this Law; and
- 3) who is preparing the commission of a criminal offense as stipulated in Article 253, when such preparation is punishable according to the provisions of the Criminal Code.

(2) The order may also pertain to a person who receives or relays shipments to and from the suspect or if the suspect uses his or her communication device.

(3) If, during the implementation of the measures, communications of a person who is not a subject of the order are monitored and recorded, the public prosecutor shall be obliged to set them aside and inform the judge of the preliminary procedure thereof. Upon proposal by the public prosecutor, the preliminary procedure judge may order, only the parts that pertain to the criminal offense for which the order had been given to be removed from the overall documentation on the implementation of the measures.

Article 256

Authorized body for ordering special investigative measures

The measures referred to in Article 252, paragraph 1, items 1, 2, 3, 4 and 5 of this Law, upon an elaborated motion by the public prosecutor shall be ordered by the preliminary procedure judge with a written order. The measures referred to in Article 252, paragraph 1, items 6, 7, 8, 9, 10, 11 and 12 of this Law shall be ordered by the public prosecutor with a written order.

Article 260

Duration of the measures

- (1) Any special investigative measure, shall last for not longer than 4 months.
- (2) Any extension of the measures referred to in Article 252, paragraph 1, items 1, 2, 3 and 4 for a maximum additional period of up to 4 months may be approved by the preliminary procedure judge, upon an elaborated written request by the public prosecutor.
- (3) For criminal offenses that entail a prison sentence of at least four years and which are suspected to have been committed by an organized group, gang or other criminal enterprise, upon a written request by the public prosecutor, and based on the assessment of the usefulness of the data obtained through the use of the measure and with a reasonable expectation that the measure may continue to result with data of interest for the procedure, the judge of the preliminary procedure may additionally extend the period referred to in paragraph 2 of this Article for another 6 months at the most.
- (4) The measures referred to in article 252, paragraph 1, items 9, 10, 11 and 12 of this Law, may be extended until the goal, for which the measure has been introduced is fulfilled, and until the completion of the investigation at the latest.
- (5) Upon an appeal by the public prosecutor, the Chamber of the Court as referred to in Article 25, paragraph 5 of this Law shall rule within 24 hours on the appeal against the judge's decision to overrule the extension of the measure.

Article 261

Termination of special investigative measures

As soon as the objectives, for which the special investigative orders have been established, have been achieved or the reasons due to which they have been approved cease to exist, the entity that issued or extended the order shall be obliged to immediately order the termination of the measures. If the public prosecutor waives the right of criminal prosecution or if any collected information through the special investigative measures is not significant for the procedure, they shall be destroyed under supervision by the judge, and the public prosecutor shall produce a record thereof.

Article 268

Reasons for restricting the use of special investigative measures

- (1) The measure referred to in Article 252, paragraph 1, item 2 of this Law may only be directed towards the suspect and implemented only at the home of the suspect. The measure shall be allowed in other persons' homes, only if based on a reasonable suspicion that the suspect resides there.
- (2) The recording shall be stopped, if during the recording, there are indications that it might be possible for statements to be recorded, which belong in the basic sphere of private and family life. Any documentation on

such statements shall be destroyed immediately.

Law on surveillance of communications (Law on Interception of Communications (Official Gazette of the Republic of Macedonia no.121/06, 110/08, 4/09 and 116/2012)

Article 29

The court may order for interception of communications for a person for whom there is a reasonable doubt that is preparing to commit a criminal act against the state, armed forces or against humanity and international law. Except in these cases, the court may order for interception of communications when an armed attack against the Republic of Macedonia is being prepared, incited, organized or participated in or its security system for performing its own functions is being disabled, if there is no other way to discover data for such activity in order to stop the commit of the criminal act, armed attack or disablement of the security system.

Criminal Code (Official Gazette of the Republic of Macedonia no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 87/07, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 42/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14 and 196/15)

Terroristic organization

Article 394-a

(1) Any person who organizes a group, gang or other criminal enterprise to commit the criminal offences of murder, corporal injuries, abduction, destruction of public facilities, transport systems, infrastructure facilities, information systems and other facilities of general use, hijacking of airplanes or other means of public transport, production, possession or trade in nuclear weapons, biological, chemical weapons and other types of weapons and hazardous materials, dispersal of hazardous radioactive, poisonous and other dangerous substances or arson or causing explosions, destruction of plants and facilities for supply of water, energy and other fundamental natural resources, with an intention to endanger the lives and bodies of the citizens and create a feeling of insecurity and fear, shall be sentenced to imprisonment of at least eight years.

(2) The member of the group, gang or other criminal enterprise, as well as the person, who assists in any possible manner, shall be sentenced to imprisonment of four, up to ten years.

(3) The sentence as referred to in paragraph (2), shall be also imposed to any person who publicly calls for, instigates or supports the establishment of a terrorist organization.

(4) The perpetrator of the crime as referred to in paragraph (1), who, by discovering the organization, or in any other manner prevents the execution of the planned crimes, shall be sentenced to imprisonment of 3 months, up to 3 years, or he or she may be acquitted.

(5) The perpetrator of the crime as referred to in paragraph (2), who discovers the organization before committing one of the crimes referred to in paragraph (1) as its member or for its benefit, shall be acquitted.

(6) Any real estate used, and the items and objects intended for preparation of the crimes referred to in paragraphs (1), (2) and (3) shall be seized.

Terrorism

Article 394-b

(1) Any person who commits one or more crimes of murder, corporal injuries, abduction, destruction of public facilities, transportation systems, infrastructure facilities, computer systems and other facilities of general use, hijacking of airplanes or other means of public transportation, production, possession, transportation, trade, procurement or use of nuclear weapons, biological, chemical weapons and other types of weapons and hazardous materials, as well as research in the direction of development of biological and chemical weapons, release of dangerous radioactive, poisonous and other dangerous substances or causing fire or an explosion, destruction of facilities for water supply, energy supply or other basic natural sources, with the intention to endanger human life and body and to create feeling of insecurity or fear among citizens, shall be sentenced to imprisonment of at least ten years or life imprisonment.

(2) Any person who seriously threatens to commit the crime referred to in paragraph (1) of this article directly or indirectly, by using electronic means or other ways, with the intention to endanger human life and body and to create feeling of insecurity or fear among citizens, shall be sentenced to imprisonment of at least eight years.

(3) Any person who publicly calls for, by spreading a message or making it publicly available in any other manner, with an intention to instigate some of the activities referred to in paragraph (1) of this article, when the appeal itself creates a danger of committing such a crime, shall be sentenced to imprisonment of four to ten years.

(4) The sentence referred to in paragraph (1) of this article shall be also applied for a person who forces someone to perform the crime specified in paragraph (1) of this article by force or serious threat upon the person's life and body or upon the life and body of the person's closely related people.

(5) The sentence referred to in paragraph (2) shall also be imposed to any person who shall agree with another person to commit the crimes referred to in paragraph (1), or shall invite another person to join an enterprise or a group with an intention to commit the crime referred to in paragraph (1).

(6) Any person who organizes manufacture, prepares, produces, sells, buys, transports or holds explosives, firearms or other types of weapons or hazardous substances intended to commit the crime as referred to in paragraph (1), as well as any person who conducts training, or in any other manner prepares another person to commit the crime referred to in paragraph (1), shall be sentenced to imprisonment of at least four years.

(7) A person who performs a grand larceny in order to obtain the necessary objects to commit any of the

crimes referred to in paragraph (1) of this article, shall be sentenced to imprisonment of at least four years.

(8) If the crime has been committed by a legal entity, it shall be punished with a monetary fine.

(9) Any real estate used, and the items and objects intended for preparation or committing the crimes shall be seized.

Financing of terrorism

Article 394-c

(1) Any person who provides or collects funds in any way, directly or indirectly, unlawfully and consciously, with the intention to use them, or knowingly that they will be used, fully or partially, to commit the criminal offence of hijacking an airplane or a ship (Article 302), endangerment of air traffic security (Article 303), terrorist endangerment of the constitutional order and security (Article 313), terrorist organization (Article 394-a), terrorism (Article 394-b), crimes against humanity (Article 403-a), international terrorism (Article 419), taking hostages (Article 421) and other crimes of murder or serious bodily injuries, committed with an intention to create a feeling of insecurity and fear amongst the citizens, shall be sentenced to imprisonment of at least four years.

(2) A person who publicly calls for, by disseminating, or making available to the public in any other manner, a message that instigates the perpetration of some of the actions referred to in paragraph (1) of this article, and when the call itself creates a danger for realization of such action, shall be sentenced to imprisonment of four to ten years.

(3) The sentence referred to in paragraph (2) shall also be imposed to any person who shall agree with another person to commit the crimes referred to in paragraph (1), or shall invite another person to join an enterprise or a group with an intention to commit the crime referred to in paragraph (1).

(4) Any person who organizes a group or a gang, in order to commit the crime as referred to in paragraph (1), shall be sentenced to imprisonment of at least eight years.

(5) The members of the group or the gang shall be sentenced to imprisonment of at least five years.

(6) The members of the group or the gang who discover the group i.e. the gang before committing some crime as its member or for its benefit, shall be acquitted.

(7) An official person, responsible person in a bank or other financial institution, or person performing activities of public interest, who according to the law is authorized to undertake measures and activities for prevention of terrorism financing, and consciously fails to undertake the measures determined by law and thus enables the crime referred to in paragraph (1) of this article to be committed, shall be sentenced to imprisonment of at least four years.

(8) The sentence referred to in paragraph (7) of this article shall be imposed to an official person who illegally

discloses to a client or other person data that refer to the procedure for investigation of suspicious transactions or application of other measures and activities for terrorism financing.

(9) If the crime defined in paragraphs (7) and (8) of this article has been committed out of negligence, the perpetrator shall be sentenced with a fine or imprisonment of up to three years.

10) If the crime referred to in this article has been committed by a legal entity, it shall be punished with a monetary fine.

(11) All means intended for the preparation, financing and committing the crimes as referred to in paragraphs (1), (2), (3) and (4) shall be seized.

International terrorism

Article 419

(1) A person who with the intention of harming a foreign state or some international organization, commits a kidnapping of another or some other act of violence, causes an explosion or fire, or with some other generally dangerous act or by generally dangerous means causes a danger to the life of people and to property to a significant value, shall be punished with imprisonment of at least three years.

(2) If because of the crime from item 1, one or more persons died, or a damage was caused of a large extent, the offender shall be punished with imprisonment of at least five years.

(3) If when committing the crimes from item 1, the offender kills another with intent, he shall be punished with imprisonment of at least ten years, or with life imprisonment

ELSA MALTA

Contributors

National Coordinator

Bernice Saliba

National Academic Coordinator

Nicole Sultana

National Researchers

Luca Zahra

Sara Ezabe

Nicole Sciberras Debono

Charlene Valentina Giordimaina

Michaela Pace

National Linguistic Editors

Yasmine Aquilina

Cinzia Azzopardi Alamango

National Academic Supervisor

Profs Kevin Aquilina

Introduction:

Before the 1974 Press Act, Chapter 248 of the laws of Malta, was amended in 1996, journalists were afforded no protection as regards their sources. Therefore, a court could require journalists to disclose the source of their information. One typical judgment reflecting this is *Carmel Cacopardo vs. Minister of Works et.*¹ in 1985, where the editor of a weekly newspaper was asked to disclose the identity of a particular article's author writing in that newspaper, and although the editor asked the court to be exempted from disclosing his source due to his office, the court ordered him to reveal his source.² Today, article 46 of the Press Act is the main article dealing with the confidentiality of sources.

Another source which journalists should be in line with is the Code of Journalistic ethics, which was launched in November 1991. Since the Press Ethics Commission isn't awarded any legal standing, this code is simply soft law, which can be referred to.

In addition to this, one can also refer to the Recommendation No. R (96) 6, Of the Committee of Ministers to Member States On The Protection Of Journalists In Situations Of Conflict And Tension (Adopted by the Committee of Ministers on 3 May 1996 at its 98th Session). However, no situation has ever arisen where there was the need to resort to this Recommendation or other community law.

As shall be seen throughout our report, the protection of journalism and the safety of journalists is not a topical issue on the islands. In fact, discussions on the topic still remain at their preliminary stages, an issue which is mirrored in our legislation. It is only a very recent case of *il-Pulizija vs Dr Jason Azzopardi*, where the court in its commenting affirmed the importance of protection journalistic sources.³ This is however one case, making it the exception rather than the norm.

¹ *Carmel Cacopardo vs. Minister for Works et.*, Constitutional Court, 25 March 1985, Vol. 69, Pt I, Section I, p. 24.

² Kevin Aquilina, 'Protection of journalistic sources in Maltese Law: an appraisal from the viewpoint of the European Convention of Human Rights' [2011] *Journal of Public Law and Policy* 245, 246.

³ *Il-Pulizija vs Dr Jason Azzopardi*, Court of Magistrates (Court of Criminal Judicature), 15th April, 2016, 4/2016

1. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

With the introduction of the protection of journalistic sources in 1996, the confidentiality of sources is dealt with in article 46.⁴

No court shall require any person mentioned in article 23 to disclose, nor shall such person be guilty of contempt of court for refusing to disclose, the source of information contained in a newspaper or broadcast for which he is responsible unless it is established to the satisfaction of the court that such disclosure is necessary in the interests of national security, territorial integrity or public safety, or for the prevention of disorder or crime or for the protection of the interests of justice:

Provided that the court shall not order such disclosure unless it is also satisfied that in the particular circumstances of the case the need for investigation by the court outweighs the need of the media to protect its sources, due regard being taken of the importance of the role of the media in a democratic society:

Provided further that nothing in this article shall be interpreted as exempting any person mentioned in article 23 from proving the truth of any facts attributed by him in terms of article 12.⁵

Article 46 provides that no court shall require an author, editor, or publisher,⁶ to disclose, nor shall such person be guilty of contempt of court for refusing to disclose, the source of information contained in a newspaper or broadcast for which he is responsible unless it is established to the satisfaction of the court that such disclosure is necessary in the interests of national security, territorial integrity or public safety or for the prevention of disorder or crime or for the protection of the interests of justice.⁷

Article 46 applies to all courts of justice, both to civil and to criminal jurisdiction, and this emerges through the use of 'no court' in the provision.

The court shall not order such disclosure unless it is also satisfied that, in the particular circumstances of the case, the need for investigation by the court outweighs the need of the media to protect its sources, due regard being taken of the importance of the role of the media in

⁴ Kevin Aquilina, 'Protection of journalists' sources' *Times of Malta* (Malta, 5 October 2011) <<http://www.timesofmalta.com/articles/view/20111005/opinion/Protection-of-journalists-sources.387809>> accessed 1 February 2016.

⁵ Press Act 1974, Chapter 248 of the Laws of Malta, s 46.

⁶ The persons mentioned in Article 23, Chapter 248 of the Laws of Malta.

⁷ Press Act 1974 (n 4).

a democratic society.⁸ This situation is similar to what was held in *Christine Goodwin vs. the United Kingdom*.⁹ In fact, Article 46 is a reflection of the development of the judgments of the European Court of Human Rights, as well as reflecting Article 10 of the European Convention on Human Rights. Article 10 protects both the journalist as well as 'the source who volunteers to assist the press in informing the public about matters of public interest'.¹⁰

In addition, it is to be noted, that nothing in Article 46 exempts any person from giving any truth on any facts attributed to him in terms of Article 12.¹¹

It is important to point out that under Maltese law, there are three types of privileges to protect the confidentiality of sources, that is, an absolute privilege, a qualified privilege, or no privilege. Where there is an absolute privilege, the court, irrespective of any competing rights or interests, the source cannot be revealed, as is the case with advocates, legal procurators and priests.¹² Where journalistic sources are concerned, the protection it is given is that of a qualified privilege in the case of the Press Act – as evident in terms of Article 46, and in terms of other special laws no privilege is given. Although the situation improved following the addition of Article 46 in the Press Act, journalists remain without any absolute privilege.

Unravelling Article 46

The protection awarded to journalists ensures that they are not faced with the charge of contempt of court for not disclosing the source of information, where otherwise any other person would be so charged. The qualified privilege translates into the court obliging journalists to disclose their sources in certain instances where it is deemed necessary in a handful of situations. This signifies the first test out of three which have to be satisfied for a source to be revealed, as confirmed by Professor Kevin Aquilina.¹³ Therefore, the disclosure of the source has to be 'necessary' in the interest particular legitimate aims, and necessary does not translate into 'expedient' or 'required' but it means that it must be 'really needed'.¹⁴

The second test that needs to be fulfilled is that despite the journalistic privilege being mentioned in the first limb of the article, the privilege is limited on the basis of a number of legitimate aims, that is, where it is in the interest of national security, territorial integrity or public safety, or for the prevention of disorder or crime or for the protection of the interests of justice.

This article is modelled on Article 10 of the United Kingdom Contempt of Court Act 1981 but

⁸ *ibid.*

⁹ 22 EHRR 25 *Christine Goodwin vs. the United Kingdom* [1996].

¹⁰ Aquilina (n 2) 254.

¹¹ Article 12 deals with instances where in an action for a defamatory libel the accused assumes full responsibility for the alleged libel and declares in his defence that he wishes to prove the truth of the facts attributed to him by the aggrieved party.

¹² Aquilina (n 3).

¹³ Aquilina (n 2) 249.

¹⁴ Geoffrey Robertson and Andrew Nicol, 'Media Law' (4th edn, Penguin Books, London 2002) 261.

this article refrains from including territorial integrity and public safety as legitimate aims.¹⁵ This renders the United Kingdom provision as more liberal and more human rights friendly when compared to the Maltese provision.¹⁶

Another issue which is to be noted here is that these six legitimate aims are not defined in the Press Act and therefore it is left at the discretion of the court to interpret their exact definition, and consequently it can be presumed that UK law is referred to when determining such latitude since they are based on such law.¹⁷

The *proviso* to Article 46 further provides the third test that is to be satisfied. According to the *proviso*, disclosure is not to be ordered by the court unless the need for investigation outweighs the need of the media to protect its sources.

As regards this point, Article 19 and Interights holds that:

The party seeking disclosure will have to demonstrate not only the presence of a countervailing interest but also that the information sought is of sufficient importance to warrant a disclosure order. In many jurisdictions this means that the courts will weigh the harm of disclosure to freedom of expression against the countervailing interest. Given the importance of the former, the latter is only occasionally deemed dominant. In addition, in a number of jurisdictions, if the information may be obtained by other means, or if the goal served by disclosure has substantially been satisfied in another way, courts will not order disclosure. This careful balance, reflected in both international and national law standards, is necessary to protect a free press and hence the fundamental democratic right to freedom of expression.¹⁸

Moreover, Maltese courts are guided by the judgments of the European Court of Human Rights (ECtHR). It is important that the scale is to tip in favour of the media in light of a democratic society.

Problems with Article 46

This qualified privilege in Article 46 is inapplicable if the journalist does not fall under Article 23, that is, if he is not an editor, author or publisher. An issue which emerges from the Press Act is that whilst the terms 'editor' and 'publisher' are defined in the act, there is no definition provided for the term 'author'. One can presume that such term includes a journalist where he is the author of the writing or broadcast. However, the term 'journalist' is neither mentioned, nor defined in the Press Act. Moreover, it may be the case where workers, inter alia, heads of news,

¹⁵ United Kingdom Contempt of Court Act 1981 c 49.

¹⁶ Aquilina (n 2) 249.

¹⁷ *ibid.*

¹⁸ Freedom of Expression Litigation Project (May 1998), *Briefing Paper on Protection of Journalists' Sources*, Article 19 and Interights.

secretaries, film crew, drivers, administrative and finance personnel and others who are privy to the identity of the source of information are not protected by the privilege and therefore may still be requested to reveal journalistic sources.¹⁹

The privilege found in Article 46 which, on pain of contempt of court, requires editors, authors or publishers to disclose their sources is limited to a 'newspaper or broadcast'.²⁰ 'Newspaper' is defined in Article 2 as 'any paper containing news, advertisements, intelligence, occurrences, or any comments or observations thereon, printed for sale or to be distributed free or in any other manner, and published daily or periodically'.²¹ This definition is limited to the traditional tabloids and therefore forms of media which today are widespread are excluded from such definition. 'Broadcast' is also defined in Article 2 as 'the transmission by wire or over the air, including that by satellite, in encoded or unencoded form of words or of visual images, whether or not such words or images are in fact received by any person'.²² In this definition it appears, at face value, that the new media are included in such definition and therefore journalists working for new media are to be protected under this article.²³

Special Laws

There are situations where Article 46 does not apply, because particular special laws prevail over general laws, according to the *lex specialis derogat lex generalis* principle. The judgments of the European Court of Human Rights, which Malta is to embrace, extend well beyond the limitations found in our law. These special laws include the Official Secrets Act, the Security Service Act, the Prevention of Money Laundering Act, the Police Act and the Criminal Code.

Official Secrets Act

Three provisions in the Official Secrets Act exclude the application of the qualified privilege.

Article 13 criminalises a person who fails to comply with an official direction to return a document or other article relating to international relations, security or defence in his possession which it would be an offence for him to disclose without having the lawful authority.²⁴

Article 19 allows the carrying out of a search by a superintendent of police where it appears that the case is one of great emergency and that in the interest of the State immediate action is necessary without the need for a magistrate's warrant. A magistrate can also issue such a search warrant.²⁵

¹⁹ Aquilina (n 3).

²⁰ Press Act 1974 (n 4).

²¹ Press Act 1974 (n 4) s 2.

²² *ibid*.

²³ Aquilina (n 2) 248.

²⁴ Official Secrets Act 1996, Chapter 50 of the Laws of Malta, s 13.

²⁵ *ibid* s 19.

Article 22 provides that every person is to give on demand to any police officer not below the rank of inspector, or any member of the armed forces of Malta, 'any information in his power relating to an offence or suspected offence' under the act and 'to attend at such time and place as may be specified for the purpose of furnishing such information'.²⁶ It is a criminal offence if when such information is requested or when one is asked to attend, one does not cooperate.²⁷

Security Service Act

The Security Service Act allows the Minister responsible for Security Service to, firstly, authorise an entry on and interference with property in terms of Article 6(1) and secondly the interception of communications, that is, post, radio communications or telecommunication system or by other means in terms of Article 6(2).²⁸

It is to be mentioned that this law neither refrains the Minister from authorising the Security Service from entering on or interfering with the property used by journalists, for instance newsrooms or offices, nor does it prohibit the authorisation of the Security Service to intercept communications, for instance, telephone calls, SMS messages, e-mails, etc., through which the journalists might use to communicate with sources or whistle-blowers with the ultimate aim of publishing information in the general interest of society.²⁹

Prevention of Money Laundering Act

The Prevention of Money Laundering Act contains two provisions in terms of which journalistic sources may be disclosed.

Firstly, Article 4 stipulates that where on the basis of information received, the Attorney General has reasonable cause to suspect that a person is guilty of an offence falling under Article 3 of the Act, an application may be made in the Criminal Court for an investigation order to be issued, that the person named in the order who appears to be 'in possession of particular material or material of a particular description which is likely to be of substantial value to the investigation of, or in connection with, the suspect, shall produce or grant access to such material to the person or persons indicated in the order; and the person or persons so indicated shall, by virtue of the investigation order, have the power to enter any house, building or other enclosure for the purpose of searching for such material'.³⁰

Such an investigated order cannot be utilized in relation to advocates and legal procurators and

²⁶ *ibid* s 22.

²⁷ Aquilina (n 2) 250.

²⁸ Security Service Act 1996, Chapter 391 of the Laws of Malta, s 6.

²⁹ Aquilina (n 2) 250-251.

³⁰ Prevention of Money Laundering Act 1994, Chapter 373 of the Laws of Malta, s 4(1).

their clients, or between clergymen and people confessing to them.³¹ This demonstrates that absolute privilege is protected, but the qualified privilege of the protection of sources of information is not, if the need arises.

Moreover, no reference is made to a journalist and his source, and as a result, the Criminal Court may issue an investigation order against a journalist.³²

Secondly, Article 30A authorises the Financial Intelligence Analysis Unit 'to demand from any person, authority or entity ... any information it deems relevant and useful for the purpose of pursuing its functions', 'notwithstanding anything contained in any other law'.³³

Police Act

Article 66 of the Police Act states:

- (1) The Minister may by regulations issue codes of practice in connection with:
 - (a) the exercise by police officers of statutory powers:
 - (i) to search a person without first arresting
 - (ii) to search a vehicle without making an arrest
 - (b) the detention, treatment, questioning and identification of persons by police officers
 - (c) searches of premises by police officers
 - (d) the seizure of property found by police officers on person or premises.”³⁴

However, no codes of practice have as yet been issued.

Criminal Code

The Criminal Code in Article 355E provides that there is no right entry, search of seizure in case of a crime which is punishable under the Press Act;³⁵ where a crime is committed in flagrante *delicto* under the Press Act;³⁶ and in the case of prevention of the commission of a crime in terms

³¹ *ibid* s 4 (1)(3)(a).

³² Aquilina (n 2) 251.

³³ Prevention of Money Laundering Act 1994 (n 29) s 30A.

³⁴ Police Act 1961, Chapter 164 of the Laws of Malta, s 66.

³⁵ Criminal Code 1854, Chapter 9 of the Laws of Malta, s 355E (1)(a).

³⁶ *ibid* s 355E (1)(b).

of the Press Act.³⁷

In terms of the Criminal Code, there can be no arrest by the Police of any person in cases where there are crimes punishable under the Press Act without there being a warrant.³⁸

The absolute privilege awarded to advocates and legal procurators emerges out of Article 642, whereby it provides that: 'advocates and legal procurators may not be compelled to depose with regard to circumstances knowledge whereof is derived from the professional confidence which the parties themselves shall have placed in their assistance or advice'.³⁹ Furthermore, the same rule applies to 'those persons who are by law bound to secrecy respecting circumstances on which evidence is required'.⁴⁰

Article 355Q enables the Police '...in addition to the power of seizing a computer machine, [to] require any information which is contained in a computer to be delivered in a form in which it can be taken away and in which it is visible and legible'.⁴¹

Article 355AD (3) allows the Police to:

orally or by a notice in writing, [to] require any person to attend at the police station or other place indicated by them to give such information and to produce such documents as the Police may require and if that person so attends at the police station or other place voluntarily. The written notice referred to in this subarticle shall contain a warning of the consequences of failure to comply, as are mentioned in subarticle (5).⁴²

Article 355AD (4) consequently provides that:

Any person who is considered by the police to be in possession of any information or document relevant to any investigation has a legal obligation to comply with a request from the police to attend at a police station to give as required any such information or document:

Provided that no person is bound to supply any information or document which tends to incriminate him'.⁴³

It is a criminal offence not to comply with the law, in terms of Article 355AD (3) and (4).⁴⁴

³⁷ *ibid* s 355E (1)(c).

³⁸ *ibid* s 355X (5) and s 355Y (1).

³⁹ *ibid* s 642(1).

⁴⁰ *ibid* s 642(2).

⁴¹ *ibid* s 355Q.

⁴² *ibid* s 355AD (3).

⁴³ *ibid* s 355AD (4).

⁴⁴ *ibid* s 355AD (3) and (4).

The Minister responsible for justice may make regulations regarding the interception of communications to provide mutual assistance in criminal matters to foreign law enforcement agencies in terms treaties to which Malta is a party to.⁴⁵

Article 61 provides that the failure to disclose the commission of a crime against the safety of the government is punishable:

Whosoever, knowing that any of the crimes referred to in the preceding articles of this Title is about to be committed, shall not, within twenty-four hours, disclose to the Government or to the authorities of the Government, the circumstances which may have come to his knowledge, shall, for the mere omission, be liable, on conviction, to imprisonment for a term from nine to eighteen months.⁴⁶

Article 61 of the Criminal Code is applicable to journalists and therefore they are under a legal duty to disclose information that they might be in possession of, such as the identity of the source, to the police if they are aware of any crime against the safety of the government, 'that is, attempts against the President of Malta (Article 55), insurrection or coup d'état (Article 56), conspiracy against the State (Article 57) and provocation to perpetrate crimes against the safety of the government (Article 59).'⁴⁷

The Code of Organisation and Civil Procedure

In the Code of Organisation and Civil Procedure, Article 588 mentions the individuals who enjoy a privilege from non-disclosure of source in civil proceedings.⁴⁸ Article 588(1) mentions the absolute privilege in communications that extends to advocates, legal procurators and priests, while Article 588(2) alludes to particular members of a profession who are awarded a qualified privileged communication, that is, accountants, medical practitioners, social workers, psychologists, and marriage counsellors. As a result, it is within the court's discretion whether or not to allow such individuals in such a position to exercise such a privilege 'without delineating the criteria to be applied by the court to accord or deny such privileged status'.⁴⁹ As evident from the legal extract, journalists are not listed among such individuals.

2. Is there, in domestic law, a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

⁴⁵ *ibid* s 628B.

⁴⁶ *ibid* s 61.

⁴⁷ Aquilina (n 2) 253.

⁴⁸ Code of Organization and Civil Procedure 1855, Chapter 12 of the Laws of Malta, s 588.

⁴⁹ Aquilina (n 2) 253.

Malta's Code of Journalistic Ethics self-regulates the behaviour of 'all those who are engaged directly or indirectly in that activity and that profession'.⁵⁰ The Code contains a list of cases which are considered to be in breach of ethical behaviour, among which one can find 'whenever the confidentiality of the source of information, as requested, is not respected', and 'whenever a source of information is divulged without obtaining an explicit permission so to do'.⁵¹ Therefore, this soft law renders unethical the divulging of a source of information by a journalist whenever the confidentiality is breached when it was requested or when permission was not sought by such journalist.

The Press Ethics Commission is set up by the Malta Press Club to 'be competent to consider any complaints made to it against any journalist for any alleged breach of ethical behaviour'.⁵² As for sanctions, if the Press Ethics Commission finds that 'a journalist has violated one or more of the rules of this Code of Ethics', sanctions may be imposed in accordance with the gravity of the offence. Such sanctions are disapproval, censure, or grave censure. The decision by the Commission is to be given the publicity as seen fit by the same Commission. Moreover, the decision by the Commission is to be communicated to the Organizational Head of the journalist concerned.⁵³

The Press Ethics Commission is a totally independent entity which was set up by the IGM, the Institute of Maltese Journalists, but it works autonomously to the IGM. The task of the Press Ethics Commission is to investigate complaints made against a journalist, irrespective of whether he is a member of the Institute or not. The Commission is composed of ten members, with a lawyer chairing the same Commission while another member of the legal profession is one of the ten members, having experience in journalism.⁵⁴

The Press Ethics Commission interprets the Code of Ethics and journalists breaching their source of information falls under a breach of the code. The Commission is to hear the different parties in each case, and when a decision is taken it is heeded by all the members of the profession.⁵⁵

However, the Press Ethics Commission is awarded no legal standing, because it is a moral institution which is empowered to name and shame where applicable. As regards sanctions, it can only disapprove the journalist's actions, censure the wrong-doing journalist or gravely censure the journalist. The Press Ethics Commission is founded on standards of journalism

⁵⁰ Code of Journalistic Ethics, s 1.

⁵¹ *ibid* s 4.

⁵² *ibid* s 2.

⁵³ *ibid* s 12.

⁵⁴ Malcolm J. Naudi, 'Press Ethics Commission judgment' *Malta Independent Sunday* (Malta, 30 June 2013) <<http://www.independent.com.mt/articles/2013-06-30/letters/press-ethic-commission-judgement-1951694854/>> accessed 18 February 2016.

⁵⁵ *ibid*.

which are needed in any democracy, while having the media having credibility and moral authority.⁵⁶

Although Article 46 of the Press Act applies to the protection of the source of information, the journalist is not protected. Therefore, if a journalist commits a criminal act when disclosing secret or confidential information, he would still be prosecuted according to the law for any criminal offence committed.⁵⁷

In the Press Act, Article 8 provides that whosoever shall divulge any secret matter confided to him by reason of his profession or calling, shall be liable on conviction to imprisonment for a term not exceeding three month or to a fine, or to both such imprisonment and fine.⁵⁸ The Press Act, under Article 8, only covers acts done through the publication or distribution in Malta of printed matter, from whatsoever place such matter may originate, or by means of any broadcast.⁵⁹ This depends on the definition awarded to 'broadcast', which according to Article 2 of the Press Act, 'means the transmission by wire or over the air, including that by satellite, in encoded or unencoded form of words or of visual images, whether or not such words or images are in fact received by any person'.⁶⁰ It appears at face value that new media are covered through this definition.⁶¹

Our Employment and Industrial Relations Act is also silent on the matter and does not provide for journalists and their work.⁶²

3. Who is a “Journalist” according to the National Legislation? Is it, in your view, a Restricted Definition for the Purpose of the Protection of Journalistic Sources? What is the Scope of Protection of other Media Actors? Is the Protection of Journalists’ Sources Extended to Anyone Else?

Maltese law does not define what a journalist is and in fact the Press Act does not even make reference to the word “journalist”. However, the chairman of the Institute of Maltese Journalists (IGM)⁶³ and RTK Radio station manager, Karl Wright, says that, from practical experience, it is now accepted that a journalist is any person whose income derives from journalism, including photographers and cameramen. However, a journalist is not just limited to that. In fact, he says

⁵⁶ *ibid.*

⁵⁷ Aquilina (n 2) 248.

⁵⁸ Press Act 1974 (n 4) s 8.

⁵⁹ *ibid* s 3.

⁶⁰ *ibid* s 2.

⁶¹ Aquilina (n 2) 248.

⁶² Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta

⁶³ <http://igm.org.mt/about/> Author, | ‘original title’ | (additional information, date of publication) | | date of access |

that any person who, in his daily job, has some sort of link with current affairs, including journals, TV stations and electronic sites, is also considered a journalist. For the (IGM), preferably such person would be accredited by the company with which he or she works and ideally he should also have some sort of link with that company.

Karl Wright is of the opinion that the idea that a journalist is only that person that is employed within a newsroom is an outdated and incorrect idea. Currently, the law does not only protect the person employed within a newsroom but, as stated earlier, a much wider definition is adopted. For this reason, one cannot say that the definition of a journalist for the protection of journalistic sources is restricted, considering that the definition of who is a journalist is so wide.

Unlike under Recommendation No. R (2000) 7, Maltese law does not provide a definition of what a journalist is. The Recommendation states that a journalist is “any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication”. Unfortunately, this couldn’t be compared to what Maltese law says, because Maltese law is silent on this issue, but if we compare the definition provided for in the Recommendation with the generally accepted definition of what a journalist is in Malta, even though it cannot be found in the law, in Malta the term “journalist” is given a much wider definition than that provided in the Recommendation. This is due to the fact that it covers more media actors. However, nevertheless, Maltese law does not provide a definition of what a journalist is so it is quite difficult to compare like with like.

Moreover, the profession of a journalist is not simply attached to the collection of daily news, but it also extends to the necessary analysis, commentaries, the creation of features, and the delivery of programmes which are inspired from various stories, persons, situations, collection and delivery of information, styles and various other tools. All those that occasionally are involved in this type of job also qualify as journalists. Nevertheless, it is necessary that such activity is carried out from time to time, and not once or twice a year.

In fact, the word journalist also extends to bloggers, columnists and broadcasters (most of them would be journalists with an extensive work experience in news gathering and news features) that are involved in the collection, distribution and analysis of daily news also qualify as journalists. This, however, does not extend to bloggers, columnists and broadcasters who simply limit themselves to subjects such as cooking, health, social affairs, and so forth. With regards the latter though, it would be quite immature to argue that they should also be considered as journalists and thus their sources should also be protected, considering the fact that when one speaks about cooking, health, social affairs and so on, one is merely stating and distributing to the public facts, and not some sort of information which he may have acquired from one’s own sources.

The Institute of Maltese Journalists believes that a revision in Maltese laws is necessary, and in fact, Mr Wright has already expressed his preoccupation with Malta’ Minister of Justice Owen Bonnici about the current not-so-ideal situation. Moreover, the IGM also believes that journalists should be given some form of warrant to practice as journalists. This would be intimately linked with the education and training of the journalist, which is another sector which the IGM would like to work on, so as to ensure that Malta’s journalists are fully educated and qualified personnel.

In Malta we also have a system of a 'Press Card', which is a card granted to all journalists (including photographers and cameramen), both those working within a newsroom and those working freelance, which is granted after the necessary application form is filled in and handed in to the Department of Information Office, which is a branch of the Maltese Government, and which also issues the Press Card upon receiving all the necessary documents.

The following media category can apply for a press card:

- A. Employees of media organisations publishing registered newspapers, magazines or other registered publications
- B. Employees of media organisations running registered television or radio stations
- C. Freelance journalists, photographers or camera persons
- D. Employees of media organisations providing news or current affairs material to be published or broadcast on registered publications or stations
- E. Employees of media organisations publishing local online news portals that have been active for six months or longer
- F. New Freelance journalists, photographers or camera persons
- G. Employees of media organisations publishing NEW local online news portals.
- H. Local correspondents of foreign media organisations
- I. Foreign media on local assignments⁶⁴

Regarding this point, Karl Wright states that the IGM opines that such Press Card should start being issued by an institution which is recognised by the IGM. New procedures may be created so that one may ensure that the person for whom the Press Card is issued truly qualifies for such Card. All Media Cards should moreover be used as a genuine method for the journalist to be given the necessary access and facilities, and no card should be used for malignant or ulterior purposes.

4. What are the Legal Safeguards for the Protection of Journalistic Sources? How are the Laws implemented? How are the Legal Safeguards combined with Self-Regulatory Mechanisms?

Prior to the 1996 amendments to the Press Act, any court could order a journalist to disclose the source of his information, as was the case in *Carmel Cacopardo vs Minister of Works et.*⁶⁵ With the amendments, article 46 was added, which deals with the confidentiality of sources.

Article 46 provides that no court shall require an editor, author or publisher to disclose, nor shall such person be guilty of contempt of court for refusing to disclose the source of information contained in a newspaper or broadcast for which he is responsible unless it is established to the satisfaction of the court that such disclosure is necessary for the interests of national security, territorial integrity or public safety or for the prevention of disorder or crime or for the

⁶⁴ <https://gov.mt/en/Communities/Media%20and%20Press/Pages/Press-Card%20info.aspx>

⁶⁵ Constitutional Court, 25th March 1985 .

protection of the interests of justice. Furthermore, the court shall not order the disclosure unless it is also satisfied that, in the particular circumstances of the case, the need for investigation by the court outweighs the need of the media to protect its sources, due regard being taken of the importance of the role of the media in a democratic society.

In Maltese law, the privilege to protect the confidentiality of sources can be (a) an absolute privilege, (b) a qualified privilege, or (c) no privilege.

The qualified privilege in article 46 does not apply to a journalist when he does not fall under the category of an editor, author or publisher, nor does it apply to journalists working in a newsroom or to employees of a news medium who are privy to the identity of the source of information.

There are, however, a number of special laws that require the disclosure of journalistic sources, such as for-example in the cases of the Official Secrets Act,⁶⁶ the Security Service Act,⁶⁷ the Prevention of Money Laundering Act,⁶⁸ the Police Act⁶⁹ and the Criminal Code.⁷⁰, as previously discussed in question one.

Orders requiring the disclosure of journalistic sources should be delivered only by the judiciary and after having heard the journalist. Should the court request the disclosure, such relegation should take place behind closed doors. Moreover, such order should not be a prerogative power of the Executive (be it a minister or any public officer).

Before ordering disclosure, a judge should be given reasonable grounds to believe that an offence has been committed under one or more of the said laws and the following conditions are fulfilled:

- (a) The judge is informed that reasonable alternative measures to the disclosure are inexistent or have been exhausted without success;
- (b) The information sought is likely to be of substantial value to the investigation and is likely to constitute relevant evidence in a criminal prosecution;

The legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure. In particular, the necessity of the disclosure is identified as responding to a pressing social need.

At the beginning of 2016, there was a very interesting court case in Malta which had to do with the protection of journalistic sources. In this case, a court had been requested by the plaintiff's lawyer to force a Maltese blogger, Daphne Caruana Galizia, to reveal the source behind the claim she included in one of her blogs. This was part of a libel case that a Minister opened against

⁶⁶ Chapter 50 of the Laws of Malta.

⁶⁷ Chapter 391 of the Laws of Malta.

⁶⁸ Chapter 373 of the Laws of Malta.

⁶⁹ Chapter 164 of the Laws of Malta.

⁷⁰ Chapter 9 of the Laws of Malta.

Daphne Caruana Galizia after she wrote in one of her blogs that the Minister was seen kissing his communications coordinator. The legal issues at hand were whether Daphne Caruana Galizia is a journalist (since she wrote her claim on her blog and not on a newspaper article) and thus whether she is protected by Maltese law, and whether she can be forced to reveal her sources. Both questions were closely connected because if the Court decided that she was not in fact a journalist, then she would not be covered by Maltese law and thus she would have to reveal her sources, but if she was indeed a journalist, then she is protected by Maltese law.

The Court in March 2016 came to the conclusion that Daphne Caruana Galizia is a journalist and that she would not be forced to reveal her sources in this libel case. In fact the magistrate turned down the request made by the Minister's wife to force Daphne Caruana Galizia to identify her sources, and declared that she was a journalist at law. In his decree, Magistrate Francesco Depasquale said that the Press Act does not speak of "journalists" but of "authors", and in such absence under Maltese law, the court referred to the definition adopted by the European Council's Committee of Ministers, which defines the term "journalist" as "any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication".

The plaintiffs argued that Daphne Caruana Galizia's blog was not covered by the Press Act, which only speaks of "newspapers or broadcasts", but the Court noted that another provision in the Act defined "printed matter" as "writing printed in typographical characters...or other means whereby words or visual images may be heard, perceived or reproduced". The Court said that, by this definition, Daphne Caruana Galizia's blog does fall under the remit of the Press Act, and the Magistrate said that "There is no reason for which the electronic means used by the defendant should not be not considered as a newspaper".

Thus, since the Court said that Daphne Caruana Galizia is indeed a journalist, then she is protected by Maltese law, which says that a journalist, unless established to the satisfaction of the court, cannot be compelled to reveal his sources. The Court said that the revelation is "required in the interests of national security, territorial integrity, public safety, protection from criminality or disorder, or the interests of justice."

In handing down its judgement, the Court also made reference to European Court of Human Rights judgements, including the case *Voskuil vs The Netherlands*⁷¹, where the protection of journalistic sources was described as "one of the basic conditions for press freedom... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the of the press to provide accurate and reliable information may be adversely affected."

⁷¹ Case of Voskuil v. The Netherlands, Application no. 64752/01, 22nd November 2007, European Court of Human Rights

The law does not speak about who can access the information on source once the request of disclosure is approved, and it has never been tested because no Court has ever approved the request of disclosure. Recently there was a request for the Court to request the journalist to disclose her sources (Daphne Caruana Galicia case) but this was rejected by the Court. Should the journalist decide to disclose the source out of his own free will, then such information become public information and thus the public has a free hand to use in any way he may deem fit.

The journalist, just like any other Maltese citizen, has a right to be heard. This is also enshrined in Article 41 of the Charter of Fundamental Rights of the European Union, which states that every citizen has the "...right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union." This includes "the right of every person to be heard, before any individual measure which would affect him or her adversely is taken ...". In addition to this, the journalist also has a right to appeal an unfavourable decision to disclose. This is done according to Malta's civil and criminal procedures. These enable the individual to appeal the first Court's decision until the Superior Courts either amend or confirm the first Court's decision.

Furthermore, a journalist has a right not to incriminate himself. This is laid down in Article 392(2) of the Criminal Code, which lays down the following:

"Before asking any of the above questions, the court shall explain to the accused the nature of the charge preferred against him and shall inform him that he is not obliged to answer any question nor to incriminate himself; that he may, if he so desires, be assisted by advocates or legal procurators and that whatever he says may be received in evidence against him."

A journalist is free to disclose his sources without any form of consent. However, such action is considered to be in breach of ethical behaviour, as laid down in the Code of Journalistic Ethics⁷² which says that "Whenever the confidentiality of the source of information, as requested, is not respected", this is considered to be in breach of ethical behaviour.

Complaints against bona fide journalists alleging breach of Journalistic Ethics can be made to the Commission by any person who considers himself to be injured by the breach.⁷³ When the Commission decides that a breach has been committed it shall condemn the transgressor and inflict one or more of the sanctions contained in the Code so as to reflect the gravity of the offence⁷⁴.

⁷² Article 4 of the Code of Journalistic Ethics: <https://igm.org.mt/resources/code-of-journalistic-ethics/>

⁷³ Article 10 of the Rules of Procedure of the Press Ethics Commission (<https://instituteofmaltesejournalists.files.wordpress.com/2012/04/rules-of-procedure-press-ethics-commission.doc>)

⁷⁴ Article 25 of the Rules of Procedure of the Press Ethics Commission

5. In the respective national legislation, are the limits of non-disclosure of the information in line with the principles of the Recommendation No R (2000) 7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

The Freedom of Information Act, the Data Protection act and the Press act is the relevant domestic legislation which deals with the non-disclosure of information. However, in relation to Recommendation No R (2000) 7, the domestic legislation still has much room for development.

The 1996 amendment to the Press Act was clearly a step forward in the right direction, yet, account has evidently not been taken of Recommendation No. R (2000) 7 of the Council of Europe Committee of Ministers to member states on the right of journalists not to disclose their sources of information, adopted on March 8, 2000.

Recommendation No. R (2000) 7 includes a definition of “Source” and “Information of identifying of a source”, however there is no incorporation of these definitions in the domestic legislation. It would be vital for the national legislation to take up these definitions. “Source” is defined to mean any person who provides information to a journalist. In this light one can look into the (see, Eu. Court H.R., Goodwin v. the United Kingdom, 27 March 1996, para. 39)⁷⁵. “Information identifying a source” means, as far as this is likely to lead to the identification of a source, the name and personal data as well as voice and image of a source, the factual circumstances of acquiring information from a source by a journalist, the unpublished content of the information provided by a source to a journalist and personal data of journalists and their employers related to their professional work. However, this is not defined in the national legislation and the Press act does not include these definitions.

The Freedom of Information Act, chapter 496 of the Laws of Malta⁷⁶, part V of this act speaks about the conclusive reasons for not disclosing official documents. Articles 29 to 34 enlist the reasons for non-disclosure on the basis of specific documents. These include;

Documents affecting national security, defence or international relations, and Cabinet documents.

Documents affecting the enforcement of the law and the protection of public safety.

Documents subject to legal professional privilege or containing material obtained in confidence

⁷⁵Goodwin v. The United Kingdom, Strasbourg, 27 March, 1996

⁷⁶ Chapter 496 of the Laws of Malta

Documents relating to business affairs, the economy and research.

Documents the disclosure of which would be contempt of Parliament or of Court.

Information concerning existence of certain documents.

The privilege should also extend to the other laws referred to above and a member of the judiciary should order disclosure.

The second limb of Article 10 of the European convention on human rights⁷⁷, protects the “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” This provision is applicable to the Maltese Law.

In terms of procedure it is necessary that the orders requiring the disclosure of journalistic sources should be delivered only by the judiciary and after heard the journalist. If then, the court requests for disclosure, such revelation should take place behind closed doors. In this case, this should not be the prerogative power of the Executive, be it a minister or any public officer.

Before ordering disclosure, a judge should be given reasonable grounds to believe that an offence has been committed under one or more of the said laws and the following conditions are fulfilled:

The judge is informed that reasonable alternative measures to the disclosure are inexistent or have been exhausted without success.

The information sought is likely to be of substantial value to the investigation and is likely to constitute relevant evidence in a criminal prosecution.

The legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure. In particular, the necessity of the disclosure is identified as responding to a pressing social need⁷⁸.

Data Protection Act⁷⁹ of the laws of Malta, Article 9 speaks about the possession of personal data and provision (e) states:

“Processing is necessary for the performance of an activity that is carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data is disclosed”

When looking into national legislation, it is evident that there is still much to improve in the Maltese Legislation. Recommendation No. R (2000) 7, is a great piece of legislation, which should be included into the Maltese Legislation, especially the definition of “sources” and

⁷⁷ The European Convention on Human Rights, Article 10 (2)

⁷⁸ The Protection of Sources, Article by Prof. Kevin Aquilina.

⁷⁹ Data Protection Act, Laws of Malta - Chapter 440.

“Information of identifying of a source”. This should be done, to ensure that the unhindered exercise of journalism enshrined in the right to freedom of expression is afforded by all institutions.

6. In the Recommendation No R (2000) 7 the following Principles should be respected when the Necessity of Disclosure is stated: absence of Reasonable Alternative Measures, outweighing Legitimate Interest (protection of human life, prevention of major crime, defence of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the Disclosure outweigh the interest in the Non-Disclosure?

With the 1996 amendments to the Maltese Press Act⁸⁰, article 46 was added to deal with the confidentiality of journalistic sources. In Malta there is no absolute privilege granted to journalists to protect their own sources. Although a journalist is still granted a qualified privilege in particular circumstances, there remain other situations where the pre-1996 position in Malta continues to prevail and a journalist may nevertheless be called upon to disclose his sources in terms of a number of provisions contained in special laws during judicial and non-judicial proceedings.⁸¹ Even though article 46 is modelled on Section 10 of the UK Contempt of Court Act 1981, the UK provision seems to be more liberal and human rights friendly.

The general provision allowing qualified protection of journalistic sources is found in Article 46 of the Press Act, which states:

“No court shall require any person mentioned in article 23 to disclose, nor shall such person be guilty of contempt of court for refusing to disclose, the source of information contained in a newspaper or broadcast for which he is responsible unless it is established to the satisfaction of the court that such disclosure is necessary in the interests of national security, territorial integrity or public safety, or for the prevention of disorder or crime or for the protection of the interests of justice:

Provided that the court shall not order such disclosure unless it is also satisfied that in the particular circumstances of the case the need for investigation by the court outweighs the need of the media to protect its sources, due regard being taken of the importance of the role of the media in a democratic society:

Provided further that nothing in this article shall be interpreted as exempting any person mentioned in article 23 from proving the truth of any facts attributed by him in terms of article 12.”

⁸⁰ Chapter 248 of the Laws of Malta.

⁸¹ Protection of journalistic sources in Maltese law: an appraisal from the European Convention on Human Rights. Kevin Aquilina – taken from International Journal Of Public Law and Policy.

Even though the article speaks of a journalistic privilege, it goes on to limit this privilege by speaking of national security, territorial integrity, public safety, prevention of disorder, prevention of crime and protection of justice. The relevant UK provision does not include legitimate aims of territorial integrity and public safety, showing its liberal aspect and limited restriction. Since the legitimate aims mentioned above are not defined in the Maltese Press Act, the Courts have discretion to interpret their extent and meaning, while referring to UK case law on the matter.

Another important aspect is the first proviso to Article 46 polishing upon the concept of the interest in the disclosure outweighing the interest in the non-disclosure. This requires the court not to order such disclosure “unless it is also satisfied that in the particular circumstances of the case the need for investigation by the court outweighs the need of the media to protect its sources, due regard being taken of the importance of the role of the media in a democratic society.” In many jurisdictions this would mean that the Court would weigh the harm of disclosure to freedom of expression against the countervailing interest⁸².

The other exceptions to the protection of journalistic sources fall under different sources of Maltese Law, which are not mentioned under Article 46 of the Press Act. All these provisions in our legislation seem to indicate that the interest in the non-disclosure is outweighed as these laws insist on the need of disclosure. The Official Secrets Act⁸³ contains three articles which can be seen to compel a journalist to disclose his sources. A person is criminalised for the failure to comply with an official direction to return any document or other article relating to security, defence or international relations in his possession which it would be an offence for him to disclose without lawful authority under Article 13. Article 19 of the said Act then authorises a superintendent of police to carry out a search without a magistrate’s warrant where the case *‘is one of great emergency and that in the interest of the State immediate action is necessary’*. Also, under article 22 there is the requirement of any person to give on demand to any police officer not below the rank of inspector *‘any information in his power relating to an offence or suspected offence under this Act’* and *‘to attend at such time and place as may be specified for the purpose of furnishing such information’*. It is a criminal offence to fail to comply with these provisions of the law.

Under the Maltese Security Service Act⁸⁴, the Minister responsible for the security service is allowed to authorise an entry on and interference with property; and to intercept or interfere with communications in the course of their transmission by post or by means of a radio communication or telecommunication system or by other means, as stated in Article 6 of the abovementioned Act. This Act does not contain any provisions to the effect that the Minister is prohibited from authorising the Security Service from entering on or interfering with property used by journalists such as their newsrooms or other offices from where they are working; or

⁸² Freedom of Expression Litigation Project (May 1998), Briefing Paper on Protection of Journalists’ Sources, Article 19 and Interrights.

⁸³ Chapter 50 of the Laws of Malta.

⁸⁴ Chapter 391 of the Laws of Malta.

from authorising the Security Service to intercept communications which journalists might have with the criminal world for the purpose of publishing information in the general interest of society.

Journalistic sources may also be disclosed under the Prevention of Money Laundering Act⁸⁵. Article 4(1) of the said Act authorizes the Criminal Court, following an application by the Attorney General, to issue an investigation order in terms of which any person named in the order *'who appears to be in possession of particular material or material of a particular description which is likely to be of substantial value (whether by itself or together with other material) to the investigation of, or in connection with, the suspect, shall produce or grant access to such material to the person or persons indicated in the order; and the person or persons so indicated shall, by virtue of the investigation order, have the power to enter any house, building or other enclosure for the purpose of searching for such material'*. Under article 4(3) (a) it is stated that this provision does not apply in the case of communications between an advocate or legal procurator and his client and between a clergyman and a person making a confession to him. As one may notice by this article, there is no reference made to a journalist and his source, meaning that the Criminal Court may issue an investigation order against a journalist. Article 4(5) states that it is a criminal offence not to comply with such an investigation order and one shall be liable to a fine and/or imprisonment. The FIAU⁸⁶ is also authorised to *'demand from any person, authority or entity... any information it deems relevant and useful for the purpose of pursuing its functions'*.⁸⁷ The fact that this provision is made *'notwithstanding anything contained in any other law'* shows a greater interest in the disclosure than non-disclosure of sources. Provisions in the Medical and Kindred Professions Ordinance and the Dangerous Drugs Ordinance⁸⁸ have similar aims to those contained in Article 4 of the Prevention of Money Laundering Act.

The Criminal Code⁸⁹ of Malta also gives empowering provisions to the police to pursue the disclosure of sources. Such is the case under article 355AD (3) as, *'the Police may, orally or by a notice in writing, require any person to attend at the police station or other place indicated by them to give such information and to produce such documents as the Police may require and if that person so attends at the police station or place indicated to him he shall be deemed to have attended that police station or other place voluntarily. The written notice referred to in this sub-article shall contain a warning of the consequences of failure to comply, as are mentioned in sub-article (5).'* Sub-article (4) of the same article then provides that *'any person who is considered by the police to be in possession of any information or document relevant to any investigation has a legal obligation to comply with a request from the police to attend at a police station to give as required any such information or document: Provided that no person is bound to supply any information or document which tends to incriminate him.'* It is a criminal offence not to comply with the abovementioned provisions; and under article 628B of the Criminal Code, the Minister responsible for justice may make regulations as to the interception of communications for providing mutual assistance in criminal matters to foreign law enforcement agencies in terms of any treaties to which Malta is a party.

⁸⁵ Chapter 373 of the Laws of Malta.

⁸⁶ Financial Intelligence Analysis Unit.

⁸⁷ Article 30A of Chapter 373 of the Laws of Malta.

⁸⁸ Article 120C of Chapter 31 of the Laws of Malta and Article 24A of Chapter 101 of the Laws of Malta, respectively.

⁸⁹ Chapter 9 of the Laws of Malta.

Article 61 of the Code also punishes the failure to disclose the commission of a crime against the safety of the government when it provides that: *'Whosoever, knowing that any of the crimes referred to in the preceding articles of this Title is about to be committed, shall not, within twenty-four hours, disclose to the Government or to the authorities of the Government, the circumstances which may have come to his knowledge, shall, for the mere omission, be liable, on conviction, to imprisonment for a term from nine to eighteen months'*. This is a clear situation in which the interest in disclosure outweighs the interest in the non-disclosure as journalists are under a legal duty to disclose any information they might have, including the identity of their source, to the police if they are aware of any crime against the safety of the government.⁹⁰

Our law is thus not seen to give an absolute privilege to journalists, as it does to advocates, legal procurators and priests under the COCP⁹¹; and there are many provisions in special laws which indicate a great need in the disclosure of sources rather than the protection of journalistic sources.

7. In the light of the Case Law of the European Court of Human Rights how do National Courts apply the Respective Laws with regard to the Right to Protect Sources? In particular, how do they balance the different interests at stake?

The Maltese Press Act⁹² amended in 1996 offers different types of privilege to protect the confidentiality of journalistic sources: absolute privilege, qualified privilege or no privilege. Prior to the amendments, journalists enjoyed no protection in relation to their sources as was seen in *"Carmel Cacopardo vs. Minister of Works et"*.⁹³ In this case, the plaintiff was dismissed from government service on the ground that, as a public officer, he was contributing articles of a political nature to Maltese newspapers. He sued the defendant claiming that his dismissal from the public service was discriminatory in nature, based on political opinion. And that other public officers, whose political opinions sympathized with the government, were allowed to publish articles of a political nature in the local press and no disciplinary action was taken against them. The editor of the weekly Maltese newspaper called 'It-Torca' was subpoenaed and asked to disclose the identity of a particular article's author writing in that newspaper. The editor asked the court to exempt him from answering that question in the light of his office but the court ordered him to disclose the identity of the article's author in question. The editor appealed to the

⁹⁰ The crimes include attempts against the President of Malta, insurrection or coup d'etat, conspiracy against the State and provocation to perpetrate crimes against the safety of the government; all found under 'of crimes against the safety of the government' in the criminal code.

⁹¹ The Code of Organisation and Civil Procedure, Article 588.

⁹² Chapter 248 of the Laws of Malta

⁹³ Constitutional Court, 25th March 1985

Constitutional Court but the said court threw out his appeal as he was a witness not a party to those proceedings and thus had no *locus standi in judicio*⁹⁴.

Even though the amendments to the Act now offer certain protection, there is still no absolute privilege granted to journalists for the protection of their own sources. A journalist may thus still be called upon to disclose his sources during judicial and non-judicial proceedings. As there is no Maltese case law on these rights, the case law of the European Court of Human Rights' is particularly relevant⁹⁵. Yet, even though it is evident that the ECtHR is very reluctant to allow disclosure, journalists are still being asked to reveal their sources in Maltese courts. As a matter of fact, in January 2016 a Court has been requested to force a columnist and blogger to reveal the source behind certain claims⁹⁶. The defendant refused claiming that as a journalist one has a legal right to protect one's sources. The case is still on-going and will determine major issues. A case similar to this occurred in 2014⁹⁷.

Prof. K. Aquilina⁹⁸ comments on this stating, "In the same way that the police are entitled to protect their informants, journalists have a right to protect their own sources too. Otherwise, they would not be in a position to act as watchdogs of society, a role which has been recognised both by the Strasbourg court and Maltese courts. This case law makes it quite clear that the press has to be protected in its watchdog role in society."

The balancing provision in relation to the different interests at stake is found under the first proviso to Article 46 of the Press Act. This states that '*unless it is also satisfied that in the particular circumstances of the case the need for investigation by the court outweighs the need of the media to protect its sources, due regard being taken of the importance of the role of the media in a democratic society*', the court will not order such disclosure. On this point, the Freedom of Expression Litigation Project⁹⁹ particularly states:

"The party seeking disclosure will have to demonstrate not only the presence of a countervailing interest but also that the information sought is of sufficient importance to warrant a disclosure order. In many jurisdictions this means that the courts will weigh the harm of disclosure to freedom of expression against the countervailing interest. Given the importance of the former, the latter is only occasionally deemed dominant. In addition, in a number of jurisdictions, if the information may be obtained by other means, or if the goal served by disclosure has substantially been satisfied in another way, courts will not order disclosure. This careful balance, reflected in both international and national law standards, is necessary to protect a free press and hence the fundamental democratic right to freedom of expression."

⁹⁴ Protection of journalistic sources in Maltese law: an appraisal from the European Convention on Human Rights. Kevin Aquilina – taken from International Journal Of Public Law and Policy

⁹⁵ <http://www.timesofmalta.com/articles/view/20160125/opinion/Bloggers-and-their-sources.600021>

⁹⁶ <http://www.independent.com.mt/articles/2016-01-18/local-news/Court-requested-to-force-Daphne-Caruana-Galizia-to-reveal-source-of-minister-s-affair-claims-6736151916>

⁹⁷ <http://www.independent.com.mt/articles/2014-01-16/news/police-seek-identity-of-fuel-procurement-scandal-source-3701211136/>

⁹⁸ Dean of the Faculty of Laws at the University of Malta

⁹⁹ Freedom of Expression Litigation Project (May 1998), Briefing Paper on Protection of Journalists' Sources, Article 19 and Interrights.

Malta needs to legislate the soft law instruments of the Council of Europe in its domestic legislation to ensure the protection of sources and that the principles of proportionality and subsidiarity are respected¹⁰⁰.

8. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, and foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

National law in Malta is accessible in that all national legislation, including subsidiary legislation, notices and bye-laws are made public through the judiciary's website.¹⁰¹

With reference to the general activity to communicating ideas and information, this freedom is protected by article 41 (1) of the Laws of Malta. This proviso states that every person is free to receive ideas and information without interference¹⁰². There is thus a general freedom applicable to all the citizens of Malta. Nevertheless the same article, sub-article 2 continues that such freedoms may be restricted in the interest of defence and public safety.¹⁰³ These restrictions are seen in the Security Service Act.¹⁰⁴

This Maltese Legislation empowers law-enforcement authorities to intercept communications. The Act which deals with electronic surveillance and anti-terrorism laws, contains no specific mention of journalists, yet for reasons of national security and anti-terrorism measures this Act would be the most applicable in terms of the issue in question.

The Security Service Act

Chapter 391 of the Laws of Malta defines interception as;

in relation to a warrant, includes the obtaining possession of, disrupting, destroying, opening, interrupting, suppressing, stopping, seizing, eavesdropping on, surveilling,

¹⁰⁰ <http://www.timesofmalta.com/articles/view/20120914/opinion/The-protection-of-sources.436876> accessed on the 2nd February 2016

¹⁰¹ <http://www.justiceservices.gov.mt/> (accessed 27th May 2016)

¹⁰² Constitution of Malta, Article 41

¹⁰³ *ibid.* s41(2)

¹⁰⁴ Security Service Act, Chapter 391 of the Laws of Malta

recording, copying, listening to and viewing of communications and the extraction of information from such communications;¹⁰⁵

Authorities are thus empowered to make lawful interceptions for reasons of national security. Nevertheless interception can be also utilized for other reasons such as public safety and to prevent serious crime.

With reference to who is in charge of administering such interceptions, the role lies with Commissioner of the Security Service. The Commissioner is appointed by the Prime Minister¹⁰⁶ of Malta whilst decisions of the Commissioner cannot be subject to appeal, nor may it be questioned before a court of law.¹⁰⁷ The role of the Minister in the issuing of such warrants in relation to Chapter 391 was reinforced in the case of *Republic of Malta v. Charles Steven Muscat*.¹⁰⁸ This case however did not concern journalistic sources but drug trafficking.

Therefore the expected standards adopted by the judicial authority are not applicable and the judicial mechanism is not part of this process. The commissioner's ability to bring a problem to the public's attention is limited in that the law directs him/her to only report to the Prime Minister and any other avenue of informing is curtailed by the law.¹⁰⁹

Accessibility, Precision and Forseeability of Laws

In its judgment in *S. and Marper v. the United Kingdom*¹¹⁰, the Court ruled that it is essential in the context of telephone tapping, secret surveillance and covert intelligence gathering to have "clear,detailed rules governing the scope and application of measures, as well as minimum safeguards concerning *inter alia*, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness"¹¹¹. Through research on the Maltese scenario, one is aware that there is no existing legislation on journalists and the protection of their sources. It was only in a very recent libel case of *il-Pulizija vs Dr Jason Azzopardi*, where the Judge¹¹² made a reference to journalistic sources and quoted an ECtHR case:

"protection of journalistic sources is one of the basic conditions for press freedom, as is recognised and reflected in various international instruments including the Committee of Ministers Recommendation (...).

¹⁰⁵ *ibid.* 2(1)

¹⁰⁶ *ibid.*12(1)

¹⁰⁷ *ibid.* 13

¹⁰⁸ *Republic of Malta vs. Charles Steven Muscat*, Court of Criminal Appeal (Superior), 31 July 2014, 47/2010

¹⁰⁹ Surveillance by Intelligence Services: fundamental rights safeguards and remedies in the EU. European Union Agency for Fundamental Rights, 2015

¹¹⁰ *S. and Marper v. the United Kingdom*, Applications Nos. 30562/04 and 30566/04, judgment of 4 December 2008

¹¹¹Parliamentary Assembly, The protection of journalists' sources,Doc. 12443

1 December 2010 - Rapporteur: Mr Morgan JOHANSSON, Sweden, Socialist Group

¹¹² *Il-Pulizija vs Dr Jason Azzopardi*, Court of Magistrates (Court of Criminal Judicature), 15th April, 2016, 4/2016

*Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest”.*¹¹³

With reference to accessibility, as aforementioned, Maltese law is public and accessible. With reference to foreseeability and precision of Maltese legislation on matters of surveillance and anti-terrorism, the UN Special Rapporteur on Privacy, Profs Joe Cannataci of the University of Malta said that these laws are ill-conceived, outdated and that they do not offer citizens enough protection and also stated that:

“One of the problems with the Maltese law is that it is ill-conceived, having apparently been modelled on one of the weakest oversight mechanisms in the world, that of the UK, where, recently too, we have witnessed widespread calls to replace the authorisation role of the minister with that of an independent judicial authority.”¹¹⁴

At this moment in time therefore there is no clear foreseeability. This also stems from the fact that such an issue on terrorism, surveillance and journalistic sources has not arisen yet in front of the Maltese Courts.

9. Can journalists rely on Encryption and Anonymity online to Protect themselves and their Sources against Surveillance?

With reference to the modern age of digital communications, the United Nations special rapporteur on Freedom of Expression presented a report¹¹⁵ which dealt on the significance and importance of encryption and anonymity, being leading instruments for online security. This report somewhat extended the freedom of opinion and expression and gave it a modern outlook, with reference to the right of privacy in the modern digital age. The report urged countries to ensure that people are free to protect the privacy of digital communications by using strong encryption and anonymity tools.¹¹⁶ Furthermore, the ability given to journalists to rely on anonymity online could be said to be an extension of the right to freedom of speech, as online

¹¹³ ECtHR (Decision) 8 December 2005, Case No. 40485/02, Nordisk Film & TV A/S v. Denmark u ECtHR 31 May 2007, Case No. 40116/02, S ec ic v. Croatia.

¹¹⁴ <http://www.timesofmalta.com/articles/view/20150715/local/surveillance-laws-are-out-of-date-dont-offer-protection.576641>

¹¹⁵ Jeff Kosseff, ‘Do we have a right to online anonymity?: It depends on which judge you ask’ <<http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2014/do-we-have-right-online-ano>> accessed 16 February 2016.

¹¹⁶ Human Rights Watch, ‘UN: Online Anonymity, Encryption Protect Rights: Support Safeguards Against Invasive Surveillance’, (17 June 2015).

anonymity enables commenters to express unpopular political views, expose government corruption, and reveal information about sensitive topics.

However, to this date, there is no particular piece of legislation which makes reference to encryption or anonymity online for journalists to protect themselves and their sources against surveillance. In the light of the fact that there are no laws which prohibit journalists from anonymity, this lacuna in the law could lead one to conclude that journalists could choose to publish their reports anonymously, as there is nothing which prohibits them from doing so. This coincides with the right to privacy, implemented through our Data Protection Laws.¹¹⁷

However, with such use of anonymity, laws which protect libelous or harmful claims by the media still apply. In fact, in the case of defamation, before victims can collect damages, the defendant must be identifiable, and this is typically accomplished by issuing a subpoena to the defendant's Internet Service Provider, seeking the defendant's name and address, proving to be/have become a limitation to the right of privacy of journalists when it is in breach of the rights of others.

This brings to mind encryption. One would think that there is nothing stopping the authorities from using methods of surpassing such anonymity, where possible. Encryption is said to be a method of protecting information from being seen by those who were not intended to see it.

This is done by using mathematical formulae in order to scramble data, which can only be deciphered with a specific key. Encryption has become an important tool for journalists ever since awareness was raised on global surveillance operations in 2013.¹¹⁸ In Malta, there are no laws which prohibit journalists from making use of encryption in their means of communication.

In accordance to the legal maxim, *ubi lex voluit dixit*, it provides that this lacuna in the law could be used in favour of journalists in using encryption to protect their sources against surveillance.

The above mentioned report by the United Nations special rapporteur on Freedom of Expression expresses that encryption and anonymity should be used, in light of the fact that without so, states could use loopholes in technology which would be oppressive on journalists.¹¹⁹

10. Are Whistle-Blowers explicitly Protected under Law protecting Journalistic Sources? Is there another practice Protecting whistle-

¹¹⁷ Chapter 440 of the Laws of Malta.

¹¹⁸ Karen D Burke, 'Toolkit for Protecting Journalistic Sources' (Global Editors Network, July 2015).

¹¹⁹ Geoffrey King, 'UN report promotes encryption as fundamental and protected right', (Committee to Protect Journalists, June 2015), <<https://cpj.org/blog/2015/06/un-report-promotes-encryption-as-fundamental-and-p.php>>, accessed 16 February 2016.

blowers? Is the Legislation prohibiting Authorities and Companies from Identifying whistle-blowers?

In the light of the exposure given to the concept of 'whistleblowing' in recent years, such as in the internationally known WikiLeaks case, or more locally in Malta, the recent scandal regarding corrupt practices in the procurement of fuel by EneMalta,¹²⁰ whistle-blowers are deemed to be a primary journalistic source if discretion is used to determine their authenticity. The latter case is mentioned further on through the case of George Farrugia. However, Chapter 527 of the Laws of Malta, the Protection of the Whistle-blower Act, has been thoroughly criticised for lacking basic procedures to ensure that journalists are not harassed or victimised for their efforts in order to uncover their sources.¹²¹ Therefore, to introduce the matter, regardless of the protection given under the Press Act regarding Journalistic Freedoms and the confidentiality of resources,¹²² several instances have shown that whistle-blowers, as a source, are given a different treatment.

The intention of the Protection of the Whistle-blower Act is to provide *'for procedures in terms of which employees in both the private sector and the public administration may disclose information regarding improper practices by their employers or other employees in the employ of their employers and to protect employees who make said disclosures from detrimental action.'*¹²³ Article 46 of the Press Act refers to the confidentiality of journalistic sources, of which information derived from a whistle-blower forms part. However before delving further into this matter, it is important to differentiate between the journalist and the whistle-blower, as they are entitled to different protection and should not be confused to be one and the same in the eyes of our law. Article 46 of the Press Act protects the journalist, and does not make reference to the whistle-blower, even though in practice, considering the whistle-blower would be a journalistic source, such would be protected.

Since in the aforementioned answers, a thorough discussion was made on the protection of journalists and their sources, this section will be dealing with the protection given to whistle-blowers as a source. The main piece of legislation regarding whistle-blowers is the Protection of the Whistle-blower Act, referred to by Profs. Kevin Aquilina as *'a feather in the cap of democracy'* but yet *'contains provisions that discourage the mass media from carrying out their fourth estate public watchdog duty'*.¹²⁴ This is because a journalist (who could also be referred to as the 'whistleblowing reporting officer' in terms of Article 2 of Chapter 527 of the Laws of Malta)¹²⁵ who reveals the

¹²⁰ MaltaToday, 'Corruption at EneMalta and the oil scandal' (27 January 2013), <<http://www.maltatoday.com.mt/news/national/24262/corruption-at-enemalta-and-the-oil-scandal-20130127#.VxQAT2MRpE4>>

¹²¹ MaltaToday, 'Whistle-blowers still unprotected' (17 March 2015),

<http://www.maltatoday.com.mt/comment/editorial/50752/whistle-blowers_still_unprotected#.Vr8w1Mdh1E4>

¹²² Articles 46 and 47, Chapter 248 of the Laws of Malta.

¹²³ Chapter 527 of the Laws of Malta.

¹²⁴ Kevin Aquilina, 'A whistle-less Whistle-blower' (MaltaToday, 9 April 2014),

http://www.maltatoday.com.mt/comment/blogs/37813/a_whistleless_whistle-blower#.Vr9YB8dh1E5.

¹²⁵ Under Article 2 of Chapter 527 of the Laws of Malta, the "whistleblowing reporting officer" means such officer within an employer charged with carrying out the functions designated under Article 12 of the same Act.

identity of a whistle-blower, though ought to keep such information secret,¹²⁶ and improperly divulges such information, is **not** subject to a criminal punishment, that which is established under Article 19 of the same act.¹²⁷ The enactment does not punish such conduct through a specifically established offence for the purpose but relies on the general crime contained in the Criminal Code and on disciplinary proceedings which may be instituted against the reporter.¹²⁸

Although it is stated that whistle-blowers are protected under the aforementioned act, in reality such protection is very restricted. A whistle-blower is defined under article 2 of the Act as *'any employee who makes a disclosure to a whistleblowing reporting officer or a whistleblowing reports unit, as the case may be, whether it qualifies as a protected disclosure or not under this Act'*¹²⁹. Under our law the organisations subject to this Act, and of which the employees mentioned in the definition form part of, are, within the private sector, those whose last annual accounts meets at least two of the following criteria, that is an average number of more than 250 employees, during the financial year, a total balance sheet exceeding €43,000,00 and an annual turnover exceeding €50,000,000.¹³⁰ As regards to the public sector, the term 'employer' which the employee is subject to is each ministry of the Government of Malta.¹³¹ An exhaustive list of 'improper practices' are defined under article 2, however, excluded from the protection provided by this enactment are the following three:

- (a) members of a disciplined force (including the Armed Forces of Malta, the Police Force, the Department of Civil Protection Personnel, and the Corroding Correctional Facility Officers
- (b) members of the Security Service; and
- (c) persons employed in the foreign, consular or diplomatic service of the government.

Furthermore, a whistle-blower is only protected by law if his disclosure is a protected one, i.e. that through an explicit reference by a legal provision. Therefore this brings to mind instances in which are not subject to being considered as 'protected disclosures', hence one would not be considered a whistle-blower, and moreover not liable to the law's protection. An interesting occurrence was in the local case between George Farrugia, a middleman in a bribery scandal, and John's Garage, the Farrugia family business.¹³² In January 2013, a Maltese newspaper MaltaToday, had published emails which revealed information related to commissions paid to oil companies to secure oil contracts. This was used as evidence in a court case between the above mentioned, of which police later investigated the newspaper, pressuring it to reveal its sources.

¹²⁶ Chapter 527 of the Laws of Malta.

¹²⁷ *ibid.*

¹²⁸ Aquilina (n 3).

¹²⁹ Chapter 527 of the Laws of Malta.

¹³⁰ Second Schedule, Chapter 527 of the Laws of Malta.

¹³¹ Second Schedule, Chapter 527 of the Laws of Malta.

¹³² Times of Malta, 'Oil Scandal: George Farrugia made donation at Austin Gatt event: Manual Mallia as lawyer knew of bribery since 2010' (16 December 2013), <<http://www.timesofmalta.com/articles/view/20131216/local/oil-procurement-scandal-george-farrugia-continues-to-give-evidence.499311>

Eventually, enough evidence emerged and allowed for a warrant to take criminal action to be issued in regards to the officials involved.

George Farrugia was offered a Presidential pardon in exchange of giving out incriminating information. In taking up this offer, the Farrugia brothers were arrested, well after the Whistle-blower's Act coming into force in September of that year. Their arrest circulated around the depositing of the incriminating emails in the public domain, being the who first lifted the lid on this scandal.

What is most anomalous about this case is how this act of law, which aims to protect the whistle-blower, was used to achieve something completely opposite to this. According to the act, the Farrugia brothers couldn't have been considered to be whistle-blowers as they do not meet the requirements, and George Farrugia was offered a settlement in return for former's immunity. The man who was the cause of the scandal, was rather anomalously given immunity. This instance set about a dangerous precedent, running counter to the intentions of the Whistle-blower's Act. The idea behind this law was to encourage people to reveal corruption without fear of incrimination. In practice, however, this case showed the contrary. As the definition of 'whistle-blower' is restricted only to employees within a company or entity within which the improper conduct was reported, we find that this was not applicable to the Farrugia brothers, who were not granted immunity, even if their revelation of the facts were, so to speak, accidental.

This case shows how one could opine that Malta's law on the protection of whistle-blowers is limited, even without considering the limitations set as regards to the Armed Forces of Malta, the Police Force, the Department of Civil Protection Personnel, the Corradino Correctional Facility officers and the Foreign Office. It is thus debatable as to whether this law is in fact effective, giving regard to how limited it is, and how very few persons could be considered as 'whistle-blowers' in the eyes of the law.

The Council of Europe recognised that individuals who report and disclose information on threats or harm to the public interest, i.e. the scope being the concept of the 'whistle-blower', can contribute to strengthening transparency and democratic accountability.¹³³ The personal scope enlisted in this recommendation indicates that the definition of whistle-blower should cover *'all individuals working in either the public or private sectors, irrespective of the nature of their working relationship and whether they are paid or not'*. This proves inconsistency with our law, as whereas this definition is deemed to be rather wide, our law and case law have shown far too many limitations. Ultimately, regardless of the limitations set, it is always of great importance that the element of public interest is maintained, and it is debatable whether this is reflected in our legislation.

¹³³ Recommendation CM/Rec (2014) 7 of the Committee of Ministers to Member States on the Protection of Whistle-blowers.

It could thus be argued that Recommendation CM/Rec (2014) 7 of the Committee of Ministers is not implemented and mirrored into our legislation to the fullest extent, but only partly. The ensuing legislation contains far too many loopholes for it to be considered an adequate Whistle-blower's Protection Act. This could be reflected merely through the limited definition of a whistle-blower, without considering all the other prospects.

11. Conclusion

The judgments by the ECtHR emphasise that the balance tips towards protecting journalistic sources and not towards revealing information, irrespective of the reasons as to why this is to be done. Since these judgments are to be taken into consideration in Malta, it may be held that the journalistic sources' protection is awarded a considerably high esteem because it is a fundamental constituent of a democratic society.¹³⁴ Moreover, since there is no extant case law in Malta on this point, the ECtHR cases are paramount in such area of law.

However, in Maltese legislation it may be said that there is a two-fold void, because neither the definition of 'journalist', 'journalistic sources' or 'media', and nor the definition of the six legitimate aims in Article 46 of the Press Act (as mentioned above) are found in our law, among other lacking definitions mentioned above.

It can be concluded that the privilege to protect journalistic source is limited, and as evident it is not always granted, due to it not being absolute, such privilege being qualified under the Press Act but not afforded under the above-mentioned laws. Therefore there is no uniformity where journalistic sources are concerned because under different situations there is either a limited privilege or no privilege at all. Moreover, the legitimate aims in terms of which a journalist may be forced to disclose the source of information are broader than those under UK law.

As held by Professor Kevin Aquilina, the protection given by Article 10 of the ECHR to journalistic sources may be circumvented by having the Police or the security service reach the journalistic source through different means than the disclosure of the journalist's information, *inter alia*, telephone or e-mail interception.¹³⁵

It has to be noted that individuals other than journalists at a particular medium are privy to the source of journalistic information, but the protection awarded to journalists is not extended to them and therefore where journalists would not be requested to reveal their sources, such workers would be, and therefore have no legal protection.

The special laws in Malta which deny the qualified privilege of journalistic sources or criminalise not revealing journalistic sources can be compared to the judgments of the ECtHR because the

¹³⁴ Aquilina (n1)

¹³⁵ Aquilina (n1)

protection given by the Court contrasts with the position in Malta.¹³⁶ This is so because the ECtHR in its case law seems to require that the restrictions on freedom of expression are as limited as possible, due to the protection of journalistic sources being indispensable in a democratic society which respects the freedom of the press.¹³⁷ Moreover, in our courts, there have been please[1] by the Police to request individuals falling under the umbrella protected by journalistic sources such as editors, to be ordered by the court to disclose sources, despite the constant ECtHR judgments and the unequivocal direction they adopt.¹³⁸

For the above-mentioned reasons the Maltese Press Act requires extensive updates, especially as regards definitions, to extend and enhance the protection to journalistic sources, in line with ECtHR judgments. This would serve to firmly establish and emphasise the important function of journalists within the media, that of having the public being able to access, in a democratic society founded on the rule of law, information about the State, its institutions, the public administration, and all that may affect society. Finally, Malta should legislate soft law instruments of the Council of Europe, particularly the Appendix to Recommendation No. R (2000) 7 of 8 March 2000 in our domestic legislation, whereby the 'unhindered exercise of journalism enshrined in the right to freedom of expression is afforded by all institutions and to fill in the gaps in Maltese Law concerning the application of the right of journalists not to disclose information identifying a source'.¹³⁹

¹³⁶ Aquilina (n1)

¹³⁷ Aquilina (n3) 249

¹³⁸ Kevin Aquilina, 'Bloggers and their sources' *Times of Malta* (Malta, January 25 2016) <<http://www.timesofmalta.com/articles/view/20160125/opinion/Bloggers-and-their-sources.600021>> accessed 2 February 2016.

¹³⁹ Aquilina (n 3) 260-261.

12. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

12.1. Legislation

- Code of Organization and Civil Procedure 1855, Chapter 12 of the Laws of Malta
- Constitution of Malta
- Criminal Code 1854, Chapter 9 of the Laws of Malta
- Dangerous Drugs Ordinance 1939, Chapter 101 of the Laws of Malta
- Medical Kindred Professions Ordinance 1901, Chapter 31 of the Laws of Malta
- Official Secrets Act 1996, Chapter 50 of the Laws of Malta
- Police Act 1961, Chapter 164 of the Laws of Malta
- Press Act 1974, Chapter 248 of the Laws of Malta
- Prevention of Money Laundering Act 1994, Chapter 373 of the Laws of Malta
- Security Service Act 1996, Chapter 391 of the Laws of Malta
- Chapter 527 of the Laws of Malta
- The Prevention of Money Laundering Act, Chapter 373 of the Laws of Malta
- Medical and Kindred Professions Ordinance, Chapter 31 of the Laws of Malta
- Maltese Code of Journalistic Ethics
- United Kingdom Contempt of Court Act 1981
- Freedom of Expression Litigation Project (May 1998), *Briefing Paper on Protection of Journalists' Sources*, Article 19 and Interights.

12.2. Case Law

- *Carmel Cacopardo vs. Minister for Works et*, Constitutional Court, 25 March 1985, Vol. 69, Pt I, Section I, p. 24.
- *Carmel Cacopardo vs. Minister of Works et* - Constitutional Court, 25th March 1985
- *Il-Pulizija vs Dr Jason Azzopardi*, Court of Magistrates (Court of Criminal Judicature), 15th April, 2016, 4/2016
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- 22 EHRR 25 *Christine Goodwin vs. the United Kingdom* [1996].
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12.3. Books and articles

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- Aquilina K, 'Bloggers and their sources' *Times of Malta* (Malta, January 25 2016) <<http://www.timesofmalta.com/articles/view/20160125/opinion/Bloggers-and-their-sources.600021>>
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- Kosseff J, 'Do we have a right to online anonymity?: It depends on which judge you ask' (Reporters Committee for Freedom of the Press)
- Burke K, 'Toolkit for Protecting Journalistic Sources' (Global Editors Network, July 2015)
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- Freedom of Expression Litigation Project (May 1998), Briefing Paper on Protection of Journalists' Sources, Article 19 and Interrights

12.4. Internet sources

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12.5. Other sources

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- Surveillance by Intelligence Services: fundamental rights safeguards and remedies in the EU. European Union Agency for Fundamental Rights, 2015
- Parliamentary Assembly, 'The protection of journalists' sources, Doc. 124431 December 2010 - Rapporteur: Mr Morgan JOHANSSON, Sweden, Socialist Group

13. Table of Provisions

Provisions in the Maltese Language	Corresponding Translation
<p>Att dwar l-istampa – Kapitlu 248 – Artikolu 46</p> <p>Ebda qorti ma għandha teħtieġ li persuna msemmija fl-artikolu 23 tikkxef, anqas ma għandha dik il-persuna tkun hatja ta' disprezz lejn l-awtorità tal-qorti talli ma tkunx trid tikkxef, is-sorsi ta' informazzjoni li tkun tinsab f'gazzetta jew xandira li hija tkun responsabbli għaliha, kemm-il darba ma jiġix stabbilit għassodisfazzjon tal-qorti li dak il-kxif ikun meħtieġ fl-interess tassigurtà nazzjonali, integrità territorjali jew inkolumità pubblika, jew għat-tharis mid-dizordni jew kriminalità, jew għall-harsien talinteressi tal-gustizzja:</p> <p>Iżda l-qorti m'għandhiex tordna dak il-kxif sakemm ma tkunx ukoll sodisfatta li fiċ-ċirkostanzi partikolari tal-każ il-htieġa li l-qorti tagħmel investigazzjoni tkun ikbar mill-htieġa tal-media li jiproteġu s-sorsi ta' informazzjoni tagħhom, wara li jitqies sew irrwol tal-media f'soċjetà demokratika:</p> <p>Iżda wkoll, ebda haġa f'dan l-artikolu ma għandha titfisser bħala li teżenta lil xi persuna msemmija fl-artikolu 23 milli ġgħib prova dwar il-verità ta' xi fatti minnha attribwiti skont ma</p>	<p>Press Act- Chapter 248- Article 46</p> <p>No court shall require any person mentioned in article 23 to disclose, nor shall such person be guilty of contempt of court for refusing to disclose, the source of information contained in a newspaper or broadcast for which he is responsible unless it is established to the satisfaction of the court that such disclosure is necessary in the interests of national security, territorial integrity or public safety, or for the prevention of disorder or crime or for the protection of the interests of justice:</p> <p>Provided that the court shall not order such disclosure unless it is also satisfied that in the particular circumstances of the case the need for investigation by the court outweighs the need of the media to protect its sources, due regard being taken of the importance of PRESS [CAP. 248. 13 the role of the media in a democratic society:</p> <p>Provided further that nothing in this article shall be interpreted as exempting any person mentioned in article 23 from proving the truth of any facts attributed by him in terms of article 12.</p>

<p>hemm flartikolu 12.</p>	
<p>Att dwar l-istampa – Kapitolu 248 – Artikolu 12</p> <p>(1) F'kull kawża ta' libell minhabba malafama taht l-artikolu 11, il-prova tal-verità tal-fatti attribwiti hija ammessa jekk l-akkużat, fl-istadju preliminari tal-kawża, jieħu r-responsabbiltà kollha ta' malafama li tagħha huwa akkużat u jiddikjara illi b'difiża tiegħu huwa jrid jipprova l-verità tal-fatti attribwiti minnu lill-parti offiża: Izda l-prova tal-verità tal-fatti attribwiti hija ammessa biss fil-każ li l-persuna offiża –</p> <p>(a) tkun uffiċjal jew impjegat pubbliku u l-fatti attribwiti lilha huma dwar l-eżerċizzju tal-funzjonijiet tagħha; jew</p> <p>(b) tkun kandidat għal kariga pubblika u l-fatti attribwiti lilha jkunu dwar l-onestà, il-ħila jew il-kompetenza tagħha li tokkupa dik il-kariga; jew (ċ) abitwalment teżerċita professjoni, arti jew sengħa, u l-fatti attribwiti lilha jkunu dwar l-eżerċizzju ta' dik il-professjoni, arti jew sengħa; jew</p> <p>(d) tieħu parti attiva fil-politika u l-fatti attribwiti lilha jkunu dwar il-parti li hi tieħu fil-politika; jew (e) jkollha kariga ta' fiduċja fi kwistjoni ta' interess pubbliku ġenerali: Izda wkoll il-prova tal-verità tal-fatti attribwiti ma hijjex ammessa jekk dawk il-fatti ikunu dwar il-ħajja domestika tal-offiż.</p>	<p>Press Act- Chapter 248- Article 12</p> <p>(1) In any action for a defamatory libel under article 11, the truth of the matters charged may be enquired into if the accused, in the preliminary stage of the proceedings, assumes full responsibility for the alleged libel and declares in his defence that he wishes to prove the truth of the facts attributed by him to the aggrieved party:</p> <p>Provided that the truth of the matters charged may be enquired into only if the person aggrieved –</p> <p>(a) is a public officer or servant and the facts attributed to him refer to the exercise of his functions; or</p> <p>(b) is a candidate for a public office and the facts attributed to him refer to his honesty, ability or competency to fill that office; or</p> <p>(c) habitually exercises a profession, an art or a trade, and the facts attributed to him refer to the exercise of such profession, art or trade; or</p> <p>(d) takes an active part in politics and the facts attributed to him refer to his so taking part in politics; or</p> <p>(e) occupies a position of trust in a matter of general public interest: Provided further that the truth of the matters charged may not be enquired into if such matters refer to the</p>

<p>(2) Jekk il-verità tal-fatti attribwiti tiġi ammessa skont iddisposizzjonijiet ta' qabel ta' dan l-artikolu –</p> <p>(a) jekk il-verità tal-fatti attribwiti tkun sostanzjalment ippruvata, l-akkużat ma jehel ebda piena jekk il-qorti tkun sodisfatta illi l-prova tal-verità saret fl-interess pubbliku u hu jkollu jedd għall-ħlas lura mingħand ilkwerelant jew l-attur tal-ispejjeż li jkun għamel f'xi proċedimenti kriminali jew ċivili: Iżda il-prova tal-verità tal-fatti attribwiti ma teħlisx lill-akkużat mill-piena għal insulti, akkużi jew allegazzjonijiet illi l-qorti jkun jidhrilha li ma kenux meħtieġa li jiġu attribwiti lill-persuna offiża l-fatti li l-prova tagħhom tkun giet ammessa;</p> <p>(b) jekk il-verità tal-fatti attribwiti ma tkunx sostanzjalment ippruvata, l-akkużat jehel priġunerija għal żmien ta' mhux iżjed minn sitt xhur jew multa ta' mhux iżjed minn elf, mija u erbgħa u sittin euro u disgħa u sittin ċenteżmu (1,164.69) jew dik ilpriġunerija u multa flimkien.</p>	<p>domestic life of the aggrieved party.</p> <p>(2) Where the truth of the matters charged is enquired into in accordance with the foregoing provisions of this article –</p> <p>(a) if the truth of the matters charged is substantially proved, the defendant shall not be liable to punishment if the court is satisfied that the proof of the truth has been for the public benefit and he shall be entitled to recover from the complainant or plaintiff the costs sustained by him in any criminal or civil proceedings: Provided that the proof of the truth of the matters charged shall not exempt the defendant from punishment for any insult, imputation or allegation which the court shall consider to have been unnecessary in attributing to the person aggrieved the facts the proof of the truth whereof shall have been allowed;</p> <p>(b) if the truth of the matters charged is not substantially proved, the accused shall be liable to imprisonment for a term not exceeding six months or to a fine (multa) not exceeding one thousand and one hundred and sixtyfour euro and sixty-nine cents (1,164.69) or to both such imprisonment and fine.</p>
<p>Att dwar l-istampa – Kapitolu 248 – Artikolu 2</p> <p>F'dan l-Att, kemm-il darba r-rabta tal-kliem ma teħtieġx xort'ohra - "editur" tfisser il-persuna responsabbli għall-pubblikazzjoni ta' kull stampat u dwar gazzetta jew servizz ta' xandir tinkludi kull persuna li tħares id-disposizzjonijiet tal-artikolu 35; "gazzetta" tfisser kull gazzetta li jkun fiha aħbarijiet,</p>	<p>Press Act- Chapter 248- Article 2</p> <p>"broadcast" means the transmission by wire or over the air, including that by satellite, in encoded or unencoded form of words or of visual images, whether or not such words or images are in fact received by any person;</p>

<p>avviżi, informazzjonijiet, grajjiet, jew xi kummenti jew osservazzjonijiet fuqhom, stampata għall-bejgħ jew sabiex titqassam bla hlas jew xort'ohra, u pubblikata kuljum jew kull tant żmien; "Malta" għandha l-istess tifsir kif mogħti lilha bl-artikolu 124 tal-Kostituzzjoni ta' Malta; "persuna" tinkludi korp ta' persuni sew jekk ikollhom personalità ġuridika distinta sew jekk le; "pubblikazzjoni" tfisser kull att li bih kull stampat jiġi jew jista' jiġi ikkommunikat jew imgharraf lil xi persuna jew li bih kliem jew immaġini viżwali jiġu mxandra; "Reġistratur" tfisser dik il-persuna li l-Prim Ministru jista', minn żmien għal żmien b'avviż fil-Gazzetta tal-Gvern, jahtar bhala Reġistratur tal-Istampa għall-finijiet ta' dan l-Att; "responsabbli għall-pubblikazzjoni" tfisser persuna li tkun sid ta' impriza għall-pubblikazzjoni ta' gazzetta jew li jkollha liċenza għax-xandir u tinkludi kull persuna li jkollha faċilitajiet għallproduzzjoni jew riproduzzjoni ta' kull stampat; "stampat" tfisser kull kitba stampata b'tipi tipografici jew billitografija jew b'mezzi jew proċessi oħra bħal dawn fuq karta jew sustanza oħra, kif ukoll kull kartellun jew avviż ieħor li jitwaħħal li jkun fih xi sinjal jew kitba miktuba, stampata, impingija, riżaltata jew xort'ohra impressa, u tinkludi kull diska, tape, film jew mezz ieħor li bih kliem jew immaġini viżwali jistgħu jinstemgħu, jitwasslu jew jiġu riprodotti; "xandir" tfisser it-trasmissjoni permezz ta' fili jew minn ġewwa l-arja, inkluża wkoll permezz ta' satellita, f'għamla kodifikata jew mhijiex; ta' kliem jew immaġini viżivi, sew jekk daww il-kliem jew immaġini jkunu fil-fatt riċevuti minn xi persuna sew jekk le.</p>	<p>"newspaper" means any paper containing news, advertisements, intelligence, occurrences, or any comments or observations thereon, printed for sale or to be distributed free or in any other manner, and published daily or periodically;</p>
<p>Att dwar l-istampa – Kapitolu 248 – Artikolu 8</p>	<p>Press Act- Chapter 248- Article 8</p>

<p>Kull min, b'xi mezz imsemmi fl-artikolu 3, jikkxef xi haġa sigrieta li tkun giet fdata lilu minhabba l-professjoni jew il-kariga tiegħu, jeħel meta jinsab hati prigunerija għal żmien ta' mhux iżjed minn tliet xhur jew multa jew dik il-prigunerija u multa flimkien.</p>	<p>Whosoever, by any means mentioned in article 3, shall divulge any secret matter confided to him by reason of his profession or calling, shall be liable on conviction to imprisonment for a term not exceeding three months or to a fine (multa) or to both such imprisonment and fine.</p>
<p>Att dwar is-sigrieti uffiċjali – Kapitlu 50 – Artikolu 13</p> <p>(1) Meta funzjonarju pubbliku jew kuntrattat mill-Gvern, bis-saħħa tal-kariga tiegħu bħala tali, ikollu fil-pussess tiegħu jew taħt il-kontroll tiegħu xi dokument jew oġġett ieħor li jekk huwa jikkxifhom mingħajr awtorità legittima taħt xi waħda mid-disposizzjonijiet ta' qabel ta' dan l-Att huwa jkun qed jaġħmel reat, huwa jkun hati ta' reat jekk –</p> <p>(a) billi jkun funzjonarju pubbliku, iżomm dak iddokument jew oġġett kontra d-dmirijiet uffiċjali tiegħu; jew</p> <p>(b) billi jkun kuntrattat mill-Gvern, jonqos milli jħares direttiva uffiċjali biex iragġa' lura jew jiddisponi minn dak id-dokument jew oġġett, jew jekk huwa jonqos milli jara li ma jsehħx il-kxif mhux awtorizzat tad-dokument jew tal-oġġett li bħala persuna fil-kariga tiegħu huwa jista' raġonevolment ikun mistenni li jara li ma jsehħx. (2) Tkun difiża għal funzjonarju pubbliku li jkun akkużat b'reat taħt is-subartikolu (1)(a) li jgħib prova li fil-waqt* tar-reat allegat huwa kien qed jaġixxi skont id-dmirijiet uffiċjali tiegħu u li ma kellu ebda kawża raġonevoli għaliex il-fehma tiegħu kellha</p>	<p>Official Secrets Act- Chapter 50 – Article 13</p> <p>13. (1) Where a public servant or government contractor, by virtue of his position as such, has in his possession or under his control any document or other article which it would be an offence under any of the foregoing provisions of this Act for him to disclose without lawful authority he is guilty of an offence if -</p> <p>(a) being a public servant, he retains the document or article contrary to his official duty; or</p> <p>(b) being a government contractor, he fails to comply with an official direction for the return or disposal of the document or article, or if he fails to take such care to prevent the unauthorised disclosure of the document or article as a person in his position may reasonably be expected to take.</p> <p>(2) It is a defence for a public servant charged with an offence under subarticle (1)(a) to prove that at the time of the alleged offence he believed that he was acting in accordance with</p>

<p>tkun xort'ohra.</p> <p>(3) Fis-subartikolu (1) u (2) referenzi għal funzjonarju pubbliku jinkludu kull persuna, li ma tkunx funzjonarju pubbliku jew kuntrattat mill-Gvern, li fil-każ tagħhom ikun hemm fis-sehħ avviż għall-għanijiet tal-artikolu 6(1) .</p> <p>(4) Meta persuna jkollha fil-pussess tagħha jew taht il-kontroll tagħha xi dokument jew oġġett ieħor li jkun reat għaliha taht lartikolu 10 li tikxef mingħajr awtorità legittima, hija tkun hatja ta' reat jekk –</p> <p>(a) hija tonqos milli tħares xi direttiva ufficjali biex titragga' lura jew tiddisponi minn dak id-dokument jew oġġett; jew</p> <p>(b) meta hija tkun kisbitu mingħand funzjonarju pubbliku jew kuntrattat mill-Gvern b'patti li jkunu jehtiegu li jinżamm b'mod konfidenzjali jew f'ċirkostanzi li fihom dak il-funzjonarju jew persuna kuntrattata jistgħu raġonevolment jippretendu li jkunu hekk se jinżammu, hija tonqos milli tiehu dak il-hsieb sabiex tara li kxif mhux awtorizzat ma jsirx hekk bħalma persuna fil-kariga tagħha tista' tkun raġonevolment mistennija li tiehu.</p> <p>(5) Meta persuna jkollha fil-pussess tagħha jew taht il-kontroll tagħha xi dokument jew oġġett ieħor li jkun reat għaliha taht lartikolu 11 li tikxef mingħajr awtorità legittima, hija tkun hatja ta' reat jekk hija tonqos milli tħares direttiva ufficjali sabiex titragga' lura jew tiddisponi minn dak id-dokument jew oġġett.</p> <p>(6) Persuna tkun hatja ta' reat jekk hija tikxef xi informazzjoni, dokument jew oġġett ieħor ufficjali li jista' jintuza bil-għan li jinkiseb aċċess għal xi informazzjoni, dokument jew oġġett ieħor li jkun protett kontra l-kxif bid-disposizzjonijiet ta' qabel ta' dan lAtt u ċ-ċirkostanzi li fihom isir il-kxif ikunu tali li jkun</p>	<p>his official duty and had no reasonable cause to believe otherwise.</p> <p>(3) In subarticles (1) and (2) references to a public servant include any person, not being a public servant or government contractor, in whose case a notification for the purposes of article 6(1) is in force.</p> <p>(4) Where a person has in his possession or under his control any document or other article which it would be an offence under article 10 for him to disclose without lawful authority, he is guilty of an offence if -</p> <p>(a) he fails to comply with an official direction for its return or disposal; or</p> <p>(b) where he obtained it from a public servant or</p> <p>government contractor on terms requiring it to be held in confidence or in circumstances in which that servant or contractor could reasonably expect that it would be so held, he fails to take such care to prevent its unauthorised disclosure as a person in his position may reasonably be expected to take.</p> <p>(5) Where a person has in his possession or under his control any document or other article which it would be an offence under article 11 for him to disclose without lawful authority, he is guilty of an offence if he fails to comply with an official direction for its return or disposal.</p> <p>(6) A person is guilty of an offence if he discloses any official information, document or other article which can be used for the purpose of obtaining access to any information, document or other article protected against disclosure by the foregoing provisions of this</p>
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<p>ragonevoli li wiehed jistenna li dak se jintuza ghal dak l-għan mingħajr ebda awtorità.</p> <p>(7) Għall-għanijiet tas-subartikolu (6) persuna tikxef informazzjoni jew dokument jew oġġett uffiċjali jekk –</p> <p>(a) l-informazzjoni, dokument jew oġġett ikun jew kien fil-pussess tagħha bis-saħħa tal-kariga tagħha ta' funzjonarju pubbliku jew ta' kuntrattat mill-Gvern; jew</p> <p>(b) tkun taf jew ikollha kawża ragonevoli li tkun tal-fehma li funzjonarju pubbliku jew kuntrattat mill-Gvern ikollu jew kellu din l-informazzjoni, dokument jew oġġett bis-saħħa tal-kariga tiegħu bħala tali.</p> <p>(8) L-artikolu 10(5) japplika għall-għanijiet tas-subartikolu (6) hekk kif japplika għall-għanijiet ta' dak l-artikolu.</p> <p>(9) F'dan l-artikolu "direttiva uffiċjali" tfisser direttiva debitament mogħtija minn funzjonarju pubbliku jew minn kuntrattat mill-Gvern jew minn jew f'isem korp preskritt jew korp ta' klassi preskritta.</p>	<p>Act and the circumstances in which it is disclosed are such that it would be reasonable to expect that it might be used for that purpose without authority.</p> <p>(7) For the purposes of subarticle (6) a person discloses information or a document or article which is official if -</p> <p>(a) he has or has had it in his possession by virtue of his position as a public servant or government contractor; or</p> <p>(b) he knows or has reasonable cause to believe that a public servant or government contractor has or has had it in his possession by virtue of his position as such.</p> <p>(8) Article 10(5) applies for the purposes of subarticle (6) as it applies for the purposes of that article.</p> <p>(9) In this article "official direction" means a direction duly given by a public servant or government contractor or by or on behalf of a prescribed body or a body of a prescribed class.</p>
<p>Att dwar is-sigrieti uffiċjali – Kapitlu 50 – Artikolu 19</p> <p>(1) Jekk maġistrat ikun sodisfatt minn informazzjoni taht ġurament li hemm raġuni biex wiehed jissuspetta illi sar jew se jirreat taht dan l-Att, li ma jkunx reat taht l-artikolu 13(1), (4) u (5), hu jista' joħroġ mandat ta' perkwiżizzjoni u bih jawtorizza lilluffiċjal tal-</p>	<p>Official Secrets Act- Chapter 50 – Article 19</p> <p>(1) If a magistrate is satisfied by information on oath that there is reasonable ground for suspecting that an offence under this Act, other than an offence under article 13(1), (4) and (5), has been or is about to be committed, he may grant a search warrant authorizing any Police officer named therein to enter at any</p>

<p>Pulizija hemm fih imsemmi li jidhol f'kull żmien f'fond jew post iehor imsemmi fil-mandat, billi juża, jekk ikun meħtieġ, il-forza, u li jfittex f'dan il-fond jew post u fuq kull persuna li tkun tinsab hemm ġew, u li jaqbad kull skizz, pjanta, mudell, oġġett, nota, jew dokument, jew kull haġa ta' din ix-xorta jew kull haġa li tista' sservi bħala prova li sar jew sejjer isir reat taħt dan l-Att, li ma jkunx reat taħt l-artikolu 13(1), (4) u (5), illi huwa jsib fil-fond jew post jew fuq dawk il-persuni, kemm-il darba hu jkollu raġun biex jissuspetta li sar jew sejjer isir reat taħt dan l-Att, li ma jkunx reat taħt l-artikolu 13(1), (4) u (5) rigward jew dwar dawk il- hwejjeg.</p> <p>(2) Meta jkun jidher lil Superintendent tal-Pulizija illi l-każ hu ta' urġenza kbira u li hu meħtieġ fl-interess tal-Istat li jittiehdu passi minnufih, hu jista' b'ordni bil-miktub taħt il-firma tiegħu jagħti lil ufficjali tal-Pulizija l-istess setgħa li tista' tingħata b'mandat ta' maġistrat taħt dan l-artikolu.</p>	<p>time any premises or place named in the warrant, if necessary, by force, and to search the premises or place and every person found therein, and to seize any sketch, plan, model, article, note, or document, or anything of a like nature or anything which is evidence of an offence under this Act other than an offence under article 13(1), (4) and (5) having been or being about to be committed, which he may find on the premises or place or upon any such person, and with regard to or in connection with which he has reasonable ground for suspecting that an offence under this Act, other than an offence under article 13 (1), (4) and (5), has been or is about to be committed.</p> <p>(2) Where it appears to a superintendent of Police that the case is one of great emergency and that in the interest of the State immediate action is necessary, he may by a written order under his hand give to any Police officer the like authority as may be given by the warrant of a magistrate under this article.</p>
<p>Att Dwar is-Sigrieti Ufficjali- Kapitlou 50-Artikolu 22</p> <p>Kull persuna għandha tagħti, meta mitluba, lil ufficjal tal-Pulizija ta' grad mhux anqas minn dak ta' spettur maħtur għaldaqshekk mill-Kummissarju tal-Pulizija, jew lil membru tal-Forzi Armati ta' Malta inkarigat mill-għassa, sentinella, pattulja jew dmir iehor bħal dan, kull informazzjoni li tkun tista' tagħti dwar reat li sar jew li dwaru jkun hemm suspett li sar taħt dan l-Att; u, kemm-il darba tiġi hekk mitluba, u</p>	<p>Official Secrets Act- Chapter 50 – Article 22</p> <p>It shall be the duty of every person to give on demand to any Police officer not below the rank of inspector appointed by the Commissioner of Police for the purpose, or to any member of the armed forces of Malta engaged on guard, sentry, patrol, or other similar duty, any information in his power relating to an offence or suspected offence under this Act, and, if so required, and upon tender of his reasonable expenses, to attend at</p>

<p>wara l-ħlas lilha tal-ispejjeż xierqa, għandha tmur fiż-żmien u fil-post li jiġu lilha speċifikati sabiex tagħti din l-informazzjoni, u kull min jonqos li jagħti din l-informazzjoni jew li jmur kif jingħad hawn fuq, jeħel, meta jinsab ħati, il-piena tal-prigunerija għal żmien ta' mhux iżjed minn sentejn jew multa jew dawn iż-żewġ pieni flimkien.</p>	<p>such time and place as may be specified for the purpose of furnishing such information, and if any person fails to give any such information or to attend as aforesaid, he shall be liable, on conviction, to imprisonment for a term not exceeding two years or to a fine (multa) or to both such imprisonment and fine.</p>
<p>Kostituzzjoni ta' Malta – Artikoli 41</p> <p>(1) Hlief bil-kunsens tiegħu stess jew bħala dixxiplina tal- ġenituri, hadd ma għandu jiġi mfixkel fit-tgawdija tal-libertà tiegħu ta' espressjoni, magħduda libertà li jkollu fehmiet mingħajr indhil, libertà li jirċievi idejiet u tagħrif mingħajr indhil, libertà li jikkomunika idejiet u tagħrif mingħajr indhil (kemm jekk ilkomunikazzjoni tkun lill-pubbliku in ġenerali jew lil xi persuna jew klassi ta' persuni) u libertà minn indhil dwar il-korrispondenza tiegħu. (2) Ebda haġa li hemm fi jew magħmula skont l-awtorità ta' xi liġi ma għandha titqies li tkun inkonsistenti ma' jew bi ksur tassubartikolu (1) ta' dan l-artikolu safejn dik il-liġi tagħmel provvediment - (a) li jkun meħtieġ raġonevolment - (i) fl-interess tad-difiża, sigurtà pubblika, ordni pubbliku, moralità jew deċenza pubblika, jew saħħa pubblika;</p>	<p>Constitution of Malta- Article 41</p> <p>(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence. (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subarticle (1) of this article to the extent that the law in question makes provision - (a) that is reasonably required - (i) in the interests of defence, public safety, public order, public morality or decency, or public health; or</p>
<p>Att dwar is-servizz tas-sigurta' – Kapitolu 391 – Artikolu 2</p> <p>"interċettazzjoni", għar-rigward ta' ordni, tinkludi l-ksib, ittfixkil, il-qirda, il-ftuħ, l-interruzzjoni, is-soppressjoni, il-waqfien, il-</p>	<p>Security Service Act – Chapter 391 – Article 2</p> <p>"interception", in relation to a warrant, includes the obtaining possession of, disrupting, destroying, opening, interrupting,</p>

<p>qbid, it-tismigh, is-sorveljanza, ir-registrazzjoni, l-ikkupjar, is-smigh ta' u li tara komunikazzjonijiet u l-ksib ta' informazzjoni minn dawk il-komunikazzjonijiet;</p>	<p>suppressing, stopping, seizing, eavesdropping on, surveilling, recording, copying, listening to and viewing of communications and the extraction of information from such communications;</p>
<p>Att dwar is-servizz tas-sigurta' – Kapitolu 391 – Artikolu 6</p> <p>(1) Ebda dhul fi, jew interferenza ma' proprjeta' ma tkun kontra l-ligi jekk dawn ikunu awtorizzati b'mandat mahruġ mill-Ministru bis-sahha ta' dan l-artikolu.</p> <p>(2) Ebda intercettazzjoni ta' jew interferenza ma' komunikazzjonijiet fil-kors tat-trasmissjoni tagħhom bil-posta jew bil-mezz ta' sistema ta' radjokomunikazzjoni jew ta' telekomunikazzjoni jew b'kull mezz ieħor ma għandu jkun kontra l-ligi jekk dan jiġi awtorizzat b'mandat mahruġ mill-Ministru bissahha ta' dan l-artikolu.</p> <p>(3) Il-Ministru jista', wara li ssirlu talba mis-Servizz ta' Sigurta', johroġ jew jibdel mandat bis-sahha ta' dan l-artikolu li jkun jawtorizza li tittiehed kull azzjoni bħalma jkun hemm speċifikat fil-mandat dwar dik il-proprjeta' li tkun hekk speċifikata jew dwar kull komunikazzjoni hekk speċifikata jekk il-Ministru - (a) iqis bħala li jkun meħtieġ li l-azzjoni jkollha tittiehed għar-raġuni li x'aktarx tkun ta' valur sostanzjali flassistenza li tingħata lis-Servizz fit-twettiq talfunzjonijiet tiegħu skont dan l-Att; u</p> <p>(b) ikun sodisfatt li dak li l-azzjoni tkun qiegħda tfittex li tikseb ma jkunx jista'</p>	<p>Security Service Act – Chapter 391 – Article 6</p> <p>(1) No entry on or interference with property shall be unlawful if it is authorised by a warrant issued by the Minister under this article.</p> <p>(2) No interception of or interference with communications in the course of their transmission by post or by means of a radiocommunications or telecommunication system or by any other means shall be unlawful if it is authorised by a warrant issued by the Minister under this article.</p> <p>(3) The Minister may, on an application made by the Security Service, issue or modify a warrant under this article authorising the taking of such action as is specified in the warrant in respect of any property so specified or in respect of any communications so specified if the Minister –</p> <p>(a) thinks it necessary for the action to be taken on the ground that it is likely to be of substantial value in assisting the Service in carrying out any of its functions under this Act;</p>

<p>ragonevolment jinkiseb b'mezzi oħra; u</p> <p>(ċ) ikun sodisfatt illi jkun hemm fis-seħħ arrangamenti sodisfaċenti skont dan l-Att għar-rigward tal-kxif ta' informazzjoni miksuba bis-saħħa ta' dan l-artikolu u li kull informazzjoni miksuba bis-saħħa tal-mandat tkun sugġetta għal dawk l-arrangamenti.</p>	<p>and</p> <p>(b) is satisfied that what the action seeks to achieve cannot reasonably be achieved by other means; and</p> <p>(c) is satisfied that satisfactory arrangements are in force under this Act with respect to the disclosure of information obtained by virtue of this article and that any information obtained under the warrant will be subject to those arrangements.</p>
<p>Att dwar is-servizz tas-sigurta' – Kapitolu 391 – Artikolu 12</p> <p>(1) Il-Prim Ministru għandu jaħtar Kummissjunarju għallgħanijiet ta' dan l-Att li jkun persuna li jkollha jew kellha l-kariga ta' mħallef tal-qrati superjuri jew li kellha l-kariga ta' Avukat Ġenerali: Izda jekk ma jigix hekk mahtur Kummissjunarju mill-Prim Ministru, l-Avukat Ġenerali għandu jassumi b'mod awtomatiku lfunzjonijiet ta' Kummissjunarju sa dak iż-żmien meta jinħatar Kummissjunarju kif dovut. (2) Il-Kummissjunarju jibqa' f'dik il-kariga għal żmien skont ma jkollu stipulat fil-ħatra tiegħu u, fil-każ ta' Kummissjunarju li ma jkunx imħallef tal-qrati superjuri attwalment fil-kariga jew l-Avukat Ġenerali, huwa għandu jingħata mill-Ministru dawk l-allowances li jistgħu jigu hekk stabbiliti mill-Prim Ministru. (3) (a) B'żieda mal-funzjonijiet lil mogħtija biddisposizzjonijiet sussegwenti ta' dan l-Att, il-Kummissjunarju għandu jistharreġ il-mod kif il-Ministru jkun qed iwettaq is-setgħat li għandu bl-artikoli minn 6 sa 10. (b) Fit-twettiq tal-funzjonijiet tiegħu skont dan l-Att, il-Kummissjunarju għandu jaġixxi skont il-għudizzju individwali tiegħu u ma jkun sugġett</p>	<p>Security Service Act – Chapter 391 – Article 12</p> <p>(1) The Prime Minister shall appoint as a Commissioner for the purposes of this Act a person who holds or has held the office of judge of the superior courts or who has held the office of Attorney General: Provided that if a Commissioner is not so appointed by the Prime Minister the Attorney General shall automatically assume the functions of Commissioner until such time as a Commissioner shall be so appointed. (2) The Commissioner shall hold office in accordance with the terms of his appointment and, in the case of a Commissioner who is not a serving judge of the superior courts or the Attorney General, there shall be paid to him by the Minister such allowances as the Prime Minister may determine. (3) (a) In addition to his functions under the subsequent provisions of this Act, the Commissioner shall keep under review the exercise by the Minister of his powers under articles 6 to 10 (b) In the discharge of his functions under the Act, the Commissioner shall act in his individual judgment and shall not be subject to the</p>

<p>għad-direzzjoni jew il-kontroll ta' ebda persuna jew awtorità oħra u ma jkun sindakabbli minn ebda qorti.</p>	<p>direction or control of any other person or authority and shall not be liable to be questioned by any court.</p>
<p>Att dwar is-servizz tas-sigurta' – Kapitlu 391 – Artikolu 13</p> <p>(1) Il-Kummissjunarju għandu wkoll jinvestiga ilmenti dwar is-Servizz ta' Sigurtà bil-mod speċifikat fl-Iskeda 1 li tinsab ma' dan l-Att. (2) Id-deċizzjonijiet tal-Kummissjunarju skont l-Iskeda 1 li tinsab ma' dan l-Att ma għandhom ikunu appellabbli jew sindakabbli minn ebda qorti.</p>	<p>Security Service Act – Chapter 391 – Article 13</p> <p>(1) The Commissioner shall also investigate complaints about the Security Service in the manner specified in Schedule 1 to this Act. (2) The decisions of the Commissioner under Schedule 1 to this Act shall not be subject to appeal or liable to be questioned in any court.</p>
<p>Att Kontra Money Laundering – Kapitlu 373 – Artikolu 4(3)(a)</p> <p>(a) ma jagħti ebda jedd għall-produzzjoni ta' aċċess għal, jew tiftix għal komunikazzjonijiet bejn avukat jew prokuratur legali u l-klijent tiegħu, u bejn saċerdot u persuna li tkun għamlet qrara miegħu, li fi proċedimenti legali jkunu protetti kontra l-kxif bl-artikolu 642(1) tal-Kodiċi Kriminali jew bl-artikolu 588(1) tal--Kodiċi ta' Organizzazzjoni u Proċedura Ċivili;</p>	<p>Prevention of Money Laundering Act-Chapter 373- Article 4 (3)(a)</p> <p>(a) shall not confer any right to production of, access to, or search for communications between an advocate or legal procurator and his client, and between a clergyman and a person making a confession to him, which would in legal proceedings be protected from disclosure by article 642(1) of the Criminal Code or by article 588(1) of the Code of Organization and Civil Procedure.</p>
<p>Att kontra <i>money laundering</i> – Kapitlu 373 – Artikolu 30A</p>	<p>Prevention of Money Laundering Act-Chapter 373- Article 30A</p>

<p>(1) Minkejja kull haġa li tista' tinsab f'xi ligi oħra, il-Korp jista' bl-istess mod jitolb mingħand kull persuna, awtorità jew entità, bħal ma hemm imsemmi fl-artikolu 30, kull informazzjoni li jqis bħala rilevanti u utli għall-fini li jikkonforma ruħu malfunzjonijiet taħt l-artikolu 16.</p> <p>(2) Id-disposizzjonijiet tal-artikolu 30(2) u (3) għandhom ikunu mutatis mutandis japplikaw meta tintalab xi informazzjoni lill-Korp taħt dan l-artikolu</p>	<p>(1) Notwithstanding anything contained in any other law, the Unit may likewise demand from any person, authority or entity, as is referred to in article 30, any information it deems relevant and useful for the purpose of pursuing its functions under article 16.</p> <p>(2) The provisions of article 30(2) and (3) shall mutatis mutandis apply where any information is demanded by the Unit under this article.</p>
<p>Att dwar il-Pulizija – Kapitlu 164 – Artikolu 66</p> <p>(1) Il-Ministru jista' b'regolamenti johroġ kodicijiet ta' Prattika f'dak li għandu x'jaqsam -</p> <p>(a) ma' l-esercizzju minn uffiċjali tal-pulizija ta' poteri statutorji - (i) li jfittxu fuq persuna mingħajr ma qabel jarrestawh; (ii) li jfittxu fuq vettura mingħajr ma jagħmlu arrest;</p> <p>(b) id-detenzjoni, it-trattament, l-interrogazzjoni u lidentifikkazzjoni ta' persuni minn uffiċjali tal-pulizija;</p> <p>(c) it-tiftix li jista' jsir go xi fond minn uffiċjali tal-pulizija; u (d) il-qbid ta' proprjetà li tinstab minn uffiċjali tal-pulizija fuq xi persuna jew go xi fond.</p>	<p>Police Act- Chapter 164 – Article 66</p> <p>(1) The Minister may by regulations issue codes of practice in connection with -</p> <p>(a) the exercise by police officers of statutory powers -</p> <p>(i) to search a person without first arresting him;</p> <p>(ii) to search a vehicle without making an arrest;</p> <p>(b) the detention, treatment, questioning and</p>

	<p>identification of persons by police officers;</p> <p>(c) searches of premises by police officers; and</p> <p>(d) the seizure of property found by police officers on person or premises.</p>
<p>Kodici Kriminali – Kapitlu 9 – Artikolu 355E</p> <p>Salvi l-kazijiet fejn il-liġi tipprovdi xort'oħra, ebda uffiċjal tal-Pulizija ma għandu, sakemm ma jkollux mandat minn Magistrat, jidhol f'xi lokal, dar, bini jew reċint għall-fini li jagħmel xi perkwiżizzjoni hemm ġew jew li jarresta lil xi persuna li tkun għamlet reat jew li tkun raġonevolment suspettata li tkun għamlet jew li tkun se tagħmel xi reat, hlief jekk -</p> <p>(a) ir-reat ikun delitt, minbarra delitt punibbli taħt l-Att dwar l-Istampa, u jkun hemm periklu imminenti li dik il-persuna tista' taħrab jew li l-corpus delicti jew ilprovi dwar ir-reat jistgħu jiġu mneħhija; jew</p> <p>(b) il-persuna tinkixef fl-att tal-għemil tar-reat innifsu, minbarra reat punibbli taħt l-Att dwar l-Istampa; jew</p> <p>(c) l-intervent tal-pulizija jkun meħtieġ sabiex jipprevjeni l-għemil ta' delitt, li ma jkunx delitt punibbli taħt l-Att dwar l-Istampa; jew</p>	<p>Criminal Code- Chapter 9 – Article 355E</p> <p>(1) Saving the cases where the law provides otherwise, no police officer shall, without a warrant from a Magistrate, enter any premises, house, building or enclosure for the purpose of effecting any search therein or arresting any person who has committed or is reasonably suspected of having committed or of being about to commit any offence unless –</p> <p>(a) the offence is a crime other than a crime punishable under the Press Act and there is imminent danger that the said person may escape or that the corpus delicti or the means of proving the offence will be suppressed; or Cap. 248.</p> <p>(b) the person is detected in the very act of committing a crime other than a crime punishable under the Press Act; or Cap. 248.</p> <p>(c) the intervention of the Police is necessary in order to prevent the commission of a crime other than a crime punishable under the Press Act; or</p>

<p>Kodici Kriminali – Kapitlu 9 – Artikolu 355Q</p> <p>Il-Pulizija tista', flimkien mas-setgħa li taqbad magna ta' computer, titlob li tinghatalha informazzjoni li tkun maħzuna f'xi computer f'għamla li tista' tingarr u li tkun tidher u tinqara.</p>	<p>Criminal Code- Chapter 9 – Article 355Q</p> <p>The Police may, in addition to the power of seizing a computer machine, require any information which is contained in a computer to be delivered in a form in which it can be taken away and in which it is visible and legible.</p>
<p>Kodici Kriminali – Kapitlu 9 – Artikolu 355AD(3)(4)</p> <p>(3) Il-Pulizija tista, bil-fomm jew b'avviż bil-miktub, tehtieg lil xi persuna li tattendi l-Għassa tal-Pulizija jew xi post ieħor li tindikalha sabiex hemm tagħti dak it-tagħrif u ggħib magħha daww id-dokumenti li l-Pulizija jistgħu jinhtiegu u jekk dik il-persuna hekk tattendi fl-Għassa tal-Pulizija jew post lilha indikat hija għandha titqies bhala li tkun attendiet dik l-Għassa tal-Pulizija jew post ieħor volontarjament. L-avviż bil-miktub imsemmi f'dan il-subartikolu għandu jkun fih twissija dwar il-konsegwenzi li nnuqqas ta' tharis igħib miegħu, kif jinsabu msemmija fis-subartikolu (5).</p> <p>(4) Kull min il-Pulizija tqis li jkollu xi tagħrif jew dokument rilevanti għal xi investigazzjoni, għandu l-obbligu legali li jimxi mat-talba li ssirlu mill-Pulizija li jattendi f'Għassa tal-Pulizija sabiex hemm jagħti kif ikun mehtieg</p>	<p>Criminal Code- Chapter 9 – Article 355AD(3)(4)</p> <p>(3)The Police may, orally or by a notice in writing, require any person to attend at the police station or other place indicated by them to give such information and to produce such documents as the Police may require and if that person so attends at the police station or place indicated to him he shall be deemed to have attended that police station or other place voluntarily. The written notice referred to in this subarticle shall contain a warning of the consequences of failure to comply, as are mentioned in subarticle (5).</p> <p>(4)Any person who is considered by the police to be in possession of any information or document relevant to any investigation has a legal obligation to comply with a request from the police to attend at a police station to give as required any such information or document: Provided that no person is bound to supply</p>

<p>dak it-tagħrif jew dokument: Izda ħadd ma jkun marbut li jagħti xi tagħrif jew dokument li jista' jinkriminaha.</p>	<p>any information or document which tends to incriminate him.</p>
<p>Kodici Kriminali – Kapitlu 9 – Artikolu 642</p> <p>(1) L-avukati u l-prokuraturi legali ma jistgħux jiġu mgeġġlin jixhdu fuq ħwejjeg li jkunu ġew jafu minħabba li lpartijiet infishom ikunu fdaw fil-patroċinju jew konsult tagħhom.</p> <p>(2) Din ir-regola tgħodd ukoll għal dawk li huma obbligati milligi għas-sigriet dwar ħwejjeg li fuqhom tintalab ix-xiehda tagħhom.</p>	<p>Criminal Code- Chapter 9 – Article 642</p> <p>Advocates and legal procurators may not be Professional secret. compelled to depose with regard to circumstances knowledge whereof is derived from the professional confidence which the parties themselves shall have placed in their assistance or advice.</p> <p>(2) The same rule shall apply in regard to those persons who are by law bound to secrecy respecting circumstances on which evidence is required.</p>
<p>Kodici Kriminali – Kapitlu 9 – Artikolu 61</p> <p>Kull min waqt li jkun jaf li sejjer isir wieħed mid-delitti msemmijin fl-artikoli ta' qabel ta' dan it-Titolu, u, fi żmien erbgħa u għoxrin siegħa, ma jgħarrafx lill-Gvern jew lill-awtoritajiet talGvern, iċ-ċirkostanzi li huwa jkun sar jaf bihom, jeħel, meta jinsab hati, għal dan in-nuqqas biss, il-piena ta' prigunerija minn disa' xhur sa tmintax-il xahar.</p>	<p>Criminal Code- Chapter 9 – Article 61</p> <p>Whosoever, knowing that any of the crimes referred to in Failure to disclose. the preceding articles of this Title is about to be committed, shall not, within twenty-four hours, disclose to the Government or to the authorities of the Government, the circumstances which may have come to his knowledge, shall, for the mere omission, be liable, on conviction, to imprisonment for a term from nine to eighteen months.</p>

<p>Kodici Kriminali – Kapitlu 9 – Artikolu 392(2)</p> <p>(2) Qabel ma tagħmel ebda waħda mill-mistoqsijiet hawn fuq imsemmija, il-qorti għandha tfisser lill-imputat ix-xorta tal-akkuża miġjuba kontra tiegħu u twissih li mhux obligat iwieġeb għal ebda mistoqsija lanqas li jitfa' l-ħtija fuqu nnifsu, li hu jista', jekk irid, ikun assistit minn avukati jew prokuraturi legali u li kull haġa li huwa jgħid tkun tista' tingieb bħala prova kontra tiegħu.</p>	<p>Criminal Code- Chapter 9 – Article 392(2)</p> <p>(2) Before asking any of the above questions, the court shall explain to the accused the nature of the charge preferred against him and shall inform him that he is not obliged to answer any question nor to incriminate himself; that he may, if he so desires, be assisted by advocates or legal procurators and that whatever he says may be received in evidence against him.</p>
<p>Kodici ta' Organizzazzjoni u Procedura Civili – Kapitlu 12 – Artikolu 588</p> <p>(1) L-avukat u l-prokuratur legali ma jistgħux, mingħajr il-kunsens tal-klijent, u s-sacerdot mingħajr il-kunsens tal-persuna li tkun għamlet il-qrara, jiġu mistoqsija fuq hwejjeġ li jkunu ġew jafu, l-avukat jew il-prokuratur legali billi jkunu ġew fdati lilhom mil-klijent għall-finijiet tal-kawża, u s-sacerdot billi jkun ġie jafhom taht is-sigriet tal-qrar jew bħala qrar.</p> <p>(2) Hlief bl-ordni tal-qorti, ebda accountant, tabib jew haddiem soċjali, psikologu jew</p>	<p>Code of Organization and Civil Procedure-Chapter 12 – Article5 88</p> <p>(1) No advocate or legal procurator without the consent of the client, and no clergyman without the consent of the person making the confession, may be questioned on such circumstances as may have been stated by the client to the advocate or legal procurator in professional confidence in reference to the cause, or as may have come to the knowledge of the clergyman under the seal of confession or loco confessionis.</p> <p>(2) Unless by order of the court, no accountant, medical practitioner or social</p>

<p>marriage counsellor ma jista' jigi mistoqsi fuq hwejjeg li jkun sar jaf mill-klijent tieghu taht sigriet professjonali jew li seta' sar jaf bihom fil-kapacità professjonali tieghu.</p> <p>(3) Dan il-privilegg igħodd ukoll għall-interpretu li jkun gie mqabbad sabiex jistgħu jsiru dawk il-hwejjeg sigrieti.</p>	<p>worker, psychologist or marriage counsellor may be questioned on such circumstances as may have been stated by the client to the said person in professional confidence or as may have come to his knowledge in his professional capacity. Privilege to extend to interpreter.</p> <p>(3) This privilege extends to the interpreter who may have been employed in connection with such confidential communications.</p>
<p>Att Dwar il-Protezzjoni u l-Privatezza tad-Data – Kapitolu 440 – Artikolu 9</p> <p>Id-data personali jistgħu jkunu proċessati biss jekk: (a) is-sugġett ta' data jkun mingħajr ebda ambigwità ta lkunsens tieghu; jew (b) l-ipproċessar ikun meħtieġ sabiex jista' jitwettaq kuntratt li fih is-sugġett ta' data ikun parti jew biex jittiehdu passi fuq talba tas-sugġett ta' data qabel lgħemil tal-kuntratt; jew (c) l-ipproċessar ikun meħtieġ biex tithares xi obbligazzjoni legali li l-kontrollur ikun sugġett għaliha; jew (d) l-ipproċessar ikun meħtieġ sabiex jigu protetti linteressi vitali tas-sugġett ta' data; jew (e) l-ipproċessar ikun meħtieġ għat-twettiq ta' attivita li ssir fl-interess pubbliku jew fl-esercizzju tal-awtorita ufficjali vestita fil-kontrollur jew f'terzi li d-data jigu zvelati lilhom; jew (f) l-ipproċessar ikun meħtieġ għal xi skop li jolqot linteress legittimu tal-kontrollur jew ta' dawk it-terzi li lilhom jkunu gew ipprovduti d-data personali, hliet meta dak l-interess jigi megħlub b'kull interess biex jigu protetti d-drittijiet u l-libertajiet fundamentali tassugġett ta' data u partikolarment id-dritt għallprivatezza.</p>	<p>Data Protection Act- Chapter 440- Article 9</p> <p>Personal data may be processed only if: (a) the data subject has unambiguously given his consent; or (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or (c) processing is necessary for compliance with a legal obligation to which the controller is subject; or (d) processing is necessary in order to protect the vital interests of the data subject; or (e) processing is necessary for the performance of an activity that is carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data is disclosed; or (f) processing is necessary for a purpose that concerns a legitimate interest of the controller or of such a third party to whom personal data is provided, except where such interest is overridden by the interest to protect the fundamental rights and freedoms of the data subject and in particular the right to privacy</p>

<p>Att Dwar il-Protezzjoni u l-Privatezza tad-Data – Kapitolu 527 – Artikolu 2</p> <p>"informatur" tfisser kull impjegat li jizvela lill-ufficjal li jirrapporta dwar zvelar ta' informazzjoni protetta jew lill-unità dwar rapporti ta' zvelar ta' informazzjoni protetta, skont il-każ, kemm jekk l-informazzjoni tikkwalifika jew ma tikkwalifikax bhala zvelar protett taht dan l-Att;</p>	<p>Protection of the Whistle-blower Act-Chapter 527- Article 2</p> <p>"whistle-blower" means any employee who makes a disclosure to a whistleblowing reporting officer or a whistleblowing reports unit, as the case may be, whether it qualifies as a protected disclosure or not under this Act;</p>
<p>Att Dwar il-Protezzjoni u l-Privatezza tad-Data – Kapitolu 440 – Artikolu 19</p> <p>Kull persuna li, bil-ħsieb li gġiegħel lil xi persuna oħra li ma tagħmilx jew li tagħmel xi għemil li dik il-persuna l-oħra għandha jedd billiġi li tagħmel jew li ma tagħmilx skont iddispożizzjonijiet ta' dan l-Att, mingħajr dritt u mingħajr setgħa billiġi - (a) tuża jew thedded li tuża vjolenza fuq dik il-persuna, jew fuq martu, żewġha jew uliedha, jew fuq xi persuna oħra li tgħix magħha, jew tagħmel jew thedded li tagħmel ħsara lill-proprjetà tagħha; (b) kontinwament timxi wara dik il-persuna l-oħra minn post għall-iehor; (c) tgħasses jew iddawwar id-dar jew post ieħor fejn dik il-persuna l-oħra toqgħod, jew l-inħawi ta' dik id-dar jew dak il-post; (d) iċċaħhad lil dik il-persuna, jew b'xi mod tfixkilha flužu ta' xi għodod, ilbies jew proprjetà oħra ta' dik il-persuna l-oħra jew użati minnha, tkun ħatja ta' xi reat u tehel meta tinsab ħatja prigunerija għal żmien ta' mhux iżjed minn sena jew multa minn ħames mitt euro (€500) sa ħamest elef</p>	<p>Protection of the Whistle-blower Act-Chapter 527- Article 19</p> <p>Any person who, for the purpose of compelling any other person to abstain from doing or to do any act which such other person has a legal right to do or to abstain from doing under the provisions of this Act, wrongfully or without legal authority - (a) uses or threatens to use violence against such person, or the wife, husband or child of such person, or a member of his household, or causes or threatens to cause damage to his property; (b) persistently follows such other person from place to place; (c) watches or besets the house or other place where such other person resides or the approaches to such house or place; (d) deprives such person, or in any matter hinders him in the use of, any tools, clothing or other property owned or used by such other person, shall be guilty of any offence and be liable on conviction to imprisonment for a period not exceeding one year or to a fine (multa) of not less than five</p>

euro (€5,000) jew dik il-prigunerija u multa flimkien, bla hsara għal piena akbar li jkun hemm għal dak ir-reat taħt xi legislazzjoni oħra: Izda jekk b'dan l-għemil il-hati jkun fil-fatt laħaq l-għan tiegħu l-piena ta' prigunerija għandha tiżdied b'minn grad sa żewġ gradi u l-multa tkun ta' mhux inqas minn elf u ħames mitt euro (€1,500) u ta' mhux iżjed minn għaxart elef euro (€10,000).

hundred euro (€500) and of not more than five thousand euro (€5,000) or to both such imprisonment and fine, without prejudice to any heavier punishment to which the offence may be liable under any other enactment: Provided that where as a result of his conduct the person convicted has achieved his aim the punishment of imprisonment shall be increased by one to two degrees and the fine (multa) shall not be less than one thousand five hundred euro ((€1,500) and not more than ten thousand euro (€10,000).

ELSA NETHERLANDS

Contributors

National Coordinator

Giovanni Torres Taytelbaum

National Academic Coordinator

Dr. T. (Tarlach) McGonagle

National Researchers

Jordi Bierens

Willem Knigge

Feodora Mendes de Leon

Philipp Niewiera

Rachel Wouda

National Linguistic Editors

Elin Börjedal

Silvia Carpanè

Elena Alexandra Radu

National Academic Supervisor

Mr. Dr. A.W. (Wouter) Hins

1. Overview of the Current Legal Framework

This contribution will set out the applicable law and relevant developments relating to the protection of journalistic sources in the Netherlands. For a relevant part of the 20th century, the dominant position in the Dutch literature and case-law was unwilling to accept the idea of a general right to protect journalistic sources.¹ Case-law dating back to 1948 confirms that, unlike lawyers, notaries and doctors, journalists were initially unable to rely on any form of legal privilege. It will become clear that starting from the 1996 European Court of Human Rights (ECtHR) *Goodwin* judgment,² the (scope of) protection of journalistic sources in the Netherlands has strongly been interlinked with Strasbourg law.

Dutch law does not provide for any explicit legislation regulating the protection of sources for journalists. The Dutch Supreme Court (*Hoge Raad*) directly derives this protection from Article 10 European Convention of Human Rights (ECHR) and its interpretation by the ECtHR. International treaties have direct effect in the Netherlands according to Articles 93 and 94 of the Dutch Constitution (*Nederlandse Grondwet*). These Articles ensure that Article 10, ECHR has direct effect and takes priority over all domestic legislation, even the Constitution itself. Article 92 of the Constitution provides that legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty. Judgments of the ECtHR have more authority than judgments of any Dutch court, including those given by the Supreme Court. Therefore, it is the ECtHR that decides how Article 10 ECHR should be interpreted within the Dutch legal order.

Furthermore, Article 7 of the Constitution protects the freedom of expression and Article 13 safeguards privacy. More specifically, Article 7 provides that the press can freely express its thoughts and feelings, notwithstanding everyone's responsibility according to the law. It further explains that statutes are created for television and broadcast, but that no supervision takes place regarding the content. In paragraph 3 it is subsequently made clear that regarding means of communication that have not been stipulated in the provision, freedom of expression exists as well but again with the condition that the law is respected. Article 13 makes clear that privacy (by means of correspondence, telegraph and telephone) is an absolute concept and may only be derogated from if authorisation is granted by statute, which, in the case of correspondence, may only come from a judge. Article 7 of the Constitution is an important platform on which the legislative proposals are built.

¹ Gerard Schuijt, *Bronbescherming en het journalistieke verschoningsrecht* in Gerard Schuijt, *Vrijheid van nieuwsgaring* (Boom Juridische Uitgevers 2006) 143 [Dutch].

² *Christine Goodwin v United Kingdom* [1966] ECHR 2002-VI.

2. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

The protection of journalistic sources is a much debated topic in the Netherlands. Yet, there has been no codification, fact which has caused several issues regarding the required legal safeguards. Below, it will be explained how these problems emerged and evolved through time, the attempts to find solutions and the current state of affairs. On the other hand, there is currently no legislation in place that prohibits a journalist from disclosing his or her sources.

2.1. Historical Background: (Lack of) Codification of the Non-Disclosure Right

The Supreme Court of the Netherlands has been asked several times whether a journalist has the privileges that are granted to certain traditional professions, such as doctors, lawyers, notaries and clergymen, by Article 218 *Sv* (the Dutch Code of Criminal Procedure) that protects their sources for the reasons of confidentiality. Before *Goodwin v United Kingdom*³ in 1996, the Supreme Court was, and still is, reluctant to grant this privilege to journalists.⁴ This unwillingness can be illustrated by the famous *KGB* case of 1977, when it was held that ‘the position that a journalist has a right to protect his sources cannot be accepted as a general rule.’⁵ Therefore, Dutch member of Parliament, submitted a legislative proposal for the protection of journalistic sources in 1993. Unfortunately, the legislative proposal was pushed to the background when the Lower Chamber in 2005 announced that it would not continue the process.⁶

Nevertheless, shortly after the *Goodwin* case in 1996, the Supreme Court changed its position when a similar case arose. In *Van den Biggelaar et al v Dohmen and Langenberg*⁷, the Supreme Court took the *Goodwin* judgment into account and concluded that it would have to change the rule established earlier: it considered that it followed from the first limb of Article 10 ECHR that a journalist should be granted the protection of sources if there would be a risk that the relevant source would have to be disclosed. Thus, the Supreme Court took the opposite position than before and followed the case law of the ECtHR. Consequently, journalists only had to reveal their sources if the conditions of the second limb of Article 10 ECHR were fulfilled.

³ *Goodwin* (n 2).

⁴ Council of State Advice W04.13.0151/I 2013 [Advies van de Raad van State].

⁵ *KGB-affaire* [1977] Hoge Raad NJ 399 [1978] [Dutch].

⁶ Letter repealing the Code of Criminal Procedure and the Code of Civil Procedure relating to the protection of journalistic sources (disclosure of information) [Kamerstukken II 2004/05, 23133, nr 9].

⁷ *Van den Biggelaar v Dohmen & Langenberg* [1996] Hoge Raad NJ 1996 [1996] 578 [Dutch].

In 2007, the Dutch journalist, Voskuil, was compelled by the domestic court to disclose his sources. This case was eventually referred to the ECtHR where it was settled that the protection of sources is one of the basic conditions for the freedom of the press, as decided in the *Goodwin* case. Such a right could only be curtailed by a justified overriding requirement in the public interest.⁸ The judgment was a wake-up call for the Netherlands. The former Minister of Security and Justice Hirsch Ballin, after consulting the Lower Chamber, decided to make a draft legislative proposal to strengthen the protection of journalistic sources.⁹ Nevertheless, a bill was never introduced in the Parliament.

A few years later, following the case *Sanoma v the Netherlands*¹⁰, it was made clear by the ECtHR that the Netherlands had not fulfilled its obligations in the light of source protection as it was decided that an order of a Dutch court to hand over a CD-ROM containing evidence was a breach of Article 10 of the Convention. It was also pointed out that procedural safeguards were needed. Namely, there was 'no procedure attended by adequate legal safeguards for the applicant's 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.'¹¹ Following the judgment of *Telegraaf v the Netherlands*¹² a few years later, the Dutch Minister of Internal Affairs sent a letter to the Lower Chamber, which recognised the importance of the judgment of the ECtHR, concluding that legislation in the field of the protection of journalistic sources was highly necessary.¹³ Firstly, an amendment to the *Wiv* (Intelligence and Security Service Act 2002) was needed. Secondly, a proposal was made for an amendment of Article 218a of the *Sv* (Code of Criminal Procedure).

2.2. Two Legislative Proposals

It is now clear that the introduction of clear-cut legislation seems to be an issue. At the moment there are two pending legislative proposals: Article 218a *Sv* and *Wiv*.

2.2.1. Article 218a *Sv*

Article 218a does not create a new law, but adds a new provision to a pre-existing law. The provision is part of the Dutch Code of Criminal Procedure. As the law stands right now (Article

⁸ *Voskuil v the Netherlands* App no 64752/01 (ECtHR, 22 November 2007).

⁹ Letter of the Minister of Security and Justice [Kamerstukken II 2007/08, 31200 VI, nr 92]; General Consultation [Kamerstukken II 2007/08, 31, 200 VI, nr 104, 7].

¹⁰ *Sanoma Uitgevers B.V. v the Netherlands* App no 38224/03 (ECtHR, 14 September 2010).

¹¹ *ibid*, para 100.

¹² *Telegraaf Media Nederland Landelijke Media B.V. and Others v the Netherlands* App no 39315/06 (ECtHR, 22 November 2012).

¹³ Letter from the Ministry of the Interior and Kingdom Relations [Kamerstukken II 2012–2013, 30977, nr 49].

218), the provision only protects the sources of professions such as doctors, lawyers, notaries and clergymen. Only for the people mentioned in Articles 217 to 219b, exceptions have been made to the legal duty to speak up (family members of witnesses). The adjustment brought by Article 218a *Sv* would add journalists to these categories. The protection of journalists would look as follows: 'Witnesses, being journalists or publishers, who in the framework of spreading the news, possess information from sources, that have provided this information under the condition that it will not be traced back to them, have the right to protect their sources, when questioned about their origin.'

The proposed Article 218a *Sv* concerns both journalists and publishers. This is different from the *Win*, which only concerns journalists. The impact of this difference will be analysed in the following chapter. Article 218a *Sv* would be limited as journalists would not be able to invoke the right in case of an overriding public interest or when there would be a disproportionate amount of damage, which would be inflicted if the information would not be revealed. This would be decided by the investigative judge. The limitation allegedly reflects the requirement of an 'overriding requirement in the public interest', prescribed by the ECtHR in its case law.¹⁴

2.2.2. *Win*

After the judgment in *Telegraaf v the Netherlands*¹⁵, the Dutch government had to reconsider its legislative proposals. It was emphasised by the ECtHR that Articles 8 and 10 of the Convention were breached as the *Win* did not contain sufficient legal safeguards. Prior judicial review for the use of special powers against journalists in order to reveal their sources was lacking.¹⁶ In the proposed Article 19a *Win*, the court chosen by the legislator would have to give permission for the use of special powers against journalists whereby the aim would be to track down their sources. The general rule of the current legislation is reflected in Article 19(1), which provides that 'the use of special powers is only permitted when, in so far it is not determined otherwise by this paragraph, the Minister concerned or on behalf of him the head of the service has given permission.' The proposed Article 19a, first paragraph aims to take into account the requirement formulated by the ECtHR, that prior independent review for the exercise of special powers is necessary as the authorisation of the Minister of Interior and Kingdom Relations is deemed to be insufficient and can hardly be regarded as independent and impartial.¹⁷ The reason that the specific court was chosen is that it already has experience with giving permission pursuant to Article 23 which prescribes authorisation for the opening of letters.¹⁸ Consequently, this would

¹⁴ Amendment of the Code of Criminal Procedure laying down the law on protection of sources for free news (source protection in criminal matters) [Kamerstuk 34032, nr 8].

¹⁵ *Telegraaf and others* (n 14).

¹⁶ *Telegraaf and others* (n 14) para 82.

¹⁷ *Telegraaf and others* (n 14); Amendments to the Law on the Intelligence and Security 2002 in connection with the establishment of an independent binding test (which aims to identify their sources) prior to the use of special powers against journalists [Kamerstukken 2014/2015, 34027, nr 3].

¹⁸ Constitutional obligation derived from Article 13, para 1 of the Dutch Constitution [Nederlandse Grondwet].

provide for a more uniform procedure. What exactly a journalistic source is has not (yet) been defined in neither of the proposals.

2.2.3. Temporary Regulation of the *Wiv*

Since January 1 2016, the *Wiv*, a temporary regulation for judicial review, regarding the exercise of special powers against lawyers and journalist, has come into force. The Minister of Interior and Kingdom Relations has announced that this regulation is necessary while awaiting the definitive legislation.¹⁹ A temporary independent commission, compulsorily composed by jurists, is set up to review the application of special powers against lawyers and journalists, such as telephone tapping. If the commission gives a negative advice, the Minister of Interior and Kingdom Relations will not allow the use of this special power. The procedure will only be used in two cases: when the use of a special powers (direct or indirect) can breach the fundamental right of confidential communication with a person's lawyer and when it is aimed at obtaining the source of a journalist. A strict proportionality test needs to be applied; when using the special powers, the interest of the individual enjoying the right must be taken into account next to the interest of the protection of privacy and, additionally, concrete reasons to fear direct danger for public security must be available.²⁰

2.2.4. Regulation on Whistle-Blowers

In order to protect whistle blowers several mechanisms in the Netherlands exist. More recently, the Parliament has adopted a more comprehensive Bill that establishes "The House for the Whistle-blowers." This institution shall both advise and investigate in situations where whistle blowers suspect societal misconduct.

3. Is there, in domestic law, a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

There is no legislation in Dutch law that prohibits a journalist from disclosing his/her sources. Therefore, this question cannot be answered.

¹⁹ Letter from the Ministry of the Interior and Kingdom Relations [Kamerstukken 2015/2016, 29279, nr 292].

²⁰ Temporary scheme on the application of special powers (determined by the Law on the Intelligence and Security 2002) of lawyers and journalists [Tijdelijke Regeling van de Ministers van Binnenlandse Zaken en Koninkrijksrelaties en van Defensie van 16 December 2015].

4. Who is a 'journalist' according to the national legislation? Is it, in your view, a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media actors? Is the protection of journalists' sources extended to anyone else?

The term 'journalist' can be drawn from several sources of information. It appears that the Netherlands Union of Journalists and the Netherlands Press Council seem to wield a certain level of influence regarding the definition. In their statutes, a journalist is defined as 'a person who, whether employed or self-employed, contributes as his/her main profession to the editorial leadership or editorial composition; a. a daily newspaper, newspaper, door-to-door magazine, magazine or news website, in so far the content thereof consists of news, pictures and other illustrations, reports or articles (...); c. programmes spread on the radio, television or internet, in so far these consist of news, reports, considerations²¹ or columns of informational nature; (...).' According to Article 4(1) of the Statutes of the Press Council, reporters who regularly perform journalistic acts, while not doing so as their main profession, but considered relevant for the Dutch occupational group are also considered to be journalists.

The legislative proposal, *Wiv*, seems to adhere to the definition given by the Union of Journalists and the Press Council, as well as the indications provided for by Recommendation No R (2000) 7. The occupation seems to refer to a person who is a journalist as a main profession against payment, or not as a main profession but regularly against payment, tasked with collecting, spreading or publishing information for the purpose of public debate, irrespective of the nature of the medium and its legal status (e.g. part-time contract).²² The temporary regulation of *Wiv* 2002 adheres to the definition that was proposed for the *Wiv* 2002.

Opposed to the *Wiv*, Article 218a *Sv* would not only apply to journalists but also publicists. In the Explanatory Memorandum it has been explained that it would not be necessary to stand by the same strict limitation of the definition of 'journalist' as Article 218a *Sv*. In the context of the developing media and society, it would become possible to extend the possibilities for invoking the protection of sources: indeed, someone who regularly collects and spreads information could be called a publicist. It is important to take into account that public debate does not only play a role within the classic media but also outside these boundaries, such as websites and blogs. As public debate must be based on reliable and correct information where one can express his or her opinion freely, publicists must be able to count on the fact that their sources will be

²¹ The concept concerns a *beschouwing* which is not easily translated to English but it refers to a text in which different opinions are mentioned (look at an issue from different perspectives) and the opinion of the author does not prevail.

²² Amendments to the Law on the Intelligence and Security 2002 in connection with the establishment of an independent binding test (which aims to identify their sources) prior to the use of special powers against journalists, which aims to identify their sources [Kamerstukken 2014-2015 34027 nr 3].

protected. It was also considered that, even though it might appear difficult to define this category in this way, the nature and content of the publications should be able to demonstrate whether someone intended to make him or herself known as a publicist. Someone who regularly collects and spreads information can be called a publicist.²³

The research group pleads for a wide definition of a journalist as, in the context of the research conducted, the aim is the protection of the sources and not, *per se*, of a journalistic privilege. This was also pointed out by the Netherlands Union of Journalists; the legislative proposal is not about making a distinction between good or bad journalism or between *amateurs* and professionals, but rather to prevent that the *Algemene Inlichtingen- en Veiligheidsdienst* (the General Intelligence and Security Service of the Netherlands) (*AIVD*) or the judicial authorities do not intervene in such secrecy.²⁴ Nevertheless, it must be taken into account that the wide definition of 'publicist' could lead to confusion and still requires further consideration, as was clarified in the opinion of the Council of State.²⁵

5. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

According to Articles 93 and 94 of the Dutch Constitution, Article 10 ECHR has direct effect in the Netherlands. Therefore, every public authority in the Netherlands is obliged to comply with Article 10 ECHR and leave aside all national law that contravenes it (in theory, also the Constitution itself).

However, it should be emphasised that it has followed from several ECtHR cases that the protection granted under Dutch law has, at least in the past, not been in line with Article 10 of the Convention.²⁶ In reaction to the ECtHR case law, the Dutch Public Prosecutor has revised its previous policy on the matter and has published a new version of its *Aanwijzing toepassing dwangmiddelen tegen journalisten* (Instructions for the use of coercive measures against journalists) in

²³ Explanatory Memorandum [Wijziging van het Wetboek van Strafvordering tot vastlegging van het recht op bronbescherming van vrije nieuwsgaring (bronbescherming in strafzaken)] 12-13.

²⁴ Thomas Bruning, 'Onderwerp: bijdrage NVJ inzake rondetafelbijeenkomst wetsvoorstel bronbescherming' (December 2014) <https://www.nvj.nl/uploads/bestanden/bijdrage_nvj_rondetafel_wetsvoorstel_bronbescherming_dec_2014.pdf> accessed 26 April 2016 [Dutch].

²⁵ Advice W03.13.0152/II of the Council of State.

²⁶ *Sanoma* (n 12); *Telegraaf* (n 14); *Voskuil* (n 10).

2012. Although these Instructions are not Dutch legislation *strictu sensu*, they bind the public prosecutor when applying coercive measures against journalists.²⁷

As for the self-regulatory mechanisms, they do not have force of law but merely illustrate the ethical duty of journalists not to betray their sources, as made clear in Article b2 of the Guidelines of the Netherlands Press Council.²⁸

6. In the respective national legislation are the limits of non-disclosure of the information in line with the principles of the Recommendation No R (2000) 7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regards to the right of journalists not to disclose information?

6.1. Introduction

Recommendation No R (2000) 7 identifies seven principles, each of which will be explained and analysed to the extent to which (both civil and criminal) Dutch law is in line with them. The applicable procedures and the circumstances to which disclosure is limited will be clarified and the question to what extent authorities first search for alternative, less intrusive measures will be answered. Finally, a general conclusion will be provided.

There are currently two pending legislative proposals that will codify the right to protection of journalistic sources.²⁹ Although this codification might have implications for the applicable procedures and (thus) the question to what extent Dutch law is in line with the principles of Recommendation No R (2000) 7, a final version of this legislation (April 6 2016) will have to be approved by the Dutch parliament. For this reason, focus will primarily be given to the current state of affairs and only make additional and/or supporting comments about the upcoming legislation where appropriate.

6.2. Principle 1: Right of Non-Disclosure of Journalists

²⁷ The legal basis of this Instruction is Article 130(4) of the Judicial Organisation Act. It should be mentioned that this instruction does not bind members of the public.

²⁸ Guidelines of the Netherlands Press Council 2015. For more details, see Annex I.

²⁹ Amendment (n 16) nr 2; Amendment (n 19).

The first principle of Recommendation No R (2000) 7 prescribes that domestic law and practice in member states should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention. In this context, account should be taken of the fact that the protection of journalistic sources in the Netherlands does not (yet) have a statutory basis under both criminal and civil law. However, this does not implicate that the Netherlands does not offer clear and explicit protection *at all*. As mentioned in Chapter 2, the explicit recognition of the right not to disclose sources in the Netherlands can be traced back to a judgment only six weeks after this right was introduced in ECtHR case-law.³⁰ Thus, although not codified, explicit and clear protection in the Netherlands has been recognised and it is directly derived from Article 10 of the Convention.³¹ In addition, specifically focusing on criminal law, the earlier mentioned Instructions for the use of coercive measures against journalists recognises the non-disclosure right by, once more, emphasising that it follows from the case law of the ECHR that ‘the use of coercive measures against journalists to identify their sources, like seizure, search or interception of telephone calls, is, in principle, impermissible. In those cases in which these restraints can be applied, extra safeguards should be taken into account’. Finally, the aforementioned new legislation will – if adopted – codify the right to protect sources by giving it an explicit statutory basis in the *Sv*.³² For these reasons, it can be concluded that the Netherlands offers explicit and clear protection for the right of journalist not to disclose their sources. At the same time, the mere existence of this right should not be confused with the question to what extent the scope of protection granted by the right is in line with (other) principles of Recommendation No R (2000) 7. The latter question will be assessed under principles 3 to 7.

6.3. Principle 2: Right of Non-Disclosure of Other Persons

The second principle of Recommendation No R (2000) 7 prescribes that other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected. Civil case-law shows that courts have referred to the right of non-disclosure not only in cases against journalists, but also in cases against the legal entity a journalist of a certain publication was working for.³³ In a case concerning alleged unlawful allegations in a newspaper, even a witness who attended a certain meeting but who did not have a professional relationship with a journalist was able to count on the protection granted by the right of non-

³⁰ *Van den Biggelaar/Dohmen & Langenberg* (n 9).

³¹ In that context, it must be mentioned that this case law has learned that the right of non-disclosure is not only limited to protection of the identity of the source, but can also (solely) protect the information the source has given when the identity of the source is no longer secret: *Plaintiff v Stichting Betaald Voetbal S.V. Top Oss and others* [2006] Gerechtshof 's Hertogenbosch NJF 2006 [2006] 475 [Dutch].

³² Amendment (n 16) nr 2.

³³ See *Omroepvereniging Bunch v Pretium Telecom BV* [2011] Rechtbank 's-Gravenhage, published online on <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2011:BU3512>> [2011] [Dutch].

disclosure. The reason for this was that a journalist, who had also attended the meeting, had later based an article on the information he had obtained there.³⁴

Concerning criminal law, it should be mentioned that, even though the Instructions for the use of coercive measures against journalists constantly refer to 'journalists', they recognise the right of non-disclosure of other persons. The accompanying definition of 'journalist' mentioned in the Instructions indicates that the use of the word 'journalist' also extends to staff desk editors, camera and sound technicians, or others who may have information about journalistic sources and by virtue of their profession are involved in the journalistic product. For that reason, the special procedures as described in the Instructions also apply to them. Finally, the Dutch Minister of Safety and Justice emphasised in the Explanatory Memorandum to the pending legislative proposals, that it is clear that the protection of sources would be illusory if it could be circumvented by addressing persons to whom the right has not been explicitly granted. Hence, those who are primarily engaged in the gathering of documentation and background information for these reports will also be covered.³⁵ The above indicates that the right of non-disclosure in the Netherlands is not solely restricted to journalists but also extends to others, who carry out similar functions.

6.4. Principle 3: Limits to the Right of Non-Disclosure

The third principle prescribes that (i) the right of journalists not to disclose their sources must not be subject to other restrictions than those mentioned in Article 10, paragraph 2 ECHR and (ii) that the disclosure of information identifying a source should not be deemed necessary unless (a) it can be convincingly established that reasonable alternative measures to the disclosure do not exist or have been exhausted, and (b) the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure.³⁶

6.5. Principle 4: Alternative Evidence to Journalists' Sources

Principle 4 prescribes that in cases against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of establishing the truth or otherwise of the allegation, all evidence which is available to them under national procedural law. They may not demand the disclosure of information identifying a source by the journalist for that purpose. There have been several court cases against a journalist (or their newspapers/websites) concerning an alleged infringement of the honour or reputation of a person. In almost all of these cases, the courts have not demanded the disclosure of journalistic

³⁴ *Van Heest v De Limburger* [2013] Hoge Raad NJB 2013 [2013] 561 [Dutch].

³⁵ Amendment (n 16) nr 3.

³⁶ A comprehensive and separate analysis of the extent to which Dutch law is in line with this principle will follow under Chapter 6, regarding the application of Dutch law in light of the ECtHR case law.

sources and/or based their decisions about the lawfulness of the publication on alternative evidence.³⁷ An illustrating example can be found in the case of *Pretium against Wegener Media*, in which the plaintiff explicitly asked for disclosure of journalistic sources.³⁸ The reason for this was an intentional, allegedly unlawful publication by the defendant that summarised customer complaints about the aggressive sales methods used by the plaintiff. Although disclosure of sources could have been relevant to assess the lawfulness of the publication and would have enabled the plaintiff to defend himself against the allegations, disclosure was denied by explicitly referring to the importance of not disclosing journalistic sources.³⁹ In another case, an investigative judge prevented a witness from answering certain questions, as it could have led to the identification of journalistic sources.⁴⁰ In a case dealing with the publication of paparazzi pictures of a topless Dutch celebrity, a magazine was ordered to disclose their source.⁴¹ However, the reason for this was not related to finding the truth of the allegation, but had to do with the prohibition of possible future infringements of the right to privacy of this celebrity.

6.6. Principle 5: Conditions Concerning Disclosures

Principle 5 prescribes five different procedural aspects that should be complied with when a disclosure is requested. Due to the variability of these procedural principles, we will analyse separately the extent to which Dutch law is in line with them:

1. The motion or request for initiating any action by competent authorities, aimed at the disclosure of information identifying a source, should only be introduced by persons or public authorities that have a direct legitimate interest in the disclosure.

Article 303 of Book 3 of the *Burgerlijk Wetboek* (the Dutch Civil Code) states that ‘without sufficient interest, no one may submit an action’. Under civil law, this is a safeguard that a request for initiating an action will only be introduced by persons that have a legitimate interest in the disclosure. Apart from this, Article 834a of the *Wetboek van Burgerlijke Rechtsvordering* (the Dutch Code of Civil Procedure) states that only those who have a legitimate interest may ask to inspect, copy or extract from other digital or non-digital documents.

³⁷ For instance see this case about a publication in a newspaper in which a plastic surgeon was accused of performing breast enlargements on prostitutes while only communicating and agreeing about the aimed size of the breasts with their pimp: *Plaintiff v Het Parool B.V.* [2009] Rechtbank Amsterdam published online <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2009:BI0904>> [2009] [Dutch]. See also about the alleged unlawfulness of allegations made in a tv-show: *Plaintiff v Endelmoel Nederland Mediagroep B.V. and others* [2015] Rechtbank Midden-Nederland NJF 2015 [2015] 451 [Dutch].

³⁸ *Pretium BV v Wegener Media BV* [2013] Rechtbank Overijssel [2013] Prg. 2013 [2013] 291 [Dutch].

³⁹ *ibid.*

⁴⁰ *Van Heest/ de Limburger B.V.* (n 35).

⁴¹ *Audax Publishing B.V. v X* [2004] Gerechtshof Amsterdam NJF 2004 [2014] 565 [Dutch].

Concerning criminal law, the Supreme Court has decided that it is up to the Public Prosecutor to motivate the judge that the application of coercive measures against journalists answers to the demands of proportionality and subsidiarity with regard to the different interests at stake.⁴² In that context, it should be stated that it has not proven to be sufficient for the Prosecutor to simply put forward that the police and the public prosecutor will act or have acted in a prudent and reasonable manner. Instead, it needs to be explicitly motivated why there is an absolute necessity and proportionality with respect to the applicable legitimate interest(s).⁴³

2. Journalists should be informed by the competent authorities of their right not to disclose information identifying a source, as well as of the limits of this right before a disclosure is requested.

It remains unclear whether competent authorities inform journalists of their right not to disclose information before a disclosure is requested. The Instructions for the use of coercive measures against journalists do not contain such an obligation. In addition, analysis of Dutch procedural law has not indicated that such obligation exists.

3. Sanctions against journalists for not disclosing information identifying a source should only be imposed by judicial authorities during court proceedings which allow for a hearing of the journalists concerned in accordance with Article 6 of the Convention.

Under criminal law, a journalist in the capacity of a witness who is upon request of the investigative judge and does not disclose information identifying a source will run the risk of being detained.⁴⁴ The detention has to be reported to the court by the investigative judge within 24 hours, unless the detainee has already been released.⁴⁵ The court will, after hearing the witness and within 48 hours after the detainment has started, decide whether the witness will be detained for longer. Apart from this, not showing up as a witness qualifies as a criminal offence under Article 192 *Sv*. The regular criminal procedures as laid down in the *Sv* will apply when prosecution is based on this Article. These procedures allow for different ways a suspected journalist can be heard.⁴⁶

Under civil law, a journalist in the capacity of witness will also run the risk of being detained when, upon request, information leading to a source is not disclosed.⁴⁷ The law prescribes that, upon request of the interested party, the court may impose this sanction when it is of the

⁴² Rejection of appeal *Plaintiff v the Netherlands* [2003] Hoge Raad NS 2003 [2003] 221, para 188 [Dutch].

⁴³ See in this context: Dismissal of complaint from *Uitgeversmaatschappij De Telegraaf B.V.* [2008] Hoge Raad NS 2008 [2008] 149, para 452 [Dutch].

⁴⁴ Article 221 Dutch Code of Criminal Procedure.

⁴⁵ Article 221(2) Dutch Code of Criminal Procedure.

⁴⁶ See for instance Article 311(4) of the Dutch Code of Criminal Procedure, which decides that, under penalty of the procedure being invalid, the accused should always have the last word.

⁴⁷ Article 173 Dutch Code of Civil Procedure.

opinion that this is justified by the interest of finding the truth.⁴⁸ In addition, Article 178 of the *Burgerlijk Wetboek* also mentions the sanction of compensation of damages. As Article 6 ECHR has direct effect in the Netherlands, sanctions may only be imposed after a fair hearing.

Apart from testifying as a witness, a journalist could also be asked to disclose sources in the capacity of defendant in a civil proceeding. In that context, the *Wetboek van Burgerlijke Rechtsvordering* (the Dutch Code of Civil Procedure) states that, as a general principle, the court should give both parties the opportunity to expression their opinion, to explain them and to comment on each other's views and all documents or other information that have been brought into the proceedings.⁴⁹ In case the disclosure of sources is requested, the standard *dagvaardingsprocedure* (summons procedure) will be applicable.⁵⁰

4. Journalists should have the right to have the imposition of a sanction, for not disclosing their information identifying a source, reviewed by another judicial authority.

Under criminal law, an appeal is possible against a conviction for not showing up as a witness.⁵¹ Under civil law, it is possible to lodge an appeal against the decision of a lower judge to reveal sources in cases that might have a value or interest of more than 1750 Euro.⁵²

5. Where journalists respond to a request or order to disclose information identifying a source, the competent authorities should consider applying measures to limit the extent of the disclosure, for example by excluding the public from the disclosure with due respect to Article 6 of the Convention, where relevant, and by themselves respecting the confidentiality of such a disclosure.

Under criminal law, should a journalist testify in the capacity of witness, it can be decided that the hearing will not be held in public.⁵³ Under certain circumstances, also the parties themselves may be excluded.⁵⁴ Under civil law, as a principle, hearings are open to the public. Upon request, however, the court may decide otherwise.⁵⁵ The Instructions for the use of coercive measures against journalists emphasizes that if journalistic material is seized, it should be ensured that it is handed over in the least intrusive manner. Also, the journalist will have to be given the opportunity to first copy the seized materials and the original materials should be handed back to

⁴⁸ Article 173 Dutch Code of Civil Procedure.

⁴⁹ Article 19 Dutch Code of Civil Procedure.

⁵⁰ This (standard) procedural form should be distinguished from a petitions process, which is only applicable in case the law demands so (Article 261 Dutch Code of Civil Procedure).

⁵¹ Article 404 Dutch Code of Criminal Procedure. For Supreme Court litigation, see Article 427 of the Dutch Code of Criminal Procedure.

⁵² Article 332 Dutch Code of Civil Procedure. For Supreme Court litigation, see Title 11 of the Dutch Code of Civil Procedure and Articles 78, 79, 80a and 91 of the Judicial Organisation Act.

⁵³ Article 187d Dutch Code of Criminal Procedure.

⁵⁴ Article 178 Dutch Code of Criminal Procedure.

⁵⁵ Article 27 Dutch Code of Civil Procedure.

the journalist as soon as possible. Finally, it should be mentioned that a significant part of the Dutch judgments are published on the websites of the courts. The courts have adopted guidelines for the anonymisation of these judgments.⁵⁶

6.7. Principle 6: Interception of Communication, Surveillance and Judicial Search and Seizure

Principle 6 of Recommendation No (2000) 7 prescribes that (a) certain measures should not be applied if their purpose is, under the terms of the other principles, to circumvent the right of journalists not to disclose information identifying a source. It provides that, (b) where police or judicial authorities have properly obtained information identifying a source by any of the actions referred to under (a), although this might not have been the purpose of these actions, measures should be taken to prevent subsequent use of this information as evidence before courts, unless disclosure is justified under Principle 3.

a. The following measures should not be applied if their purpose is to circumvent the right of journalists, under the terms of these principles, not to disclose information identifying a source:

- (i) interception orders or actions concerning communication or correspondence of journalists or their employers,
- (ii) surveillance orders or actions concerning journalists, their contacts or their employers, or
- (iii) search or seizure orders or actions concerning the private or business premises, belongings or correspondence of journalists or their employers or personal data related to their professional work.

Due to the absence of coercion, the interception of communication and surveillance orders are not qualified as a coercive measure under Dutch law but as special methods of detection.⁵⁷ The Instructions for the use of coercive measures against journalists will therefore not apply. However, in order to intercept communication, the Public Prosecutor will have to ask the investigative judge for permission. This judge will assess the lawfulness of the measure.⁵⁸ In case of systematic surveillance of a journalist, the law does not prescribe prior authorisation of an independent judge. Instead, only the consent of the public prosecutor is required.⁵⁹

Search or seizure actions will qualify as coercive measures. The Instructions for the use of coercive measures against journalists emphasise that, in light of the Convention and the ECtHR

⁵⁶ This guideline can be found at: 'Anonimiseringsrichtlijnen' (2015) <<https://www.rechtspraak.nl/Uitspraken-en-nieuws/Uitspraken/Paginas/Anonimiseringsrichtlijnen.aspx>> accessed 05 May 2016 [Dutch].

⁵⁷ Paul Mevis, *Capita Strafrecht: een thematische inleiding* (6th edn, Ars Aequi Libri 2009) 291 [Dutch].

⁵⁸ Articles 126m, 126t and 126zg of the Dutch Code of Criminal Procedure.

⁵⁹ Articles 126g and 126o Dutch Code of Criminal Procedure.

case law, the use of coercive measures should be restricted to situations in which the use of a certain measure is the only reasonable and effective manner to investigate and prevent serious offences. In that context, it concerns those offences that could seriously harm or endanger the life, safety or health of people. In principle, that could, for instance, be the case when a person, if not arrested, would commit new serious offences, or when, explosives would be located to prevent an imminent terrorist attack.⁶⁰ If the Prosecutor would, despite the above, still want to demand the search or seizure of journalistic belongings, he will have to submit a warrant to the investigative judge asking for permission.⁶¹ The investigative judge will then assess the lawfulness of the seizure in light of Article 10 ECHR.

b. Where information identifying a source has been properly obtained by police or judicial authorities by any of the above actions, although this might not have been the purpose of these actions, measures should be taken to prevent the subsequent use of this information as evidence before courts, unless the disclosure would be justified under Principle 3.

Article 359a *Sv* regulates what should happen in case of irreparable procedural defects by the public prosecutor. This Article stipulates that in case of, for instance, unlawfully obtained evidence, the court may decide that (i) the penalty will be reduced, (ii) the improperly obtained evidence will not be taken into account or that (iii) the prosecution will be inadmissible. Case law of the Supreme Court has developed several instructions regarding which of these consequences, will have to be applied under different circumstances.⁶² It should be noted that the sanction referred to under (ii) will be best suitable to answer the demand under Principle 6 of the Recommendation. Analysis of the Dutch case law shows that a judge could be expected to opt for this sanction in case of improperly obtained evidence, that would infringe the journalistic right of non-disclosure. This is due to the fact that the Supreme Court has ruled that this sanction can be imposed in cases when a far-reaching infringement of an important rule or principle of criminal law has occurred and when the exclusion of evidence might be deemed necessary as a means to prevent similar future procedural irregularities. Case-law shows that a breach of professional legal privilege has been qualified as such in the past.⁶³

⁶⁰ Instruction for the use of coercive measures against journalists, chapter 2 2012 (Aanwijzing toepassing dwangmiddelen tegen journalisten).

⁶¹ *ibid*, chapter 3. See also: Article 105 Dutch Code of Criminal Proceeding.

⁶² Rejection of Appeal *Plaintiff v the Netherlands* [2004] Hoge Raad NS 2004 [2004] 146 [Dutch]. See also: Overrule of decision *Plaintiff v the Netherlands* [2013] Hoge Raad NS 2013 [2013] 139 [Dutch].

⁶³ See for instance: Pronunciation 8722 [1996] Hoge Raad NJ 1999 578 [Dutch] in which the evidence based on a telephone call between a suspect and a lawyer was excluded from the proceedings. See also Overrule of decision 02157/06 [2007] Hoge Raad NJ 2008 [2007] 374 [Dutch], in which the minutes of a hearing were excluded because they disclosed information about a telephone conversation between the suspect and a doctor. See in this context also: *TELE2 Nederland B.V. v Defendant* [2010] Rechtbank Haarlem published on <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBHAA:2010:BO9358>> [2010] [Dutch] and *Q.Q. and others v Beheer B.V. and others* [2015] Rechtbank Den Haag JOR 2015 [2015] 339 [Dutch] in which evidence

6.8. Principle 7: Protection Against Self-Incrimination

The final principle of Recommendation No R (2000) 7 demands that the aforementioned principles shall not in any way limit national laws on the protection against self-incrimination in criminal proceedings, and that journalists should, as far as these laws apply, enjoy such protection with regard to the disclosure of information identifying a source. There are no known cases in which a suspected journalist was obliged to reveal sources, thereby limiting national laws on the protection against self-incrimination in criminal proceedings. Neither the current law nor the legislative proposals give any cause to suspect that this would be the case.

6.9. Conclusions

It has been analysed to which extent the Dutch law and procedures are in line with the principles of Recommendation No R (2000) 7. The findings suggest that, for the most part, the limits of non-disclosure seem to be in line with the analysed principles of the Recommendation. Generally, the authorities first search for and apply alternative measures, which are less intrusive with regard to the right of journalists not to disclose information.

7. In the Recommendation No R (2000) 7, the following principle should be respected when the necessity of disclosure is stated: absence of reasonable alternative measures, outweighing legitimate interest (protection of human life, prevention of major crime, defence of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the disclosure outweigh the interest in the non-disclosure?

The case-law of the ECtHR has clarified under what circumstances disclosure of journalistic sources is or not possible and how the different applicable interests should be balanced. Apart from this, Principle 3 of Recommendation No R (2000) 7 identifies what the limits to the right of non-disclosure should be.

The Principles in Recommendation No R (2000) 7 are not directly implemented in any Dutch legislation. The criteria under which the interest in disclosure can outweigh the interest in non-disclosure therefore have been assessed and applied in case law, where they have been defined by the Dutch courts.

originating from illegally tapping the phone of a journalist by an intelligence service was qualified as 'fruit of the poisonous tree' and was therefore excluded.

This chapter will assess whether the application of the right of non-disclosure in Dutch case-law respects these ECHR standards. First, the general approach applied by the Dutch Courts when assessing the necessity of a disclosure will be explained. Then, a selection of case-law, that does not or could possibly not comply with the ECHR standards, will be considered.

As mentioned before, the protection of journalistic sources under Dutch law is strongly interlinked with international law. That is why, when assessing an interference with the right of non-disclosure of journalistic sources, Dutch courts apply the same test as contained in Article 10 ECHR and refer to case-law of the ECtHR to support their judgments.

There are three criteria contained in this test. The first requirement entails the interference to be prescribed by law. Secondly, the interference should be aimed at protecting certain values.⁶⁴ Third, the interference must be necessary in a democratic society. This necessity test includes a decision on the principle of proportionality of the interference. The interference should be proportional to the means used to reach the aim. The Supreme Court has stated in the *Zipschijf* case that, in principle, the Public Prosecutors should prove that the application of restraints against journalists fulfills the requirements of proportionality and subsidiarity.⁶⁵ In *Observer and Guardian v the United Kingdom*, the ECtHR stated that ‘the adjective “necessary”, within the meaning of Article 10(2) ECHR implies the existence of a “pressing social need”’.⁶⁶ More specifically in cases where the disclosure of journalistic sources is ordered, the ECtHR has considered that this cannot be compatible with Article 10 ECHR unless justified by an overriding requirement of the public interest.⁶⁷ Lastly, the court must assess if the principle of subsidiarity has been adhered to. The question that the court must ask is whether the interference is relevant and sufficient to achieve its aim.

8. In the light of the case law of the European Court of Human Rights, how do national courts apply the respective laws with regard to the right to protect sources? In particular, how do they balance the different interests at stake?

8.1. Compliance with ECHR Standards: Selection of Case-Law

⁶⁴ Such as national security, territorial integrity, public safety, prevention of disorder or crime, protection of health, morals, reputation or rights of others, preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary.

⁶⁵ Rejection of appeal 01022/01 B [2003] Hoge Raad NJ 2004 [2003] 188 [Dutch].

⁶⁶ *Observer and Guardian v the United Kingdom* (1991) Series A no 216.

⁶⁷ *Goodwin* (n 2).

As the Dutch courts balance the different interests in a equivalent way to the ECtHR, the short conclusion could be that this approach provides a sufficient framework to comply with the standards set out in ECtHR case-law and demanded by Principle 3 of Recommendation No R (2000) 7. However, such a short conclusion would not acknowledge the difficulties that have proven to exist. That is why it will now be analysed whether the application and outcome of the balancing act has been in line with the case-law of the ECtHR and Principle 3 of the Recommendation.

Due to the scope of this report, it is not possible to enumerate and describe all available case-law concerning the right of non-disclosure of sources.⁶⁸ Therefore, only the following case-law will be identified and described:

- (i) Dutch case-law that has proven not to be in line with the standards of the Convention pursuant to a later judgment by the ECtHR, and;
- (ii) a selection of national cases in which the parties have not lodged an appeal with the ECtHR but of which it can be nevertheless questioned to what extent the courts' considerations comply with ECtHR case-law.

This selection will make it possible to give an insight in some of the possible difficulties that exist or missteps that have occurred in the past while balancing the different interests in light of the ECHR standards.

8.2. Dutch Violations of Article 10: ECtHR Cases

In three ECtHR judgments, it was made clear that the application and the outcome of the balancing act as performed by the Dutch courts was not in line with Article 10(2) of the Convention. A closer look at the facts and the different ways the national courts and the ECtHR have balanced the various interests is provided in the following.

8.2.1. *Voskuil*

In the case of *Voskuil*,⁶⁹ a journalist had published two articles on a criminal investigation regarding arms trafficking. In these articles, an unnamed police officer was quoted saying that the police abused their powers during the investigation and later made up a story about how they found the weapons. During the appeal proceedings in the case against the suspects, Voskuil had to appear as a witness. Upon request to reveal his source, he denied to do so by invoking his right of non-disclosure of journalistic sources (as it had, at that time, already been acknowledged by the Supreme Court). However, the Court of Appeal was of the opinion that if the statements quoted in the article written by Voskuil were right, this would seriously affect the outcome of the

⁶⁸ Depending on the chosen selection criteria, there are approximately 30 - 40 cases in the past fifteen years that are relevant.

⁶⁹ *Voskuil* (n 10).

case and the integrity of the police. For that reason, the Court ruled that the interest of the accused and the integrity of the authorities outweighed the interest of not having to disclose journalistic sources. Nevertheless, Voskuil remained silent. That is why, in order to make him speak, the Court ordered the immediate detention of Voskuil. Seventeen days later, during another hearing, he was released. Upon release, he lodged an appeal against the Netherlands with the ECtHR. The Strasbourg Court found that there had been an interference with the protection granted to journalists under Article 10 of the Convention.⁷⁰ It then assessed whether this interference was 'necessary in a democratic society'. In that context, the Netherlands claimed that the detention was necessary for two reasons: (i) to secure a fair trial for the accused and (ii) to guard the integrity of the police.⁷¹ Although the ECtHR acknowledged the importance of both of these interests in general, it ruled that these were insufficient as valid reasons in the case at hand. The first reason was lacking, as, during a later stage of the national proceedings, it had become clear that the evidence that Voskuil would possibly had been able to supply was replaceable by evidence of other witnesses. With regard to the second reason, the integrity of the police, the Court emphasised that the use of improper methods by public authorities is precisely the kind of issue which the public is entitled to be informed about in a democratic society. Above all, the Court was struck by the length of the detention:

Whatever the consequences might have been for the source, the Court is struck by the lengths to which the Netherlands authorities were prepared to go to learn his or her identity. Such far-reaching measures cannot but discourage persons who have true and accurate information relating to wrongdoing of the kind here at issue from coming forward and sharing their knowledge with the press in future cases.⁷²

For these reasons, the Court was of the opinion that, the Government's interest in knowing the identity of the source could not override the interest of Voskuil in not disclosing his sources. Thus, a violation of Article 10 of the Convention was found.⁷³

8.2.2. *Sanoma*

In *Sanoma*, the ECtHR found an infringement of Article 10.⁷⁴ The case concerned a police raid in 2002 at the editorial offices of *Autoweek*, one of the magazines published by *Sanoma*. During this raid, the police demanded seizure of certain photos that contained images of participants to an illegal street race. As these photos were taken by a journalist of *Autoweek* under the strict condition that the participants would remain anonymous, *Sanoma* at first denied to hand over the pictures. The police detectives and the public prosecutors then threatened to detain one of the

⁷⁰ *Voskuil* (n 10) para 49.

⁷¹ *Voskuil* (n 10) para 54.

⁷² *Voskuil* (n 10) para 71.

⁷³ *Voskuil* (n 10) para 74.

⁷⁴ *Sanoma* (n 12).

editors of the magazine, to seal and search the whole of the company's premises for the weekend or longer and to remove all computers. Finally, under protest, *Sanoma* then decided to surrender the photographs to the public prosecutor. Two weeks later, *Sanoma* lodged a complaint before Dutch courts, seeking the lift of the seizure, restitution of the photographs, an order to destroy copies of the photographs and an injunction preventing the police and prosecuting department from making use of the information obtained through the photographs. The regional court only granted the request to lift the seizure and to return the photographs to *Sanoma* as the interest of the investigation did not oppose this. Although the regional court did consider that Article 10 of the Convention includes the freedom to gather news, which deserves protection, it also stated that this interest could be outweighed by another interest warranting priority. In the underlying case, it found that the interest of criminal investigation outweighed the right to freely gather news. An important reason for this was that the investigation at issue did not concern the illegal street race, but an investigation into other serious offences in which the underlying pictures could play a role. As other investigations in the context of these latter offences had led to nothing, the regional court found that authorities had complied with the principles of proportionality and subsidiarity. Subsequently, an appeal lodged with the Supreme Court by *Sanoma* was inadmissible due to a lack of interest. The *Sv* did not provide for a possibility to obtain a declaratory ruling that the seizure or the use of a seized item was unlawful once returned.

During the proceedings before the ECtHR, the Dutch Government insisted that the above did not implicate an interference with Article 10 of the Convention.⁷⁵ In short, the government contested that an agreement concerning the anonymity of the photographed persons had been made at all. Would there nonetheless be a source deserving protection, the agreement of confidentiality could only relate to the street race, whereas the order demanding the photographs had been given in the context of the investigation of an entire different and more serious crime. The ECtHR decided differently. It found that it is not required to put forward evidence of the existence of a confidentiality agreement.⁷⁶ In addition, it had already found in another case that the fact that a disclosure order had not been enforced could not prevent the Court from finding that there had been an interference.⁷⁷ In that context, while a search or seizure did not take place in the present case (only a compulsory handover), the Court emphasised that a chilling effect would arise whenever journalists assist in the identification of anonymous sources.⁷⁸ In conclusion, the ECtHR found that there was an interference.⁷⁹

⁷⁵ *Sanoma* (n 12) paras 33, 54 and 55.

⁷⁶ *Sanoma* (n 12) 64.

⁷⁷ *Financial Times Ltd and Others v the United Kingdom* App no 821/03 (ECtHR, 15 December 2009).

⁷⁸ *ibid* para 71. While it is true that no search or seizure took place in the present case, the Court emphasises that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources (*mutatis mutandis*, *Financial Times Ltd and Others* (n 77) para 70).

⁷⁹ *Financial Times Ltd and Others* (n 77) para 72.

It then assessed whether this interference was provided by law (as demanded by Article 10(2) of the Convention). In that context – in line with settled case-law – the ECtHR also assessed the quality of the law. The ECtHR ruled that the quality of the Dutch 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. Other than was provided by Dutch law, an assessment by a judge prior to the search and seizure that may lead to disclosure of sources had to be provided, as an assessment after a search or seizure had taken place would undermine the very essence of the right to confidentiality:

Although the public prosecutor, like any public official, is bound by requirements of basic integrity, in terms of procedure he or she is a “party” defending interests potentially incompatible with journalistic source protection and can hardly be seen as objective and impartial so as to make the necessary assessment of the various competing interests.⁸⁰

Thus, as the interference was not prescribed by (a qualitative) law, a violation of Article 10 of the Convention was found.⁸¹

8.2.3. *Telegraaf*

In the *Telegraaf Media c.s.* case⁸², the Supreme Court balanced the interest in the disclosure and the interest in non-disclosure with, in particular, regard for the possibilities concerning reasonable alternative measures.⁸³ The case concerned an order for the newspaper *De Telegraaf* to surrender documents to the State, which could identify journalistic sources. The documents were leaked by an employee of the *AIVD*. Furthermore, the public prosecutor had used phone-tapping and computer data as evidence to convict the source. The Court of Appeal had stated that no law forbids the use of intelligence to ascertain someone’s identity. The Supreme Court balanced the interests at stake and ruled that there was no violation of human rights, because the conviction was necessary in light of national security. However, the ECtHR had a different view. It concluded that these practices can have a chilling effect on sources’ willingness to come forward with information, finding in particular that the relevant law in the Netherlands had not provided appropriate safeguards in respect of the powers of surveillance used against them, with a view to discovering their journalistic sources. The need to identify the secret services official(s) who had supplied the secret documents to the applicants had not justified the order to surrender documents. The ECtHR concluded that this goal could have been attained by using less far-reaching and invasive measures. For instance, the substance of the document could have been carefully examined for more information regarding the source and internal access to the

⁸⁰ *Financial Times Ltd and Others* (n 77) para 93.

⁸¹ *Financial Times Ltd and Others* (n 77) para 100.

⁸² *Telegraaf* (n 14).

⁸³ *Telegraaf* (n 14).

documents could be monitored to see who could have obtained and leaked the documents. Secondly, the government contended that the documents should be handed over, in order to prevent the information from falling into the wrong hands. However, it is highly unlikely that this measure would still have the desired effect, as the documents had been circulating for quite a while. Moreover, the *AIVD* could have ordered that the documents be destroyed – it was not necessary to demand that they return to the *AIVD*. The ECtHR concluded that there were no ‘relevant and sufficient reasons’ to justify a violation of the applicant’s rights under Article 10 ECHR.

8.3. Other Case-Law

Some national cases relating to the protection of journalistic sources have not reached the ECtHR. Yet, it can be doubted whether the (outcome of the) balancing act performed by the Dutch courts in some of these cases has been in line with the case law of the ECtHR. The three cases discussed below, could be considered questionable in the light of the ECtHR case-law.

8.3.1. *Karin Bloemen/Audax*

In 2004, a Dutch magazine was ordered to disclose its source in a case concerning the publication of paparazzi pictures of a topless Dutch celebrity.⁸⁴ Despite the fact that the magazine invoked its right of protection of sources, the deciding court was of the opinion that disclosure was necessary to prohibit possible future infringements of the right to privacy of the celebrity. The court of appeal later confirmed this judgment.⁸⁵ A controversial consideration that led the court to decide to demand disclosure of the source had to do with the (alleged) low level of newsworthiness of the publication.⁸⁶

On appeal, Audax contested the relevance of this consideration by referring to the ECtHR *Goodwin* judgment in which the ECtHR has considered that ‘a source may provide information of little value one day and of great value the next’.⁸⁷ This could indicate that the newsworthiness of the supplied information/photos is irrelevant for the answer to the question to what extent a source can enjoy protection. However, without any further clarification, the Court of Appeal ruled that this does not apply to someone who, with the aim of making profit, secretly makes pictures of (naked) visitors of a hotel.⁸⁸

⁸⁴ *Plaintiff v Audax Publishing B.V.* [2003] Rechtbank Amsterdam published online <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2003:AL8451>> [2003].

⁸⁵ *Audax Publishing B.V.* (n 41).

⁸⁶ *ibid* para 14.

⁸⁷ *Goodwin* (n 2) para 37.

⁸⁸ *Audax Publishing B.V.* (n 86) para 4.15.

The extent to which these aforementioned factors should be relevant can be questioned. The reason for this is that it is questionable whether one may expect of sources that they (always) have complete insight on the newsworthiness of the information they supply. In addition, it should be noted that the newsworthiness of information is for an important part influenced by the final form of the publication and the time that the final publication is published. However, sources usually do not exercise any (extensive) control on the final form and time of the publication. Under these circumstances, attribution of relevance to the newsworthiness of the final publication could lead to a chilling effect on potential sources and would therefore contradict ECtHR case-law.

8.3.2. *Van Heest / De Limburger*

A second judgment is not so much suspected of granting insufficient protection to the non-disclosure right, but, instead, *overprotecting* it. This – in some eyes⁸⁹ – unnecessarily broad protection could violate the right to a fair trial and/or the right to privacy of others.

The case concerned alleged unlawful allegations in a newspaper (*De Limburger*). In an article in the newspaper, it was written that neighbours of a certain politician had described the politician as a 'psychological terrorist'. In appeal, the court focused on the question whether these allegations actually had been made. In order to substantiate the truth of the allegations made in the publication, the newspaper asked one of the attendees of a meeting in the neighbourhood in question to testify. This witness then confirmed that neighbours had made statements as described in the publication at that meeting. Subsequently, the plaintiff asked the witness about the identity of these persons. The newspaper then objected and demanded that the witness would not have to answer this question, as this could lead to the identification of journalistic sources. The examining judge accepted the complaint made by the newspaper and prevented the witness from answering this question. In that context, the judge considered that, under the circumstances of the case, the protection granted by Article 10 of the Convention to the newspaper had to prevail above the right to a fair process and the right to privacy of the plaintiff. If he would not prevent the witness from answering, this would most certainly lead to the identification of journalistic sources, which could have a chilling effect on potential, future sources. The examining judge found that there were no sufficient reasons to make such an interference with Article 10 of the Convention necessary.⁹⁰

What is interesting about this case is that the testifying witness did not invoke the right of non-disclosure himself. In addition, the witness had no professional relationship with the journalist. The judge solely prevented him from answering because he, the source and the journalist had been at the same meeting at the same time. Scholars have emphasised that this is a very broad interpretation of the right of non-disclosure. It has been advocated that this outcome could

⁸⁹ Korthals Altes, Comment nr 12 on *Van Heest/de Limburger B.V.* (Mediaforum 2013).

⁹⁰ *ibid* para 3.3.4

infringe the right to a fair trial or the right to privacy of others. Korthals Altes, for instance, mentioned that it looked like the court(s) were of the opinion that the source of information of a journalist may not become known *at all*. In his eyes, they missed the fact that what actually matters is that journalists may not be forced to reveal their sources.⁹¹ The reason therefore is that this would have a chilling effect on possible, future sources. In the underlying case, however, it is questionable to what extent a chilling effect would actually occur. It can be put forward that it is unlikely that the answer of the witness would have caused a chilling effect on future sources. The reason for this is that it would be clear that 'real' future sources could be able to count on protection, whereas the 'source' in this case was only a (unknowing) attendee of a meeting on which a journalist had later based a publication. Under those circumstances, disclosure would not jeopardize the free flow of information and granting 'unnecessary' protection could therefore (possibly) infringe the plaintiff's right to a fair trial and/or privacy as protected by the Convention.

8.3.3. *AIVD* source

A third and final questionable ruling concerned the prosecution of an employee of the *AIVD* who had leaked important state secret documents to a newspaper.⁹² In this case, the employee could not rely on journalistic source protection as the Supreme Court seemed to be of the opinion that the main goal of the right of non-disclosure is not so much to protect the source, but to protect the journalist. If the journalist would be forced to reveal his or her sources, these sources would feel less inclined to come forward with their information and it would severely hamper the functioning of that journalist. It can be doubted whether the focus on the journalist is correct. After all, Article 10 of the Convention is not so much about the protection of journalists as such, but primarily about the vital importance of maintaining a free flow of information within a democratic society. Already in its *Goodwin* judgment, the ECtHR has held that the rationale behind protection of journalistic sources is that sources must not be deterred from assisting the press in informing the public on matters of public interest.⁹³ The focus on the journalist, rather than the effect on potential, future sources fail to recognize that rationale. However, it should also be mentioned that others have argued that the judgment is correct. Therefore, it can be concluded that there does not seem to exist any consensus concerning this judgment.⁹⁴

8.4. Conclusions

⁹¹ Altes (n 90)

⁹² Korthals Altes, Comment nr 16 on *Van Heest/de Limburger B.V.* (Mediaforum 2013).

⁹³ *Goodwin* (n 2).

⁹⁴ Korthals Altes, Comment nr 16 on case 13/01003 (Mediaforum 2015).

This Chapter has assessed whether the boundaries of the right of non-disclosure in the Netherlands are in line with ECtHR case law and the demands of principle 3 of Recommendation No 2000 (7). As the Dutch courts assess the lawfulness of an interference with the right of non-disclosure in a way equivalent to the ECtHR, it can be concluded that, in principle, the Dutch law provides a sufficient framework to balance the different interests and to comply with the ECHR standards. Nevertheless, several cases have shown that the existence of this framework does not mean that the outcome of the Dutch balancing act will always comply with Article 10 of the Convention. To illustrate this, a selection of case law was made. It was shown that in the past ten years, the ECtHR has ruled three times that the balancing act as performed by the Dutch courts led to an infringement of Article 10 of the Convention. In addition, three cases that could potentially not be in line with ECHR standards have been identified.

9. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

In order to identify journalists' sources of information, secret services dispose over a variety of competences. The execution of these competences is subjected to certain requirements. National legislation gives information of the competences as well as the criteria for its use. Therefore the focus will first be on national legislation and national case law. Afterwards, the quality of this legislation will be assessed based on criteria set by the ECtHR in a number of important cases.

9.1. *Wiv*: Competences & Application Criteria

The *Wiv* provides competences to the *AIVD* in paragraph 3.2.2 of chapter 3. These are:

Article 20(1) <i>Wiv</i>	conduct surveillance relating to the action of persons and objects with the aid of observation and registration instruments
Article 21(1) <i>Wiv</i>	deploy persons under cover of an assumed identity or capacity who are charged with the collection in a directed way information relating to persons and

	organisations that can be relevant to the performance of the tasks of the service
Article 22(1) <i>Wiv</i>	conduct a search of enclosed spaces, closed objects and to conduct an investigation of objects aimed at establishing a person's identity
Article 23(1) <i>Wiv</i>	open letters and other consignments without the consent of the sender or the addressee
Article 24(1) <i>Wiv</i>	enter an automated work which also includes the powers to penetrate any security and to introduce technical devices to undo the encryption of data stored or processed in the automated work
Article 25(1) <i>Wiv</i>	tap, receive, record and monitor any form of conversation, telecommunication or data transfer by means of an automated work
Article 26(1) <i>Wiv</i>	receive and record non-cable-bound telecommunication originating from or intended for other countries, on the basis of a technical characteristic to monitor the communication. This includes the power to undo the encryption of the telecommunication
Article 27(1) <i>Wiv</i>	receive and record non-specific non-cable-bound telecommunication. This includes the power to undo the encryption of the telecommunication
Article 28(1) <i>Wiv</i>	turn to providers of public telecommunication networks and public telecommunication services with the request to furnish information on a user and telecommunication traffic relating to this user
Article 29(1) <i>Wiv</i>	turn to providers of public telecommunication networks and public telecommunication services with the request to furnish information relating to the name, address, postcode, place of residence and type of service relating to a

	user of telecommunication
Article 30(1) <i>Wiv</i>	access any place as long as it is reasonably necessary for the execution of the competences in Articles 20, 22, 24 and 25

The *Wiv* subjects the application of these competences to a number of requirements. In subsection 2 of Articles 23, 26, 27, 28, 29, 30 *Wiv* it is stated that the competences laid down in these paragraphs do not require a permission of the relevant minister or the head of the service on behalf of the minister, in the sense of Article 19(1) *Wiv*. On the contrary, the second limb of Articles 20, 22 and 25 *Wiv* explicitly requires a written permission by the responsible minister to the head of the service in advance to execute these particular competences.

The requirement to receive permission of a higher instance (or not) in advance is just one requirement which is imposed on national level by the *Wiv*. It can be stated that this requirement can be applied rather easily in practice: either a permission needs to be given or not. But the *Wiv* also imposes other requirements which proper application is less obvious.

Firstly, Article 6(2)(a) *Wiv* states that the *AIVD* has the tasks to conduct investigation regarding organisations and persons who give cause for serious suspicion that they are a danger to the democratic legal system or the security of other vital interests of the state. Furthermore, according to (c), it has to promote measures to protect these interests. This Article forms the baseline. Any measure, based on the *Wiv*, which the *AIVD* wants to carry out needs to be in line with the tasks mentioned in Article 6(2). To guarantee this the responsible minister is obliged to report the activities of the *AIVD* to both chambers of the national parliament (Article 8 *Wiv*).

Article 6 *Wiv* clarifies that the *AIVD* cannot use its competences with levity. The person (or organization) has to be suspected of a crime which forms a serious danger to democracy or other state-interests. In theory, every crime can form a danger to the state. In practice it can be stated, that a certain level of seriousness is necessary to fulfill this requirement (e. g. terrorism, drug-trafficking etc.).

Secondly, Article 12(1) *Wiv* authorises the *AIVD* to process information. This processing of data only takes place to achieve a certain goal and only if necessary for a proper execution of this act or the *Wet veiligheidsonderzoeken* (the Dutch Security Investigation Act) (subsection 2), which entails specific rules with regard to the manner how safety investigations have to be conducted. Furthermore, the processing needs to take place in accordance with the law and with proper and due care (subsection 3).

Thirdly, Article 13 *Wiv* states that the processing of personal data through the *AIVD* can among others only be conducted with regards to people, who give rise to the serious suspicion for being a danger to the democratic legal system or to the security or other vital interests of the state (a).

Fourthly, Article 18 *Wiv* refers back to Article 6(2)(a) and makes clear that any measure based on this Act can only be carried out for the security of the democratic society or other important state interests.

Lastly, Articles 31 and 32 should be mentioned. Article 31 *Wiv* states that the execution of one of the competences is only permitted, if the intended collection of data cannot take place by consulting publicly accessible sources of information or sources of information for which the service has been granted a right to inspect the information contained in said sources (subsection 1). Furthermore, it is stated that only the competence is executed which, based on the circumstances of the case, causes least harm to the person involved (subsection 2) and that there is no execution at all, if it causes disproportionate harm in comparison with the intended objective of the action (subsection 3). Subsection 4 states that the execution of a power must be proportionate to the intended objective of the action. Article 32 *Wiv* finally states that the execution of a power will be immediately terminated if the objective to which the power was exercised has been accomplished, or exercising of a less far-reaching power is sufficient. The question whether these requirements are fulfilled in a particular case is often difficult to answer and depends on the facts of the case. Therefore it should be clear what the different terms entail and how they have to be applied in practice. This concerns the quality of the law which will be accessed by the application of criteria set in case law of the ECtHR.

9.2. ECtHR: Quality of the National Legislation

The ECtHR has tested the quality of national legislation in different cases. In the following the accessibility, precision, foreseeability and clarity of the Dutch legislation will be examined based on ECHR norms which have been set in four important cases in the field of data protection and in the light of recommendations given in the report ‘Ten standards for oversight and transparency of national intelligence services’ published by the Institute of Information Law of the University of Amsterdam.⁹⁵ In all cases, the applicant alleged a violation of Article 8 ECHR which entails the right to private life and allows interference only if it is in accordance with the law, necessary in a democratic society and (among others) in the interest of the national security or public safety.

9.2.1. Accessibility

The case *Shimovolos v Russia* concerned the registration of a human rights activist in a ‘surveillance database’, which gathered information about his movements. The ECtHR held that the database in which the name had been registered had been created on the basis of a ministerial order which had not been published and was not accessible to the public. People could not find out why individuals were registered, for how long information about them was being kept, what type of information it considered, how the information was stored, how it was used and who had control over it.⁹⁶ In this case the ECtHR set out criteria to assess the accessibility of a

⁹⁵ Sarah Eskens et al, Ten standards for oversight and transparency of national intelligence services (University of Amsterdam, Institute for Information Law 2015).

⁹⁶ *Shimovolos v Russia* App no 30194/09 (ECtHR, 21 June 2011) para 69.

‘surveillance database’. Although the *Wiv* is a statutory law (and therefore differs from a ‘database’) the Institute of Information and Law has addressed the case *Shimovolos v Russia* in its report, stating that also statute law should indicate the procedures on secret surveillance and data collection.⁹⁷ The *Wiv* and the included competences can be openly accessed by the public. It can be assumed that the national law meets the criteria of accessibility.

9.2.2. Precision

In *Rotaru v Romania*, the applicant alleged that it was impossible to refute, what he claimed to be false information, in a file on him kept by the Romanian Intelligence Service. In 1948, he was sentenced to imprisonment for having expressed criticism of the communist regime. In this case, no provision defined the kind of information that could be recorded, the categories of people against whom surveillance measures could be taken, the circumstances in which such measures could be taken, the applicable procedure, the age of the held information or the length of time for which it could be kept. Furthermore, there existed no explicit provision concerning the persons authorised to consult the files, the procedure to be followed or the use that could be made of the obtained information. Therefore, the Court considered that the national law did not indicate with reasonable clarity the scope and manner of discretion conferred on the public authorities.⁹⁸ With regard to the *Wiv*, it is fair to say that the legislative norms and procedure set out in this act are sufficiently precise. People are enabled to understand what precisely the law entails and what they can expect, which leads to the next point: foreseeability.

9.2.3. Foreseeability

In *Malone v UK*, the applicant was charged with several offences. He complained about the interception of his postal and telephone communications. The ECtHR held that the quality of the law, does not have to be such that an individual should be enabled to foresee when his communications are likely to be intercepted so that he can adapt his conduct accordingly. But the law must be sufficiently clear to give citizens in general an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this interference of the right to respect for private life.⁹⁹ This case established that the powers of secret surveillance and data collection should be transparent.¹⁰⁰ Article 6 of the *Wiv* states that the *AIVD* is competent to conduct surveillance measures with regards to people or organisations which have the following characteristics: through their activities they give cause to the serious suspicion that they are a danger to the continued existence of the democratic legal system, or to the security of other vital interests of the state. To be able to foresee the

⁹⁷ Eskens (n 96) 28.

⁹⁸ *Rodica Mihaela Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000) para. 61.

⁹⁹ *Malone v the United Kingdom* (1984) Series A no 82, para 67.

¹⁰⁰ Eskens (n 96) p 27.

application of these measures the person concerned needs to know when he or she is under a serious suspicion. The term 'serious suspicion' is a higher requirement than just an indication, which is, according to Article 126Zd *Sv*, required to enable the police to conduct surveillance measures against suspected terrorists.¹⁰¹ This bridges the gap to the next point.

9.2.4. Clarity of Legislative Norms

Kruslin v France concerned telephone tapping in a murder case. The court stated that tapping and other forms of interception of telephone conversations represent a serious interference with private life and correspondence and must accordingly be based on a 'law' that is particularly precise. It is essential to have clear and detailed rules on the subject.¹⁰² In its report, the Institute of Information Law has set out standards which are similar to the ones mentioned above. The eighth norm states that Intelligence services and their supervising bodies should provide layered transparency, meaning that the individual concerned should be informed and that there is an adequate level of openness about intelligence activities. The ninth guideline states that individuals should be able to receive and access information about surveillance – this includes clear legislation and access to information about surveillance, which must provide for a framework for oversight and support of public scrutiny.¹⁰³ It is of utmost importance to examine how the *AIVD* exercises its competences in practice. Based on the cases of the ECtHR and the guidelines of the report, one can state that the *Wiv* can, in theory, be regarded to be in line with these requirements. Nevertheless, recent national developments draw a different picture.

9.3. National Development

Supreme Court in the *De Telegraaf*-case, *had to answer* whether evidence, which were obtained illegally from a journalist can still be used against a source of the same journalist – in other words: can a journalist's source itself invoke the journalist's right of protection of sources (Article 10 ECHR)?

The Supreme Court stated, and thereby confirmed the judgement of the Dutch Appeal Court (*Gerechtshof*), that the right of the protection of sources does not apply to the employee of the *AIVD* and that he, based on his function, was obliged to keep certain information secret. That certain surveillance measures were regarded as disproportionate was not an extraordinary circumstance which can justify the leaking by the employee.¹⁰⁴ This case limits the right of protection of journalistic sources and widens the scope of the competences stated in the *Wiv*. It deals with illegally obtained information through a surveillance measure by the *AIVD*, which

¹⁰¹ Aleid Wolfsen, *Terrorismebestrijding en de rechtsstaat in Arjen van Witteloostuijn* (ed), *Veiligheid, tot welke prijs?* (S&D 2007) 51 [Dutch].

¹⁰² *Kruslin v France* (1990) Series A no 176-A, para 33.

¹⁰³ Eskens (n 96) ii.

¹⁰⁴ *Telegraaf* (n 14) para 27.

nevertheless was used in an investigation. The court distinguished between the journalist and his source. While the journalist is protected, his source does not enjoy the same protection. Even if information has been obtained illegally with regard to the journalist, it can still be used against the source. It is possible that higher interests of the state prevent a journalistic source from relying on Article 10 ECHR. This widens the scope of the application of measures imposed based on the *Wiv*.

Other developments on the national level head for another direction (one can argue that this is an effort to strengthen the protection of journalistic sources again after the *Telegraaf* case). As already mentioned earlier in this report, the application of the *Wiv* to protect journalistic sources issued in December 2015 explicitly refers to the competences given to the *AIVD* in paragraph 3.2.2 *Wiv* in Article 2(b) *Toepassing Wiv*. According to Article 3(1) *Toepassing Wiv* the minister has to ask an independent committee for advice before he or the chief of the service give permission to the execution of a competence from paragraph 3.2.2 *Wiv*. According to Article 3(2) *Toepassing Wiv* the committee reviews the case based on the law and if it provides a depreciative advice, the minister or the chief of the service are obliged to decline the requested permission.

9.4. Conclusions

The *Wiv* guarantees the *AIVD* a wide range of competences. The act itself is in line with the requirements of the ECHR and can be regarded as accessible, precise, foreseeable and it includes clear legislative norms. The *Telegraaf*-case has broadened the competences of the *AIVD* with regards to journalistic sources. The application of the *Wiv* to protect journalistic sources can be regarded as an effort to again set limitations to the competences of the *AIVD*.

10. Can journalists rely on encryption and anonymity online to protect themselves and their sources against surveillance?

Since March 2007, the Netherlands are party to the Convention on Cybercrime (CCC), drawn up by the Council of Europe. The Conventions lists a number of cybercrimes and states in article 13 that the parties should enact national rules to punish these offences. Therefore, amongst others, the CCC requires its parties to adopt measures to empower its competent authorities to search or access a computer system and data stored therein (article 19).

The Netherlands has given its authorities a number computer-related investigatory powers (also in order to fulfill the requirements of the CCC). Generally, a frequently used threshold for the application of investigatory powers is that the suspected crime allows pre-trial detention (article 67, para. 1 under a) and b) *Sn*). This is the case with most cybercrimes and it can be stated, that the whole range of traditional investigatory powers can be used, including several specific

computer-related investigation techniques.¹⁰⁵

Since January 2006 a judge can order someone to provide data, if these data had a certain relationship to the crime or the suspect.¹⁰⁶ Article 126nc *Sv* gives any investigating officer in case of a crime the competence to order identifying data (e.g. name, address etc.), article 126nd *Sv* gives the public prosecutor in cases for which pre-trial detention the competence to order other data (including future data) and article 126nf *Sv* allows the judge in cases of a pre-trial detention crime that seriously infringes the rule of law to order sensitive data (e.g. health, sexual orientation, religion). As required by the CCC, article 126ni *Sv* enables the public prosecutor in case of pre-trial detention crimes and those who seriously infringe the rule of law to order the preservation of data which is particularly vulnerable to loss or change.¹⁰⁷

These orders can generally be given to people who process the data in a professional capacity, and, only with regards to the last two categories, also for personal use – with journalists falling within the first category of people. Suspects cannot be asked to provide data. According to article 126nh *Sv* the people targeted by the order can be forced to decrypt encrypted data.¹⁰⁸

11. Are whistle-blowers explicitly protected under law protecting journalistic sources? Is there another practice protecting whistle-blowers? Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

11.1. Introduction

This chapter examines the protection of whistle-blowers, specifically by considering legal provisions shielding journalistic sources. It will be demonstrated whether there exists explicit protection for whistle blowers under law protecting journalistic sources and whether there is another practice protecting whistle-blowers. It will also be examined whether there exists legislation prohibiting authorities and companies from identifying whistle-blowers.

11.2. Current Legislation

105 Kooops B.-J, 'Cybercrime Legislation in the Netherlands' [2010] *Electronic Journal of Comparative Law*, vol. 14.3; 16.

106 *ibid* 16.

107 *ibid* 17.

108 *ibid* 17.

11.2.1. Absence of General Legislative Protection and the Advice Centre for Whistle-blowers

Presently, there is no general legislation protecting whistle-blowers in the Netherlands directed at journalistic sources or otherwise. However, it is important to highlight the draft introduced by several Dutch opposition parties in 2012: 'Huis voor de Klokkenluiders' ("House for the whistle-blowers" or "House"). This bill would seek to create legislative means to report misconduct, by enabling the investigation of such practices and to improve protection for whistle-blowers.¹⁰⁹

Until this draft enters into force a stopgap has been created under the 'Whistle-blower Advice and Referral Commission Temporary Decree' as a (temporary) measure. This takes the form of an Advice Centre for Whistle-blowers. The Dutch Ministry of Interior and Kingdom Relations has put this institution in place.¹¹⁰ It is an independent organisation that advises and supports workers in the private and public sector on reporting concerns about wrongdoing. Its services are confidential and free of charge.

Under Article 3 of the Temporary Decree, the Advice Centre must, on request, provide information, advice, and offer support with possible follow-up steps to anyone who suspects malpractices detrimental to the public interest.¹¹¹ This applies to information obtained by this person from businesses or organisations where that person has worked or such entities of which that person has obtained knowledge through his/her work. Furthermore, the Advice Centre is tasked with identifying trends and patterns from this information that cannot be traced back to an individual and to communicate its findings to the relevant organisations. Also the Advice Centre must provide general information about dealing with suspected abuses. It is interesting to note that the implicit scope of the term 'whistle-blower' is thereby confined to persons who obtain information detrimental to the public interest through his or her work. Persons who obtain information through other means are therefore not included in the task of the Advice Centre.

The Advice Centre will cease to exist on July 1 2016, unless the Temporary Decree is renewed.¹¹² This has occurred before, due to the delayed parliamentary process of the 'Huis voor de

¹⁰⁹ Bill proposed by Van Raak, Fokke, Koşer Kaya, Segers, Thieme, Klein en Voortman on the establishment of a House for whistle-blowers [Kamerstukken II, 2012-13, 33258, no 2 and no 3, 1-2]. This was later amended several times, most notably by special senatorial legislative procedure (nouvelle). To the latter see: New bill by Van Raak, Fokke, Koşer Kaya, Segers, Thieme, Klein en Voortman on the establishment of a House for whistle-blowers [Kamerstukken I, 2014-15, 34105, no A].

¹¹⁰ Decision of 27 September 2011 regarding the constitution of the Commissie advies- en verwijspunt klokkenluiden [Tijdelijk besluit Commissie advies- en verwijspunt klokkenluiden Staatsblad 2011/427]

¹¹¹ *ibid* 7. However, the legislator refers for further information to the Dutch Labour Foundation's statement on malpractices discussed in paragraph 9.2.3.

¹¹² Decree of May 22, 2015, amending the Temporary Commission Decision advisory and referral point on whistleblowing and the Decree governing bodies WNo and WOB in connection with change of the date of

Klokkenluiders' draft law. However, as the latter has been approved by the legislator, a further renewal of the former is not to be expected.

11.2.2. Protection for Specific Public Sectors

Apart from the general assistance offered to whistle blowers by the Advice Centre, there exist specific safeguards for civil servants. Governmental employers have since 2003 been obligated to arrange for the safe reporting of suspicions of misconduct under Article 125 *quinquies*, paragraph 1, section f and paragraph 2 of the Central and Local Government Personnel Act.

11.2.2.1. CENTRAL GOVERNMENT ORGANS, POLICE AND MILITARY

This obligation has led the Central Dutch government, Police, and the Military to issue Decrees that introduced safeguards for civil servants working for these organisations.¹¹³ The explanatory memoranda to these decrees explain that reliability and integrity are indispensable for a properly functioning government. Misconduct detracts from this and should be prevented and where applicable must be ended. In order to do so the Decrees provide a number of measures that apply to civil servants that work or previously worked at the mentioned governmental bodies. This includes employees under civil¹¹⁴ and/or temporary contract.¹¹⁵

A suspicion of misconduct is defined by Article 1, paragraph 1e of the Decrees as: a suspicion on reasonable grounds of (1) an infringement of legal or policy rules; (2) a danger for public health, security, or the environment; or (3) the improper acting or failing to act, that constitutes a danger for the functioning of the public service.

In order to report suspected malpractice, potential whistle blowers must, in principle, report the relevant facts internally, unless this cannot be reasonably expected of him/her or is contrary to the public interest. There is a specific whistle-blower complaints body for the public sector, the *Onderzoeksraad Integriteit Overheid* (Council on Integrity in the public sector). This body investigates whether an internal report of suspected misconduct was justified and whether proper procedures were adhered to. If this cannot be reasonably expected, the whistle-blower can report the facts to an external entity proportional to the situation. The Advice Centre is seen as the route most

expiration of the Temporary Commission Decision counseling and referral point whistleblowing [Staatsblad 2015/202].

¹¹³ Article 1(1)e Notification of suspected wrongdoing by Government and Police [Staatsblad 2009/572]; Article 126g

Report Decision suspected wrongdoing at the Ministry of Defence [Staatsblad 2010/706].

¹¹⁴ Dutch civil servant employment contracts (for the moment remain to) have special status in the Netherlands. However, there exists a proposal that aims to change this for most civil servants. See for current wording: Initiative Bill by Van Weyenberg and Keijzer on the Act of normalization of legal officials [Kamerstukken I, 32 550, nr A].

¹¹⁵ Staatsblad 2010/706 (n 111) 10.

suited to report governmental misconduct by civil servants. Reporting to the media is seen as a last resort. This is reflected by the absence of any mentioning of reporting to external bodies not appointed by the government body. If the malpractice persists despite repeated reports a situation may arise in which the employee will be justified to contact the media in that case.¹¹⁶

11.2.2.2. LOCAL AUTHORITIES: PROVINCES, MUNICIPALITIES, AND WATER BOARDS

The *Vereniging Nederlandse Gemeenten* (Association of Netherlands Municipalities), *Unie van Waterschappen* (The Dutch Water Authorities) and the *Interprovinciaal Overleg* (Association of Provinces of the Netherlands)¹¹⁷ have all drafted their own model regulations to protect whistle-blowers and to guarantee the possibility to safely report suspected misconduct.¹¹⁸ Their members must make provisions for protecting whistle-blowers. To this end, they can make use of the model, but are not obliged to do so.

These regulations to a large extent mirror the Decrees at the national level. Confidentiality safeguards are put in place by protecting the identity of the whistle-blower.¹¹⁹ Whistle-blowers are required to have reasonable grounds for their suspicions, and are obliged to report the potential misconduct internally first. To the latter, the model regulations indicate that internal reports can be made to officially appointed confidential contact persons, or the external independent committee appointed by the competent authority.¹²⁰ The regulations do not indicate the possibility for whistle-blowers to report suspected misconduct to parties other than entities officially appointed by government bodies.

11.2.3. Scant Protection in the Private Sector

The Dutch Corporate Governance Code (*de Code Tabaksblat*) states in paragraph II.1.7 that publicly listed companies are obliged to provide a mechanism that allows employees to report “alleged irregularities of a general, operational and financial nature within the company to the chairman of the management board or to an official designated by him, without jeopardising their legal position.” These arrangements for whistle-blowers shall be posted on the company’s

¹¹⁶ Dutch response to the Call for Submissions on the Protection of Sources and Whistle-blowers by the UN Special rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye. Digital source: <www.ohchr.org/Documents/Issues/Opinion/Protection/Netherlands.docx> accessed 6 April 2016.

¹¹⁷ The associations for respectively Dutch Municipalities, Waterboards, and Provincial Authorities.

¹¹⁸ VNO, Modified Example Rules on Reporting Suspected Abuse in 2013 [Gewijzigde Voorbeeldregeling Melding Vermoeden Misstand 2013]; UvW, Model Rules on Reporting Suspected Abuse and / or Regional Water Integrity Violation [Modelregeling Melding Vermoeden Misstand en/of Integriteitschending Waterschappen].

¹¹⁹ Article 2 Voorbeeldregeling VNG; Article 16 Modelregeling UvW; Article 11 Procedureregeling IPO.

¹²⁰ See Article 1g Voorbeeldregeling VNG; Article 1e Modelregeling UvW; and Article 1 and 4 Procedureregeling IPO.

website. Furthermore, sector specific regulations exist where similar obligations are set out for banks, investment firms, and accountancy organisations.¹²¹

Beyond this, no general legislative obligation exists to protect whistle blowers in the private sector. Labour unions, together with the Dutch Labour Foundation, have set out a “Statement concerning methods for dealing with malpractices in companies”.¹²² This has been adopted by several companies. Apart from these self-regulatory instruments, the “Huis voor de Klokkenluiders” proposal would lay down a general requirement to adopt whistle-blower protection for all companies employing more than fifty persons.

11.2.4. A Legislative Look to the Future: The ‘Huis voor de Klokkenluiders’ Draft Law

The Netherlands is one of a few European states that are momentarily actively pursuing legislative protection for whistle-blowers.¹²³ After an unsuccessful earlier attempt to regulate protection of whistleblowing,¹²⁴ seven parliamentarians¹²⁵ initiated the procedure for a private members bill¹²⁶ to provide more comprehensive protection for whistle-blowers.¹²⁷ To do so, it would aim at providing conditions for reporting misconduct within organisations by enabling investigation and furnishing whistle-blowers with better protection.

To achieve this goal the parliamentarians wish to establish a House for the Whistle-blowers. This institution is to conduct investigations into suspicions of societal misconduct (*‘maatschappelijke misstanden’*) and will make recommendations to resolve problems. The explanatory memorandum to the proposal¹²⁸ states that the definition of such conduct should be based on the Dutch Labour Foundation’s statement on malpractices and the Decrees relating to central government organs and the police.¹²⁹ Therefore the term should include harm to the public interest in cases where there is: 1) infringement of a legal act; 2) danger to public health, 3) safety of persons, 4)

¹²¹ ‘Adviespunt Klokkenluiders’ (2013) <<https://www.adviespuntklokkenluiders.nl/bescherming/>> accessed 05 May 2016.

¹²² English version available at: <http://www.stvda.nl/en/~/_media/files/stvda/talen/engels/2012/20120829_en.ashx> accessed 05 May 2016.

¹²³ Paul Stephenson and Michael Levi, *Principes van klokkenluiden: de benadering van de Raad van Europa* (Bomm Lemma 2013) 94-95 [Dutch].

¹²⁴ Kamerstukken II, 2003/04, 28990, nr 2.

¹²⁵ Six members of the opposition (Van Raak (SP), Koşer Kaya (D66), Voortman (GroenLinks), Segers (ChristenUnie), Thieme (PvdD), and Klein (independent)). The Bill was co-drafted by MP Fokke (PvdA) representing the ruling Dutch Labour Party.

¹²⁶ Kamerstukken II 34105 (n 106) nr 2.

¹²⁷ Dutch MP’s can take the initiative in drafting legislation. Although not unheard of the usual procedure is to leave the initiative to the cabinet.

¹²⁸ Kamerstukken II 33258 (n 106) nr 3, 7.

¹²⁹ Respectively discussed in paragraphs 7.2.3 and 7.2.2.1.

the environment, or 5) the proper functioning of the public service as result of careless misconduct or failure to act.

When asked, the House will advise and support the person or entity seeking to report the misconduct. The House shall reside under the legal power of the Dutch National Ombudsperson, but is open to reports from both public and private sectors. It will report its findings yearly.¹³⁰ The House will consist of an Advisory department and an Investigating department.¹³¹ The Advisory department gives information to potential whistle-blowers and aids in the transfer of information to the relevant public watchdog.¹³² Information can be given before or after the suspicion has been reported internally.¹³³ Furthermore, the Advisory department gives general advice to the public about dealing with misconduct.¹³⁴ The Investigations department can investigate both public and private organisations.¹³⁵ In each case the department publishes a report of the investigation. The organisation receives a draft four weeks in advance of the publication to allow for the organisation to declare whether certain information is sensitive to the internal workings of the organisation.¹³⁶

The proposal does not give an explicit definition of the word whistle-blower but states that: 'employees who suspect societal misconduct can report to the House for the Whistle-blowers.'¹³⁷ Their protection would be set out in a single phrase. Article 18 would state that the Dutch civil code would have to be adapted to include an article stating: 'The employer may not disadvantage the employee in response to reporting – in good faith and conform procedure - a suspicion of misconduct [...] during or after the processing this complaint by the employer or the organisation charged with this task.'¹³⁸ This would include taking disciplinary steps, withholding raises in pay or promotions, and/or termination of employment contracts. Reporting in good faith includes – as is practice under the current protection scheme – first reporting the suspicions internally before reporting them to the House. This principle is equally important in order to conform to '*procedure*.' In order to have done so, civil servants are expected to have conducted themselves carefully (both procedurally and in substance). For privately employed persons this norm corresponds to the procedures of the Statement concerning methods for dealing with malpractices in companies, referenced above. For further interpretation of the 'good faith'

¹³⁰ Article 17c.

¹³¹ Article 3a(1).

¹³² Article 3a(2), section a, b and c.

¹³³ Kamerstukken II 34105 (n 106) nr 3, 19-20.

¹³⁴ Article 3a(2), section c.

¹³⁵ However, the House has more far-reaching investigatory competences in case of suspected public malfeasances.

¹³⁶ This has the disadvantage that the reaction to this declaration is published in the final report. This leads to the possibility of extra focus on the content to which a denied request pertains. See thereto: Marjolijn Lips and Vonne Laan, *Verplichte introductie klokkenluidersregeling en rechtsbescherming klokkenluider* (Van Doorne 2016) [Dutch].

¹³⁷ Kamerstukken II 33258 (n 106) nr 3, 3.

¹³⁸ Literal translation by the author as no official English version is currently available.

criterion the legislator refers to jurisprudence, in particular the case-law of the ECtHR regarding Article 10 ECHR.¹³⁹

Under the new draft, provisions would be included to set out admissibility criteria for complaints to the House. In regard to the conformity to procedure, the proposed bill places emphasis on the internal procedure. Article 6(1) subsection d) of the draft states that if the organisation has 'properly' dealt with the internal complaint, the complaint is not admissible for subsequent procedures at the House. Only when it cannot be expected of the whistle blower to follow the internal procedure, a direct complaint to the House can be made.¹⁴⁰

Also, this bill would ensure that every organisation with fifty or more employees implements internal regulations to enable whistle-blowers. Such regulations must state which suspicions of misconduct can be reported, to whom such reports can be made, and what procedural steps must be adhered to. The organisation is obligated to deal with complaints confidentially. Also, organisations must provide opportunity for employees to consult an advisor. The regulations must further state how the organisation will report back to the complainant about the reported suspicions.¹⁴¹ The Dutch Senate unanimously passed the Bill on March 1 2016.¹⁴² At the time in which this contribution is being written, the entry into force of the new law was yet to be determined by Royal Decree.

The bill encountered quite substantial criticism and was amended several times before being adopted by the Dutch House of Representatives in December 2013. In its early drafts, the House had greater competences to conduct investigations into suspected misconduct. However, in order to respond to the parliamentary criticism, the House was changed in an entity that primarily refers complaints it receives to relevant public watchdogs. Some (parliamentary) critics see this change as a marginalisation of the House's role. If the House shall only function as a service-hatch for delivering complaints to existing public watchdogs, critics asked what added value the establishment of the House retains.¹⁴³ Academic literature reflects an appreciation for the efforts made to strengthen the position of whistle-blowers. However, it also reflects apprehension against the quick succession of different pieces of legislation and bodies that should protect or advice potential whistle-blowers.

¹³⁹ Kamerstukken II (n 132).

¹⁴⁰ Article 4(2).

¹⁴¹ Lips (n 135).

¹⁴² Voting results [Stemmingen] 1 March 2016, nr 21.

<https://www.eerstekamer.nl/stenogramdeel/20160301/huis_voor_klokkenluiders_novelle> accessed 05 May 2016.

¹⁴³ Albert Verdam, 'Wetsvoorstel Huis voor klokkenluiders: van melding aan Huis, naar melding aan toezichthouders' [2016] Tijdschrift voor Arbeid en Onderneming 1 [Dutch] 3-4.

11.3. Judicial Practice in the Netherlands and Compliance to the ECtHR Case-Law

11.3.1. Direct Protection

In recent years, the ECtHR clarified much in regard to whistle-blowers rights in Europe.¹⁴⁴ However, Dutch judicial practice on whistle-blowers remains varied. In most cases, courts acknowledge that Article 10 ECHR is at issue.¹⁴⁵ A case from 2014 a Rotterdam judge in preliminary relief proceedings can serve as a clear example thereof. The court assessed whether several factors from the *Guja* case (reporting, public interest, authenticity of information, potential damage, effect of making the information public) were satisfied.¹⁴⁶ The court subsequently ruled that the whistle-blower had satisfied these criteria and declared that the termination of the employee's labour contract should be annulled based on its contravention of Article 10, paragraph 2 ECHR.

This application of the ECHR (case) law by the Dutch judiciary *should* not be seen as surprising: Articles 93 and 94 of the Dutch Constitution compel the application of international norms in the Dutch legal system when the norms may be binding on all persons by virtue of their contents. Statutory regulations in force within the Netherlands shall not be applicable if in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.¹⁴⁷ However, there are cases where Dutch courts do not mention the rights of whistle-blowers under Article 10 ECHR,¹⁴⁸ or even use the word 'whistle-blower' explicitly.¹⁴⁹ A clear line can therefore not yet be discovered and despite the fact that (lower) courts generally acknowledge this dimension related to the rights of whistle-blowers, parties in Dutch whistle-

¹⁴⁴ *Fuentes Bobo v Spain* App no 39293/98 (ECtHR, 29 February 2008); *Guja v Moldova* App no 14277/04 (ECtHR, 12 February 2008); *Heinisch v Germany* App no 28274/08 (ECtHR, 21 July 2011).

¹⁴⁵ Jens van den Brink and Emiel Jurgens, 'Bescherming van klokkenluiders onder artikel 10 EVRM' [2015] NJCM Bulletin 1 [Dutch] 14.

¹⁴⁶ *Plaintiff v the Mayor of the City of Rotterdam* [2014] Rechtbank Rotterdam TAR 2014 [2014] 57 [Dutch] para 22 et seq.

¹⁴⁷ For official English version see: <<https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008>> accessed 05 May 2016.

¹⁴⁸ *Case 316844 / HA ZA 05-1541*[2007] Rechtbank Amsterdam RF 2007 [2007] 18 [Dutch]; *Case 12-6673 AW* [2013] Centrale Raad van Beroep NJB 2013 [2013] 2630 [Dutch]; *Quirijns v TGB* [2012] Hoge Raad NJB 2012 [2012] 2254 [Dutch].

¹⁴⁹ *Case 127383 / HA ZA 06-1498*[2008] Rechtbank Zwolle-Lelystad published on <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBZLY:2008:BD2201>> [2008] [Dutch]; *Case 200.010.214/01* [2010] Gerechtshof Arnhem published on <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHARN:2010:BN1847>> [2010] [Dutch]. This judgment was subsequently confirmed by the Dutch Supreme Court in *Case 10/04884* [2012] Hoge Raad NJB 2012 [2012] 1220 [Dutch].

blower cases do not raise the issue of (constitutional) human rights.¹⁵⁰ Such cases then are often not fought along the lines of human rights protection.

Moreover, when human rights norms *are* used in judicial proceedings in final instance, the Supreme Court does not seem to weigh these aspects.¹⁵¹ The Dutch Supreme Court prefers to consider the issue in light of Article 7:611 of the Civil Code. In 2012 the Supreme Court ruled on the matter in the case *Quirijns v. TGB*¹⁵², in which an employee resigned from his position at the Theodoor Gillissen Bank because of misconduct by others at the bank. Before resigning, he informed a client of the bank, the bank's stakeholder and the public (financial) watchdog AFM. The Supreme Court made clear that the basic premise in Article 7:611 of the Civil Code entails that employees must in principle act discretely and loyally towards their employers. In the context of whistleblowing, *internal* reporting (or reporting in a form that is least damaging to the employer) is the norm. This principle extends to situations where the employee is convinced that misconduct exists within the organisation. Derogation from this could only occur where a legislative basis justifies revealing the information or when the suspected misconduct concerns leading figures in the organisation.¹⁵³ Thus, the Supreme Court follows the continuing trend in Dutch legislation on whistle-blowers regarding the importance of internal reporting. The Supreme Court, moreover, only examined Article 7:611 of the Civil Code, thereby not considering the case-law of the ECtHR.¹⁵⁴ Some commentators note that the Court itself thereby neglects its own criteria, set out in the case-law mentioned above.¹⁵⁵ However, it can be argued that the Supreme Court at least used parts of the case law by Strasbourg Court to give substance to Article 7:611 of the Civil Code. After all, the ECtHR also makes explicit reference to the employee's duty of loyalty, reserve and discretion to their employer and the importance of using the most discreet means of remedying the wrongdoing. However, by only making (implicit) reference to these aspect of the ECtHR's interpretation in *Guja*, the Supreme Court neglects the other factors of the ECtHR-balancing test. Thereby it did not completely clarify the legal position of Dutch whistle-blowers, nor did it fully – if at all – align its position with Strasbourg.¹⁵⁶

¹⁵⁰ Franck van Uden, 'Klokkenluiden: verder van huis met het Huis (1)' [2013] *ArbeidsRecht* 18 [Dutch].

¹⁵¹ *Meijer v De Schelde* [2000] Hoge Raad NJ 2000 [2005] 430 [Dutch]; *Greenpeace v Kotte* [1995] Rechtsbank Amsterdam JAR 1995 [1995] 208 [Dutch].

¹⁵² *Quirijns v TGB* (n 147).

¹⁵³ Franck van Uden, 'Klokkenluiden: tour d'horizon,' in: Jan Brabers et al (eds), *Vereniging van Handelsrecht, Preadvies 2015: Klokkenluiders in perspectief* (Uitgeverij Paris 2015) [Dutch] 24.

¹⁵⁴ Case note by Inge de Laat regarding *Quirijns v TGB* (n 147).

¹⁵⁵ Franck van Uden (n 152) 24.

¹⁵⁶ *ibid.*

11.3.2. Indirect Protection

In regard to the ECtHR's case-law on the indirect protection of journalistic sources¹⁵⁷, the Dutch courts have followed the ECtHR and examined whether there was a public interest at stake that could override a journalist's right to protect its sources. In one case, the court implicitly followed the case law of the Strasbourg court by attaching special importance to the broadcaster's role as a public watchdog and the public's right to receive information.¹⁵⁸ Not only lower courts are of the opinion that indirect rights are enjoyed by whistle-blowers under Article 10 ECHR. The Dutch Supreme Court recently followed¹⁵⁹ the opinion by its Advocate-General Spronken.¹⁶⁰ The A.G. had made plain that protection of journalistic sources *ex* Article 10 ECHR should be applied broader than just protecting journalists from revealing their sources.

11.4. Implementation of Recommendation CM/Rec(2014)

In 2014, the Committee of Ministers of the Council of Europe adopted the Recommendation CM/Rec(2014). The Committee recommended 'that member States 'have in place a normative, institutional and judicial framework to protect individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest.' In the appendix, the Committee included 'a series of principles to guide member States when reviewing their national laws or when introducing legislation and regulations or making amendments as may be necessary and appropriate in the context of their legal systems.' It is interesting to verify to what extent these principles are complied with by Dutch legislation, taking into account the proposal discussed earlier. Where the relation between Dutch law and specific factors of the recommendation is not discussed, compliance can be presumed.¹⁶¹

Heading II of the Recommendation relates to personal scope. The Committee refers to the work-based relationship, stating that no distinction should be made between paid and unpaid work. The Committee refers also to information that was gathered during the process of recruitment of employees. Applicable Dutch law do not make explicit provisions for these aspects, except in regard to (ex-)employees. Under Heading III, the Recommendation revolves around restrictions and exceptions which 'should be no more than necessary' of the rights of persons to report or disclose information in the public interest. Dutch practice by the legislator and the judiciary strongly emphasises the need to report internally and external communication is

¹⁵⁷ *Nagla v Latvia* App no 73469/10 (ECtHR, 16 July 2013) para 97; *Tillack v Belgium* App no 20477/05 (ECtHR 27 november 2007) para 53; *Goodwin* (n 2) para 39.

¹⁵⁸ Rejection of Appeal *Ryanair LTD. V Katholieke Radio Omroep* [2015] Gerechtshof Amsterdam NJF 2015 [2015] 372 [Dutch] paras 3.2, 3.14. and 3.17.

¹⁵⁹ *Case The Netherlands v Defendant* [2014] Hoge Raad published at <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2014:1777>> [2014] [Dutch].

¹⁶⁰ Opinion AG Spronken, 6 September 2014, *The Netherlands v Defendant*.

¹⁶¹ Or, where relevant, no applicable provisions exist that restrict freedoms referred to by the Recommendation.

seen as the very last resort. Depending on the interpretation of the Recommendation,¹⁶² this emphasis placed on internal reporting could be seen as derogating from Heading III to a certain extent. The duties mentioned in Heading VII of the Recommendation that relate to 'Protection against retaliation' have no explicit basis in Dutch law. However, the more general protection clause under Article 18 of the 'Huis voor de Klokkenluiders' bill can be considered to include such safeguards, as does the direct application of Article 10 ECHR.

11.5. Conclusions

By establishing the House for the Whistle-blowers, the Dutch Legislator has made protection of persons who wish to report misconduct more explicit. Also, more resources have been committed to the investigation and advice where suspicions of misconduct exist. General application by Dutch judges of ECtHR case-law regarding the direct protection of whistle-blowers under Article 10 ECHR cannot yet be established, also because parties often do not raise the issue themselves. However, it is possible (especially in lower courts) to see a convergence of case law towards a more consistent application of the criteria set out by the ECtHR. It remains to be seen whether the Supreme Court will apply the ECtHR's balancing test for direct protection of whistle-blowers under Article 10 ECHR to a fuller extent in future cases.

12. Summary

In this contribution, the applicable law and relevant developments relating to the protection of journalistic sources in the Netherlands have been described. With respect to the legal safeguards, it appears that there is no current legislation in place but there are two pending legislative proposals – Article 218a *sv* and *Wiv*. In order to remedy this, the government decided to provide a temporary mechanism for the *Wiv*. The term 'journalist' has not been defined yet in legal terms, but it turns out that the proposed scopes of the two legislative proposals differ, which has been subject of considerable debate.

Despite the lack of legislation defining the legal safeguards for the protection of journalistic sources, the findings suggest that, for the most part, the limits of non-disclosure seem to be in line with the analysed principles of the Recommendation No R (2000) 7. Generally, the authorities search for and apply alternative measures, which are less intrusive with regard to the right of journalists not to disclose information. In principle, the Dutch law provides a sufficient framework to balance the different interests and to comply with the ECtHR standards. When assessing an interference with the right of non-disclosure of journalistic sources, Dutch courts apply the same test as contained in Article 10 ECHR and refer to case-law of the ECtHR. Nevertheless, several cases have shown that the existence of this framework does not mean that

¹⁶² NB: point 24 of the Recommendation explicitly allows for the requirement to take into account the need for internal reporting schemes.

the outcome of the balancing act by the national courts will always comply with Article 10 of the Convention. In the past ten years, the ECtHR has ruled three times that the balance struck by the Dutch courts led to infringements of Article 10 ECHR and several other cases that could potentially not be in line with Article 10 ECHR and its interpretation by the Strasbourg court have been identified.

With regard to the use of electronic surveillance and anti-terrorism laws, the *AIVD* derives a wide range of competences from the *Wiv*. In the light of the relevant case law of the ECtHR it can be stated that this act fulfils the requirements of accessibility, precision, and foreseeability, as well as that it includes legislative norms which can be labelled as clear and understandable. In the course of the *Telegraaf* case, the competences of the *AIVD* have been expanded further with regard to journalistic sources. However, the application of the *Wiv* to protect journalistic sources can be regarded as a counter-effort to set limitations to the competences of the *AIVD*.

Regarding whistle-blowers, steps have been taken to provide more explicit protection. Most recently this has taken the form of a law establishing the House for the Whistle-blowers. The institute will aid and advise whistle blowers in reporting societal misconduct and investigate alleged misdeeds. Self-regulation has regressed in the Netherlands in recent years. A number of sizable news outlets have renounced the authority of the Netherlands Press Council. Self regulatory bodies have thereby gained a more indirect impact on the protection of the rights of journalists, for instance as a credited source for defining concepts important to the judiciary.

13. Annex I: Self-Regulatory Mechanisms in the Netherlands

13.1. Dutch Institutes Furthering the Interests of Journalists

There are essentially two Dutch bodies that impact self-regulation of Dutch journalists. Firstly, the Netherlands Society of Chief Editors is a professional association. However it is not an interest group that formally represents all Dutch editorial boards. This, states the Society, would go against the independent position of these organisations. The Society presently has over one hundred members. In 2008 the Society of Chief Editors published the “Code voor de Journalistiek” (Code for Journalism). Its members are not in any way bound by the document. Its purpose is solely as a starting point for debate. It can nonetheless be seen as an expression of the views of the organisation. Concerning the protection of journalistic sources it states: *The journalist protects the sources to whom he has pledged confidentiality. [...] The journalist who bases himself on anonymous sources, must make plausible that the sources are reliable, the information could not be obtained in another way, and must have been verified – as well as is possible – from another source.*¹⁶³ Thus, the Society

¹⁶³ Translation by the author, no official translation available. Code of journalists <<http://www.genootschapvanhoofdredacteuren.nl/het-genootschap/code-voor-de-journalistiek/>> accessed 06 May 2016.

makes clear that the protection of sources is justified, but certain conditions need to be fulfilled by journalists wishing to protect the identity of their sources.

The second institution, more pertinent to the present discussion, is the Netherlands Press Council. Article 3 of the Articles of Association of the Foundation of the Press Council state that the Press Council is charged with the examination of complaints against violations of good journalistic practice. The Council was established by the reorganization of the Dutch Federation of Journalists in 1960. This reorganization entailed a changing of competences of the newly formed Press Council. The Council could now hear complaints against journalists that were not affiliated with the Press Council. This was not possible before. However, this extension of the scope of action of the Council also led to the loss of the previous competence of the Federation to impose sanctions on journalists. Presently the Press Council can still only express its disapproval of journalistic conduct.¹⁶⁴ The Press Council is composed of a Chairperson, three vice-persons who are jurists and not journalists, a minimum of ten members who are journalists, *and* a minimum of ten members that are not journalists.¹⁶⁵ The Council is competent to adjudicate complaints about journalistic conduct. This is defined as: 'a journalist's acts or omissions while exercising his occupation' as well as 'acts or omissions in the context of journalistic activities by someone who contributes regularly and against payment to the editorial content of mass media without being a journalist'.¹⁶⁶ The term journalist is in Article 4(2) of the Articles of association of the Council defined as: 'anyone who makes it their prime occupation, either as employee or on freelance basis, to work on the editorial supervision or editorial composition of mass media.' The article subsequently provides a non-exhaustive list containing examples of both print and digital media.

Every person that can be considered as directly involved in a case of journalistic (mal)practice can complain to the Press Council. This allows persons or entities that claim to have been harmed by a publication based on anonymous sources to bring claim against the authors. The Press Council does not examine whether the journalistic conduct conforms to Dutch legal statutes, it only judges whether 'limits of what is socially accepted in terms of journalistic responsibility have been transgressed.' A claim for damages bases on legal provisions concerning for instance wrongful act/publication or cases alleging defamation or libel can only be brought before the a court. The Council can also give advisory opinions when it finds that matters of principle warrant this procedure without an individual complaint being lodged.¹⁶⁷

The Press Council bases its examination whether limits have been transgressed on its Guidelines.¹⁶⁸ In regard to the protection of journalistic sources the Guidelines state: 'In

¹⁶⁴ Daphne Koene, 'Press Councils in Western Europe' (AMB 2008) 27 *et seq.*

¹⁶⁵ Article 5(1) of the Articles of association of the Foundation of the Dutch Press Council.

¹⁶⁶ Koene (n 163) 30.

¹⁶⁷ Article 3(1) of the Articles of association of the Foundation of the Dutch Press Council.

¹⁶⁸ Guidelines of the Netherlands Press Council (English version: <<https://www.rvdj.nl/uploads/fckconnector/f60f0e13-cfde-43b7-9ea3-d3d49e012c78>> accessed 06 May 2016.

principle, sources are referred to in the publications. Publications must hide the identity of sources to whom the journalists have promised confidentiality, and of sources with regard to whom they knew or could have known that they have given them information on the assumption that they would not disclose their identities.' Also indirectly relevant information to the present discussion is included in the chapter on privacy. Thereto, the Guidelines state: 'A publication must not infringe the privacy of persons more than is reasonably necessary within the framework of the report. An intrusion of privacy will be careless if this is not reasonably proportionate to the social interest of the publication.' There are several aspects of the Press Council that have attracted criticism over the years. The fact that the Council can hear cases concerning persons who are not affiliated to it can cause paradoxical situations. The Council can for instance judge the conduct of individuals to be in violation of the Guidelines. However, the persons involved can regard themselves not to be journalists in the first place and will therefore likely be merely surprised but not in the least concerned that they will reportedly have acted in contravention of the rules set by the Council. Furthermore, several media platforms – notably the largest Dutch newspaper 'De Telegraaf' – have withdrawn its recognition of the Council. Although complaints continue to be brought against these media and their journalists, this journalistic organization no longer appear at hearings by the Council and no longer put up a defence. Such actions can be seen as erosion of the Council's authoritative position.¹⁶⁹

13.2. Conclusions

We can conclude that Dutch self-regulation of the journalist's profession has somewhat fallen into disfavour in recent years. Moreover, there are no possibilities for the imposition of punitive measures, which can be expected to lower the effectiveness of these mechanisms. From the previous explanations it has become clear that in the Netherlands self-regulatory mechanisms are free standing private instruments. These instruments are aimed at policing the morals and standards of the journalist's profession. Influence on legal safeguards can take place in an indirect way. As was for instance stated in previous Chapters, the Dutch Association of Journalists and the Counsel for Journalism influence the definition of the term journalist.

¹⁶⁹ Kamerstukken II (n 15) nr 3, 11.

14. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

14.1. Legislation

- Amendment of the Code of Criminal Procedure laying down the law on protection of sources for free news (source protection in criminal matters) [Kamerstuk 34032, nr 8]
- Amendments to the Law on the Intelligence and Security 2002 in connection with the establishment of an independent binding test (which aims to identify their sources) prior to the use of special powers against journalists [Kamerstukken 2014/2015, 34027, nr 3]
- Amendments to the Law on the Intelligence and Security 2002 in connection with the establishment of an independent binding test (which aims to identify their sources) prior to the use of special powers against journalists, which aims to identify their sources [Kamerstukken 2014-2015 34027 nr 3]
- Council of State Advice W04.13.0151/I 2013 [Advies van de Raad van State]
- Decision of 27 September 2011 regarding the constitution of the Commissie advies- en verwijspunt klokkenluiden [Tijdelijk besluit Commissie advies- en verwijspunt klokkenluiden Staatsblad 2011/427]
- Decree of May 22, 2015, amending the Temporary Commission Decision advisory and referral point on whistleblowing and the Decree governing bodies WNo and WOB in connection with change of the date of expiration of the Temporary Commission Decision counseling and referral point whistleblowing [Staatsblad 2015/202]
- Explanatory Memorandum [Wijziging van het Wetboek van Strafvordering tot vastlegging van het recht op bronbescherming van vrije nieuwsgaring (bronbescherming in strafzaken)]
- Kamerstukken II, 2003/04, 28990, nr 2
- Letter from the Ministry of the Interior and Kingdom Relations [Kamerstukken II 2012–2013, 30977, nr 49]
- Letter from the Ministry of the Interior and Kingdom Relations [Kamerstukken 2015/2016, 29279, nr 292]
- Letter of the Minister of Security and Justice [Kamerstukken II 2007/08, 31200 VI, nr 92]; General Consultation [Kamerstukken II 2007/08, 31, 200 VI, nr 104, 7]
- Letter repealing the Code of Criminal Procedure and the Code of Civil Procedure relating to the protection of journalistic sources (disclosure of information) [Kamerstukken II 2004/05, 23133, nr 9]
- New bill by Van Raak, Fokke, Koşer Kaya, Segers, Thieme, Klein en Voortman on the establishment of a House for whistle-blowers [Kamerstukken I, 2014-15, 34105, no A]
- Notification of suspected wrongdoing by Government and Police [Staatsblad 2009/572]
- Report Decision suspected wrongdoing at the Ministry of Defence [Staatsblad 2010/706]
- UvW, Model Rules on Reporting Suspected Abuse and / or Regional Water Integrity Violation [Modelregeling Melding Vermoeden Misstand en/of Integriteitschending Waterschappen]

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14.2. Case Law

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- *Financial Times Ltd and Others v the United Kingdom* App no 821/03 (ECtHR, 15 December 2009)
- *Fuentes Bobo v Spain* App no 39293/98 (ECtHR, 29 February 2008)
- *Guja v Moldova* App no 14277/04 (ECtHR, 12 February 2008)
- *Heinisch v Germany* App no 28274/08 (ECtHR, 21 July 2011)
- *Kruslin v France* (1990) Series A no 176-A
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- *Observer and Guardian v the United Kingdom* (1991) Series A no 216
- *Rodica Mihaela Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000)
- *Sanoma Uitgevers B.V. v the Netherlands* App no 38224/03 (ECtHR, 14 September 2010)
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- *Telegraaf Media Nederland Landelijke Media B.V. and Others v the Netherlands* App no 39315/06 (ECtHR, 22 November 2012)
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14.2.2. Dutch titles

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- *Case 10/04884* [2012] Hoge Raad NJB 2012 [2012] 1220
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- *Plaintiff v Endelmoel Nederland Mediagroep B.V. and others* [2015] Rechtbank Midden-Nederland NJF 2015 [2015] 451 *Pretium BV v Wegener Media BV* [2013] Rechtbank Overijssel [2013] Prg. 2013 [2013] 291
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- Voting results [Stemmingen] 1 March 2016, nr 21

15. Table of Provisions

Provisions in native language	Corresponding translation
<p>Artikel 93 Nederlandse Grondwet</p> <p>Bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties, die naar haar inhoud een ieder kunnen verbinden, hebben verbindende kracht nadat zij zijn bekendgemaakt.</p>	<p>Article 93 Dutch Constitution</p> <p>Provisions of treaties and of resolutions by international institutions which may be binding to all persons by virtue of their contents shall become binding after they have been published.</p>
<p>Artikel 94 Nederlandse Grondwet</p> <p>Binnen het Koninkrijk geldende wettelijke voorschriften vinden geen toepassing, indien deze toepassing niet verenigbaar is met een ieder verbindende bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties.</p>	<p>Article 94 Dutch Constitution</p> <p>Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding to all persons.</p>
<p>Artikel 3 Statuten Stichting Raad voor de Journalistiek</p> <p>1. De door de Stichting in te stellen Raad heeft tot taak om in de bij hem aanhangig gemaakte zaken betreffende journalistieke gedragingen te beoordelen of de grenzen zijn overschreden van hetgeen, gelet op de eisen van journalistieke verantwoordelijkheid, maatschappelijk aanvaardbaar is. De Raad kan tevens uit eigen hoofde uitspraken doen ter zake van het vorenstaande, indien zich naar zijn oordeel principiële vraagstukken voordoen.</p>	<p>Article 3 Statutes Foundation Press Council*</p> <p>1. The Council appointed by the Foundation has the task to review the cases presented to them concerning journalistic practices in terms of whether the limits have been exceeded, which, given the demands of journalistic responsibility, are socially acceptable. The Council may also in their own right make statements relating to the foregoing, in the event it considers the issues to be fundamental.</p> <p>2. A case can be brought before the Council</p>

<p>2. Een zaak kan bij de Raad aanhangig worden gemaakt door indiening van een klaagschrift door een ter beoordeling van de Raad rechtstreeks belanghebbende.</p> <p>3. De Raad heeft tevens tot taak het bemiddelend optreden tussen burgers en instanties enerzijds en publiciteitsmedia anderzijds in daarvoor in aanmerking komende gevallen.</p> <p>4. De aan de Stichting deelnemende organisaties kunnen de Raad verzoeken een uitspraak te doen omtrent zaken met een algemene strekking en die van principieel belang zijn. De organisatie wordt in dat geval beschouwd als rechtstreeks belanghebbende.</p> <p>5. De Raad zal voorts datgene verrichten wat hem verder bij deze statuten of bij reglement wordt opgedragen.</p>	<p>by submitting a written complaint by a direct interest in the discretion of the Board.</p> <p>3. The Council also has the task to mediate between citizens and authorities on the one hand and the other publicity media in the other hand, in the appropriate cases.</p> <p>4. The organizations participating in the Foundation may request the Council to decide on matters of a general nature and which are of fundamental importance. The organization is considered in this case as directly concerned.</p> <p>5. The Council will also conduct that which is instructed to it through its statutes or regulations.</p>
<p>Artikel 4(2) Statuten Stichting Raad voor de Journalistiek</p> <p>2. Voor de toepassing van deze statuten en de reglementen van de Raad wordt onder journalist verstaan:</p> <p>degene die, hetzij in dienstverband, hetzij als zelfstandige, er zijn hoofdberoep van maakt mede te werken aan de redactionele leiding of redactionele samenstelling van publiciteitsmedia, waaronder:</p> <ul style="list-style-type: none"> • een dagblad, nieuwsblad, huis-aan-huisblad of tijdschrift voor zover de inhoud daarvan bestaat uit nieuws, foto's en andere illustraties, verslagen of artikelen; • een persbureau, voor zover de productie 	<p>Article 4(2) Statutes Foundation Press Council*</p> <p>2. For the purposes of these statutes and the regulations of the Council, journalist shall mean:</p> <p>the person who, whether in employment or self-employment, makes it their main profession contributing to the editorial line or editorial composition of publicity media, including:</p> <ul style="list-style-type: none"> • a newspaper, news magazine, house-to-house newspaper or magazine to the extent that its content consists of news, photos and other illustrations, reports or articles; • a news agency, provided their production

<p>daarvan bestaat uit nieuws, foto's en andere illustraties, verslagen of artikelen bestemd voor dagbladen, nieuwsbladen, huis-aan-huisbladen, tijdschriften, radio, televisie, film, teletext of viewdata;</p> <ul style="list-style-type: none"> • programma's die worden verspreid door radio of televisie, voor zover deze bestaan uit nieuws, reportages, beschouwingen of rubrieken van informatieve aard; • films, beeld-, geluids- en ampexbanden, voor zover deze nieuws verschaffen, een documentair karakter dragen of dienstbaar zijn aan rubrieken van informatieve aard; <p>(...)</p>	<p>consists of news, photos and other illustrations, reports or articles for newspapers, news magazines, house-to-house newspapers, magazines, radio, television, film, teletext or viewdata;</p> <ul style="list-style-type: none"> • programs that are distributed by radio or television, to the extent that they consist of news, reports, views or columns of an informative nature; • film, videotapes, audiotapes and tracks, insofar as these provide news, consist of a documentary nature or serve sections of an informative nature; <p>(...)</p>
<p>Artikel 5(1) Statuten Stichting Raad voor de Journalistiek</p> <p>1. De Raad zal als volgt zijn samengesteld: een voorzitter en ten hoogste drie plaatsvervangend voorzitters, die jurist en geen journalist zijn, én ten minste tien leden die journalist zijn én ten minste tien leden die geen journalist zijn.</p>	<p>Article 5(1) Statutes Foundation Press Council*</p> <p>1. The Council shall be composed as follows: a president and up to three Deputy Presidents who are lawyers and not journalists, and at least ten members who are journalist and at least ten members who are not journalists.</p>
<p>Artikel 3:303 Burgerlijk Wetboek</p> <p>Zonder voldoende belang komt niemand een rechtsvordering toe</p>	<p>Article 3:303 Dutch Civil Code</p> <p>Without sufficient interest no one has a right of action.</p>
<p>Artikel 192 Sv</p> <p>1. Hij die, wettelijk als getuige, als deskundige of als tolk opgeroepen, opzettelijk niet voldoet aan enige wettelijke</p>	<p>Article 192 Dutch Code of Criminal Procedure</p> <p>1. Any person who has been legally summoned to appear as a witness, as an</p>

<p>verplichting die hij als zodanig te vervullen heeft, wordt gestraft:</p> <p>1°. in strafzaken met gevangenisstraf van ten hoogste zes maanden of geldboete van de derde categorie;</p> <p>2°. in andere zaken met gevangenisstraf van ten hoogste vier maanden of geldboete van de tweede categorie.</p> <p>2. Hij die na de totstandkoming van een afspraak met de officier van justitie ingevolge artikel 226h, derde lid, of artikel 226k, eerste lid, van het Wetboek van Strafvordering wettelijk als getuige opgeroepen, opzettelijk niet voldoet aan zijn verplichting te verklaren, wordt gestraft met gevangenisstraf van ten hoogste een jaar of geldboete van de vijfde categorie.</p> <p>3. Het bepaalde in het vorige lid van dit artikel is niet van toepassing op de partij in een burgerlijke procedure die, wanneer zij als getuige wordt gehoord, weigert op de haar gestelde vragen te antwoorden.</p>	<p>expert witness or as an interpreter, and intentionally fails to fulfill any statutory obligation which they have to in such capacity, shall be liable to:</p> <p>1°. in criminal cases with a term of imprisonment of a maximum of six months or a fine of the third category;</p> <p>2°. in all other criminal cases with a term of imprisonment of a maximum of four months or a fine of the second category.</p> <p>2. Any person who, after having come to an agreement with the public prosecutor under section 226h(3) or section 226k(1) of the Code of Criminal Procedure, is legally summoned to appear as a witness, and intentionally fails to fulfill any obligation which they have to in such capacity, shall be liable to a term of imprisonment of a maximum of one year or a fine of the fifth category.</p> <p>3. The provisions of the preceding subsection of this section shall not apply to a party in civil proceedings who, when examined as a witness, refuses to answer the questions put to them.</p>
<p>Artikel 221 Sv</p> <p>1. Indien de getuige bij zijn verhoor zonder wettigen grond weigert op de gestelde vragen te antwoorden of de van hem gevorderde verklaring, eed of belofte af te leggen, beveelt de rechter-commissaris, zoo dit in het belang van het onderzoek dringend noodzakelijk is, hetzij ambtshalve, hetzij op de vordering van den officier van justitie of</p>	<p>Article 221 Dutch Code of Criminal Procedure</p> <p>1. If the witness, when being questioned, refuses without any legal grounds to answer the questions or to make an oath or affidavit regarding their statements, the examining magistrate shall order, if such action is urgently necessary, either ex officio or by demand of the public prosecutor or the</p>

<p>op het verzoek van den verdachte, dat de getuige in gijzeling zal worden gesteld totdat de rechtbank daaromtrent zal hebben beslist.</p> <p>2. De rechter-commissaris doet binnen vier en twintig uren nadat de gijzeling is aangevangen, verslag aan de rechtbank, tenzij de getuige reeds eerder uit de gijzeling mocht zijn ontslagen. De rechtbank beveelt binnen tweemaal vier en twintig uren daarna, na verhoor van den getuige, dat deze in gijzeling zal worden gehouden of daaruit zal worden ontslagen.</p>	<p>suspect, that the witness be detained until the District Court has decided thereon.</p> <p>2. The examining magistrate shall submit a report to the District Court within twenty-four hours after said detention has commenced, unless the witness could have been released earlier. The District Court shall order within two times twenty-four hours thereafter, after the questioning of the witness, that they will be held in detention or will be released.</p>
<p>Artikel 311 (4) Sv</p> <p>4. Aan de verdachte wordt op straffe van nietigheid het recht gelaten om het laatst te spreken.</p>	<p>Article 311 (4) Dutch Code of Criminal Procedure</p> <p>4. The defendant shall be permitted to make the last statement, under penalty of nullity.</p>
<p>Artikel 173 Wetboek van Burgerlijke Rechtsvordering</p> <p>1. Indien een getuige weigert zijn verklaring af te leggen, kan de rechter op verzoek van de belanghebbende partij bevelen, dat hij op kosten van die partij in gijzeling zal worden gesteld totdat hij aan zijn verplichting zal hebben voldaan, met dien verstande dat de gijzeling ten hoogste een jaar kan duren. Deze bepaling is niet van toepassing als het een partij betreft die als getuige wordt gehoord.</p> <p>2. De rechter beveelt de gijzeling slechts indien naar zijn oordeel het belang van de waarheidsvinding toepassing van die maatregel rechtvaardigt.</p> <p>3. De rechter die de gijzeling heeft bevolen,</p>	<p>Article 173 Dutch Code of Civil Procedure*</p> <p>1. If a witness refuses to testify, the judge may order, upon the request of an interested party, that the witness is detained at the expense of the interested party until they comply with the obligation, subject to the proviso that the detainment lasts up to a year. This provision is not applicable when it concerns a party being heard as a witness.</p> <p>2. The judge shall order the detainment only if in their opinion the interest of ascertaining the truth justifies application of this measure.</p> <p>3. The judge that ordered the detainment shall terminate it ex officio or upon request of the detainee, if in the judge's opinion the continuation of the detainment is no longer</p>

<p>beëindigt ambtshalve of op verzoek van de gegijzelde de gijzeling indien voortzetting ervan naar zijn oordeel niet meer door het belang dat met toepassing van de dwangmaatregel werd gediend, wordt gerechtvaardigd.</p>	<p>justified by the interest that was served by application of the coercive measure.</p>
<p>Artikel 19 Wetboek van Burgerlijke Rechtsvordering</p> <p>De rechter stelt partijen over en weer in de gelegenheid hun standpunten naar voren te brengen en toe te lichten en zich uit te laten over elkaars standpunten en over alle bescheiden en andere gegevens die in de procedure ter kennis van de rechter zijn gebracht, een en ander tenzij uit de wet anders voortvloeit. Bij zijn beslissing baseert de rechter zijn oordeel, ten nadele van een der partijen, niet op bescheiden of andere gegevens waarover die partij zich niet voldoende heeft kunnen uitlaten.</p>	<p>Article 19 Dutch Code of Civil Procedure*</p> <p>The judge shall offer the parties reciprocally the opportunity to present their arguments and to clarify, to react to each other's arguments and all other documents and other data that was brought to the attention of the judge in the procedure, unless the law dictates otherwise. The judge will not base his or her decision contained in the judgment on documents or other data concerning which one of the parties was not able to sufficiently express an opinion, to the detriment of one of the parties.</p>
<p>Artikel 261 Wetboek van Burgerlijke Rechtsvordering</p> <p>1. Voor zover uit de wet niet anders voortvloeit, is deze titel van toepassing op alle zaken die met een verzoekschrift moeten worden ingeleid, alsmede op zaken waarin de rechter ambtshalve een beschikking geeft.</p> <p>2. Met een verzoekschrift worden ingeleid de zaken ten aanzien waarvan dit uit de wet voortvloeit.</p>	<p>Article 261 Dutch Code of Civil Procedure*</p> <p>1. Unless the law provides otherwise, this title is applicable to all proceedings that are brought with an application, as well as matters in which the judge decides of its own motion.</p> <p>2. The proceedings that have to be brought with an application are provided by law.</p>
<p>Artikel 404 Sv</p> <p>1 Tegen de vonnissen betreffende</p>	<p>Article 404 Dutch Code of Criminal Procedure</p>

<p>misdriven, door de rechtbank als einduitspraak of in de loop van het onderzoek ter terechtzitting gegeven, staat hoger beroep open voor de officier van justitie bij het gerecht dat het vonnis heeft gewezen, en voor de verdachte die niet van de gehele telastlegging is vrijgesproken.</p> <p>2 Tegen de vonnissen betreffende overtredingen, door de rechtbank als einduitspraak of in de loop van het onderzoek gegeven, staat hoger beroep open voor de officier van justitie bij het gerecht dat het vonnis heeft gewezen, en voor de verdachte die niet van de gehele telastlegging is vrijgesproken, tenzij terzake in de einduitspraak:</p> <p>a. met toepassing van artikel 9a van het Wetboek van Strafrecht geen straf of maatregel werd opgelegd, of</p> <p>b. geen andere straf of maatregel werd opgelegd dan een geldboete tot een maximum – of, wanneer bij het vonnis twee of meer geldboetes werden opgelegd, geldboetes tot een gezamenlijk maximum – van € 50.</p> <p>3 In afwijking van het tweede lid staat voor de verdachte hoger beroep open tegen een bij verstek gewezen vonnis als bedoeld in het tweede lid, onder a en b, indien de dagvaarding of oproeping om op de terechtzitting in eerste aanleg te verschijnen of de aanzegging of oproeping voor de nadere terechtzitting aan de verdachte niet in persoon is gedaan of betekend en zich geen andere omstandigheid heeft voorgedaan waaruit voortvloeit dat de dag van de terechtzitting of van de nadere terechtzitting de verdachte tevoren bekend was. De vorige zin is niet van toepassing in geval de dagvaarding of oproeping binnen zes weken</p>	<p>1. Appeal may be filed against judgments concerning serious offences, rendered by the District Court as final judgment or in the course of the hearing, by the public prosecutor with the court which rendered the judgment, and by the defendant who was not acquitted of the entire indictment.</p> <p>2. Appeal may be filed against judgments concerning minor offences, rendered by the District Court as final judgment or in the course of the hearing, by the public prosecutor with the court which rendered the judgment, and by the defendant who was not acquitted of the entire indictment, unless in this regard in the final judgment:</p> <p>a. under application of section 9a of the Criminal Code, a punishment or measure was not imposed, or</p> <p>b. no other punishment or measure was imposed than a fine up to a maximum – or, where two or more fines were imposed in the judgment, fines up to a joint maximum – of € 50.</p> <p>3. In derogation of subsection (2), the defendant may file an appeal against a judgment rendered in absentia as referred to in subsection (2)(a) and (b), if the summons or notice to appear at the court session of the court of first instance or the notice to appear at the court session at a later date was not given to or served on the defendant in person and no other circumstance has occurred from which it follows that the date of the court session or of the court session at a later date was known to the defendant beforehand. The preceding sentence shall not apply in the event that the summons or appearance notice was lawfully served on the defendant in accordance with section 588a within six weeks after the defendant filed an</p>
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<p>nadat door de verdachte op de voet van artikel 257e verzet is gedaan, rechtsgeldig aan de verdachte is betekend met inachtneming van artikel 588a.</p> <p>4 Tegen de in het tweede lid, onder a en b, bedoelde vonnissen waartegen geen hoger beroep openstaat, staat evenmin beroep in cassatie open, tenzij zij een overtreding betreffen van een verordening van een provincie, een gemeente, een waterschap of een met toepassing van de Wet gemeenschappelijke regelingen ingesteld openbaar lichaam.</p> <p>5 Zijn in eerste aanleg strafbare feiten gevoegd aan het oordeel van de rechtbank onderworpen, dan kan de verdachte alleen hoger beroep instellen van die gevoegde zaken waarin hij niet van de gehele telastlegging is vrijgesproken.</p>	<p>objection to the judgment in absentia under the terms of section 257e.</p> <p>4. The judgments, referred to in subsection (2)(a) and (b), which are not open to appeal, shall not be open to appeal in cassation either, unless in the case of a violation of a bye-law of a province, a municipality, a water control authority, or a public body established under application of the Joint Regulations Act [Wet Gemeenschappelijke Regelingen].</p> <p>5. If at the court of first instance criminal offences have been tried jointly by the District Court, then the defendant may only file an appeal in regard of those joint cases in which he was not acquitted of the entire indictment.</p>
<p>Artikel 427 Sv</p> <p>1. Tegen de arresten van de gerechtshoven, als uitspraak gegeven, betreffende misdrijven staat beroep in cassatie open voor het openbaar ministerie bij het gerecht dat de uitspraak heeft gedaan, en de verdachte.</p> <p>2. Tegen arresten van de gerechtshoven, als uitspraak gegeven, betreffende overtredingen staat beroep in cassatie open voor het openbaar ministerie bij het gerecht dat het arrest heeft gewezen, en de verdachte, tenzij terzake in de einduitspraak:</p> <p>a. met toepassing van artikel 9a van het Wetboek van Strafrecht geen straf of maatregel werd opgelegd, of</p> <p>b. geen andere straf of maatregel werd</p>	<p>Article 427 Dutch Code of Criminal Procedure</p> <p>1. Appeal in cassation may be filed against judgments concerning serious offences pronounced by the Courts of Appeal by the Public Prosecution Service attached to the court which rendered the judgment, and by the defendant.</p> <p>2. Appeal may be filed against judgments concerning minor offences, pronounced by the Courts of Appeal by the Public Prosecution Service attached to the court which rendered the judgment, and by the defendant, unless in this regard in the final judgment:</p> <p>a. under application of section 9a of the Criminal Code, a punishment or measure was</p>

<p>opgelegd dan een geldboete tot een maximum – of, wanneer bij het arrest twee of meer geldboetes werden opgelegd, geldboetes tot een gezamenlijk maximum – van EUR 250.</p> <p>3. Tegen de arresten, bedoeld in het tweede lid, onder a en b, staat niettemin beroep in cassatie open indien zij een overtreding betreffen van een verordening van een provincie, een gemeente, een waterschap of een met toepassing van de Wet gemeenschappelijke regelingen ingesteld openbaar lichaam.</p> <p>4. Hoger beroep schorst de rechtsgevolgen van beroep in cassatie; indien in de lagere aanleg een uitspraak wordt gegeven over een of meer van de vragen, bedoeld in de artikelen 351 en 352 vervalt het ingestelde beroep in cassatie.</p>	<p>not imposed, or</p> <p>b. no other punishment or measure was imposed than a fine up to a maximum – or, where two or more fines were imposed in the judgment, fines up to a joint maximum – of EUR 250.</p> <p>3. Appeal in cassation may nevertheless be filed against the judgments, referred to in subsection (2)(a) and (b), in the case of a violation of a bye-law of a province, a municipality, a water control authority, or a public body established under application of the Joint Regulations Act.</p> <p>4. Appeal shall suspend the legal effects of appeal in cassation; if a judgment is rendered on one or more of the questions, referred to in sections 351 and section 352, by the lower court, the appeal in cassation filed shall be cancelled.</p>
<p>Artikel 332 Wetboek van Burgerlijke Rechtsvordering</p> <p>1. Partijen kunnen van een in eerste aanleg gewezen vonnis in hoger beroep komen, tenzij de vordering waarover de rechter in eerste aanleg had te beslissen niet meer beloopt dan € 1750 of, in geval van een vordering van onbepaalde waarde, er duidelijke aanwijzingen bestaan dat de vordering geen hogere waarde vertegenwoordigt dan € 1750, een en ander tenzij de wet anders bepaalt.</p> <p>Voor de toepassing van de eerste zin wordt de tot aan de dag van dagvaarding in eerste aanleg verschenen rente bij de vordering inbegrepen.</p>	<p>Article 332 Dutch Code of Civil Procedure*</p> <p>1. Parties can appeal a judgment delivered at first instance, unless the claim upon which the judge at first instance has decided does not amount to more than € 1750, or, in a case that the claim is of unlimited worth, there are clear indications that the claim does not represent a value of more than € 1750, all of which is subject to provisions in the law that dictate otherwise.</p> <p>Regarding the application of the first sentence, the interest accrued up until the day of summons at first instance is included in the claim.</p>

Artikel 78 Wet op de rechterlijke organisatie

1. De Hoge Raad neemt kennis van het beroep in cassatie tegen de handelingen, arresten, vonnissen en beschikkingen van de gerechtshoven en de rechtbanken, ingesteld hetzij door een partij, hetzij «in het belang der wet» door de procureur-generaal bij de Hoge Raad.

2. Het eerste lid is niet van toepassing op de handelingen en uitspraken van de rechtbanken in zaken waarvan zij als bestuursrechter kennis nemen.

3. Het eerste lid is voorts niet van toepassing ten aanzien van de handelingen en beslissingen van de rechtbanken en van het gerechtshof Arnhem-Leeuwarden in zaken met betrekking tot de Wet administratiefrechtelijke handhaving verkeersvoorschriften en in zaken betreffende bestuurlijke boeten opgelegd op grond van artikel 154b van de Gemeentewet, met dien verstande dat de Hoge Raad wel kennis neemt van de eis tot «cassatie in het belang der wet» door de procureur-generaal.

4. De Hoge Raad neemt kennis van het beroep in cassatie tegen uitspraken van de bestuursrechter voorzover dit bij wet is bepaald.

5. De Hoge Raad neemt kennis van het beroep in cassatie ingesteld «in het belang der wet» tegen uitspraken van de Raad voor strafrechtstoepassing en jeugdbescherming, bedoeld in artikel 32 van de Instellingswet Raad voor strafrechtstoepassing en jeugdbescherming.

Article 78 Judicial Organisation Act

1. The Supreme Court takes cognizance of appeals in cassation against the acts, judgments and orders of the courts of appeal and the district courts instituted either by a party or, in the interests of the uniform application of the law, by the procurator general at the Supreme Court.

2. Paragraph 1 does not apply to the acts and rulings of the district courts in cases of which they take cognizance as administrative courts.

3. Paragraph 1 does not apply to acts and decisions either of the district courts or of the court of appeal in Leeuwarden in cases concerning the Traffic Regulations (Administrative Enforcement) Act, and in cases concerning administrative fines based on Article 154b of the Municipalities Act, subject to the proviso that the Supreme Court will take cognizance of an application by the procurator general for cassation in the interests of the uniform application of the law.

4. The Supreme Court takes cognizance of appeals in cassation against rulings of the administrative courts in so far as this is provided for by statute.

5. The Supreme Court takes cognizance of appeals in cassation against ruling of the Council for application of criminal law and protection of youth, referred to in Article 32 of the Act establishing the Council for application of criminal law and protection of youth.

6. A party may not institute an appeal in cassation if another ordinary legal remedy is

<p>6. Een partij kan geen beroep in cassatie instellen indien voor haar een ander gewoon rechtsmiddel openstaat of heeft opengestaan.</p> <p>7. Cassatie «in het belang der wet» kan niet worden ingesteld indien voor partijen een gewoon rechtsmiddel openstaat en brengt geen nadeel toe aan de rechten door partijen verkregen.</p>	<p>or was available to him.</p> <p>7. Appeal in cassation may not be instituted in the interests of the uniform application of the law if an ordinary legal remedy is available to the parties. Such appeal does not prejudice the rights obtained by the parties.</p>
<p>Artikel 79 Wet op de rechterlijke organisatie</p> <p>1. De Hoge Raad vernietigt handelingen, arresten, vonnissen en beschikkingen:</p> <p>a. wegens verzuim van vormen voorzover de niet-inachtneming daarvan uitdrukkelijk met nietigheid is bedreigd of zodanige nietigheid voortvloeit uit de aard van de niet in acht genomen vorm;</p> <p>b. wegens schending van het recht met uitzondering van het recht van vreemde staten.</p> <p>2. Feiten waaruit het gelden of niet gelden van een regel van gewoonterecht wordt afgeleid, worden voorzover zij bewijs behoeven, alleen op grond van de bestreden beslissing als vaststaande aangenomen.</p>	<p>Article 79 Judicial Organisation Act</p> <p>1. The Supreme Court sets aside acts, judgments and orders:</p> <p>a) on account of a procedural defect in so far as nullity is the express consequence of such defect or such nullity results from the nature of the procedural defect;</p> <p>b) on account of an infringement of the law, with the exception of the law of foreign states.</p> <p>2. Facts from which the applicability or otherwise of a rule of customary law is inferred are assumed, in so far as they require proof, to have been established only on the basis of the disputed decision.</p>
<p>Artikel 80a Wet op de rechterlijke organisatie</p> <p>1. De Hoge Raad kan, gehoord de procureur-generaal, het beroep in cassatie niet-ontvankelijk verklaren wanneer de aangevoerde klachten geen behandeling in</p>	<p>Article 80a Judicial Organisation Act*</p> <p>1 The Supreme Court may, upon hearing the procurator general, declare the appeal in cassation inadmissible, if the claims that were brought do not justify a hearing in cassation, either because the party that filed the appeal</p>

<p>cassatie rechtvaardigen, omdat de partij die het cassatieberoep instelt klaarblijkelijk onvoldoende belang heeft bij het cassatieberoep of omdat de klachten klaarblijkelijk niet tot cassatie kunnen leiden.</p> <p>2. De Hoge Raad neemt een beslissing als bedoeld in het eerste lid niet dan nadat de Hoge Raad kennis heeft genomen van:</p> <p>a. de dagvaarding of het verzoekschrift, bedoeld in artikel 407 onderscheidenlijk artikel 426a van het Wetboek van Burgerlijke Rechtsvordering, en de conclusie van antwoord of het verweerschrift, bedoeld in artikel 411 onderscheidenlijk artikel 426b, derde lid, van dat Wetboek, voor zover ingediend;</p> <p>b. de schriftuur, houdende de middelen van cassatie, bedoeld in artikel 437 van het Wetboek van Strafvordering; dan wel</p> <p>c. het beroepschrift waarbij beroep in cassatie wordt ingesteld, bedoeld in artikel 28 van de Algemene wet inzake rijksbelastingen, en het verweerschrift, bedoeld in artikel 29b, van die wet, voor zover ingediend.</p> <p>3. Het beroep in cassatie wordt behandeld en beslist door drie leden van een meervoudige kamer, van wie een als voorzitter optreedt.</p> <p>4. Indien de Hoge Raad toepassing geeft aan het eerste lid, kan hij zich bij de vermelding van de gronden van zijn beslissing beperken tot dit oordeel.</p>	<p>in cassation clearly has insufficient interest in the appeal in cassation or because the claims clearly cannot lead to cassation.</p> <p>2. The Supreme Court takes a decision, referred to in the first section, but not before the Supreme Court has taken recognizance of:</p> <p>a. The summons or application, referred to in Article 407 and Article 426a of the Code of Civil Procedure, and the statement of defence, referred to in Article 411 or Article 426b, third section, of the Code of Civil Procedure, insofar as it was submitted;</p> <p>b. The document containing the grounds for cassation, referred to in Article 437 of the Code of Civil Procedure; or</p> <p>c. the notice of appeal, with which the appeal in cassation is instituted, referred to in Article 28 of the State Taxes Act, and the statement of defence, referred to in Article 29b of that Act, insofar as it was submitted.</p> <p>3. The appeal in cassation is handled and decided upon by three members of the multiple judge division, of whom one will act as President.</p> <p>4. In the case that the Supreme Court applies the first section, it may limit its reasoning to this judgment when stating the grounds for its decision.</p>
<p>Artikel 91 Wet op de rechterlijke organisatie</p>	<p>Article 91 Judicial Organisation Act</p>

<p>1. De Raad is belast met:</p> <p>a. de voorbereiding van de begroting voor de Raad en de gerechten gezamenlijk;</p> <p>b. de toekenning van budgetten ten laste van de rijksbegroting aan de gerechten;</p> <p>c. de ondersteuning van de bedrijfsvoering bij de gerechten;</p> <p>d. het toezicht op de uitvoering van de begroting door de gerechten;</p> <p>e. het toezicht op de bedrijfsvoering bij de gerechten;</p> <p>f. landelijke activiteiten op het gebied van werving, selectie, aanstelling, benoeming en opleiding van het personeel bij de gerechten.</p> <p>2. Ter uitvoering van de in het eerste lid, onder c en e, genoemde taken is de zorg van de Raad in het bijzonder gericht op:</p> <p>a. automatisering en bestuurlijke informatievoorziening;</p> <p>b. huisvesting en beveiliging;</p> <p>c. de kwaliteit van de bestuurlijke en organisatorische werkwijze van de gerechten;</p> <p>d. personeelsaangelegenheden;</p> <p>e. overige materiële voorzieningen.</p>	<p>1. The Council is responsible for:</p> <p>a) preparing the budget for the Council and the courts jointly;</p> <p>b) allocating budgets from the central government budget to the courts;</p> <p>c) supporting operations at the courts; d) supervising the implementation of the budget by the courts;</p> <p>e) supervising operations at the courts;</p> <p>f) nationwide activities relating to the recruitment, selection, appointment and training of court staff.</p> <p>2. In performing the duties referred to in paragraph 1 (c) and (e), the Council must concentrate in particular on:</p> <p>a) information systems and the provision of management information;</p> <p>b) accommodation and security;</p> <p>c) the quality of the administrative and organisational procedure of the courts;</p> <p>d) personnel matters;</p> <p>e) other facilities.</p>
<p>Artikel 187d Sv</p>	<p>Article 187d Dutch Code of Criminal</p>

1. De rechter-commissaris kan hetzij ambtshalve, hetzij op de vordering van de officier van justitie of het verzoek van de verdachte of diens raadsman of de getuige beletten dat antwoorden op vragen betreffende een bepaald gegeven ter kennis komen van de officier van justitie, de verdachte en diens raadsman, indien er geground vermoeden bestaat dat door de openbaarmaking van dit gegeven:

a. de getuige ernstige overlast zal ondervinden of in de uitoefening van zijn ambt of beroep ernstig zal worden belemmerd,

b. een zwaarwegend opsporingsbelang wordt geschaad, of

c. het belang van de staatsveiligheid wordt geschaad.

2. De rechter-commissaris maakt in zijn proces-verbaal melding van de redenen waarom het bepaalde in het eerste lid toepassing heeft gevonden.

3. De rechter-commissaris neemt de maatregelen die redelijkerwijs nodig zijn om onthulling van een gegeven als in het eerste lid bedoeld, te voorkomen. Hij is daartoe bevoegd gegevens in processtukken onvermeld te laten.

4. Ingeval de rechter-commissaris belet dat een antwoord ter kennis komt van de officier van justitie, de verdachte of diens raadsman, doet hij in het proces-verbaal opnemen dat de gestelde vraag is beantwoord.

5. Hoger beroep of beroep in cassatie is tegen een beslissing op grond van het eerste

Procedure

1. The examining magistrate may, either ex officio or on application of the public prosecutor or the suspect or his defence counsel or the witness, prevent the public prosecutor, the suspect and his defence counsel from learning of the answers to questions concerning certain information, if there are justified reasons to assume that disclosure of this information:

a. will cause serious inconvenience to the witness or seriously hinder him in the performance of his office or profession,

b. will prejudice a compelling investigative interest, or

c. will prejudice the interest of state security.

2. The examining magistrate shall note the reasons for application of the provisions of subsection (1) in his official record.

3. The examining magistrate shall take the measures that are reasonably necessary to prevent disclosure of information as referred to in subsection (1). To that end, he may omit to mention information in the case documents.

4. In the event that the examining magistrate prevents the public prosecutor, the suspect or his defence counsel from learning of an answer, he shall state in the official record that the question posed has been answered.

5. A decision taken under subsection (1) shall not be open to appeal or appeal in cassation.

<p>lid niet toegelaten.</p>	
<p>Artikel 178 Sv</p> <p>Indien bij afwezigheid van den officier van justitie gedurende het onderzoek eenig strafbaar feit wordt begaan, doet de rechter-commissaris daarvan een proces-verbaal opmaken en dat toekomen aan het bevoegde openbaar ministerie. Hij kan tevens, in de gevallen en op de gronden in de artikelen 67 en 67a vermeld, ambtshalve een bevel van bewaring tegen den verdachte uitvaardigen. De bepalingen van de tweede afdeling van den Vierden Titel van het Eerste Boek zijn dan van toepassing.</p>	<p>Article 178 Dutch Code of Criminal Procedure</p> <p>If, in the absence of the public prosecutor, any criminal offence is committed during the investigation, the examining magistrate shall prepare an official record thereof and forward said record to the competent Public Prosecution Service. He may also, in the cases and on the grounds stated in sections 67 and 67a, issue ex officio a detention order against the suspect. The provisions of Chapter Two of Part Four of Book One shall apply.</p>
<p>Artikel 27 Wetboek van Burgerlijke Rechtsvordering</p> <p>1. De terechtzitting is openbaar. De rechter kan evenwel gehele of gedeeltelijke behandeling met gesloten deuren of slechts met toelating van bepaalde personen bevelen:</p> <p>a.in het belang van de openbare orde of de goede zeden,</p> <p>b.in het belang van de veiligheid van de Staat,</p> <p>c.indien de belangen van minderjarigen of de eerbiediging van de persoonlijke levenssfeer van partijen dit eisen, of</p> <p>d.indien openbaarheid het belang van een goede rechtspleging ernstig zou schaden.</p>	<p>Article 27 Dutch Code of Civil Procedure*</p> <p>1. The court session is open to the public. The judge may order a hearing in closed session, partially or wholly, or with admission of only certain persons:</p> <p>a. in the interest of public order or public morality,</p> <p>b. in the interest of state security,</p> <p>c. if the interests of minors or the respect for the right to family life of parties compel it, or</p> <p>d. if public access would severely damage the interest of administration of justice.</p> <p>2. In the case that someone disturbs the order at a hearing, the judge may order to</p>

<p>2. Indien iemand op een terechtzitting de orde verstoort, kan de rechter hem laten verwijderen</p>	<p>have that person removed.</p>
<p>Artikel 353 Wetboek van Burgerlijke Rechtsvordering</p> <p>1. Voor zover uit deze titel dan wel uit een andere wettelijke regeling niet anders voortvloeit, is de tweede titel in hoger beroep van overeenkomstige toepassing, met dien verstande dat partijen slechts bij advocaat kunnen procederen, dat artikel 131 niet van toepassing is en dat geen eis in reconventie kan worden ingesteld.</p> <p>2. Niettemin is artikel 224 niet anders van toepassing dan behoudens de navolgende bepalingen:</p> <p>De oorspronkelijke gedaagde, eischer wordende in hoger beroep, is niet gehouden tot de in dat artikel bedoelde zekerheidstelling. De gedaagde in hoger beroep is daartoe evenmin gehouden, zelfs niet bij het instellen van incidenteel beroep. De in eersten aanleg gestelde zekerheid blijft ook verbonden voor de kosten van hoger beroep. De zekerheidstelling wordt gevorderd vóór alle weren van regten.</p>	<p>Article 353 Dutch Code of Civil Procedure*</p> <p>1. Insofar as it is not provided by this chapter or another legislative regulation, the second chapter also applies on appeal, subject to the proviso that the parties can only litigate with legal representation, that Article 131 does not apply and that no counterclaims can be brought.</p> <p>2. Nevertheless, Article 224 only applies notwithstanding the following provisions:</p> <p>The original defendant, becoming a claimant on appeal, is not required to provide the security referred to in that Article. De defendant on appeal is also not required to provide that security, not even when bringing an interim action on appeal. The security provided at first instance will be bound for the costs of the appeal. The security is required for all defences.</p>
<p>Artikel 126m Sv</p> <p>1. In geval van verdenking van een misdrijf als omschreven in artikel 67, eerste lid, dat gezien zijn aard of de samenhang met andere door de verdachte begane misdrijven een ernstige inbreuk op de rechtsorde oplevert, kan de officier van justitie, indien het onderzoek dit dringend vordert, aan een opsporingsambtenaar bevelen dat met een</p>	<p>Article 126m Dutch Code of Criminal Procedure</p> <p>1. In the case of suspicion of a serious offence as defined in section 67(1), which serious offence in view of its nature or the relation to other serious offences committed by the suspect constitutes a serious breach of law and order, the public prosecutor may, if urgently required by the investigation, order</p>

<p>technisch hulpmiddel niet voor het publiek bestemde communicatie die plaatsvindt met gebruikmaking van de diensten van een aanbieder van een communicatiedienst, wordt opgenomen.</p> <p>2. Het bevel is schriftelijk en vermeldt:</p> <p>a. het misdrijf en indien bekend de naam of anders een zo nauwkeurig mogelijke aanduiding van de verdachte;</p> <p>b. de feiten of omstandigheden waaruit blijkt dat de voorwaarden, bedoeld in het eerste lid, zijn vervuld;</p> <p>c. zo mogelijk het nummer of een andere aanduiding waarmee de individuele gebruiker van de communicatiedienst wordt geïdentificeerd alsmede, voor zover bekend, de naam en het adres van de gebruiker;</p> <p>d. de geldigheidsduur van het bevel;</p> <p>e. een aanduiding van de aard van het technisch hulpmiddel of de technische hulpmiddelen waarmee de communicatie wordt opgenomen.</p> <p>3. Indien het bevel betrekking heeft op communicatie die plaatsvindt via een openbaar telecommunicatienetwerk of met gebruikmaking van een openbare telecommunicatiedienst in de zin van de Telecommunicatiewet, wordt – tenzij zulks niet mogelijk is of het belang van strafvordering zich daartegen verzet – het bevel ten uitvoer gelegd met medewerking van de aanbieder van het openbare telecommunicatienetwerk of de openbare telecommunicatiedienst en gaat het bevel vergezeld van de vordering van de officier van justitie aan de aanbieder om</p>	<p>an investigating officer to record by means of a technical device non-public communications which are conducted by use of the services of a provider of a communication service.</p> <p>2. The warrant shall be in writing and shall state:</p> <p>a. the serious offence and if known, the name or otherwise the most precise description possible of the suspect;</p> <p>b. the facts or circumstances which show that the conditions, referred to in subsection (1), have been met;</p> <p>c. where possible, the number or another indication by means of which the individual user of the communication service is identified as well as, insofar as is known, the name and the address of the user;</p> <p>d. the term of validity of the warrant;</p> <p>e. a description of the nature of the technical device or the technical devices by means of which the communications are recorded.</p> <p>3. If the warrant relates to communications which are conducted through a public telecommunication network or by use of a public telecommunication service within the meaning of the Telecommunications Act, the warrant shall – unless such is impossible or is not permitted in the interest of the criminal proceedings – be executed with the assistance of the provider of the public telecommunication network or the public telecommunication service and the warrant shall be accompanied by the request for assistance from the public prosecutor to the</p>
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<p>medewerking te verlenen.</p> <p>4. Indien het bevel betrekking heeft op andere communicatie dan bedoeld in het derde lid, wordt – tenzij zulks niet mogelijk is of het belang van strafvordering zich daartegen verzet – de aanbieder in de gelegenheid gesteld medewerking te verlenen bij de tenuitvoerlegging van het bevel.</p> <p>5. Het bevel, bedoeld in het eerste lid, kan slechts worden gegeven na schriftelijke machtiging, op vordering van de officier van justitie te verlenen door de rechter-commissaris. Artikel 126l, vijfde tot en met achtste lid, is van overeenkomstige toepassing.</p> <p>6. Voor zover het belang van het onderzoek dit bepaaldelijk vordert, kan indien toepassing is gegeven aan het eerste lid tot degene van wie redelijkerwijs kan worden vermoed dat hij kennis draagt van de wijze van versleuteling van de communicatie, de vordering worden gericht medewerking te verlenen aan het ontsleutelen van de gegevens door hetzij deze kennis ter beschikking te stellen, hetzij de versleuteling ongedaan te maken.</p> <p>7. De in het zesde lid bedoelde vordering wordt niet gericht tot de verdachte.</p> <p>8. Op de in het zesde lid bedoelde vordering zijn artikel 96a, derde lid, en artikel 126l, vierde, zesde en zevende lid, van overeenkomstige toepassing.</p> <p>9. Bij of krachtens algemene maatregel van bestuur kunnen regels worden gesteld over de wijze waarop het in het eerste lid bedoelde bevel en de in het derde en zesde lid bedoelde vorderingen kunnen worden gegeven en over de wijze waarop daaraan</p>	<p>provider.</p> <p>4. If the warrant relates to communications other than the communications referred to in subsection (3), the provider shall – unless such is impossible or is not permitted in the interest of the criminal proceedings – be given the opportunity to assist in the execution of the warrant.</p> <p>5. The warrant, referred to in subsection (1), may only be issued following written authorisation to be granted by the examining magistrate on application of the public prosecutor. Section 126l(5) to (8) inclusive shall apply mutatis mutandis.</p> <p>6. Insofar as is specifically required in the interest of the investigation, the person, who may be reasonably presumed to have knowledge of the manner of encryption of the communications, may be requested, if subsection (1) is applied, to assist in decrypting the data by either providing this knowledge, or undoing the encryption.</p> <p>7. The request referred to in subsection (6) shall not be directed to the suspect.</p> <p>8. Section 96a(3) and section 126l(4), (6) and (7) shall apply mutatis mutandis to the request referred to in subsection (6).</p> <p>9. Rules pertaining to the manner in which the order referred to in subsection (1) and the requests referred to in subsections (3) and (6) may be given and the manner of compliance with such requests shall be set by Governmental Decree.</p>
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<p>wordt voldaan.</p>	
<p>Artikel 126t Sv</p> <p>1. In een geval als bedoeld in artikel 126o, eerste lid, kan de officier van justitie, indien het onderzoek dit dringend vordert, aan een opsporingsambtenaar bevelen dat met een technisch hulpmiddel niet voor het publiek bestemde communicatie die plaatsvindt met gebruikmaking van de diensten van een aanbieder van een communicatiedienst in de zin van artikel 126la, en waaraan een persoon deelneemt ten aanzien van wie uit feiten of omstandigheden een redelijk vermoeden voortvloeit dat deze betrokken is bij het in het georganiseerd verband beramen of plegen van misdrijven, wordt opgenomen.</p> <p>2. Het bevel is schriftelijk en vermeldt:</p> <p>a. een omschrijving van het georganiseerd verband;</p> <p>b. de feiten en omstandigheden waaruit blijkt dat de voorwaarden, bedoeld in het eerste lid, zijn vervuld;</p> <p>c. zo mogelijk het nummer waarmee de individuele gebruiker van de communicatiedienst wordt geïdentificeerd alsmede, voor zover bekend, de naam en het adres van de gebruiker;</p> <p>d. de naam van de persoon, genoemd in het eerste lid, wanneer deze niet de houder is;</p>	<p>Article 126t Dutch Code of Criminal Procedure</p> <p>1. In a case as referred to in section 126o(1), the public prosecutor may, if urgently required in the interest of the investigation, order an investigating officer to record by means of a technical device non-public communications which are conducted by use of the services of a provider of a communication service within the meaning of section 126la and in which one of the participants is a person in regard of whom facts or circumstances give rise to the reasonable suspicion that he is involved in the planning or commission of serious offences by an organised group.</p> <p>2. The warrant shall be in writing and shall state:</p> <p>a. a description of the organised group;</p> <p>b. the facts and circumstances which show that the conditions, referred to in subsection (1), have been met;</p> <p>c. where possible, the number by means of which the individual user of the communication service is identified as well as, insofar as is known, the name and the address of the user;</p> <p>d. the name of the person, referred to in subsection (1), if this person is not the account holder;</p>

<p>e. de geldigheidsduur van het bevel; en</p> <p>f. een aanduiding van de aard van het technisch hulpmiddel of de technische hulpmiddelen waarmee de communicatie wordt opgenomen.</p> <p>3. Indien het bevel betrekking heeft op communicatie die plaatsvindt via een openbaar telecommunicatienetwerk of met gebruikmaking van een openbare telecommunicatiedienst in de zin van de Telecommunicatiewet, wordt – tenzij zulks niet mogelijk is of het belang van strafvordering zich daartegen verzet – het bevel ten uitvoer gelegd met medewerking van de aanbieder van het openbare telecommunicatienetwerk of de openbare telecommunicatiedienst en gaat het bevel vergezeld van een vordering aan de aanbieder om medewerking te verlenen.</p> <p>4. Indien het bevel betrekking heeft op andere communicatie dan bedoeld in het derde lid, wordt – tenzij zulks niet mogelijk is of het belang van strafvordering zich daartegen verzet – de aanbieder in de gelegenheid gesteld medewerking te verlenen bij de tenuitvoerlegging van het bevel.</p> <p>5. Het bevel, bedoeld in het eerste lid, kan slechts worden gegeven na schriftelijke machtiging, op vordering van de officier van justitie te verlenen door de rechter-commissaris. Artikel 126s, vijfde tot en met achtste lid, is van overeenkomstige toepassing.</p> <p>6. Voor zover het belang van het onderzoek dit bepaaldelijk vordert, kan bij of terstond na de toepassing van het eerste lid tot degene van wie redelijkerwijs kan worden vermoed dat hij kennis draagt van de wijze van versleuteling van de communicatie, de</p>	<p>e. the term of validity of the warrant;</p> <p>f. a description of the nature of the technical device or the technical devices by means of which the communications are recorded.</p> <p>3. If the warrant relates to communications which are conducted through a public telecommunication network or by use of a public telecommunication service within the meaning of the Telecommunications Act, the warrant shall – unless such is impossible or is not permitted in the interest of the criminal proceedings – be executed with the assistance of the provider of the public telecommunication network or the public telecommunication service and the warrant shall be accompanied by a request for assistance from the public prosecutor to the provider.</p> <p>4. If the warrant relates to communications other than the communications referred to in subsection (3), the provider shall – unless such is impossible or is not permitted in the interest of the criminal proceedings – be given the opportunity to assist in the execution of the warrant.</p> <p>5. The warrant, referred to in subsection (1), may only be issued following written authorisation to be granted by the examining magistrate on application of the public prosecutor. Section 126s(5) to (8) inclusive shall apply mutatis mutandis.</p> <p>6. Insofar as is specifically required in the interest of the investigation, the person who may be reasonably presumed to have knowledge of the manner of encryption of the communications may, in or immediately after the application of subsection (1), be requested to assist in decrypting the data by either providing this knowledge, or undoing</p>
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<p>vordering worden gericht medewerking te verlenen aan het ontsleutelen van de gegevens door hetzij deze kennis ter beschikking te stellen, hetzij de versleuteling ongedaan te maken.</p> <p>7. De in het zesde lid bedoelde vordering wordt niet gericht tot de verdachte.</p> <p>8. Op de in het zesde lid bedoelde vordering zijn artikel 96a, derde lid, en artikel 126s, vierde, zesde en zevende lid, van overeenkomstige toepassing.</p> <p>9. Bij of krachtens algemene maatregel van bestuur kunnen regels worden gesteld over de wijze waarop het in het eerste lid bedoelde bevel en de in het derde en zesde lid bedoelde vorderingen worden gegeven en over de wijze waarop daaraan wordt voldaan.</p>	<p>the encryption.</p> <p>7. The request referred to in subsection (6) shall not be directed to the suspect.</p> <p>8. Section 96a(3) and section 126s(4), (6) and (7) shall apply mutatis mutandis to the request referred to in subsection (6).</p> <p>9. Rules pertaining to the manner in which the warrant referred to in subsection (1) and the requests referred to in subsections (3) and (6) will be given and the manner of compliance with such requests shall be set by Governmental Decree.</p>
<p>Artikel 126zg Sv</p> <p>1. In geval van aanwijzingen van een terroristisch misdrijf kan de officier van justitie, indien het onderzoek dit dringend vordert, aan een opsporingsambtenaar bevelen dat met een technisch hulpmiddel niet voor het publiek bestemde communicatie die plaatsvindt met gebruikmaking van diensten van een aanbieder van een communicatie in de zin van artikel 126la, wordt opgenomen.</p> <p>2. Het bevel vermeldt, behalve de gegevens, bedoeld in artikel 126za, tevens:</p> <p>a.zo mogelijk het nummer of een andere aanduiding waarmee de individuele gebruiker van de communicatiedienst wordt geïdentificeerd alsmede, voor zover bekend,</p>	<p>Article 126zg Dutch Code of Criminal Procedure</p> <p>1. In the case of indications of a terrorist offence, the public prosecutor may, if urgently required by the investigation, order an investigating officer to record by means of a technical device non-public communications which are conducted by use of the services of a provider of a communication service within the meaning of section 126la.</p> <p>2. The warrant shall also state in addition to the information referred to in section 126za:</p> <p>a. where possible, the number or another indication by means of which the individual user of the communication service is identified as well as, insofar as is known, the</p>

<p>de naam en het adres van de gebruiker;</p> <p>b. de geldigheidsduur van het bevel; en</p> <p>c. een aanduiding van de aard van het technisch hulpmiddel of de technische hulpmiddelen waarmee de communicatie wordt opgenomen.</p> <p>3. Indien het bevel betrekking heeft op communicatie die plaatsvindt via een openbaar telecommunicatienetwerk of met gebruikmaking van een openbare telecommunicatiedienst in de zin van de Telecommunicatiewet, wordt – tenzij zulks niet mogelijk is of het belang van strafvordering zich daartegen verzet – het bevel ten uitvoer gelegd met medewerking van de aanbieder van het openbare telecommunicatienetwerk of de openbare telecommunicatiedienst en gaat het bevel vergezeld van een vordering van de officier van justitie aan de aanbieder om medewerking te verlenen.</p> <p>4. Indien het bevel betrekking heeft op andere communicatie dan bedoeld in het derde lid, wordt – tenzij zulks niet mogelijk is of het belang van strafvordering zich daartegen verzet – de aanbieder in de gelegenheid gesteld medewerking te verlenen bij de tenuitvoerlegging van het bevel.</p> <p>5. Artikel 126m, vijfde tot en met negende lid, is van overeenkomstige toepassing.</p>	<p>name and the address of the user;</p> <p>b. the term of validity of the warrant; and</p> <p>c. a description of the nature of the technical device or the technical devices by means of which the communications are recorded.</p> <p>3. If the warrant relates to communications which are conducted through a public telecommunication network or by use of a public telecommunication service within the meaning of the Telecommunications Act, the warrant shall – unless such is impossible or is not permitted in the interest of the criminal proceedings – be executed with the assistance of the provider of the public telecommunication network or the public telecommunication service and the warrant shall be accompanied by a request for assistance from the public prosecutor to the provider.</p> <p>4. If the warrant relates to communications other than the communications referred to in subsection (3), the provider shall – unless such is impossible or is not permitted in the interest of the criminal proceedings – be given the opportunity to assist in the execution of the warrant.</p> <p>5. Section (5) to (9) of article 126m shall be applicable <i>mutatis mutandis</i>.</p>
<p>Artikel 126g Sv</p> <p>1. In geval van verdenking van een misdrijf, kan de officier van justitie in het belang van het onderzoek bevelen dat een</p>	<p>Article 126g Dutch Code of Criminal Procedure</p> <p>1. In the case of suspicion of a serious offence, the public prosecutor may, in the</p>

<p>opsporingsambtenaar stelselmatig een persoon volgt of stelselmatig diens aanwezigheid of gedrag waarneemt.</p> <p>2. Indien de verdenking een misdrijf betreft als omschreven in artikel 67, eerste lid, dat gezien zijn aard of de samenhang met andere door de verdachte begane misdrijven een ernstige inbreuk op de rechtsorde oplevert, kan de officier van justitie in het belang van het onderzoek bepalen dat ter uitvoering van het bevel een besloten plaats, niet zijnde een woning, wordt betreden zonder toestemming van de rechthebbende.</p> <p>3. De officier van justitie kan bepalen dat ter uitvoering van het bevel een technisch hulpmiddel wordt aangewend, voor zover daarmee geen vertrouwelijke communicatie wordt opgenomen. Een technisch hulpmiddel wordt niet op een persoon bevestigd, tenzij met diens toestemming.</p> <p>4. Het bevel wordt gegeven voor een periode van ten hoogste drie maanden. Het kan telkens voor een termijn van ten hoogste drie maanden worden verlengd.</p> <p>5. Het bevel tot observatie is schriftelijk en vermeldt:</p> <p>a. het misdrijf en indien bekend de naam of anders een zo nauwkeurig mogelijke aanduiding van de verdachte;</p> <p>b. de feiten of omstandigheden waaruit blijkt dat de voorwaarden, bedoeld in het eerste lid, zijn vervuld;</p> <p>c. de naam of een zo nauwkeurig mogelijke aanduiding van de in het eerste lid bedoelde persoon;</p>	<p>interest of the investigation, order an investigating officer to systematically follow a person or systematically observe his movements or behaviour.</p> <p>2. In the case of suspicion of a serious offence as defined in article 67(1), which in view of its nature or the relation to other serious offences committed by the suspect constitutes a serious breach of law and order, the public prosecutor may determine, in the interest of the investigation, that an enclosed place, not being a dwelling, will be entered without the consent of the person entitled to use the premises, for the purpose of executing the warrant.</p> <p>3. The public prosecutor may determine that a technical device will be used for the purpose of executing the warrant, insofar as no confidential information is recorded by means of that device. A technical device shall not be attached to a person, unless with his consent.</p> <p>4. The warrant shall be issued for a period of maximum three months. It may be extended each time for a period of maximum three months.</p> <p>5. The surveillance warrant shall be in writing and shall state:</p> <p>a. the serious offence and if known, the name or otherwise the most precise description possible of the suspect;</p> <p>b. the facts or circumstances which show that the conditions, referred to in subsection (1), have been met;</p> <p>c. the name or the most precise description possible of the person referred to in</p>
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<p>d. bij toepassing van het tweede lid, de feiten of omstandigheden waaruit blijkt dat de voorwaarden, bedoeld in dat lid, zijn vervuld, alsmede de plaats die zal worden betreden;</p> <p>e. de wijze waarop aan het bevel uitvoering wordt gegeven, en</p> <p>f. de geldigheidsduur van het bevel.</p> <p>6. Bij dringende noodzaak kan het bevel mondeling worden gegeven. De officier van justitie stelt in dat geval het bevel binnen drie dagen op schrift.</p> <p>7. Zodra niet meer wordt voldaan aan de voorwaarden, bedoeld in het eerste lid, bepaalt de officier van justitie dat de uitvoering van het bevel wordt beëindigd.</p> <p>8. Het bevel kan schriftelijk en met redenen omkleed worden gewijzigd, aangevuld, verlengd of beëindigd. Bij dringende noodzaak kan de beslissing mondeling worden gegeven. De officier van justitie stelt deze in dat geval binnen drie dagen op schrift.</p> <p>9. Een bevel als bedoeld in het eerste lid kan ook worden gegeven aan een persoon in de openbare dienst van een vreemde staat. Bij algemene maatregel van bestuur kunnen eisen worden gesteld aan deze personen. Het tweede tot en met achtste lid zijn van overeenkomstige toepassing.</p>	<p>subsection (1);</p> <p>d. in the application of subsection (2), the facts or circumstances which show that the conditions, referred to in that subsection, have been met, as well as the place to be entered;</p> <p>e. the manner in which the warrant will be executed, and</p> <p>f. the term of validity of the warrant.</p> <p>6. In the case of urgent necessity, the warrant may be issued verbally. In that case the public prosecutor shall put the warrant in writing within three days.</p> <p>7. As soon as the conditions referred to in subsection (1) are no longer met, the public prosecutor shall determine that the execution of the warrant has ended.</p> <p>8. The warrant may be amended, supplemented, extended or terminated in writing and stating reasons. In the case of urgent necessity, the decision may be given verbally. In that case the public prosecutor shall put this decision in writing within three days.</p> <p>9. A warrant as referred to in subsection (1) may also be issued to a person in the public service of a foreign state. Requirements may be set for these persons by Governmental Decree. Subsections (2) to (8) inclusive shall apply <i>mutatis mutandis</i>.</p>
<p>Artikel 126o Wetboek van Strafvordering</p> <p>1. Indien uit feiten of omstandigheden een</p>	<p>Article 126o Dutch Code of Criminal Procedure</p>

redelijk vermoeden voortvloeit dat in georganiseerd verband misdrijven als omschreven in artikel 67, eerste lid, worden beraamd of gepleegd die gezien hun aard of de samenhang met andere misdrijven die in dat georganiseerd verband worden beraamd of gepleegd een ernstige inbreuk op de rechtsorde opleveren, kan de officier van justitie in het belang van het onderzoek bevelen dat een opsporingsambtenaar stelselmatig een persoon volgt of stelselmatig diens aanwezigheid of gedrag waarneemt.

2. De officier van justitie kan in het belang van het onderzoek bepalen dat ter uitvoering van het bevel een besloten plaats, niet zijnde een woning, wordt betreden zonder toestemming van de rechthebbende.

3. De officier van justitie kan bepalen dat ter uitvoering van het bevel een technisch hulpmiddel wordt aangewend, voor zover daarmee geen vertrouwelijke communicatie wordt opgenomen. Een technisch hulpmiddel wordt niet op een persoon bevestigd, tenzij met diens toestemming.

4. Het bevel tot observatie is schriftelijk en vermeldt:

a. een omschrijving van het georganiseerd verband;

b. de feiten of omstandigheden waaruit blijkt dat de voorwaarden, bedoeld in het eerste lid, zijn vervuld;

c. de naam of een zo nauwkeurig mogelijke omschrijving van de persoon, bedoeld in het eerste lid;

d. bij toepassing van het tweede lid, de plaats

1. If facts or circumstances give rise to the reasonable suspicion that serious offences as defined in section 67(1) are being planned or committed by an organised group, which serious offences in view of their nature or the relation to other serious offences that are being planned or committed by an organised group constitute a serious breach of law and order, the public prosecutor may, in the interest of the investigation, order an investigating officer to systematically follow a person or systematically observe his movements or behaviour.

2. The public prosecutor may, in the interest of the investigation, determine that an enclosed place, not being a dwelling, will be entered without the consent of the person entitled to use the premises for the purpose of executing the warrant.

3. The public prosecutor may determine that a technical device will be used for the purpose of executing the warrant, insofar as no confidential information is recorded by means of that device. A technical device shall not be attached to a person, unless with his consent.

4. The surveillance warrant shall be in writing and shall state:

a. a description of the organised group;

b. the facts or circumstances which show that the conditions, referred to in subsection (1), have been met;

c. the name or the most precise description possible of the person referred to in subsection (1);

d. in the application of subsection (2), the

<p>die zal worden betreden;</p> <p>e. de wijze waarop aan het bevel uitvoering wordt gegeven, en</p> <p>f. de geldigheidsduur van het bevel.</p> <p>5. Artikel 126g, vierde en zesde tot en met achtste lid, is van overeenkomstige toepassing.</p> <p>6. Een bevel als bedoeld in het eerste lid kan ook worden gegeven aan een persoon in de openbare dienst van een vreemde staat. Bij algemene maatregel van bestuur kunnen eisen worden gesteld aan deze personen. Het tweede tot en met vijfde lid zijn van overeenkomstige toepassing.</p>	<p>place to be entered;</p> <p>e. the manner in which the warrant will be executed, and</p> <p>f. the term of validity of the warrant.</p> <p>5. Section 126g(4) to (6) inclusive and (8) shall apply <i>mutatis mutandis</i>.</p> <p>6. A warrant as referred to in subsection (1) may also be issued to a person in the public service of a foreign state. Requirements may be set for these persons by Governmental Decree. Subsections (2) to (5) inclusive shall apply <i>mutatis mutandis</i>.</p>
<p>Artikel 359a Sv</p> <p>1. De rechtbank kan, indien blijkt dat bij het voorbereidend onderzoek vormen zijn verzuimd die niet meer kunnen worden hersteld en de rechtsgevolgen hiervan niet uit de wet blijken, bepalen dat:</p> <p>a. de hoogte van de straf in verhouding tot de ernst van het verzuim, zal worden verlaagd, indien het door het verzuim veroorzaakte nadeel langs deze weg kan worden gecompenseerd;</p> <p>b. de resultaten van het onderzoek die door het verzuim zijn verkregen, niet mogen bijdragen aan het bewijs van het telastegelegde feit;</p> <p>c. het openbaar ministerie niet ontvankelijk is, indien door het verzuim geen sprake kan</p>	<p>Article 359a Dutch Code of Criminal Procedure</p> <p>1. The District Court may, if it appears that procedural requirements were not complied with during the preliminary investigation which can no longer be remedied and the law does not provide for the legal consequences thereof, determine that:</p> <p>a. the length of the sentence shall be reduced in proportion to the gravity of the non-compliance with procedural requirements, if the harm or prejudice caused can be compensated in this manner;</p> <p>b. the results obtained from the investigation, in which there was a failure to comply with procedural requirements, may not be used as evidence of the offence as charged in the</p>

<p>zijn van een behandeling van de zaak die aan de beginselen van een behoorlijke procesorde voldoet.</p> <p>2. Bij de toepassing van het eerste lid, houdt de rechtbank rekening met het belang dat het geschonden voorschrift dient, de ernst van het verzuim en het nadeel dat daardoor wordt veroorzaakt.</p> <p>3. Het vonnis bevat de beslissingen vermeld in het eerste lid. Deze zijn met redenen omkleed.</p>	<p>indictment;</p> <p>c. there is a bar to the prosecution, if as a result of the procedural error or omission there cannot be said to be a trial of the case which meets the principles of due process.</p> <p>2. In the application of subsection(1), the District Court shall take into account the interest served by the violated rule, the gravity of the procedural error or omission and the harm or prejudice caused as a result of said error or omission.</p> <p>3. The judgment shall contain the decisions referred to in subsection (1). Said decisions shall be reasoned.</p>
<p>Artikel 6 (2, a, c) Wiv</p> <p>(...)</p> <p>2. De Algemene Inlichtingen- en Veiligheidsdienst heeft in het belang van de nationale veiligheid tot taak:</p> <p>a. het verrichten van onderzoek met betrekking tot organisaties en personen die door de doelen die zij nastreven, dan wel door hun activiteiten aanleiding geven tot het ernstige vermoeden dat zij een gevaar vormen voor het voortbestaan van de democratische rechtsorde, dan wel voor de veiligheid of voor andere gewichtige belangen van de staat;</p> <p>(...)</p> <p>c. het bevorderen van maatregelen ter bescherming van de onder a genoemde belangen, waaronder begrepen maatregelen</p>	<p>Article 6 (2, a, c) Wiv (Intelligence and Security Service Act 2002)</p> <p>(...)</p> <p>2. In the interest of national security the General Intelligence and Security Service has the following tasks:</p> <p>a. conducting investigations regarding organisations that, and persons who, because of the objectives they pursue, or through their activities give cause for serious suspicion that they are a danger to the continued existence of the democratic legal system, or to the security or other vital interests of the state;</p> <p>(...)</p> <p>c. promoting measures for the protection of the interests referred to under a, including measures for the protection of information</p>

<p>ter beveiliging van gegevens waarvan de geheimhouding door de nationale veiligheid wordt geboden en van die onderdelen van de overheidsdienst en van het bedrijfsleven die naar het oordeel van Onze ter zake verantwoordelijke Ministers van vitaal belang zijn voor de instandhouding van het maatschappelijk leven;</p> <p>(...)</p>	<p>that is to remain secret for reasons of national security, and information pertaining to those parts of the public service and business community that in the opinion of the relevant Ministers are of vital importance for the continued existence of the social order;</p> <p>(...)</p>
<p>Artikel 8 (1) Wiv</p> <p>1. Onze betrokken Ministers brengen jaarlijks voor 1 mei gelijktijdig aan beide kamers der Staten- Generaal een openbaar verslag uit van de wijze waarop de Algemene Inlichtingen- en Veiligheidsdienst en de Militaire Inlichtingen- en Veiligheidsdienst hun taken in het afgelopen kalenderjaar hebben verricht.</p>	<p>Article 8 (1) Wiv (Intelligence and Security Service Act 2002)</p> <p>1. Once a year, before 1 May, the relevant Ministers will publicly report simultaneously to the two Chambers of the States General on the way in which the General Intelligence and Security Service and the Defence Intelligence and Security Service have carried out their tasks over the past calendar year.</p>
<p>Artikel 12 (1) (2) (3) Wiv</p> <p>1. De diensten zijn bevoegd tot het verwerken van gegevens met inachtneming van de eisen die daaraan bij of krachtens deze wet of de Wet veiligheidsonderzoeken zijn gesteld.</p> <p>2. De verwerking van gegevens vindt slechts plaats voor een bepaald doel en slechts voor zover dat noodzakelijk is voor een goede uitvoering van deze wet of de Wet veiligheidsonderzoeken.</p>	<p>Article 12 (1) (2) (3) Wiv (Intelligence and Security Service Act 2002)</p> <p>1. The services are authorised to process information with due observance of the requirements set by or in accordance with this Act or by or in accordance with the Security Investigations Act.</p> <p>2. Processing information takes place exclusively for a specific purpose and only in so far as necessary for the proper implementation of this Act or the Security</p>

<p>3. De verwerking van gegevens geschiedt in overeenstemming met de wet en op behoorlijke en zorgvuldige wijze.</p>	<p>Investigations Act.</p> <p>3. Processing information takes place in accordance with the law and with proper and due care.</p>
<p>Artikel 13 (1, a) Wiv</p> <p>1. De verwerking van persoonsgegevens door de Algemene Inlichtingen- en Veiligheidsdienst kan slechts betrekking hebben op personen:</p> <p>a. die aanleiding geven tot het ernstige vermoeden dat zij een gevaar vormen voor de democratische rechtsorde, dan wel voor de veiligheid of voor andere gewichtige belangen van de staat;</p> <p>(...)</p>	<p>Article 13 (1, a) Wiv (Intelligence and Security Service Act 2002)</p> <p>1. The General Intelligence and Security Service may only process personal data relating to persons:</p> <p>a. who give cause to serious suspicion for being a danger to the democratic legal system, or to the security or other vital interests of the state;</p> <p>(...)</p>
<p>Artikel 18 Wiv</p> <p>Een bevoegdheid als bedoeld in deze paragraaf mag slechts worden uitgeoefend, voor zover dat noodzakelijk is voor de goede uitvoering van de taken, bedoeld in artikel 6, tweede lid, onder a en d, en de taken, bedoeld in artikel 7, tweede lid, onder a, c, en e.</p>	<p>Article 18 Wiv (Intelligence and Security Service Act 2002)</p> <p>A power as referred to in this paragraph may only be exercised in so far as necessary for a proper performance of the tasks as referred to in Article 6, second paragraph, under a and d, and the tasks as referred to in Article 7, second paragraph, under a, c, and e.</p>
<p>Artikel 20 (1) (2) Wiv</p> <p>1. De diensten zijn bevoegd tot:</p> <p>a. het observeren en in het kader daarvan</p>	<p>Article 20 (1) (2) Wiv (Intelligence and Security Service Act 2002)</p> <p>1. The services are authorised to:</p>

<p>vastleggen van gegevens betreffende gedragingen van natuurlijke personen of gegevens betreffende zaken, al dan niet met behulp van observatie- en registratiemiddelen;</p> <p>b. het volgen en in het kader daarvan vastleggen van gegevens betreffende natuurlijke personen of zaken, al dan niet met behulp van volgmiddelen, plaatsbepalingsapparatuur en registratiemiddelen.</p> <p>2. De toepassing van observatie- en registratiemiddelen als bedoeld in het eerste lid, onder a, alsmede het aanbrengen van volgmiddelen, plaatsbepalingsapparatuur en registratiemiddelen als bedoeld in het eerste lid, onder b, door de Militaire Inlichtingen- en Veiligheidsdienst is, voor zover het gaat om de toepassing dan wel het aanbrengen daarvan in besloten plaatsen die niet in gebruik zijn van het Ministerie van Defensie slechts toegestaan, indien de toestemming daarvoor is verleend in overeenstemming met Onze Minister van Binnenlandse Zaken en Koninkrijksrelaties dan wel, voor zover van toepassing, het hoofd van de Algemene Inlichtingen- en Veiligheidsdienst.</p>	<p>a. conduct surveillance and within this context record information relating to the actions of natural persons or information relating to objects, whether or not with the aid of observation and registration instruments;</p> <p>b. trace and within this context record information relating to natural persons or information relating to objects, whether or not with the aid of tracing instruments, location positioning equipment and registration instruments.</p> <p>2. Using observation and registration instruments as referred to in the first paragraph, under a, and installing tracing instruments, location positioning equipment and registration instruments as referred to in the first paragraph under b by the Defence Intelligence and Security Service is only permitted, in so far as this concerns the use or installation of such instruments or equipment in enclosed spaces not in use by the Ministry of Defence, if permission therefore is granted in accordance with the Minister of the Interior and Kingdom Relations or, in so far as applicable, the head of the General Intelligence and Security Service.</p>
<p>Artikel 21 (1) Wiv</p> <p>1. De diensten zijn bevoegd tot:</p> <p>a. de inzet van natuurlijke personen, al dan niet onder dekmantel van een aangenomen identiteit of hoedanigheid, die onder verantwoordelijkheid en onder instructie van een dienst zijn belast met:</p> <p>1°. het gericht gegevens verzamelen</p>	<p>Article 21 (1) Wiv (Intelligence and Security Service Act 2002)</p> <p>1. The services are authorised to:</p> <p>a. deploy natural persons, whether or not under cover of an assumed identity or capacity, who, under the responsibility and on the instruction of a service, are charged with:</p> <p>1°. collecting in a directed way</p>

<p>omtrent personen en organisaties die voor de taakuitvoering van een dienst van belang kunnen zijn;</p> <p>2°. het bevorderen of het treffen van maatregelen ter bescherming van door een dienst te behartigen belangen.</p> <p>b. het oprichten en de inzet van rechtspersonen ter ondersteuning van operationele activiteiten.</p>	<p>information relating to persons and organisations that can be relevant to the performance of the tasks of a service;</p> <p>2°. promoting or taking measures to protect the interests attended to by a service.</p> <p>b. setting up and using legal entities in support of operational activities.</p>
<p>Artikel 22 (1) (2) Wiv</p> <p>1. De diensten zijn bevoegd tot het, al dan niet met behulp van een technisch hulpmiddel:</p> <p>a. doorzoeken van besloten plaatsen;</p> <p>b. doorzoeken van gesloten voorwerpen;</p> <p>c. verrichten van onderzoek aan voorwerpen gericht op het vaststellen van de identiteit van een persoon.</p> <p>2. De uitoefening van de bevoegdheid, bedoeld in het eerste lid, door de Militaire Inlichtingen- en Veiligheidsdienst buiten plaatsen in gebruik van het Ministerie van Defensie, is slechts toegestaan indien de toestemming daarvoor is verleend in overeenstemming met Onze Minister van Binnenlandse Zaken en Koninkrijksrelaties dan wel, voor zover van toepassing, het hoofd van de Algemene Inlichtingen- en Veiligheidsdienst.</p>	<p>Article 22 (1) (2) Wiv (Intelligence and Security Service Act 2002)</p> <p>1. The services are authorised, with or without the aid of a technical instrument:</p> <p>a. to conduct a search of enclosed spaces;</p> <p>b. to search closed objects;</p> <p>c. conduct an investigation of objects aimed at establishing a person's identity.</p> <p>2. The execution of the power referred to in the first paragraph by the Defence Intelligence and Security Service outside of places in use by the Ministry of Defence, is only permitted if permission therefore is granted in accordance with the Minister of the Interior and Kingdom Relations or, in so far as applicable, the head of the General Intelligence and Security Service.</p>

<p>Artikel 23 (1) (2) Wiv</p> <p>1. De diensten zijn bevoegd tot het openen van brieven en andere geadresseerde zendingen, zonder goedvinden van de afzender of de geadresseerde, indien de rechtbank te Den Haag daartoe, op verzoek van het hoofd van de dienst, een last heeft afgegeven.</p> <p>2. Voor de uitoefening van de bevoegdheid, bedoeld in het eerste lid, is geen toestemming vereist als bedoeld in artikel 19.</p>	<p>Article 23 (1) (2) Wiv (Intelligence and Security Service Act 2002)</p> <p>1. The services are authorised to open letters and other consignments without the consent of the sender or the addressee, provided the District Court at The Hague, on the request of the head of the service, has given a mandate to do so.</p> <p>2. For the execution of the power as referred to in the first paragraph, no permission as referred to in Article 19 is required.</p>
<p>Artikel 24 (1) Wiv</p> <p>1. De diensten zijn bevoegd tot het al dan niet met gebruikmaking van technische hulpmiddelen, valse signalen, valse sleutels of valse hoedanigheid, binnendringen in een geautomatiseerd werk. Tot de bevoegdheid, bedoeld in de eerste volzin, behoort tevens de bevoegdheid:</p> <p>a. tot het doorbreken van enige beveiliging;</p> <p>b. tot het aanbrengen van technische voorzieningen teneinde versleuteling van gegevens opgeslagen of verwerkt in het geautomatiseerde werk ongedaan te maken;</p> <p>c. de gegevens opgeslagen of verwerkt in het geautomatiseerde werk over te nemen.</p>	<p>Article 24 (1) Wiv (Intelligence and Security Service Act 2002)</p> <p>1. The services are authorised, whether or not using technical instruments, false signals, false keys or false identities, to enter an automated work. The powers referred to in the first sentence, also include the power:</p> <p>a. to penetrate any security;</p> <p>b. to introduce technical devices to undo the encryption of data stored or processed in the automated work;</p> <p>c. to copy the data stored or processed in the automated work.</p>
<p>Artikel 25 (1) (2) Wiv</p> <p>1. De diensten zijn bevoegd tot het met een technisch hulpmiddel gericht aftappen,</p>	<p>Article 25 (1) (2) Wiv (Intelligence and Security Service Act 2002)</p> <p>1. The services are authorised, with the aid of</p>

<p>ontvangen, opnemen en afluisteren van elke vorm van gesprek, telecommunicatie of gegevensoverdracht door middel van een geautomatiseerd werk, ongeacht waar een en ander plaatsvindt. Tot de bevoegdheid, bedoeld in de eerste volzin, behoort tevens de bevoegdheid om versleuteling van de gesprekken, telecommunicatie of gegevensoverdracht ongedaan te maken.</p> <p>2. De in het eerste lid bedoelde bevoegdheid mag slechts worden uitgeoefend, indien door Onze betrokken Minister daarvoor op een daartoe strekkend verzoek toestemming is verleend aan het hoofd van de dienst.</p>	<p>a technical device, to tap, receive, record and monitor in a directed way any form of conversation, telecommunication or data transfer by means of an automated work, irrespective of where this takes place. The powers referred to in the first sentence include the power to undo the encryption of the conversations, telecommunication or data transfer.</p> <p>2. The power referred to in the first paragraph may only be exercised if a request to that effect has been granted to the head of the service.</p>
<p>Artikel 26 (1) (2) Wiv</p> <p>1. De diensten zijn bevoegd tot het met een technisch hulpmiddel ontvangen en opnemen van niet – kabelgebonden telecommunicatie die zijn oorsprong of bestemming in andere landen heeft, aan de hand van een technisch kenmerk ter verkenning van de communicatie. De diensten zijn bevoegd om van daarbij ontvangen gegevens kennis te nemen. Tot de bevoegdheid, bedoeld in de eerste volzin, behoort tevens de bevoegdheid om versleuteling van de telecommunicatie ongedaan te maken.</p> <p>2. Voor de uitoefening van de bevoegdheid, bedoeld in het eerste lid, is geen toestemming vereist als bedoeld in artikel 19.</p>	<p>Article 26 (1) (2) Wiv (Intelligence and Security Service Act 2002)</p> <p>1. The services are authorised, with the aid of a technical device, to receive and record non-cable-bound telecommunication originating from or intended for other countries, on the basis of a technical characteristic to monitor the communication. The services are authorised to take cognisance of the information received in this context. The powers as referred to in the first sentence include the power to undo the encryption of the telecommunication.</p> <p>2. For exercising the power as referred to in the first paragraph, no permission as referred to in Article 19 is required.</p>
<p>Artikel 27 (1) (2) Wiv</p> <p>1. De diensten zijn bevoegd tot het met een technisch hulpmiddel ongericht ontvangen en opnemen van niet-kabelgebonden</p>	<p>Article 27 (1) (2) Wiv (Intelligence and Security Service Act 2002)</p> <p>1. The services are authorised, with the aid of a technical device, to receive and record non-</p>

<p>telecommunicatie. Tot de bevoegdheid, bedoeld in de eerste volzin, behoort tevens de bevoegdheid om versleuteling van de telecommunicatie ongedaan te maken.</p> <p>2. Voor de uitoefening van de bevoegdheid, bedoeld in het eerste lid, is geen toestemming vereist als bedoeld in artikel 19.</p>	<p>specific non-cable-bound telecommunication. The powers as referred to in the first sentence include the power to undo the encryption of the telecommunication.</p> <p>2. For exercising the power as referred to in the first paragraph, no permission as referred to in article 19 is required.</p>
<p>Artikel 28 (1) (2) Wiv</p> <p>1. De diensten zijn bevoegd zich te wenden tot de aanbieders van openbare telecommunicatienetwerken en openbare telecommunicatiediensten in de zin van de Telecommunicatiewet met het verzoek gegevens te verstrekken over een gebruiker en het telecommunicatieverkeer met betrekking tot die gebruiker. Het verzoek kan slechts betrekking hebben op gegevens die bij algemene maatregel van bestuur zijn aangewezen en kan zowel gegevens betreffen die ten tijde van het verzoek zijn verwerkt als gegevens die na het tijdstip van het verzoek worden verwerkt.</p> <p>2. Onder een gebruiker van telecommunicatie wordt in dit artikel verstaan de natuurlijke persoon of rechtspersoon die met de aanbieder een overeenkomst is aangegaan met betrekking tot het gebruik van een openbaar telecommunicatienetwerk of de levering van een openbare telecommunicatiedienst, alsmede de natuurlijke persoon of rechtspersoon die daadwerkelijk gebruik maakt van een openbaar telecommunicatienetwerk of een openbare telecommunicatiedienst.</p>	<p>Article 28 (1) (2) Wiv (Intelligence and Security Service Act 2002)</p> <p>1. The services are authorised to turn to providers of public telecommunication networks and public telecommunication services in the sense of the Telecommunication Act with the request to furnish information on a user and telecommunication traffic relating to this user. The request can only relate to information that has been designated by order in council. It can concern information that has been processed at the date of the request as well as information that will be processed after the date of the request.</p> <p>2. In this article ‘user of telecommunication’ is understood to mean the natural person or legal entity who has concluded an agreement with the provider relating to the use of public telecommunication network or the provision of a public telecommunication service, as well as the natural person or legal entity who actively uses a public telecommunication network or a public telecommunication service.</p>

<p>Artikel 29 (1) (2) Wiv</p> <p>1. De diensten zijn bevoegd zich te wenden tot de aanbieders van openbare telecommunicatienetwerken en openbare telecommunicatiediensten in de zin van de Telecommunicatiewet met het verzoek gegevens te verstrekken terzake van naam, adres, postcode, woonplaats, nummer en soort dienst van een gebruiker van telecommunicatie.</p> <p>2. Onder een gebruiker van telecommunicatie wordt in dit artikel verstaan de natuurlijke persoon of rechtspersoon die met de aanbieder een overeenkomst is aangegaan met betrekking tot het gebruik van een openbaar telecommunicatienetwerk of de levering van een openbare telecommunicatiedienst, alsmede de natuurlijke persoon of rechtspersoon die daadwerkelijk gebruik maakt van een openbaar telecommunicatienetwerk of een openbare telecommunicatiedienst.</p>	<p>Article 29 (1) (2) Wiv (Intelligence and Security Service Act 2002)</p> <p>1. The services are authorised to turn to providers of public telecommunication networks and public telecommunication services in the sense of the Telecommunication Act with the request to furnish information relating to the name, address, postcode, place of residence and type of service relating to a user of telecommunication.</p> <p>2. In this article ‘user of telecommunication’ is understood to mean a natural person or legal entity who has entered into an agreement with the provider with regard to the use of public telecommunication network or the provision of a public telecommunication service, as well as a natural person or legal entity who actively uses a public telecommunication network or public telecommunication service.</p>
<p>Artikel 30 (1) (2) Wiv</p> <p>1. De diensten hebben toegang tot elke plaats, voor zover dat redelijkerwijs nodig is om:</p> <p>a. observatie- en registratiemiddelen als bedoeld in artikel 20, eerste lid, onder a, aan te brengen;</p> <p>b. volgmiddelen, plaatsbepalingsapparatuur en registratiemiddelen als bedoeld in artikel</p>	<p>Article 30 (1) (2) Wiv (Intelligence and Security Service Act 2002)</p> <p>1. The services have access to all places in so far as this is in reasonableness necessary:</p> <p>a. to install observation and registration instruments as referred to in Article 20, first paragraph, under a;</p> <p>b. to install tracing instruments, location positioning equipment and registration</p>

<p>20, eerste lid, onder b, aan te brengen;</p> <p>c. de bevoegdheid, bedoeld in artikel 22, eerste lid, onder a, uit te oefenen;</p> <p>d. de bevoegdheid, bedoeld in artikel 24, uit te oefenen;</p> <p>e. de bevoegdheid, bedoeld in artikel 25, uit te oefenen;</p> <p>f. met betrekking tot de aldaar aanwezige telecommunicatie-apparatuur de gegevens te verzamelen die noodzakelijk zijn om de bevoegdheid, waarvoor overeenkomstig artikel 25, zesde lid, toestemming is verleend, uit te kunnen oefenen.</p> <p>2. Voor de uitoefening van de bevoegdheid, bedoeld in het eerste lid, is geen toestemming vereist als bedoeld in artikel 19.</p>	<p>instruments as referred to in Article 20, first paragraph, under b;</p> <p>c. to exercise the power as referred to in Article 22, first paragraph, under a;</p> <p>d. to exercise the power as referred to in Article 24;</p> <p>e. to exercise the power as referred to in Article 25;</p> <p>f. to collect as regards the telecommunication equipment present the information necessary in order to exercise the power for which permission has been granted in accordance with Article 25, sixth paragraph.</p> <p>2. For the execution of the power as referred to in the first paragraph, first sentence, no permission as referred to in Article 19 is required.</p>
<p>Artikel 31 (1) (2) (3) (4) Wiv</p> <p>1. De uitoefening van een bevoegdheid als bedoeld in deze paragraaf is slechts geoorloofd, indien de daarmee beoogde verzameling van gegevens niet of niet tijdig kan geschieden door raadpleging van voor een ieder toegankelijke informatiebronnen of van informatiebronnen waarvoor aan de dienst een recht op kennisneming van de aldaar berustende gegevens is verleend.</p> <p>2. Indien is besloten tot het verzamelen van gegevens door uitoefening van een of meer bevoegdheden als bedoeld in deze paragraaf, wordt slechts die bevoegdheid uitgeoefend, die gelet op de omstandigheden van het geval, waaronder de ernst van de bedreiging</p>	<p>Article 31 (1) (2) (3) (4) Wiv (Intelligence and Security Service Act 2002)</p> <p>1. Exercising the power as referred to in this section is permitted only if the intended collection of information cannot take place or cannot take place in time by consulting publicly accessible sources of information or sources of information for which the service has been granted a right to inspect the information contained in said sources.</p> <p>2. If it has been decided to collect information by exercising one or more powers as referred to in this paragraph, only that power will be exercised that in view of the circumstances of the case, including the seriousness of the threat to the interests</p>

<p>van de door een dienst te beschermen belangen, mede in vergelijking met andere beschikbare bevoegdheden voor de betrokkene het minste nadeel oplevert.</p> <p>3. De uitoefening van een bevoegdheid blijft achterwege, indien de uitoefening ervan voor betrokkene een onevenredig nadeel in vergelijking met het daarbij na te streven doel oplevert.</p> <p>4. De uitoefening van een bevoegdheid dient evenredig te zijn aan het daarmee beoogde doel.</p>	<p>protected by a service, also in comparison with other available powers, will cause least harm to the person involved.</p> <p>3. A power will not be exercised if the execution of said power will result in disproportionate harm to the person involved in comparison with the intended objective of the action.</p> <p>4. The execution of a power must be proportionate to the intended objective of the action.</p>
<p>Artikel 32 Wiv</p> <p>De uitoefening van een bevoegdheid als bedoeld in deze paragraaf wordt onmiddellijk gestaakt, indien het doel waartoe de bevoegdheid is uitgeoefend is bereikt dan wel met de uitoefening van een minder ingrijpende bevoegdheid kan worden volstaan.</p>	<p>Article 32 Wiv (Intelligence and Security Service Act 2002)</p> <p>Exercising a power as referred to in this paragraph will be immediately terminated if the objective to which the power was exercised has been accomplished, or exercising a less far-reaching power would suffice.</p>
<p>Artikel 126Zd Sv</p> <p>1. In geval van aanwijzingen van een terroristisch misdrijf is de opsporingsambtenaar, bij bevel daartoe van de officier van justitie, bevoegd in het belang van het onderzoek:</p> <p>(...)</p>	<p>Article 126Zd Dutch Code of Criminal Procedure</p> <p>1. In case of an indication of a terrorist crime has the criminal investigator, by order of the public prosecutor and if necessary for the investigation, the competences to:</p> <p>(...)</p>
<p>Artikel 67 (1) (a) (b) Sv</p> <p>1. Een bevel tot voorlopige hechtenis kan</p>	<p>Article 67 (1) (a) (b) Dutch Code of Criminal Procedure</p>

<p>worden gegeven in geval van verdenking van:</p> <p>a) een misdrijf waarop naar de wettelijke omschrijving een gevangenisstraf van vier jaren of meer is gesteld;</p> <p>b) een der misdrijven omschreven in de artikelen 132 , 138a , 138ab , 138b , 139c , 139d, eerste en tweede lid , 141a , 137c, tweede lid , 137d, tweede lid , 137e, tweede lid , 137g, tweede lid , 151 , 184a , 254a , 248d , 248e , 272 , 284, eerste lid , 285, eerste lid , 285b , 285c , 300, eerste lid , 321 , 323a , 326c, tweede lid , 350 , 350a , 350c , 350d 351 , 395 , 417bis en 420quater van het Wetboek van Strafrecht;</p> <p>(...)</p>	<p>1. A pre-trial detention order may be issued on the basis of suspicion of:</p> <p>a) a serious offence which carries a statutory term of imprisonment of at least four years;</p> <p>b) any of the serious offences defined in sections 132, 138a, 138ab, 138b, 139c, 139d(1) and (2),141a, 161sexies(1)(1°) and (2),137c (2), 137d(2), 137e(2), 137g(2), 184a, 254a, 248d, 248e,285(1), 285b, 300(1), 321, 323a,326c(2), 350, 350a, 351, 395, 417bis and 420quater of the Criminal Code;</p> <p>(...)</p>
<p>Artikel 3 Tijdelijk besluit Commissie advies- en verwijspunt klokkenluiden</p> <p>De taak van de Commissie is:</p> <p>a. op verzoek informatie en advies geven over en ondersteuning bieden bij mogelijke vervolgstappen aan degene die een vermoeden heeft van een mogelijke misstand die raakt aan het algemeen belang bij:</p> <ul style="list-style-type: none"> – het bedrijf of de organisatie waar hij werkt of heeft gewerkt; of – een ander bedrijf of een andere organisatie indien hij door zijn werkzaamheden kennis heeft gekregen van de mogelijke misstand. <p>b. niet tot een persoon te herleiden ontwikkelingen en patronen die zijn af te</p>	<p>Article 3 Whistle blower Advice and Referral Commission Temporary Decree</p> <p>The task of the Commission is</p> <p>a. to provide information and advice when requested on and offer support with possible follow-up steps to anyone who suspects abuses detrimental to the public interest in:</p> <ul style="list-style-type: none"> – a business or organisation where he works or has worked; or – any other business or organisation if he has obtained knowledge of the possible abuses through his work; <p>b. to identify from the information available to it by virtue of its task as referred to at a)</p>

<p>leiden uit de informatie die de Commissie heeft op grond van haar taak, bedoeld in onderdeel a, mededelen aan organisaties voor wie deze informatie relevant is;</p> <p>c. algemene voorlichting geven over het omgaan met een vermoeden van een mogelijke misstand.</p>	<p>trends and patterns that cannot be traced back to an individual and to communicate its findings to the relevant organisations;</p> <p>cc to provide general information about dealing with suspected abuses.</p>
<p>Artikel 125quinquies Ambtenarenwet</p> <p>1. Voor zover deze onderwerpen niet bij of krachtens de wet zijn geregeld, worden voor de ambtenaren, door of vanwege het rijk aangesteld, bij of krachtens algemene maatregel van bestuur voorschriften vastgesteld betreffende:</p> <p>a. de verplichte aflegging van de eed of belofte door de ambtenaar bij zijn aanstelling;</p> <p>b. de melding en de registratie van nevenwerkzaamheden die de belangen van de dienst voor zover deze in verband staan met de functievervulling, kunnen raken;</p> <p>c. de openbaarmaking van de krachtens onderdeel b geregistreerde nevenwerkzaamheden van ambtenaren aangesteld in een functie waarvoor ter bescherming van de integriteit van de openbare dienst openbaarmaking van nevenwerkzaamheden noodzakelijk is;</p> <p>d. het verbieden van nevenwerkzaamheden waardoor de goede vervulling van de functie of de goede functionering van de openbare dienst, voor zover deze in verband staat met de functievervulling, niet in redelijkheid zou</p>	<p>Article 125quinquies Central and Local Government Personnel Act</p> <p>1. To the extent that these matters are not regulated by or under the law, are the officials appointed by or on behalf of the rich, by or pursuant to general administrative rules governing:</p> <p>a. mandatory authenticity of the oath or affirmation by the official at his appointment.;</p> <p>b. notification and registration of ancillary activities that the interests of the service in so far in connection to get the job performance;</p> <p>c. disclosure under section b registered outside activities of officials appointed to a position for which to protect the integrity of the public service disclosure of ancillary activities is necessary;</p> <p>d. the banning of outside activities so that the proper performance of the function or the proper functioning of the public service, to the extent that this is related to job performance would not be reasonably assured;</p> <p>e. the declaration of financial interests or the possession of and transactions in securities</p>

<p>zijn verzekerd;</p> <p>e. de melding van financiële belangen respectievelijk van het bezit van en transacties in effecten, die de belangen van de dienst voor zover deze in verband staan met de functievervulling, kunnen raken voor ambtenaren aangesteld in een functie waaraan in het bijzonder het risico van financiële belangenverstrengeling of het risico van oneigenlijk gebruik van koersgevoelige informatie verbonden is;</p> <p>f. een procedure voor het omgaan met bij een ambtenaar levende vermoedens van misstanden binnen de organisatie waar hij werkzaam is.</p> <p>2. Het bevoegd gezag van provincies, gemeenten en waterschappen stelt voor de ambtenaren door of vanwege deze lichamen aangesteld, onder gelijk voorbehoud voorschriften vast omtrent de onderwerpen, genoemd in het eerste lid. Als ambtenaar aangesteld door of vanwege een waterschap wordt aangemerkt hij die is aangesteld door het in het reglement van die instelling daartoe aangewezen gezag teneinde in dienst van het waterschap werkzaam te zijn.</p> <p>3. De ambtenaar die te goeder trouw de bij hem levende vermoedens van misstanden meldt volgens de procedure, bedoeld in het eerste lid onder f, zal als gevolg van het melden van die vermoedens geen nadelige gevolgen voor zijn rechtspositie ondervinden tijdens en na het volgen van die procedure.</p>	<p>that the service of the interests insofar as these in connection to get the job performance appointed officials in a position which in particular the risk of financial interest or risk of improper use of inside information is linked;</p> <p>whether. a procedure for dealing with a civil servant living suspicions of wrongdoing within the organization where he works.</p> <p>2. The competent authority of provinces, municipalities and water suggests the officials appointed by or on behalf of these entities, under identical reservation rules on the matters mentioned in the first paragraph. An official appointed by or on behalf of a water board shall he deemed appointed by the rules of that institution designated authority in order to be employed by the water board.</p> <p>3. Official who in good faith report to him living suspicions of misconduct in accordance with the procedure referred to in paragraph f, is due to report such suspicions are not adversely affect his status during and after following that procedure.</p>
<p>Artikel 1(1)(e) Besluit melden vermoeden van misstand bij Rijk en Politie</p>	<p>Article 1(1)(e) Notification of suspected wrongdoing by Government and Police*</p>

<p>1. In dit besluit wordt verstaan onder:</p> <p>(...)</p> <p>e. <i>vermoeden van een misstand</i>: een op redelijke gronden gebaseerd vermoeden van:</p> <p style="padding-left: 40px;">1° een schending van wettelijke voorschriften of beleidsregels;</p> <p style="padding-left: 40px;">2° een gevaar voor de gezondheid, de veiligheid of het milieu;</p> <p style="padding-left: 40px;">3° een onbehoorlijke wijze van handelen of nalaten, die een gevaar vormt voor het goed functioneren van de openbare dienst;</p> <p>bij de organisatie waarin de melder werkt of heeft gewerkt of bij een andere organisatie indien hij uit hoofde van zijn ambtenaarschap met die organisatie in aanraking is gekomen en kennis heeft gekregen van de misstand;</p> <p>(...)</p>	<p>1. This Decree shall apply in case of:</p> <p>(...)</p> <p>e. <i>suspected irregularity</i>: a suspicion based on reasonable grounds:</p> <p style="padding-left: 40px;">1° a violation of laws or policies;</p> <p style="padding-left: 40px;">2° a danger to the health, safety or the environment;</p> <p style="padding-left: 40px;">3° an improper manner by act or omission that constitutes a threat to the proper functioning of the public service;</p> <p>the organization in which the detector is working or has worked or with another organization if it has been exposed by virtue of his civil service with that organization and became aware of the wrongdoing;</p> <p>(...)</p>
<p>Artikel 126g (c) Besluit melden vermoeden van misstand bij Defensie</p> <p>In deze paragraaf wordt verstaan onder:</p> <p>(...)</p> <p>c. <i>vermoeden van een misstand</i>: een op redelijke gronden gebaseerd vermoeden van:</p> <p style="padding-left: 40px;">1° een schending van wettelijke</p>	<p>Article 126g (c) Notification of suspected wrongdoing by the Ministry of Defence*</p> <p>In this section the term:</p> <p>(...)</p> <p>c. suspicion of misconduct: a reasonable suspicion of:</p> <p style="padding-left: 40px;">1 ° a violation of laws or policies;</p>

<p>voorschriften of beleidsregels;</p> <p>2° een gevaar voor de gezondheid, de veiligheid of het milieu;</p> <p>3° een onbehoorlijke wijze van handelen of nalaten, die een gevaar vormt voor het goed functioneren van de openbare dienst;</p> <p>bij het Ministerie van Defensie, of bij een andere organisatie indien de militair uit hoofde van zijn ambtenaarschap met die organisatie in aanraking is gekomen en kennis heeft gekregen van de misstand;</p> <p>(...)</p>	<p>2 ° a danger to the health, safety or the environment;</p> <p>3.° an improper manner of acts or omissions that endanger ensuring the proper functioning of the public service;</p> <p>by the Ministry of Defense, or another organization if the military under his civil service with that organization has been exposed and has knowledge of the misconduct;</p> <p>(...)</p>
<p>Artikel 2 Bescherming van de melder</p> <p>1. Een ieder die betrokken is bij de behandeling van een melding maakt de identiteit van de melder niet bekend zonder zijn instemming, dat zijn in ieder geval de leidinggevende, de vertrouwenspersoon en het externe meldpunt.</p> <p>2. De ambtenaar zal als gevolg van de melding van een vermoeden van een misstand geen nadelige gevolgen ondervinden voor zijn rechtspositie. Onder nadelige gevolgen worden in ieder geval verstaan:</p> <p>a. het verlenen van ongevraagd ontslag;</p> <p>b. het niet verlengen van een aanstelling voor bepaalde tijd;</p> <p>c. het niet omzetten van een aanstelling voor</p>	<p>Article 2 Protection of the reporter*</p> <p>1. Everyone who is involved in the treatment of a message does not reveal the identity of the messenger without his consent, which in any case the supervisor, the counselor and the external hotline.</p> <p>2. The official, as a result of the reporting of suspected wrongdoing not adversely affected by his legal situation. Under adverse consequences in any case:</p> <p>a. provision of unsolicited dismissal;</p> <p>b. non-renewal of a contract for a specific period;</p> <p>c. it does not convert an appointment for a certain time in a permanent job;</p>

<p>bepaalde tijd in een vaste aanstelling;</p> <p>d. de opgelegde benoeming in een andere functie;</p> <p>e. het treffen van disciplinaire maatregelen;</p> <p>f. het onthouden van salarisverhoging, incidentele beloning of toekenning van vergoedingen;</p> <p>g. het onthouden van promotiekansen;</p> <p>h. het afwijzen van een verlofaanvraag, voor zover dit redelijkerwijs verband houdt met de door de melder gedane melding van een vermoeden van een misstand.</p> <p>3. Het bevoegd gezag draagt er zorg voor dat de melder ook anderszins bij de uitoefening van zijn functie geen nadelige gevolgen van de melding ondervindt.</p> <p>4. Het bepaalde in lid 2 en 3 van dit artikel geldt ook voor de ambtenaar die te goeder trouw een vermoeden van een misstand in een andere organisatie dan die van [GEMEENTE OF ORGANISATIE INVULLEN], volgens de in die organisatie geldende regels, bij die organisatie heeft gemeld. De bescherming geldt alleen als de ambtenaar:</p> <ul style="list-style-type: none"> – uit hoofde van zijn functie met die andere organisatie samenwerkt of heeft samengewerkt; – uit hoofde van zijn functie kennis heeft verkregen van de vermoede misstand; – het vermoeden van de misstand tijdig bij zijn leidinggevende heeft gemeld; 	<p>d. imposed appointment to another post;</p> <p>e. taking disciplinary action;</p> <p>f. the withholding of salary increase, incidental reward or payment of the compensation;</p> <p>g. remembering promotion;</p> <p>h. the rejection of a request for leave, as far as is reasonably related to the expenditure report of a suspicion of wrongdoing by the detector.</p> <p>3. The competent authority shall ensure that the detector also otherwise is not affected by the notification in the exercise of his functions.</p> <p>4. The provisions of paragraphs 2 and 3 of this Article shall also apply to officials who in good faith suspected misconduct in an organization other than that of [CITY OR ORGANIZATION INSERT], in accordance with the rules in force in that organization, in which organization has reported. The protection applies only if the officer:</p> <ul style="list-style-type: none"> – by virtue of his duties with that other organization works or has worked; – by virtue of his office has obtained knowledge of the alleged wrongdoing; – the presumption of wrongdoing timely reported to his supervisor; – has adhered to the agreements in respect of those reporting to him or her are made by
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<p>– zich heeft gehouden aan de afspraken die ter zake van deze melding met hem of haar zijn gemaakt door het bevoegd gezag.</p> <p>5. De ambtenaar heeft recht op juridische bijstand wanneer hij als gevolg van het te goede trouw melden van een vermoeden van een misstand nadelige gevolgen ondervindt in zijn rechtspositie, tijdens en/of na het volgen van deze regeling. Deze juridische bijstand wordt gefinancierd door [GEMEENTE OF ORGANISATIE INVULLEN].</p>	<p>the competent authority.</p> <p>5. Civil servants are entitled to legal aid when it due to the reporting of suspected wrongdoing detrimental effects are having good faith in its legal position, during and / or after following those rules. This legal aid is funded by [MUNICIPALITY OR ORGANIZATION INSERT].</p>
<p>Artikel 1(c) (g) Regeling Melding Vermoeden Misstand</p> <p>1. In deze regeling wordt verstaan onder:</p> <p>(...)</p> <p>a. vermoeden van een misstand: een vermoeden van</p> <ul style="list-style-type: none"> – schending van wettelijke voorschriften of beleidsregels; – een gevaar voor de gezondheid, de veiligheid of het milieu; – een onbehoorlijke wijze van functioneren die een gevaar vormt voor het goed functioneren van de openbare dienst; <p>(...)</p> <p>g. extern meldpunt: een externe commissie of persoon die als zodanig door het bevoegd gezag is aangewezen of de Onderzoeksraad</p>	<p>Article Article 1(c) and (g) Rules on Reporting Suspected Abuse</p> <p>1. This regulation shall apply to:</p> <p>(...)</p> <p>c. suspected irregularity: a suspicion of</p> <ul style="list-style-type: none"> – breach of regulations or policies; – endangerment of health, safety or the environment; – an improper mode of operation which poses a threat to the proper functioning of the public service; <p>(...)</p> <p>g. external hotline: an external committee or person designated as such by the competent authority or the Research Council Public Integrity (OIO).</p>

<p>Integriteit Overheid (OIO).</p>	<p>(...)</p>
<p>Artikel 1(e) Modelregeling Melding Vermoeden Misstand en/of Integriteitschending</p> <p>In deze regeling wordt verstaan onder:</p> <p>(...)</p> <p>e. Vermoeden van een misstand en/of integriteitschending: een op redelijke gronden gebaseerd vermoeden met betrekking tot de waterschapsorganisatie waar de ambtenaar werkzaam is omtrent:</p> <ul style="list-style-type: none"> • een strafbaar feit • een schending van regelgeving of beleidsregels • het misleiden van justitie • een gevaar voor de volksgezondheid, de veiligheid of het milieu • het bewust achterhouden van informatie over deze feiten • misbruik van positie • misbruik van bevoegdheden 	<p>Article 1(e) Model Rules on Reporting Suspected Abuse and / or Integrity Violation*</p> <p>In these rules shall apply:</p> <p>(...)</p> <p>e. Suspicion of wrongdoing and / or breach of integrity: a reasonable grounds based conjecture regarding the water board organization in which the official operates about:</p> <ul style="list-style-type: none"> • an offense • a violation of legislation or policy • misleading justice • a danger to public health, safety or the environment • knowingly withholding information about such facts • abuse of position • abuse of power • conflict of interest

<ul style="list-style-type: none"> • belangenverstrengeling • lekken van vertrouwelijke informatie • misbruik van informatie <p>(...)</p>	<ul style="list-style-type: none"> • leaks of confidential information • abuse of information <p>(...)</p>
<p>Artikel 16 Modelregeling Melding Vermoeden Misstand en/of Integriteitschending</p> <p>1. De medewerker zal als gevolg van de melding van een vermoeden van een misstand en/of integriteitschending geen nadelige gevolgen ondervinden voor zijn rechtspositie. Onder nadelige gevolgen worden in ieder geval verstaan besluiten tot:</p> <ul style="list-style-type: none"> a. het verlenen van ongevraagd ontslag; b. het niet verlengen van een aanstelling voor bepaalde tijd; c. het niet omzetten van een aanstelling voor bepaalde tijd in een vaste aanstelling; d. de toegekende benoeming in een andere functie; e. het treffen van disciplinaire maatregelen; f. het onthouden van salarisverhoging, incidentele beloning of toekenning van vergoedingen; g. het onthouden van promotiekansen; 	<p>Article 16 Model Rules on Reporting Suspected Abuse and / or Integrity Violation*</p> <p>1. The employee shall as a result of the reporting of suspected abuse and / or breach of integrity not adversely affected by his legal situation. under adverse implications are understood in any case decide to:</p> <ul style="list-style-type: none"> a. the provision of unsolicited dismissal; b. non-renewal of a contract for a specific period; c. it does not convert an appointment for a certain time in a permanent job; d. the allocated appointment to another post; e. taking disciplinary action; f. the withholding of salary increase, incidental reward or award fees; g. remembering promotion;

<p>h. het afwijzen van een verlofaanvraag;</p> <p>i. voor zover deze besluiten worden genomen vanwege de door de ambtenaar gedane melding van een vermoeden van een misstand en/of integriteitschending.</p> <p>2. Het dagelijks bestuur draagt er zorg voor dat de melder ook anderszins bij de uitoefening van zijn functie geen nadelige gevolgen van de melding ondervindt.</p> <p>3. Het bepaalde in lid 1 en 2 van dit artikel geldt ook voor de medewerker die te goeder trouw een vermoeden van een misstand en/of integriteitschending meldt in een andere organisatie dan die van het waterschap, volgens een bij die organisatie geldende regeling. De bescherming geldt alleen als de medewerker:</p> <ul style="list-style-type: none"> – uit hoofde van zijn functie met die andere organisatie samenwerkt of heeft samengewerkt; – uit hoofde van zijn functie kennis heeft verkregen van de vermoede misstand; – het vermoeden van de misstand tijdig bij zijn leidinggevende heeft gemeld; – zich heeft gehouden aan de afspraken die ter zake van deze melding met hem of haar zijn gemaakt door het dagelijks bestuur. 	<p>h. the rejection of a request for leave;</p> <p>i. where these decisions are taken because of the disclosure made by the officer suspected of misconduct and / or integrity violation.</p> <p>2. The Executive Board shall ensure that the detector also otherwise in the performance of his function is not affected by the notification.</p> <p>3. Paragraph 1 and 2 of this article also applies to the employee who in good faith a suspicion of misconduct and / or integrity violations reported in an organization other than the water board, in accordance with rules applicable to that organization. The protection applies only if the employee:</p> <ul style="list-style-type: none"> – by virtue of his position with another organization which cooperates or has collaboration; – by virtue of his office has obtained knowledge of the alleged wrongdoing; – the presumption of wrongdoing timely reported to his supervisor; – has adhered to the agreements relating to this message with him or her made by the Executive Board.
<p>Artikel 1(1)(a) Regeling procedure en bescherming bij melding van</p>	<p>Article 1(1)(a) Regulation procedure and protection in case of reporting of</p>

<p>vermoedens van een misstand</p> <p>1. In deze regeling wordt verstaan onder:</p> <p>a. vermoeden van een misstand: een vermoeden van:</p> <ul style="list-style-type: none"> – schending van wettelijke voorschriften of beleidsregels; – een gevaar voor de gezondheid, de veiligheid of het milieu; – een onbehoorlijke wijze van functioneren die een gevaar vormt voor het goed functioneren van de openbare dienst; <p>(...)</p>	<p>suspected wrongdoing*</p> <p>1. In this regulation the following will be defined:</p> <p>a. suspected irregularity: a suspicion of:</p> <ul style="list-style-type: none"> – breach of regulations or policies; – endangering public health, public safety or the environment; – an improper way of operation which poses a threat to the proper functioning of the public service; <p>(...)</p>
<p>Artikel 4 Regeling procedure en bescherming bij melding van vermoedens van een misstand</p> <p>1. Binnen acht weken na de melding van een vermoeden van een misstand in de provinciale organisatie stellen gedeputeerde staten de ambtenaar of, in voorkomend geval, de vertrouwenspersoon, alsmede de persoon of personen op wie de melding betrekking heeft, schriftelijk en gemotiveerd in kennis van de bevindingen van het onderzoek, van hun oordeel daarover en van de eventuele consequenties die zij daaraan verbinden.</p> <p>2. De in het eerste lid genoemde termijn van acht weken kan met maximaal vier weken worden verlengd. De ambtenaar of, in voorkomend geval, de vertrouwenspersoon, alsmede de persoon of personen op wie de melding betrekking heeft, worden daarvan</p>	<p>Article 4 Regulation procedure and protection in the reporting of suspected wrongdoing*</p> <p>1. Within eight weeks of the reporting of suspected wrongdoing in the provincial organization notify the provincial executive officials or, where appropriate, the counselor and the person or persons to whom the report relates, in writing and motivated of the findings of the investigation, their judgment thereon and the possible consequences that they impose.</p> <p>2. The eight-week period mentioned in the first paragraph may be extended by up to four weeks. The official or, where appropriate, the counselor and the person or persons who are the subject of the notification, shall be informed in writing.</p>

<p>schriftelijk in kennis gesteld.</p>	
<p>Artikel 13 Regeling procedure en bescherming bij melding van vermoedens van een misstand</p> <p>1. Onder nadelige gevolgen als bedoeld in artikel 125 <i>quinquies</i>, derde lid, van de Ambtenarenwet worden in ieder geval verstaan besluiten ten aanzien van de ambtenaar die strekken tot:</p> <p>a. het verlenen van ongevraagd ontslag;</p> <p>b. het niet verlengen van een aanstelling voor bepaalde tijd;</p> <p>c. het niet omzetten van een aanstelling voor bepaalde tijd in een aanstelling voor onbepaalde tijd;</p> <p>d. de opgelegde benoeming in een andere functie;</p> <p>e. het treffen van ordemaatregelen, schorsing en disciplinaire straffen als bedoeld in hoofdstuk G van de CAP;</p> <p>f. het onthouden van een salarisverhoging, van een incidentele beloning voor prestaties of ex-tra inzet en van toelagen, uitkeringen of vergoedingen als bedoeld in hoofdstuk C van de CAP;</p> <p>g. het onthouden van promotiekansen en</p> <p>h. het afwijzen van een verlofaanvraag,</p> <p>voor zover dit besluit wordt genomen vanwege een door de ambtenaar gedane</p>	<p>Article 13 Regulation procedure and protection in the reporting of suspected wrongdoing*</p> <p>1. Under adverse effects referred to in Article 125<i>quinquies</i>, third paragraph, of the Civil Servants act at least includes decisions regarding the official who seek:</p> <p>a. grant unsolicited dismissal;</p> <p>b. non-renewal of a contract for a specific period;</p> <p>c. it does not convert an appointment for a certain time in a permanent contract;</p> <p>d. imposed appointment to another post;</p> <p>e. taking disciplinary measures, suspension and disciplinary penalties referred to in section G of the CAP;</p> <p>f. memorizing a salary increase, an occasional reward for performance or ex-tra effort and grants, benefits or allowances provided for in Section C of the CAP;</p> <p>g. the withholding of promotion and</p> <p>h. rejecting a leave application, provided that this decision is taken due to the official report made-over in accordance with this scheme.</p> <p>2. The provincial executive shall ensure that the official also otherwise is not affected by the performance of his duties of the report</p>

<p>melding over-eenkomstig deze regeling.</p> <p>2. Gedeputeerde staten dragen ervoor zorg dat de ambtenaar ook anderszins bij de uitoefening van zijn functie geen nadelige gevolgen ondervindt van de door hem gedane melding overeen-komstig deze regeling.</p> <p>3. Het bepaalde in het eerste en tweede lid is van overeenkomstige toepassing op de ambtenaar die te goeder trouw een vermoeden van een misstand in een andere dan de provinciale organisatie volgens de in die organisatie geldende regels bij die organisatie heeft gemeld. De be-scherming geldt slechts als de ambtenaar</p> <p>a. uit hoofde van zijn functie met die organisatie samenwerkt of heeft samengewerkt; b. uit hoofde van zijn functie kennis heeft gekregen van de misstand die wordt vermoed; c. het vermoeden van de misstand in die andere organisatie tijdig vooraf bij zijn leidinggevende heeft gemeld, en</p> <p>d. zich heeft gehouden aan de afspraken die de provincie met hem heeft gemaakt en de aan-wijzingen die de provincie hem heeft gegeven ter zake van eventuele melding van de ver-moede misstand.</p>	<p>made by him and correspondingly this scheme.</p> <p>3. The provisions in the first and second paragraph shall also apply to officials who in good faith has reported a suspicion of misconduct in other than the provincial organization under the rules of the organization applicable in the organization. The be-protection applies only if a civil servant a. by virtue of his position with that organization works or has worked;</p> <p>b. by virtue of his office was aware of the abuse which is suspected;</p> <p>c. suspicion of misconduct in that other organization in a timely manner has previously reported to his supervisor, and</p> <p>d. has complied with the agreements made by the province to him and the on changes to the county gave him in respect of any mention of the far-weary wrongdoing.</p>
<p>Best practice bepalingen II.1.7 De Nederlandse Corporate Governance Code</p> <p>Het bestuur draagt er zorg voor dat werknemers zonder gevaar voor hun rechtspositie de mogelijkheid hebben aan de voorzitter van het bestuur of aan een door hem aangewezen functionaris te rapporteren</p>	<p>Best practice provisions II.1.7 Dutch Corporate Governance Code</p> <p>The management board shall ensure that employees have the possibility of reporting alleged irregularities of a general, operational and financial nature within the company to the chairman of the management board or to an official designated by him, without</p>

<p>over vermeende onregelmatigheden binnen de vennootschap van algemene, operationele en financiële aard. Vermeende onregelmatigheden die het functioneren van bestuurders betreffen worden gerapporteerd aan de voorzitter van de raad van commissarissen. Deze klokkenluidersregeling wordt op de website van de vennootschap geplaatst.</p>	<p>jeopardising their legal position. Alleged irregularities concerning the functioning of management board members shall be reported to the chairman of the supervisory board. The arrangements for whistle-blowers shall be posted on the company's website.</p>
<p>Artikel 3a(1) (2) Wet Huis voor klokkenluiders</p> <p>1. Het Huis kent een afdeling advies en een afdeling onderzoek.</p> <p>2. De afdeling advies heeft tot taak:</p> <p>a. het informeren, adviseren en ondersteunen van een werknemer over de te ondernemen stappen inzake het vermoeden van een misstand;</p> <p>b. het verwijzen naar bestuursorganen of diensten die zijn belast met de opsporing van strafbare feiten of met het toezicht op de naleving van het bepaalde bij of krachtens enig wettelijk voorschrift of een andere bevoegde instantie waar het vermoeden van een misstand kan worden gemeld, en</p> <p>c. het geven van algemene voorlichting over het omgaan met een vermoeden van een misstand.</p> <p>3. De afdeling onderzoek heeft tot taak:</p> <p>a. het beoordelen of het verzoekschrift ontvankelijk is met inachtneming van de voorwaarden, bedoeld in artikel 6, eerste lid;</p>	<p>Article 3a(1) and (2) Law on the House for whistle blowers*</p> <p>1. The House has a advice department and research department.</p> <p>2. The advisory department shall:</p> <p>a. inform, advise and support the employee on the steps to be taken on the suspicion of wrongdoing;</p> <p>b. referring to administrative bodies or departments responsible for the detection of criminal offenses or for supervising compliance with the provisions under or pursuant to any statutory provision or other competent authority where the suspected misconduct can be reported, and</p> <p>c. providing general information on dealing with suspected abuse.</p> <p>3. The investigation department shall: a. judging whether the application is admissible subject to the conditions referred to in Article 6, first paragraph;</p> <p>(...)</p>

<p>(...)</p>	
<p>Artikel 6(1)(d) Wet Huis voor klokkenluiders</p> <p>(...)</p> <p>d. het vermoeden van de misstand ter beoordeling staat van bestuursorganen of diensten die zijn belast met de opsporing van strafbare feiten of met het toezicht op de naleving van het bepaalde bij of krachtens enig wettelijk voorschrift of een andere daartoe bevoegde instantie waar het vermoeden van een misstand kan worden gemeld en het bestuursorgaan, de dienst of de andere daartoe bevoegde instantie het vermoeden van een misstand naar behoren behandelt of heeft behandeld;</p> <p>(...)</p>	<p>Article 6(1)(d) Law on the House for whistle blowers*</p> <p>(...)</p> <p>d. suspected of wrongdoing to assess condition of governing bodies or services responsible for the investigation of criminal offenses or for supervising compliance with the provisions under or pursuant to any statutory provision or any other competent authority where the suspicion of wrongdoing reported and the administrative authority, agency or other authorized body suspected of misconduct properly treat or have treated;</p> <p>(...)</p>
<p>Artikel 17c Wet Huis voor klokkenluiders</p> <p>Het Huis zendt jaarlijks aan beide kamers der Staten-Generaal een overzicht van de aanbevelingen van het Huis en van de wijze waarop aan de aanbevelingen vervolg is gegeven.</p>	<p>Article 17c Law on the House for whistle blowers*</p> <p>The House held annually to both Houses of Parliament a summary of the recommendations of the House and of the manner in which it is given to the follow-up recommendations.</p>
<p>Artikel 18 Wet Huis voor klokkenluiders</p> <p>Na artikel 658b van Boek 7 van het Burgerlijk Wetboek wordt een artikel ingevoegd, luidende:</p>	<p>Article 18 Law on the House for whistle blowers*</p> <p>After Article 658b of Book 7 of the Civil Code, an article is inserted, reading:</p>

<p>Artikel 658c De werkgever mag de werknemer niet benadelen als gevolg van het te goeder trouw en naar behoren melden van een vermoeden van een misstand als bedoeld in artikel 1, onderdeel d, van de Wet Huis voor klokkenluiders tijdens en na de behandeling van deze melding bij de werkgever of de daartoe bevoegde instantie.</p>	<p>Article 658c The employer may not discriminate against an employee because of the good faith and duly reporting suspected misconduct as defined in section 1 d of the Law House for whistle-blowers during and after the treatment of this notification to the employer or the competent authority.</p>
<p>Artikel 7:611 Burgerlijk Wetboek</p> <p>De werkgever en de werknemer zijn verplicht zich als een goed werkgever en een goed werknemer te gedragen.</p>	<p>Article 7:611 Dutch Civil Code</p> <p>The employer and the employee must behave as befits a reasonable and fair employer and a reasonable and fair employee.</p>
<p>Artikel 126nc Sv</p> <p>1. In geval van verdenking van een misdrijf kan de opsporingsambtenaar in het belang van het onderzoek van degene die daarvoor redelijkerwijs in aanmerking komt en die anders dan ten behoeve van persoonlijk gebruik gegevens verwerkt, vorderen bepaalde opgeslagen of vastgelegde identificerende gegevens van een persoon te verstrekken.</p> <p>2. Onder identificerende gegevens wordt verstaan:</p> <p>a) naam, adres, woonplaats en postadres;</p> <p>b) geboortedatum en geslacht;</p> <p>c) administratieve kenmerken;</p> <p>d) in geval van een rechtspersoon, in plaats van de gegevens, bedoeld onder a en b: naam, adres, postadres, rechtsvorm en</p>	<p>Article 126nc Dutch Code of Criminal Procedure</p> <p>1. In the case of suspicion of a serious offence, the investigating officer may, in the interest of the investigation, request the person, who may be reasonably considered to be the appropriate person for that purpose and who processes data other than for personal use, to provide specific stored or recorded identifying data of a person.</p> <p>2. Identifying data shall mean:</p> <p>a) name, address, town and postal address;</p> <p>b) date of birth and sex;</p> <p>c) administrative characteristics;</p> <p>d) in the case of a legal person, instead of the details referred to in (a) and (b): name, address, postal address, legal form and</p>

<p>vestigingsplaats.</p> <p>(...)</p>	<p>registered office.</p> <p>(...)</p>
<p>Artikel 126nc Sv</p> <p>1. In geval van verdenking van een misdrijf kan de opsporingsambtenaar in het belang van het onderzoek van degene die daarvoor redelijkerwijs in aanmerking komt en die anders dan ten behoeve van persoonlijk gebruik gegevens verwerkt, vorderen bepaalde opgeslagen of vastgelegde identificerende gegevens van een persoon te verstrekken.</p> <p>2. Onder identificerende gegevens wordt verstaan:</p> <p>a) naam, adres, woonplaats en postadres;</p> <p>b) geboortedatum en geslacht;</p> <p>c) administratieve kenmerken;</p> <p>d) in geval van een rechtspersoon, in plaats van de gegevens, bedoeld onder a en b: naam, adres, postadres, rechtsvorm en vestigingsplaats.</p> <p>(...)</p>	<p>Article 126nc Dutch Code of Criminal Procedure</p> <p>1. In the case of suspicion of a serious offence, the investigating officer may, in the interest of the investigation, request the person, who may be reasonably considered to be the appropriate person for that purpose and who processes data other than for personal use, to provide specific stored or recorded identifying data of a person.</p> <p>2. Identifying data shall mean:</p> <p>a) name, address, town and postal address;</p> <p>b) date of birth and sex;</p> <p>c) administrative characteristics;</p> <p>d) in the case of a legal person, instead of the details referred to in (a) and (b): name, address, postal address, legal form and registered office.</p> <p>(...)</p>
<p>Artikel 126nd Sv</p> <p>1. In geval van verdenking van een misdrijf als omschreven in artikel 67, eerste lid, kan de officier van justitie in het belang van het onderzoek van degene van wie redelijkerwijs</p>	<p>Article 126nd Dutch Code of Criminal Procedure</p> <p>1. In the case of suspicion of a serious offence as defined in section 67(1), th</p>

<p>kan worden vermoed dat hij toegang heeft tot bepaalde opgeslagen of vastgelegde gegevens, vorderen deze gegevens te verstrekken.</p> <p>2. Een vordering als bedoeld in het eerste lid kan niet worden gericht tot de verdachte. Artikel 96a, derde lid, is van overeenkomstige toepassing. De vordering kan niet betrekking hebben op persoonsgegevens betreffende iemands godsdienst of levensovertuiging, ras, politieke gezindheid, gezondheid, seksuele leven of lidmaatschap van een vakvereniging.</p> <p>(...)</p>	<p>e public prosecutor may,</p> <p>in the interest of the investigation, request the person, who may be reasonably presumed to have</p> <p>access to specific stored or recorded data, to provide this data.</p> <p>2. A request, as referred to in subsection (1), may not be directed to the suspect. Section 96a(3) shall apply mutatis mutandis. The request may not relate to personal data concerning a person's religion or life principles, race, political persuasion, health, sex life or membership of a trade union.</p> <p>(...)</p>
<p>Artikel 126nf Sv</p> <p>1. In geval van verdenking van een misdrijf als omschreven in artikel 67, eerste lid, dat gezien zijn aard of de samenhang met andere door de verdachte begane misdrijven een ernstige inbreuk op de rechtsorde oplevert, kan de officier van justitie, indien het belang van het onderzoek dit dringend vordert, van degene van wie redelijkerwijs kan worden vermoed dat hij toegang heeft tot gegevens als bedoeld in artikel 126nd, tweede lid, derde volzin, deze gegevens vorderen.</p> <p>(...)</p>	<p>Article 126nf Dutch Code of Criminal Procedure</p> <p>1. In the case of suspicion of a serious offence as defined in section 67(1), which serious offence in view of its nature or the relation to other serious offences committed by the suspect constitutes a serious breach of law and order, the public prosecutor may, if urgently required in the interest of the investigation, request the person, who may be reasonably presumed to have access to the data referred to in section 126nd(2, third sentence), to provide said data.</p> <p>(...)</p>
<p>Artikel 126nh Sv</p> <p>1. De officier van justitie kan, indien het</p>	<p>Article 126nh Dutch Code of Criminal Procedure</p>

<p>belang van het onderzoek dit vordert, bij of terstond na de toepassing van artikel 126nd, eerste lid, 126ne, eerste of derde lid, of 126nf, eerste lid, degene van wie redelijkerwijs kan worden vermoed dat hij kennis draagt van de wijze van versleuteling van de in deze artikelen bedoelde gegevens, bevelen medewerking te verlenen aan het ontsleutelen van de gegevens door de versleuteling ongedaan te maken, dan wel deze kennis ter beschikking te stellen.</p> <p>(...)</p>	<p>1. The public prosecutor may, if required in the interest of the investigation, in or immediately after the application of section 126nd(1), 126ne(1) or (3), or 126nf(1), order the person who may be reasonably presumed to have knowledge of the manner of encryption of the data referred to in</p> <p>these sections to assist in decrypting the data by either undoing the encryption, or providing this knowledge.</p> <p>(...)</p>
<p>Artikel 126ni Sv</p> <p>1. In geval van verdenking van een misdrijf als omschreven in artikel 67, eerste lid, dat gezien zijn aard of de samenhang met andere door de verdachte begane misdrijven een ernstige inbreuk op de rechtsorde oplevert, kan de officier van justitie, indien het belang van het onderzoek dit dringend vordert, van degene van wie redelijkerwijs kan worden vermoed dat hij toegang heeft tot bepaalde gegevens die ten tijde van de vordering zijn opgeslagen in een geautomatiseerd werk en waarvan redelijkerwijs kan worden aangenomen dat zij in het bijzonder vatbaar zijn voor verlies of wijziging, vorderen dat deze gegevens gedurende een periode van ten hoogste negentig dagen worden bewaard en beschikbaar gehouden. De vordering kan niet worden gericht tot de verdachte.</p> <p>(...)</p>	<p>Article 126ni Dutch Code of Criminal Procedure</p> <p>1. In the case of suspicion of a serious offence as defined in section 67(1), which se</p> <p>rious offence in view of its nature or the relation to other serious offences committed by the suspect constitutes a serious breach of law and order, the public prosecutor may, if urgently required in the interest of the investigation, request the person who may be reasonably presumed to have access to specific data which at the time of the request is stored in a computerised device or system and which may be reasonably presumed to be particularly susceptible to loss or change, to store this data and keep it available for a period of maximum ninety days. The order may not be directed to the suspect.</p> <p>(...)</p>

* Non-official translations.

ELSA NORWAY

Contributors

National Coordinator

Asbjørn Tobiassen Øi

National Academic Coordinator

Ronni Fawaz Knudsen

National Researchers

Julianne Thunes Vangsnes

Cilje Marie Stray

Ellen Xylander Skaug

Marius Mikkjel Kjølstad

Hana Temsamani

1. Introduction

Before we answer any of the questions a short introduction to Norwegian legal method is in our view appropriate as it differs from the legal method you might find outside of Europe's most northern countries.

Norwegian provisions normally have a brief and concise wording that is suited to have a wide meaning. The content of the wording is traditionally determined and established by the provision's preparatory works, case-law, international legal obligations, legal customs etc.

Case-law has a fundamentally important role in interpreting and establishing the meaning of the words in the provisions. It is therefore essential to explore case law when explaining the provisions that regulate the protection of journalistic sources in Norwegian legislation. It is the Norwegian Supreme Court's responsibility to ensure clarification of the law's meaning and to ensure legal development. The Supreme Court's decisions are therefore a far weightier legal source than subordinate court's decisions.

2. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

2.1. The content of Norwegian provisions of law

Norwegian legislation does not contain protection for the right of the journalist in particular, but it does provide protection for the press' right not to disclose their sources in general. Journalistic sources are included in this protection. There are provisions in both constitutional law and criminal procedural law that provide protection of this right, and there is also rules and guidelines for the press in The Code of Ethics of the Norwegian Press.

2.2. The Code of Ethics of the Norwegian Press

The Norwegian press follows a self-imposed code that regulates ethics and guidelines for the Press' work and role in the society. The code is enacted by The Norwegian Press Association, and it applies to printed press, radio, television and online publications.

In the code's section 3.5 it is stated that the name of a person who has provided information on a confidential basis shall not be divulged, unless the person concerned has explicitly given consent.¹ This protection of a source is absolute and there is a complaints commission to

¹ The Code of Ethics of the Norwegian Press 3.5.

enforce the rules. This commission is called the Norwegian Press Complaints Commission, and individuals, companies and organisations may file complaints if a journalist breaks the code by disclosing the name of a source against this person's will.

Not only does the code protect the right not to disclose journalistic sources, but it also provides possibilities of sanctions towards journalists and other press agents that do not respect it.

2.3. Constitutional law

The right to freedom of expression is anchored in the Norwegian constitution, "Grunnloven" § 100. The constitution's wording is interpreted in light of the social development and the essence § 100 is that it states that there is a right to freedom of expression. The constitution's wording has a very wide extent, and it is as mentioned tradition in the legal system that the content of the Norwegian legislation is determined and established by case law.

The constitution's § 100 states in its first paragraph that there is a right to freedom of expression. In the next five paragraphs it concretizes this right and in which situations the right is to be restricted. In the second paragraph it is explicit stated that no one can be held legally responsible for having communicated or received information, ideas or messages, unless it is justifiable when held up against the considerations behind the right to freedom of expression. It also states that legal responsibility should be prescribed by law.

The paragraph does not give a specific expression of the right for journalists to not disclose their source of information, but this is a right that can be interpreted into the wording. The phrase stating no one can be held legally responsible for having communicated or received information may also work as a legal basis to argue that the press have a right not to disclose their source of information, since the press can't be held legally responsible for receiving or communicating this information. The freedom of the press is a part of the freedom of speech, anchored in the constitution. As mentioned above, Norwegian laws have a very wide and extensive wording, but how it is to be understood is determined through interpretations. It may be necessary to examine case-law to understand the meaning behind the words.

2.4. Criminal law

When it comes to criminal law, the rights for the journalists not to disclose their source of information, is specifically expressed. Initially, there is an obligation to testify for someone that is summoned to testify for the court. This obligation is stated by the criminal procedure act ("straffeprosessloven") § 108.²

However, if a journalist is summoned as a witness, the right to remain silent is enshrined in the criminal procedure act § 125.

² Lov om rettergangsmåten i straffesaker (1981) § 108

2.4.1. The right to remain silent

The provision in § 125 states that the editor of a printed publication may refuse to answer questions regarding the identity of an author of an article or message in a publication, or the source to information in it.³ The same applies for questions regarding the identity of a source for other information entrusted in the editor to use in their work.

The right to refuse to answer these questions also applies to others that have received knowledge of the author's or source's identity through their work for the same publisher, editorial, press agency or printing house.

In the Norwegian hierarchy of legal sources, the provisions in the law is the weightiest legislation. Initially, the main rule is therefore that journalists have a right to remain silent when asked questions regarding the sources of their information.

However, the third paragraph in the criminal procedure act § 125 regulates exceptions from this right. These exceptions will be in part 2; provisions that prohibits a journalist from disclosing his or her sources.

2.4.2. Status as charged

Another situation that provides a journalist with the right to refuse to disclose his or her sources is where a journalist is charged with accusations of defamation. The same right applies to editors. In Norwegian criminal law, the status as charged in a crime gives the right to remain silent and not answer any questions. This is expressed in the criminal procedure act § 90.

If the charges are against someone other than an editor or journalist, the provision in § 125 states that there is a right for editors of printed publications to be exempt from the duty to testify against this person in criminal cases. The editor may refuse to answer questions about who has written an article or message or who has been a journalistic source or given information about it. In Norwegian criminal law, an editor is understood as a person who decides the content of a printed publication. This definition is found in the criminal law, "straffeloven" § 270. The same applies for questions regarding sources to information entrusted in the editor for usage in the editor's business. The right to exempt also covers others that have acquired knowledge of these sources through their work for publishers, editorial offices, press agencies or printing houses.

2.4.3. Case-law

The Norwegian Supreme Court considers the extent of the right to not answer questions about an author's identity in the decision "*Runestein-dommen*" (2010)⁴. The case concerned an order to

³ Lov om rettergangsmåten i straffesaker (1981) § 125

⁴ Rt-2010-1381

disclose evidence, and the main question was if the publisher of an online newspaper could refuse to disclose its evidence with reference to the protection of sources in the criminal procedure act § 125.

The local police had ordered the online newspaper to disclose an anonymous author of a post on the online newspaper's webpage. The post contained a claim that the author illegally kept and sold a stone that was considered a cultural heritage.

The police demanded that the newspaper disclosed the IP-address and user details of the author. They argued that the protection of sources derived by § 125 did not cover the author's post because it could be viewed as a sales ad.

The Supreme Court disagreed with the police, and pointed out that the post could not be compared with a sales ad. This was because the main content was criticism of the legislation and regulations regarding private individuals' discovery of cultural heritage monuments. The court concluded that the post was covered by the protection from § 125.

The next issue the court had to consider was whether the case could be covered by the exception in the third paragraph in § 125. This exception prohibits protection of sources in particular cases. The assignment will return to this part of the decision in part 2.2.3.

3. Is there, in domestic law, a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

3.1. Law

In Norwegian law, not disclosing a journalistic source is formulated as a right for the journalists, but not a duty. There are not any provisions of law that clearly states a duty of confidentiality or imposes legal responsibility for breaking the duty of confidentiality.

The criminal act § 268 contains a provision that makes an editor legally responsible for the contents of published material. The law states that publishing confidential information is punishable, but the actions need to violate other provisions of law to be affected by the provision. Since there is no law that specifically states that a journalist has a duty not to disclose his or her sources, this specific action would not be punishable in light of the criminal act.

3.2. The Code of Ethics of the Norwegian Press

The fact that Norwegian law does not contain provisions that prohibits a journalist from disclosing sources, that does not mean that they are free to do so. As explained in the previous question, the Norwegian press follows a self-imposed code of ethics for the Press' work and role in the society.

The previous question also explained how this code contains a guideline in section 3.5 that says that the name of a person who has provided information on a confidential basis shall not be divulged, unless the person concerned has explicitly given consent.

3.3. Sanctions

The Code of Ethics of the Norwegian Press is absolute, and it is very unusual for the press to violate the code. As mentioned the Norwegian Press Complaints Commission enforces the provisions of the code. However, violations are not imposed with fines or other punishments. The sanctions are strictly restricted to reprimands and may be damaging to the professional reputation of the journalist or editor. A public apology to the people affected by the violation may also be ordered.

The reason that there are not more intrusive sanctions is that it has not been regarded necessary as most journalists have great respect for the Code of Ethics. Still, there is an ongoing discussion whether the Norwegian Press Complaints Commission should have authority to impose fines as a sanction to violations of the code. The main argument against this is that legal provisions and the ethical guidelines should be kept separated, and it needs to be decided by the “Storting”, the Norwegian parliament, and prescribed by law if fines are going to be imposed.

4. Who is a “journalist” according to the national legislation? Is it, in your view, a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media actors? Is the protection of journalists’ sources extended to anyone else?

4.1. Introduction

In the national legislation, the protection of journalistic sources is found in the two central Procedure Acts, the Norwegian Dispute Act for civil cases and the Norwegian Criminal Procedure Act for criminal cases. In the following, the sources will be presented, regarding only the definition of what the provisions aim to protect. Leaving out the following paragraphs, which explains the procedure when the Court decides to order the evidence presented, or the source revealed. This will be presented under Question 4.

4.2. National legislation

4.2.1. The Norwegian Criminal Procedure Act, Article 125

From the Norwegian Criminal Procedure Act (1981), Article 125, first and second paragraph:
“The editor of a printed publication may refuse to answer questions concerning the identity of the author of an article or report in the publication or the source of any information contained in it. The same applies to questions concerning who is the source of other information that has been confided to the editor for use in his work.

Other persons who have acquired knowledge of the author or the source through their work for the publishers, editors, press agency or printers in question have the same right as the editor.”

4.2.2. The Norwegian Dispute Act, Article 22-11

The Norwegian Dispute Act (2005) article 22-11, includes a parallel provision for civil cases.

Article 22-11 Exemption from the duty to provide evidence for the mass media – protection of sources.

“The editor of a printed publication may refuse to provide access to evidence about who is the author of an article or report in the publication or the source of any information contained in it. The same applies to evidence about who is the source of other information that has been confided to the editor for use in his work. Other persons who have acquired knowledge of the author or the source through their work for the publishers, editors, press agency or printing office in question have the same right as the editor.”

4.3. Terms in use in the legislation

4.3.1. The term “editor”

The “editor of a printed publication” is mentioned in both provisions. The ordinary meaning of the terms, therefore gives the editor of any newspaper, magazine, publication in paper or on the Internet these rights. The provision in both the Criminal Procedure Act and the Dispute Act are clear about the right not to disclose sources in the editor’s publication.

As the second sentence states, this right is also for information “that has been confided to the editor for use in his work”. According to the preparatory works (NOU 1969:3 page 207) of the Criminal Procedure Act, this sentence was added due to a request from the Norwegian Press Association. They wanted the protection to be not only for the “printed publication”, but also for the information the editor or journalists have before the publication is “printed”.

4.3.2. The term “other persons”

According to the second paragraph in Article 125 and the last sentence in Article 22-11, the right is not only for the editor. The Criminal Procedure Act and the Dispute Act also includes “Other persons” who have acquired knowledge of the author or the source through their work. According to the paragraphs, they have the “same right as the editor”.

These “other persons” are not defined in any further way, but the provision lists the ways persons can be affected, through their work for “the publishers, editors, press agency or printers”. The provisions therefore do not attempt to define what a “journalist” is, but they have a knowledge-based rule that gives protection for those who work as journalists, and also other people who work in the press.

It is therefore not dependent whether or not a person works as a journalist, but if they have “acquired knowledge ... through their work”. This gives journalists working for or with a “printed publication” clear protection.

4.3.3. The term “printed publication”

To illustrate the meaning of a “printed publication” in the sense of the provision in the Article 125 of the Criminal Procedure Act, is a decision from the Supreme Court about whether or not this also includes a published book.

In the decision found in Rt. 1992 s. 39 “Edderkoppen” (The spider), two journalists had published a book about the Norwegian Surveillance Service. The Control unit of the Surveillance Service confronted the authors and wanted them to reveal their sources. They refused, claiming it was under the protection of journalistic sources, and protected by the elder Civil Procedure Law (from 1915), Section 209a (Now Section 125 in the Criminal Procedure Act).

The Supreme Court deliberated on whether the Section 209a only would apply for the editor of a paper or magazine. As the ordinary meaning given to the terms of the provision appeared to only apply for the editor, the wording presumes to not give that opportunity. But the Supreme Court extended the reach of the protection given by this article due to development of the press. On page 48 in the verdict justice Lødrup says the following: “I find it natural to understand this so that it is the very journalistic work that should be protected. It should, therefore, not be essential if the journalist in the specific case can be said to have acted on behalf of a newsroom. This provision should in my opinion be understood in such a way as that the individual press employee is given an independent right to protect their sources.” The court concluded that the journalist had the right not to reveal their sources.

According to this decision, the protection is not only for “printed publications” but also for a book, in this case. The interpretation was beyond the natural meaning of the term in Section 209a, but the book “Edderkoppen” and the authors were in a special position, according to the Supreme Court. As they are two journalists who are also authors, their book can be viewed as another way to present what would else be an article in a printed publication. Therefore, the interpretation of this decision cannot be that all books are under this protection. But it is a clear statement that authors, who feel the need to protect their sources when they are speaking up about critical conditions in the society, have the right to do so.

A later decision, which also gives insight to the Supreme Court’s interpretation the extent of what the provision applies for, is found in Rt. 2010 s. 1381. A man published a commentary on an article at an Internet debate forum, claiming he had found a rare rune stone. The Supreme Court found that posts from readers on the debate forum linked to articles on websites such as this one, had the same protection of sources, as the website was under an editor’s control and responsibility. In this case, an editor, or his deputy, was constantly supervising the posts, and therefore they can be viewed as under an editor’s responsibility.

The earlier “Edderkoppen” case is mentioned in paragraph 20, as Judge Normann writes, “the assessment of Section 125 must be secured in a long-term perspective, according to Rt. 1992 s.

39". With this, he means that the reach of the provision is constantly developing, and when assessed, must be viewed in this "long-term perspective". Now, therefore, it would be natural to include Internet pages where the content is journalistic. This decision shows that the reach of the protection is beyond "printed" publications in hard copy, but also applies for pages on the Internet.

5. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

5.1. Introduction

In the following, the paragraph of Section 125 in the Criminal Procedure Act will be presented, as it is parallel to the one in the Dispute Act. The Norwegian legal method will also be presented shortly, when it comes to how the law is interpreted by judges, and implemented. After that, an explanation of how the media is self-regulatory combined with the legal safeguards will be given.

5.2. Legal safeguards

5.2.1. Presentation of the legal safeguards

The main legal safeguards for the protection of journalistic sources are the two mentioned Sections in the Criminal Procedure Act (1981) and the Dispute Act (2005).

In the Criminal Procedure Act, Section 125, the third and fourth paragraph explains how the procedure is to be followed in court. It shows that the demand for any order of disclosure is to be reviewed by the court, an independent judicial body.

Section 125, third-fifth paragraph:

"When important social interests indicate that the information should be given and it is of substantial significance for the clarification of the case, the court may, however, on an overall evaluation order the witness to reveal the name. If the author or source has revealed matters that it was socially important to disclose, the witness may be ordered to reveal the name only when this is found to be particularly necessary.

When an answer is given, the court may decide that it shall only be given to the court and the parties at a sitting in camera and under an order to observe a duty of secrecy.

The provisions of this section apply correspondingly to any director or employee of any broadcasting agency."

5.2.2. Relevant terms of the legal safeguards

The court must first determine whether "important social interests" indicates that the "information should be given", and it must also be "of substantial significance for the clarification of the case". This means that the court first has to find out if the information is

sufficiently relevant to the. It also has to be of “important social interests”, indicating a threshold for the court to order the disclosure of the source.

If these terms are fulfilled, the court “may” order the witness to reveal the name, after an “overall evaluation”. As the section is formulated, it is up to the court to make the evaluation. They have to decide which interests are more important in the case presented to them, the protection of sources or the social interests.

5.2.3. The legal safeguards in the context of legal method

Any further information about how to decide this is not found in the provisions, but the preparatory works and the rulings of the Supreme Court on the matter are other legal sources that weigh in. In accordance with Norwegian legal method, the ordinary meaning given to the terms of the provisions will always be the starting point. But as Norwegian provisions often are written in a short, and sometimes ambiguous, way the judges have to go through more legal sources than just the provision itself to find the legal rule.

In this case, preparatory work and former rulings from the Supreme Court are good sources to look at, as they are more in depth and more precise than the short provisions. This will help judges to define the right enshrined in the provision. They use said legal sources combined with the terms in the provision, to find the legal rule, on how to implement the legal safeguards.

5.3. Self-regulatory mechanisms

5.3.1. Overview

The legal safeguards are combined with self-regulatory mechanisms. There are two main bodies, which are non-governmental, that regulate the press. They receive complaints from the people and make statements. They also have breaching parties edit their work so it is in accordance with the bodies' own rules. The main body is the Norwegian Press Association and their Norwegian Press Complaints Commission. There is also a Broadcasting Council (Kringkastingsrådet), which is an advisory board of the Norwegian Broadcasting Corporation (“NRK”).

Other relevant organisations are the Norwegian Union of Journalists, and the Association of the Norwegian Editors, which have their own “Rights and duties of the editor”-declaration.

5.3.2. The Norwegian Press Association

The Norwegian Press Association has its own Code of Ethics of the Norwegian Press (Vær varsom-plakaten), which applies to printed press, TV, radio and internet publications. This includes “The Role of the Press in the society”, hereunder “Integrity and credibility”, “Journalistic Conduct and Relations with the Sources”, and “Publication rules”.

The Code of Ethics is written in a clear and precise way, stating in Section 1.1 that freedom of speech, information and press are the basic elements of a democracy. From there it gives thorough and precise information about the responsibilities of an editor, on advertisement,

choice of sources, when and how to protect sources and rules for publishing different kinds of information.

The Norwegian Press Complaints Commission is the complaints commission of the Norwegian Press Association. Their vision is to watch over, and promote the standard stated in the Code of Ethics. They assess complaints and publicly publish their reports. They received 500 complaints in 2015, and confirmed 65 cases as breaches of their ethics code.

This is an example of how the press is self-regulatory, as the press itself controls and gives statements about what is in breach with good journalistic work. The party in breach of the ethics code must publish a clearly visible statement in their own “media”.

5.3.3. How legal safeguards and self-regulatory mechanisms combine

The legal safeguards combine well with the self-regulatory mechanisms. The reason is that the legal safeguards in the Dispute Act (2005) are only activated when someone is sued. The legal safeguards in the Criminal Procedure Act (1981) are only activated when someone is charged with a criminal offence.

In other cases, the Press Complaints Commission receive complaints about possible breaches to the press' own Code of Ethics. The same is for the Broadcasting Council. Therefore, the press is self-regulatory when it's held outside of the court.

6. In the respective national legislation, are the limits of non-disclosure of the information in line with the principles of the Recommendation No R (2000)7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

6.1 Introduction

This chapter provides a comparative study of the Norwegian legislation in light of the Recommendation No R (2000) 7 of the Committee of ministers of the Council of Europe with regards to the limits of source protection.

The Recommendation No R (2000) 7 (hereinafter the “Recommendation”) reinforces and supplements the principles established by the European Court of Human Rights (hereinafter “ECtHR”) in its judgment *Goodwin v. the United Kingdom* (hereinafter Goodwin).⁵ The judgment forms a precedent for the interpretation of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the “Convention” or “ECHR”).

“Protection of journalistic sources is one of the basic conditions for press freedom....Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention, unless it is justifiable by an overriding requirement in the public interest”, cf. Goodwin.⁶

This quotation makes clear that Article 10, devoted to “Freedom of expression”, protects the right of journalists not to disclose their sources⁷, and that this protection is not absolute.⁸

6.2 Principle 3 (Limits to the right of non-disclosure)

Principle 3 of the Recommendation requires that the right of non-disclosure “must not be subject to other restrictions than those mentioned in Article 10 paragraph 2 of the Convention.” Accordingly, the authorities may validly interfere with the right to freedom of expression, if the interference is prescribed by law and is necessary in a democratic society for the legitimate aim pursued.⁹ Article 10 paragraph 2 lists the legitimate aims. Among them: Prevention of disorder or crime; protection of the rights of others.¹⁰ Hence, paragraph 2 “shapes the framework for balancing the freedom of expression as a fundamental human right with other human rights and freedoms.”¹¹

Principle 3 b. of the Recommendation outlines a series of “checks and criteria” which must be considered in the balancing test.¹² In example: disclosure should not be deemed necessary unless it can be *convincingly established* that *reasonable alternative measures do not exist or have been exhausted* and that *the legitimate interest in disclosure clearly outweighs the public interest*. A disclosure may only be ordered if circumstances are of a *sufficiently vital and serious nature*, and the necessity of the disclosure responds to a *pressing social need*.¹³ Competent authorities shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law of

⁵ Explanatory Memorandum to Recommendation No. R (00) 7, section I, para. 4.

⁶ ECtHR *Goodwin v. The United Kingdom*, 27 March 1996 (17488/90), para. 39.

⁷ Rt. 2013-1290 section 25.

⁸ Dirk Voorhoof. The protection of journalistic sources: Recent developments and actual changes, section 1 and 2.

⁹ *Ibid.*

¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10, para. 2

¹¹ Dirk Voorhoof, The protection of journalistic sources: Recent developments and actual changes (2002), section 1 and 2.

¹² Explanatory Memorandum to Recommendation No. R (00) 7, section II, para. 26.

¹³ Recommendation No. R (2000) 7, Principle 3.

ECtHR when balancing these rights, and may only order a disclosure *if there exists an overriding requirement in the public interest*, cf. Goodwin.¹⁴

The Recommendation states that member states enjoy a certain margin of appreciation in assessing the pressing social need.¹⁵ In other words, the ECtHR must take into account cultural, ideological or legal differences between the member states when evaluating whether a breach of the convention has taken place.¹⁶ This national margin of appreciation is in the case of source protection “circumscribed by the interest of a democratic society in ensuring and maintaining a free press”, cf. Goodwin, section 40. In this respect, the Recommendation provides a European consensus and “a basis for common European minimum standards concerning the right of journalists not to disclose their sources of information”.¹⁷ The Recommendation does not prevent member States from introducing a higher protection of the sources in their legislation.¹⁸ The object in the following is to examine if the level of protection in the Norwegian legislation is in line with the Recommendation as outlined above.

6.3. Norwegian legislation

6.3.1. Source protection

Source protection is secured under The Criminal Procedure Act section 125 paragraphs 1 and 2 for criminal cases and under the Dispute act section 22-11 paragraphs 1 and 3 for civil cases.¹⁹ The general rule is that journalists are not obliged to disclose their confidential journalistic sources. The provisions states that the editor and other media workers may refuse to provide access to evidence about the identity of their sources.^{20 21} This means that in circumstances where evidence can identify confidential journalistic sources, journalists are exempted from the otherwise civic duty of providing evidence before the court.²² The right of non-disclosure is furthermore shielded under the Constitution of Norway section 100, devoted to freedom of

¹⁴ Recommendation No. R (2000) 7, Principle 3 and Explanatory Memorandum to Recommendation No. R (00) 7, section II, para. 28.

¹⁵ Recommendation No. R (2000) 7, Principle 3.b.

¹⁶ Ina Lindahl, *Massemedienes kildevern en lærebok* (2009), page 39.

¹⁷ Explanatory Memorandum to Recommendation No. R (00) 7, section I para. 4-5.

¹⁸ Explanatory Memorandum to Recommendation No. R (00) 7, section I para. 7.

¹⁹ References in this paper will be made with the wordings of The Dispute Act 22-11. The Criminal Procedure Act 125, is identical in substance.

²⁰ The Dispute Act, section 22-11, para.1. “The editor of a printed publication may refuse to provide access to evidence about who is the author of an article or report in the publication or the source of any information contained in it. The same applies to evidence about who is the source of other information that has been confided to the editor for use in his work”.

²¹ The provisions protect confidential sources in both publicised and unpublicised material, and governs both court orders of disclosure and force measures like judicial search and seizure cf. Rt. 2015-1022 section 67. Both the name of a source and information that can lead to identification of the source are protected, cf. Rt-1995-1166. Hence not all information from the source is protected cf. NOU 2009:15, p. 332.

²² The duty to witness and give evidence in court is regulated by the Criminal Procedure Act section 108 and the Dispute Act section 24-1.

expression²³; and protected under Article 10 of the ECHR, incorporated into the Norwegian legislation in 1999. The Convention will in circumstances of conflict, precede other Norwegian jurisdiction with exception of the Lex superior Constitution of Norway.²⁴ The Code of Ethics of the Norwegian press states an absolute protection of confidential sources.²⁵ The judicial system does not give this absolute right. Source protection can be limited under certain conditions.

6.3.2. Limits of source protection

Exemption from source protection is regulated by the Criminal Procedure Act section 125 paragraph 3 and the Dispute Act section 22-11 paragraph 2;

“If important public interests require that evidence [...] is presented and it is of considerable importance to the clarification of the case, the court may nevertheless, based on an overall assessment, order the evidence to be presented or the source to be revealed. If the author or source has discovered circumstances that it is in the public interest to publicise, such an order may only be made if it is particularly necessary for the name to be publicised.”²⁶

6.3.2.1. First term, “important public interests”

The first sentence establishes the general rule and poses two basic terms. Firstly, disclosure must be required by “important public interests”. According to the preparatory work, the term “public interest” does not only refer to the vital interests of the public and of the state, but also to general and social interests of the society.²⁷ In many cases, the public might have an interest in protecting the rights of others,²⁸ like every individual’s right to a private life, peace, reputation and honour. The preparatory work refers in this respect in particular to the rights provided in Article 8 of the Convention and in Article 17 of the International Covenant on Civil and Political Rights.²⁹ The limits of non-disclosure will subsequently be dependent on whether the “public interest” in the given case is found to have sufficient weight.³⁰

6.3.2.2. Second term, “clarification of the case”

²³ Subsequent to the Constitutional revision in 2004.

²⁴ Act relating to the strengthening of the status of human rights in Norwegian law [The Human Rights Act] section 3.

²⁵ Code of Ethics of the Norwegian Press adopted by the Norwegian Press Association June 13. 2015. 3.4. Section 3.5 “Do not divulge the name of a person who has provided information on a confidential basis, unless consent has been explicitly given by the person concerned”.

²⁶ The Dispute Act section 22-11 para.2

²⁷ Ot.prp.nr 55 (1997-98), p. 24 and Ina Lindahl, *Massemedienes kildevern en lærebok*, 2009, p.110.

²⁸ Cf. ECHR Article 10 para. 2 “the protection of the reputation or rights of others”.

²⁹ Ot.prp.nr 55 (1997-98), p. 24.

³⁰ *Ibid.*

Secondly, disclosure must be “of considerable importance to the clarification of the case”. According to the preparatory work this is intended as an absolute condition for requiring the name of sources.³¹ This means that if “the same public interests can be adequately preserved in another way than by exemption from mass media’s source protection”, like through alternative investigation measures in criminal cases, a disclosure-order cannot be imposed.³² In the case of Rt. 2002-489 the term was considered fulfilled although no investigation was undertaken prior to the disclosure-order. This ruling has received criticism on this point.³³ The Supreme Court has later affirmed, in several rulings, the absoluteness of the term regarding alternative measures. In Rt. 2004-1400 section 41, the Supreme Court stated that there was no doubt the term was met; “SEFO [The Special Police Investigation Commission] has carried out a number of interrogations and has also attempted other measures, without bringing the investigation closer to a clarification.” In Rt. 2013-1290 section 24, the term was met based on the fact that the police investigation stood deadlocked. The term was also met in Rt. 2010-1381 section 50. The judge pronounced: “I can hardly see that it exists alternative and practically feasible steps of investigation”. In sum, the limits of non-disclosure will be dependent on which other sources of information that exist to clarify the case.³⁴

“If both terms [required by “important public interests” and “considerable importance to the clarification of the case”] are fulfilled, the court may after a concrete assessment make an exemption from the source protection.³⁵ Reference can here be made to the correlating standards of the Recommendation Principle 3: A disclosure can only be ordered if it can be convincingly established that “the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure...”, and that “reasonable alternative measures to the disclosure do not exist or have been exhausted...”.

6.3.3. “The overall assessment”

The direct effect of the ECHR in Norwegian jurisdiction entails an obligation for the Supreme Court of Norway to secure source protection in accordance with the case-law of the ECtHR³⁶ with particular regard to the Goodwin- case;³⁷ and interpret the Norwegian provisions narrowly in light of Article 10 of ECHR.³⁸ This is also asserted in case-law. “If the basic terms in Section 125, third paragraph, to make an exemption from the protection of sources are fulfilled, the various interests must be weighed, and the assessment must be made in accordance with Article 10 of ECHR and ECtHR’s practice...the key aspect is that the protection of sources can only be

³¹ Ibid.

³² Ina Lindahl, *Massemedienes kildevern en lærebok* (2009), p. 119.

³³ Ibid p. 120.

³⁴ Ibid p. 119.

³⁵ Rt. 2010-1381 section 49.

³⁶ Dirk Voorhoof, *The protection of journalistic sources: Recent developments and actual changes* (2002), section 3.

³⁷ Cf. Rt. 2004-1400 section 46.

³⁸ Ina Lindahl, *Massemedienes kildevern en lærebok* (2009), p. 126.

waived if there is an “overriding requirement in the public interest”, cf. Rt. 2015-1022 section 67. Consequently, the “overall assessment” correlates to the balancing test of the ECtHR.

In line with the Recommendation, the Supreme Court pays particular regard to the importance of the right of non-disclosure. “The essential public interest the source protection provisions aim to protect is media’s dissemination of news and free dissemination of opinions. This must therefore be the starting point of the evaluation after the third paragraph”, cf. Rt. 2010-1381 section 52. In the evaluation, the court weighs the various interests against the interest of source protection. Factors of importance in the weighing are set out in the preparatory work and in case-law. Depending on the case in question, the court shall give special consideration to the chilling effect of a disclosure-order, the nature of the case, the extent to which the information has public interest, the seriousness of the matter or crime in question, considerations that speak for an efficient prosecution of a crime.³⁹

The Criminal Procedure Act section 125 paragraph 3 and The Dispute Act section 22-11 paragraph 2, introduces a special rule in sentence two:

“If the author or source has discovered circumstances that it is in the public interest to publicise, such an order may only be made if it is particularly necessary for the name to be publicised.”

This special rule has not yet been applied by the Supreme Court.⁴⁰ The general rule of sentence one, examined above, has so far proved sufficient to determine the limits of non-disclosure. The intention of the special rule is to further strengthen source protection for information that it is in the public interest to publicise; typically, the watchdog journalism that exposes information of public interest, like misuse of public authority.⁴¹ The special rule is dependent on the fulfilment of all the terms in the general rule.⁴² It is held in the preparatory work and case-law that for information “it is in the public interest to publicise”, whether balancing the rights after the general rule or the special rule, “the protection of sources to a large extent is absolute. Otherwise it must exist “an overriding requirement in the public interest” in order for sources to be waived, cf. Rt. 2010-1381 section 61, cf. Rt. 2004-1400 section 46, cf. Rt. 2015-1022 section 67. Where the information is of no public interest, the threshold for waiving sources is lower.⁴³ If the court is left in serious doubt, subsequent to evaluating any of the terms, the ruling shall fall out in favour of source protection, in line with the principles behind ensuring a free press in a democratic society.⁴⁴

6.4. Case-law

³⁹ Ot.prp.nr 55 (1997-98), p. 25 and Ina Lindahl, *Massemedienes kildevern en lærebok* (2009), p.128-129.

⁴⁰ Ina Lindahl, *Massemedienes kildevern en lærebok* (2009), p.121.

⁴¹ NOU 1988:2 p.20

⁴² Ina Lindahl, *Massemedienes kildevern en lærebok* (2009), p.121.

⁴³ Ot.prp.nr 55 (1997-98), p. 24.

⁴⁴ Ot.prp.nr 55 (1997-98), p. 25 also cited in Rt. 2010-1381 section 56 and Rt. 2015-1022 section 42.

Case-law has developed and established the limits of source protection in Norway. In particular, four cases have contributed to establishing the current limits of non-disclosure in Norwegian legislation in line with the case-law of ECtHR and the Recommendation No R (2000) 7. These four rulings of the Supreme Court all make a clear foundation for their overall assessment in the *Goodwin* case; and pay particular regard “to the importance of the protection of journalistic sources for press freedom in a democratic society”⁴⁵, cf. Rt. 2013-1290 section 25 (police confidentiality, police corruption), Rt. 2010-1381 section 58 (criminal offence), Rt. 2004-1400 section 43 (police confidentiality), Rt. 2015-1022 section 67 (major crime). The rulings, furthermore, pay particular regard to “the potentially chilling effect an order of source disclosure has on the exercise of that freedom”⁴⁶ and the pre-eminence given to non-disclosure in the case-law of ECtHR, cf. *Goodwin*, cf. the Recommendation principle 3. Two of the four cases will be presented in the following.

6.4.1. Rt. 2015-1286, The *Rolfsen* case

Concerning protection of sources in unpublished documentary film material about the ISIS-network; seizure by the PST (Police Secret Service) in unpublished film material of Norwegian film maker Ulrik Imtiaz Rolfsen.

6.4.1.1. *Conflicting interests*

The prevention of major crime, namely recruitment of fighters to the Islamic State (ISIS) terrorist network weighed against protection of journalistic sources.

6.4.1.2. *Court assessment*

The Supreme Court made a direct reference to the Explanatory Memorandum to the Recommendation No. R (2000) 7 and its list of examples of “major crimes”. It confirmed that crimes under anti-terror legislation fall within this list, and that there could be a reason to make an exemption from source protection. The documentary film gave insight into the ISIS terrorist network and hence was “at the heart of investigative journalism”, cf. section 70. The project was made possible only because of the trust between the filmmaker and the source. The sources had withdrawn subsequent to the seizure, and the court assumed that “effective protection of sources is vital to achieving the film...On this basis an especially strong need to protect sources exist” cf. section 70-71, cf. the chilling effect. The Supreme Court furthermore held that “considerations relating to investigation of such a serious matter also carry great weight”, cf. section 71. The criteria of “important public interest” was fulfilled. The court found it hard to see that the condition “of vital significance to the clarification of the case” was fulfilled.

⁴⁵ ECtHR *Goodwin v. The United Kingdom*, 27 March 1996 (17488/90), para. 39.

⁴⁶ *Ibid.*

6.4.1.3. *Ruling*

The court unanimously ruled that the seizure was to be set aside. The ruling illustrates that the threshold for waiving sources is remarkably high. The interest of counter-terrorism investigation was not sufficient to outweigh the interest of non-disclosure. It is presumed in the preparatory work, that the terms of the overall assessment in general must be heaved in times of crisis, public state of emergency and in times of war.⁴⁷ This ruling shows, contrary to this presumption, that freedom of expression was not sacrificed in 2015 – a time when the world had declared war against terror.

6.4.2. Rt. 2013-1290, The *Brennpunkt* case

The news desk of NRK Brennpunkt, an investigative journalism show on NRK TV, was offered to buy secret documents from the criminal investigation of the case of Anders Behring Breivik⁴⁸. The documents were leaked from someone within the police to the source who offered it to the desk. NRK Brennpunkt declined the offer. The Norwegian Bureau for the Investigation of Police Affairs filed a motion of disclosure of the source, directed at the managing editor of the desk.

6.4.2.1. *Conflicting interests*

Revelation of police corruption and breach of police confidentiality weighed against protection of journalistic sources.

6.4.2.2. *Court assessment*

The terms of “important public interest” and “of considerable importance to the clarification of the case” were both met. The court made a direct reference to the Explanatory Memorandum to the Recommendation No. R (2000) 7 and its list of examples of “major crimes” that possibly can justify source disclosure; the examples being murder, manslaughter, severe bodily injury, crimes against national security or serious organised crime.⁴⁹ The court declared that “police corruption” and “breach of confidentiality” were not mentioned, and stated that even though the list just cites examples, “it still provides an indication as to where the bar normally should be set...the activities of concern to the investigation of the case are less serious than the examples cited”, cf. section 32. Accordingly, the interests of revealing police corruption and confidentiality breach, although given considerable weight, did not outweigh source protection, “on the basis of the strict terms that apply to making exemptions from source protection”, cf. section 36. The court

⁴⁷Ot.prp.nr 55 (1997-1998) p. 27.

⁴⁸ Anders Behring Breivik, the perpetrator of the 2011 Norway attacks.

⁴⁹ Explanatory Memorandum to Recommendation No. R (00) 7, section II, para. 40.

underlined that the case had raised “a difficult question of balancing, where two important objectives stand against each other”, cf. *ibid*. In the concrete assessment great emphasis was placed on the potential chilling effect of a disclosure, and weight was given to the fact that the journalist had refused the offer to buy the documents. The court also found it unlikely that the source, upon a disclosure, would reveal the name of the leaking police officer and stated: “the more certain it is that the name of the source will lead to clarification, the bigger the reason would be to make exemption from the protection of sources”, cf. section 33.

6.4.1.3. *Ruling*

The court unanimously ruled on non-disclosure. The ruling affirms the high threshold for accepting sources to be waived, and illustrates how the Supreme Court of Norway accentuates the Recommendation, the Explanatory Memorandum and ECtHR case-law in its assessments. The Supreme Court gave weight to arguments concerning prevention of police corruption and confidentiality breach, but did not refer to the possible legitimate aim of “preventing the disclosure of information received in confidence” of Article 10 paragraph 2 of the Convention⁵⁰. The assessment of the court was grounded solely on the narrower list of possibly legitimate aims as set forth in the Explanatory Memorandum. This furthermore illustrates that the Supreme Court makes direct use of the Explanatory Memorandum and its recommendations for a narrow interpretation of Article 10 of the Convention in relation to protection of confidential journalistic sources.⁵¹ Cf. chapter 6.

6.5. History:

The right to protection of journalistic sources was formally implemented in Norwegian legislation in 1951. The formal legislation was revised in 1973, 1981, 1985⁵², 1999 and 2005⁵³, and has been substantially strengthened since 1951.⁵⁴ Since then there has been more than 60 separate cases before the courts with regard to the limits of source protection.⁵⁵ Rarely have journalists been imposed with a court order to reveal their confidential sources. Never has a journalist responded to a court order of disclosure.⁵⁶ This has resulted in two weeks of prison for one editor, cf. Rt. 1953-127.⁵⁷ Fines of 20 000 NOK (2120 EUR) were imposed in Rt. 1987-910 and Rt. 1996-1164 under the Courts of Justice Act section 206. “Where a witness refuses to give evidence or give affirmation and provides no grounds or provides only those grounds that are

⁵⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10, para. 2

⁵¹ Explanatory Memorandum to Recommendation No. R (00) 7, section II, para. 37.

⁵² Revision into force in 1986.

⁵³ Revision into force in 2008.

⁵⁴ Cf. revision of the legislation in Ina Lindahl, *Massemedienes kildevern en lærebok* (2009), p. 63-67.

⁵⁵ List of source protection cases in Norway 1951-2009, in Ina Lindahl, *Massemedienes kildevern en lærebok* (2009), p. 50-53. List of source protection cases in Norway 2012-2015, collected by the Association of Norwegian Editors. 2009-2012, search in lovdata.no.

⁵⁶ Ina Lindahl, *Massemedienes kildevern en lærebok* (2009), p. 54.

⁵⁷ Sentenced under section 189 of the Criminal Procedure Act of 1887. LOV 1887-07-01-5. (Repealed.)

dismissed by a legally enforceable ruling” the witness may be penalised by fines.⁵⁸ In 2012, a Norwegian journalist of the newspaper Dagens Næringsliv, was penalised with a fine of 30 000 NOK (3240 EUR). The case is known as the “known-source-case”, and concerns a matter where the source of the journalist was known and subject to criminal charges. The journalist refused to “give evidence” while in court as a witness in his criminal trial, and claimed source protection under the Criminal Procedure Act section 125. The Supreme Court stated, with reference to the preparatory work and case-law, that the source protection provisions govern confidential sources, not sources already known. Section 125 was found not to be applicable in the case. The case is brought into the ECtHR, where it is waiting to be processed.⁵⁹

6.4. Conclusion

The figures above and the low number of court orders of disclosure confirms that the Supreme Court of Norway pay particular regard to the importance of the right of non-disclosure. Case-law and preparatory work show that the threshold for requiring source disclosure in relation to The Criminal Procedure Act and The Dispute Act is high, and that the legislation is in line with the principles of the Recommendation No R (2000) 7. It might even be proposed that in the case of Rt. 2015-1286 (Rolfsen), the Supreme Court has outlined a higher level of protection. With this case it is evident that exemptions from source protection today, is limited to exceptional circumstances and cases of a significantly grave nature we have yet to see.

7. In the Recommendation No R (2000) 7 the following principles should be respected when the necessity of disclosure is stated: absence of reasonable alternative measures, outweighing legitimate interest (protection of human life, prevention of major crime, defence of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the disclosure outweigh the interest in the non-disclosure?

As the above chapter has illustrated, exemptions from the right to source protection are rarely accepted under the Norwegian law.⁶⁰ This does not exclude the police authorities from requesting disclosure or instigating force measures in their search for valuable information in relation to criminal cases. With the gap between the judicial limits of source protection and the absolute source protection advocated by the journalists, cases are tried before the national courts.

⁵⁸ Courts of Justice act section 206.

⁵⁹ Article “Få fellende dommer”, publicised 2013.09.26 in Journalisten.

⁶⁰ Cf. Rt. 2010-1381 section 63.

As described in depth in chapter 5, exemptions from non-disclosure are regulated by the Criminal Procedure Act section 125 paragraph 3 and the Dispute Act section 22-11 paragraph 2. If it is required by “important public interests” and if it is of “considerable importance to the clarification of the case”, the court may, based on an overall assessment “order the evidence to be presented or the source to be revealed”.⁶¹

As we have seen in chapter 5, “important public interests” refers to information that contains not only the vital public interests of the state, but also more general social interests⁶². In many cases there will be a public interest in protecting individual rights, like the right to a private life.⁶³ Decisive is, if the “public interest” in each case can outweigh the considerations that in the same case speaks in favour of source protection.⁶⁴ Consequently there is not a clear border between the assessment of this term and the overall assessment.⁶⁵

The Explanatory Memorandum of the Recommendation No R (2000) 7 states that “a disclosure should only be justified if and after other means or sources have been unsuccessfully exhausted by the parties to a disclosure proceeding”.⁶⁶ In reference to the Goodwin-case, in which a restriction on the dissemination of the information sufficiently protected the interests at stake, the Explanatory Memorandum holds that if that is the case, the additional disclosure of the source will not be justified. The term “of considerable importance to the clarification of the case” of the Norwegian provision, corresponds to this principle.⁶⁷ Exemption from source protection cannot be made without its fulfilment. Case practice illustrating the interpretation of the term in line with the Memorandum is presented in chapter 5, cf. Rt. 2004-1400 section 41, Rt. 2013-1290 section 24, cf. Rt. 2010-1381 section 50.

In the *Rolfesen* case, Rt. 2015-1286, the court found it hard to see that this term was met, and proceeded to the overall assessment without further conclusions. The court stated: “Since in my view access to the seizure must be refused in any circumstances in accordance with the overall evaluation that must be made pursuant to Section 125, third paragraph, first sentence, I do not find it necessary to further consider the Court of Appeal’s assessment of the significance of the seized material as evidence”, cf. section 66. This suggests that the Supreme Court with this ruling wanted to draw up clear lines for the limits of source protection when faced with ISIS-terrorism - a “major crime” that possibly could justify disclosure according to Article 10 of the Convention, the Recommendation and its appendix as well as the Norwegian provisions. It could have been sufficient for the Supreme Court to point to the non-fulfilment of the term “of considerable importance to the clarification of the case” in order to resolve the case.

⁶¹ The Dispute Act section 22-11 para.2. Identical in substance to The Criminal Procedure Act section 125 para. 3.

⁶² Ot.prp.nr 55 (1997-98), p. 24 and Ina Lindahl, *Massemedienes kildevern en lærebok* (2009), p.110.

⁶³ Ibid.

⁶⁴ Ot.prp.nr 55 (1997-98) p. 24.

⁶⁵ Rt. 2010-1381 section 53

⁶⁶ Explanatory Memorandum to Recommendation No. R (00) 7, section II, para. 32

⁶⁷ Cf. Rt. 2004-1400 section 41, Rt. 2013-1290 section 24, cf. Rt.2010-1381 section. Cf. Ot.prp.nr 55 (1997-98) p. 26 and Ina Lindahl, *Massemedienes kildevern en lærebok* (2009), p.119-121.

The question after this is which aims can constitute legitimate interest that possibly can outweigh non-disclosure. The assessment must be carried out in line with ECHR article 10 and ECtHR case-law.⁶⁸ A disclosure can only be ordered if there exists an “overriding requirement in the public interest”⁶⁹ and if the circumstances are of a sufficiently vital and serious nature.⁷⁰ “In sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court” cf. Goodwin section 40, cf. Rt. 2013-1290 section 26.⁷¹ This quotation suggests a narrow interpretation of the legitimate aims listed in Article 10, paragraph 2 of the Convention. This is confirmed in the Explanatory Memorandum to the Recommendation which states that paragraph 2 has to be interpreted narrowly in accordance with the jurisprudence of the ECtHR.⁷² The working group of the Recommendation and its Explanatory Memorandum has with reference to Article 10 paragraph 2, identified in particular three categories of aims under which the interest in the disclosure possibly can outweigh the public interest in the non-disclosure.⁷³ These are, where the disclosure is necessary for “the protection of human life, the prevention of major crime or the defence in the course of legal proceedings of a person who is accused or convicted of having committed a serious crime”.⁷⁴ Other grounds were by the working group “deemed to be *prima facie* insufficient to justify a disclosure, though such disclosure might be justified depending on all the circumstances”.⁷⁵

The case of Rt. 2013-1290 (*Brennpunkt*) supports this narrow interpretation, and The Supreme Court follows the guidance of the Explanatory Memorandum, cf. chapter 5. In this case, the court did not retrieve “police corruption” or “breach of police confidentiality” under the example list of “major crimes” presented in the Explanatory Memorandum. The interests were identified as less serious than the examples listed, and to fall outside of the term “major crime”. They were, after a concrete overall assessment, deemed to be of insufficient weight to justify disclosure. Cf. chapter 5 for a full presentation of this case.

Also in the above mentioned case of *Rolfsen*, Rt. 2015-1286, the court supported the narrow interpretation of Article 10, and referred to the “Major Crime”-list of the Explanatory Memorandum as presented in Rt. 2013-1290. The Supreme Court stated that crimes under the anti-terror legislation fall within this list. The Supreme Court drew up new lines; the interest in preventing recruitment to the ISIS terrorist network was not sufficient to outweigh non-

⁶⁸ Rt. 2015-1286 section 67, Rt. 2013-1290 section 25.

⁶⁹ ECtHR Goodwin v. The United Kingdom, 27 March 1996 (17488/90), para. 39, Rt. 2015-1286 section 67, Rt. 2013-1290 section 25.

⁷⁰ Recommendation No. R (2000) 7, Principle 3.

⁷¹ Repeated in several judgements by the ECtHR, like Tillack v Belgium, cf. Financial Times Ltd. V The United Kingdom.

⁷² Explanatory Memorandum to Recommendation No. R (00) 7, section II, para. 37.

⁷³ Explanatory Memorandum to Recommendation No. R (00) 7, section II, para. 37-41, “subject to meeting the criteria set out in the Recommendation principle 3b” (para. 37).

⁷⁴ Ibid.

⁷⁵ Ibid.

disclosure. The ruling has been recognised worldwide, and illustrates that even when evaluating within a category of aims under which the interests legitimately could have justified disclosure, source protection prevails. Cf. chapter 5 for a full presentation of this case.

Protection of human life, prevention of major crimes and prevention of the conviction of innocent people, are also in the preparatory work of the Norwegian legislation identified as legitimate aims that may justify exemptions from the protection of sources.⁷⁶ These aims all have in common that an order of disclosure already follows from the General Civil Penal Code sections 287, 196 and 226; respectively (1) the duty to help someone in danger⁷⁷; (2) the duty to prevent criminal offences⁷⁸ like murder, severe bodily harm, crime that threaten national security, organized crime; (3) the duty to provide information in order to prevent the conviction and sentencing of an innocent⁷⁹.⁸⁰ As stated in the Explanatory Memorandum there might be situations beyond these, depending on all the circumstances, that possibly can justify disclosure.⁸¹

In one of the national cases that has resulted in a court order of disclosure, Rt.1986-1245, it is held in the preparatory work that the ruling would have been the same under current law⁸²; and in judicial theory that the ECtHR would have accepted an exemption to source protection in such a case,⁸³ due to the circumstances of the case. The reason for disclosure was a serious breach of patient-hospital confidentiality in a matter of great privacy. In a front page article about heart-transplantation, the newspaper identified, against the will of the parents, a 16-year-old boy, dead in a car accident, whose heart had been transplanted. In the court's view the information was so detailed that it could only have derived from an employee at the hospital. The Supreme Court found that the identity of the boy had no public interest; and that the confidentiality breach was exceptionally grave in that it concerned a private situation where the parents had just been faced with the death of their son and the big decision of donating his heart. The interest in pursuing a serious breach of confidentiality under these circumstances outweighed the right to source protection. The editor and journalist of the newspaper *Bergensavisen* were imposed to respond to a request of disclosure.⁸⁴ The editor was later sentenced to a fine of 20 000 NOK (2120 Euro) for not responding to the request.⁸⁵

The preparatory work furthermore states that an order of disclosure should be imposed where a crime is supposedly committed with the goal of getting media attention and the circumstances

⁷⁶ Ot.prp. nr. 55 (1997-98) page 27 and Ina Lindahl, *Massemedienes kildevern en lærebok* (2009), p. 129.

⁷⁷ Ot.prp. nr. 55 (1997-98) page 26 and *Ibid.*

⁷⁸ Ot.prp. nr. 55 (1997-98) page 27 and *Ibid.*

⁷⁹ Ot.prp. nr. 55 (1997-98) page 26 and *Ibid.*

⁸⁰ The General Civil Penal Code sections, 287, 196, 226.

⁸¹ Explanatory Memorandum to Recommendation No. R (00) 7, section II, para. 37.

⁸² Ot.prp. nr. 55 (1997-98) page 26

⁸³ Ina Lindahl, *Massemedienes kildevern en lærebok* (2009), p. 114.

⁸⁴ Rt.1986-1245

⁸⁵ Rt-1987-910

suggests that the source himself is the offender or is used as a mean by the offender.⁸⁶ As to civil cases, the preparatory work holds paternity cases as an example of cases where the public interests at stake can outweigh press freedom.⁸⁷ It is however presumed that the terms of disclosure rarely will be fulfilled in civil cases.⁸⁸

In conclusion, if the two basic terms of The Criminal Procedure Act 125 paragraph 3 and the Dispute Act 22-11 paragraph 2, are fulfilled, the court may, based on an overall assessment, order the evidence to be presented or the source to be revealed⁸⁹. This assessment is based on a wide balancing of interests.⁹⁰

“In cases of doubt which may be decided by the courts...serious doubt” shall result in source protection.⁹¹ The nature of the case, the potential chilling effect of a disclosure-order, the seriousness of a potential crime, considerations that speaks for an efficient pursuing and prosecution of such a crime, and the extent to which the information has public interest, are all matters to be considered in the overall assessment.⁹²

When the information is in the public interest to publicise, the threshold for waiving sources is at its highest.⁹³ “If sources, frightened of exposure and reprisal, decide not to talk, there will not only be less news, but the news which is published will be less reliable”⁹⁴. Without source protection journalistic sources may dry up, cf. the chilling effect.⁹⁵ It is nevertheless made room under the law for the cases in which the circumstances are so sufficiently vital and serious, that they possibly can justify source disclosure.

In line with the recommended narrow interpretation of Article 10, paragraph 2 of the Convention, it can be proposed that the legitimacy of an interest, when it comes to source protection, as a general rule should be established with reference to the grounds from one of the three categories of aims recognised in the Explanatory Memorandum to the Recommendation No R (2000) 7 and in the Norwegian preparatory work;⁹⁶ unless “disclosure can be justified depending on all the circumstances”.⁹⁷ It is within this narrow sphere we can find the criteria under which the interest in the disclosure outweigh the interest in the non-disclosure.

⁸⁶ Ot.prp.nr. 55 (1997-98) p. 27.

⁸⁷ Ot.prp.nr. 55 (1997-98) p.29.

⁸⁸ Ina Lindahl, *Massemedienes kildevern en lærebok* (2009), p. 127, cf. Ot.prp.nr. 55 (1997-98) p.29.

⁸⁹ The Dispute Act 22-11 section 2.

⁹⁰ Rt. 2004-1400 section 38.

⁹¹ Ot.prp.nr. 55 (1997-98) p. 25.

⁹² Ot.prp.nr 55 (1997-98), p. 25 and Ina Lindahl, *Massemedienes kildevern en lærebok* (2009), p.128-129.

⁹³ NOU 1988:2 p.20 and Rt. 2010-1381section 61, Rt. 2004-1400 section 46, Rt. 2015-1022 section 67.

⁹⁴G. Robertson and A. Nicol in Dirk Voorhoof. *The protection of journalistic sources: Recent developments and actual changes*, section 1.

⁹⁵ Dirk Voorhoof. *The protection of journalistic sources: Recent developments and actual changes*, section 1.

⁹⁶ Explanatory Memorandum to Recommendation No. R (00) 7, section II, para. 25 and 37 and Ot.prp. nr. 55 (1997-98) page 27.

⁹⁷ Explanatory Memorandum to Recommendation No. R (00) 7, section II, para. 37

If disclosure is justified and ordered, the court may impose confidentiality during the hearing. This is regulated by the Criminal Procedure Act section 125 paragraph 4 and the Dispute Act section 22-12 paragraph 2. The provisions are identical in substance, and states that “if evidence is presented pursuant to an order of the court, the court may impose a duty of confidentiality and decide that oral hearing of the evidence shall be held in camera”.⁹⁸ The provisions correspond to principle 5.e of the Recommendation, but has not yet been applied by the Norwegian court.⁹⁹ This can be seen in light of the absolute source protection guaranteed by journalists under the code of ethics of the press; journalists do not comply with court orders of disclosure and maintain source protection in conflict with the law.

8. In the light of the case law of the European Court of Human Rights, how do national courts apply the respective laws with regard to the right to protect sources? In particular, how do they balance the different interests at stake?

To answer the question, the following cases from the Norwegian Supreme Court will be described and analysed in light of relevant case law from the ECtHR: Rt. 1992 s. 39 (*Edderkoppen*), Rt. 2002 s. 489 (*Forsikringsbedrageri*), Rt. 2004 s. 1400 (*Dørvakt*), Rt. 2010 s. 1381 (*DinSide*), and Rt. 2013 s. 1290 (*Brennpunkt*).

The examination will focus on how the Supreme Court balances the different interests at stake when deciding whether a journalist has to reveal his source or not.

8.1. Rt. 1992 s. 39 (Edderkoppen)

At the relevant time, Section 209a of The Dispute Act¹ allowed the courts to impose on a journalist an obligation to reveal his sources if the disclosure was of “particular importance” to the case. The courts should according to the section among other relevant factors take into consideration the nature of the case and the significance of the testimony for the case.

The Supreme Court emphasized that protection of sources is the main rule, and that the question thus would have to be whether there were strong enough reasons to depart from this rule. The Court further stressed that although protection of sources enshrines a basic value in a democracy, so do the society’s interest in finding out if the security services have carried out surveillance measures for political purposes and breached their duty not to disclose secret information.

In their assessment of these principles to the facts, the Court held that investigative journalism towards governmental institutions is the core area of protection of sources. Thus, it had to be

⁹⁸ Dispute Act section 22-12 para. 2.

⁹⁹ Ina Lindahl, *Massemedienes kildevern*, 2009, page 32.

shown significant consideration to the protection element [of the rules]. The Court stressed the need for a long time perspective, and argued that a strong source protection in the long run would lead to more revelations of sizable conduct. The Court concluded that the journalists did not have to reveal their sources to the parliamentary body.

Although the judgment was passed four years before *Goodwin v. The United Kingdom*, the judgment can clearly be considered to be in line with relevant case law from the ECtHR. Compared to both *Goodwin* and *Financial Times Ltd. and others vs. The United Kingdom*, the competing interests – controlling misuse by the security agencies – were stronger in the *Edderkoppen* case. Still the Supreme Court judged in favour of source protection, giving decisive weight to the long-term perspective and the potential chilling effect an order for disclosure would have for future sources.

8.2. Rt. 2002 s. 489 (Forsikringsbedrageri)

In the *Forsikringsbedrageri (insurance fraud)* case, a Norwegian journalist had made a news story about insurance swindle. The news story revealed that A, a female celebrity, was reported to the police for swindle. A's identity was not revealed in the reportage. A later on filed a report to the bureau responsible for investigating police affairs, claiming that servicemen in the police had breached their duty of confidentiality. When testifying, the journalist refused to disclose his source regarding the information that A had been reported to the police.

The Criminal Procedure Act¹ Section 125 states that an order to disclose journalistic sources can only be given when "important public interests" call for a disclosure and it is of "considerable importance" to the clarification of the case. If these cumulative conditions are established, the court will have to make an overall assessment to decide whether a disclosure order should be imposed or not.

The Supreme Court shortly held that finding out whether police officers have breached their duty not to disclose confidential information or not, amounts to an "important public interest". This is clearly in line with ECHR article 10, which allows for restrictions on the right to freedom of expression "for the prevention of [...] crime" or "for the protection of the reputation or rights of others".

Regarding the probability that there actually *had* been a disclosure of confidential information from the police, the Court argued that as long as investigation was carried out, this was sufficient. As far as we can see the ECtHR has not explicitly addressed this question in its case law. But in *Financial Times* it was sufficient that a disclosure "might enable [Interbrew] to ascertain the identity of the proper defendant to a breach of confidence action". Thus, it seems that the Supreme Court's view is in line with ECtHR case law on this matter.

The Court also found that a disclosure order would be of "particular importance" for the [oppklaring] of the case, even though the police had not carried out any alternative investigation measures. The Court found that this was criticisable, but argued that such an investigation would require examination of a considerable amount of people, and that experience shows that such examinations seldom lead to a revelation of the guilty person.

This assessment is in itself questionable, taking into consideration firstly the need for an interference with Article 10 to be “necessary in a democratic society” and secondly Principle 3 of the Appendix to Recommendation No. R (2000) 7, which states that a disclosure order should not be deemed necessary unless it can be “convincingly established” that “reasonable alternative measures to the disclosure do not exist or have been exhausted”. However, the Supreme Court’s following overall assessment shows that these views are reflected in the judgment in a satisfying way.¹

In the overall assessment, the Supreme Court [*nemlig*] emphasized that the government *could* carry out alternative, albeit less effective, investigative steps. Preventing disclosure of confidential information could also be done by working to change attitudes inside the police. Another important fact was that A’s name had not been mentioned in the news story, and this weighted heavily in favour of keeping the source secret.

The Court concluded that a disclosure order could not be imposed.

8.3. Rt. 2004 s. 1400 (Dørvakt)

In the *Dørvakt* case, two journalists had written a series of articles where they revealed that many bouncers in Bergen were convicted for crimes of violence. The bureau responsible for investigating police affairs started an investigation to find out if police officers had breached their duty of confidentiality. The journalists refused to disclose their sources.

In the overall assessment, the Supreme Court started by referring to the preparatory works and *Goodwin* (para 42-46). Their interpretation of *Goodwin* was that in cases where the information given by the source is of public interest, the protection of the source will be more or less of an absolute character. But also outside this core area, considerable and important counter interests have to be established to impose an order to disclose the source.

In the Court’s view, the parts of the article in dispute that contained information about eavesdropping and other details from the police investigation of the bouncers, were not of public interest. Leaking information about such extraordinary and sensitive investigative measures was also considered grave, and this indicated a strong interest in sentencing the person leaking the information (para 50).

On the other hand, the leaks had not harmed the investigation (para 49). And more important, the article was part of an investigative and critical coverage revealing both a connection between bouncers and criminal groups but also how the police remained passive. The reportages were thus in the core area of freedom of speech, where the protection of sources, according to the Supreme Court, should be more or less of an absolute character. Here, the Court also compared the facts to *Goodwin* (para 51), where the ECtHR put great emphasis on the protection of the source even though the leaked information could not be considered of public interest.

Also in this case the Court concluded that a disclosure order could not be imposed.

8.4. Rt. 2010 s. 1381 (DinSide)

In the *DinSide* case a person – using the nick name “Finneren” – had claimed in a comment on the webpage DinSide.no that he had kept and sold a runestone. According to Norwegian legislation protecting cultural monuments this is punishable. The owner of the webpage refused to reveal the IP address and other information about “Finneren” to the police.

The Supreme Court emphasized – with reference to both the *Edderkoppen* case and *Goodwin* – the need for a long time perspective, and the potential chilling effect an extensive use of disclosure orders could have. Even though the source claimed that he had committed a crime, and information about who “Finneren” was could reveal where the runestone was located, the Court concluded that a disclosure order could not be imposed.

8.5. Rt. 2013 s. 1290 (Brennpunkt)

In their overall assessment, the Supreme Court took as a starting point (para 29) that if a police officer actually stood behind the offer, he would have been guilty of an attempt to break his duty not to disclose confidential information as well as [grov] corruption. The latter would also be the case for the source. However, the Court emphasized (para 30), with reference to *Financial Times* para 63, that the rules protecting sources are not given out of consideration for the specific source or other specific individuals. On the contrary, the rules are justified by the public’s interest in imparting information from the press. The Court further underlined that according to both *Tillack v. Belgium* and *Financial Times*, it is not decisive that the source has acted illegally or blameworthy. Such conduct will however be an important factor in the assessment.

The Court continued by arguing (para 31) that it is of high importance to uncover and punish leaks of police documents. Otherwise the public’s trust in the police could be seriously harmed, and witnesses could be more reluctant to testify. On the other side they noticed (para 32) that the Appendix to Recommendation No. R (2000) 7 mentions “prevention of major crime” as a possible justification for the disclosure of a source. As examples of “major crime”, “murder, manslaughter, severe bodily injury, crimes against national security, or serious organised crime” are mentioned. The Court argued that even though the list is non-exhaustive, it indicates that the crimes committed must be of a certain seriousness to justify a disclosure order. In the Court’s view, the potential crimes in this case were less serious than the listed examples.

Another relevant factor was that it was highly doubtful whether a disclosure would lead the Bureau to catch the police officer leaking the documents. The Court stated (para 33) on a general basis that the higher the probability is that a disclosure will lead to solve the case, the more it will weigh in favour of departing from the main rule of source protection.

The fact that NRK had refused the source’s offer on ethical grounds was not considered relevant (para 34). In the Court’s view such an assessment would jeopardise the principle of a long time perspective, and it could have a “chilling effect”. They argued that potential sources would not be able to understand the distinction, and that they could get the impression that they were running a risk when contacting the press with information. The Court further mentioned (para

35) that NRK had avoided contributing to corruption, and as long as the press follows such a line, this will in itself be an effective measure against such crimes.

The Court thus concluded that NRK could not be ordered to disclose the source.

8.6. Rt. 2015 s. 1286 (Rolfsen)

In the *Rolfsen* case¹, the question for the Supreme Court was whether the PST could maintain the seizure pursuant to Section 205 of the Criminal Procedure Act, which – as will be shown under question 8 – refers to the duty to testify and thus the overall assessment pursuant to Section 125. In the overall assessment, the Court took as a starting point that crimes under anti-terror legislation fall within the list of serious crimes in the Appendix to Recommendation No. R (2000) 7. On the other hand, the Court noted that sources revealing information in such cases might be of particularly great danger if their identity were to be known.

It further emphasized that the film project was at the heart of investigative journalism. It assumed that an effective protection of sources was of vital importance for the making of the film, and noted that some of the sources had withdrawn from the project due to the police search.

The court further pointed to the fact that the police had a number of investigative methods available, and that it was doubtful how valuable the information would be. For example, B's journey to Syria was prevented when the search was carried out.

The prosecuting authority had stated that the journalist D did not exercise the required distance and objectivity. The basis for this claim was a phone conversation between D and one of the sources, where the former tried to calm down the latter by assuring that compromising statements would be removed. The Court acknowledged, with reference to *Telegraaf Media v. The Netherlands* and *Stichting Ostade Blade v. The Netherlands*, that it is of significance to the overall assessment whether the journalist has shown the required objectivity or not. But they disagreed that the concrete conversation indicated that the journalist had acted blameworthy.

The Court would neither put weight to the fact that the sources were charged in the case. The Court thus concluded that the seizure had to be set aside.

8.7 Summary

To sum up, our impression is that the Supreme Court when carrying out the balancing exercise follows the principles laid down by ECtHR. Especially in the *Edderkoppen*, *Dørvakt* and *Brennpunkt* cases, the competing interests were weightier than in both *Goodwin* and *Financial Times*. Still the Supreme Court gave more importance to an effective source protection.

The Court has also underlined i) the need for a long time perspective, ii) that an effective source protection is in the public's interest, and that a limited protection could have a chilling effect on potential sources, and iii) that it is not decisive whether the source or other individuals have

acted illegally or blameworthy. Thus, the relevant factors from ECtHR are applied in the balancing exercise.

9. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

To answer the question, we will give a brief overview of the criteria for search and seizure actions, interception of communication and covert audio surveillance laid down in The Criminal Procedure Act and The Police Act.

9.1. General overview

In Norwegian law, there is no general prohibition of investigative measures conducted with the view to reveal the identity of a source.¹ The use of police coercive measures is regulated by The Criminal Procedure Act¹ and The Police Act.¹

9.2. The general principle of proportionality

Pursuant to Section 170a of The Criminal Procedure Act, coercive measures can only be conducted when there is "sufficient reason" to do so. Such measures can however not be conducted if it, in view of "the nature of the case and other circumstances" would be considered a "disproportionate intervention". The provision is to be applied in accordance with the obligations laid down in the ECHR.¹ In cases regarding coercive measures that could reveal journalistic sources, the interest of protecting sources will have to be taken into consideration when deciding whether the measure is disproportionate or not.^{1 1}

9.3. Searches

The conditions for conducting searches are laid down in Chapter 15 of the Criminal Procedure Act.

Pursuant to the first subsection of Section 192, a search of someone's place can be conducted when the person is "with just cause suspected" of an act punishable pursuant to statute by imprisonment, and the aim of the search is to arrest the person, or to look for evidence or other objects that can be seized or on which a charge may be created. Such searches can be conducted at any other person's premises when

1) the act has been committed or the suspect arrested there

- 2) the suspect has been there under pursuit when caught in the act or on finding fresh clues, or
- 3) there are otherwise special grounds to assume that the suspect can be arrested, or that there may be found evidence or objects that may be seized or on which a charge may be created.

If the suspicion relates to an act punishable pursuant to statute by imprisonment for a term of eight years or more, a search may be made of all buildings or premises in a specified area if there are “grounds to assume” that the offender may be hiding in the area, or that evidence or objects liable to seizure may be found there, cf. Section 194.

Pursuant to the first subsection of Section 195, a search of a person can be conducted if he is “with just cause” suspected of an act punishable pursuant to statute by imprisonment, and there are “grounds to assume” that it may lead to the discovery of evidence or of objects that may be seized or on which a charge may be created. For searches of other persons than the suspect, the suspicion has to relate to an act punishable pursuant to statute by imprisonment for a term exceeding six months, and when “special circumstances” indicate that the search should be conducted, cf. second subsection.

When it comes to the procedural safeguards, Section 197 demands that a search may only be made pursuant to a court decision, unless the concerned person has given a written consent. From this main rule, there is however an exception in the second subsection for cases where “delay entails any risk”. In such instances, the prosecution authority can issue the search warrant. But if the urgent search is conducted at “an editorial office or the like”, it has to be the public prosecutor who issues the warrant. The warrant can in addition only be issued if it is “probable” that the investigation will be “substantially impaired” by waiting for a court decision.

Section 198 gives a police officer the competence to make a search without a warrant from the public prosecutor when it is “strong suspicion” of an act punishable pursuant to statute by imprisonment for a term exceeding six months, and there is an “imminent risk” that the purpose of the search otherwise will be thwarted. The provision does however not apply searches of “an editorial office or the like”.

According to the preparatory works¹, the wording “the like” in Section 197 and 198 includes a journalists’ home office. But it is acknowledged that the assessment of what constitutes a home office can be difficult, especially when bearing in mind that Section 197 and 198 concern cases of urgency. The preparatory works emphasizes that it has to be a specified working place with distinctive marks showing that the place is used for journalistic work.

To sum up, the rules allowing for searches are accessible, and must be considered sufficiently clear and precise. There has to be a suspicion of a criminal offence, which reduces the risk for arbitrariness. And more important, the main rule calling for a search warrant from the court constitutes a satisfactory procedural safeguard.

Regarding searches conducted by a police officer without a warrant, and which unintentionally turn out to be a journalist’s home office, cf. Section 198, such safeguards will not exist. However, these cases will be utterly rare. And as long as the journalist makes sure to make it visible that his

working desk is a place used for journalistic work, the place will be protected against a search without a warrant.

9.4. Disclosure orders and seizure

The conditions for giving a forced disclosure order or seizing objects are laid down in Chapter 16 of the Criminal Procedure Act.

Pursuant to Section 210, the court may order the possessor to surrender objects that are deemed to be significant as evidence if he is bound to testify in the case. Thus, the conditions laid down in Section 125 have to be established to issue a forced disclosure order regarding source revealing material. By establishing such a connection, the legislator has made sure that the protection of sources is not circumvented by the authorities. This is in line with Principle 6 *litra a* of Recommendation No. R (2000) 7.

Pursuant to the second subsection of Section 210, the prosecution authority can issue the order if a delay entails “a risk that the investigation will be impaired”. In legal theory, Ragna Aarli has argued that this provision is not applicable, due to *Sanoma Uitgevers B.V. v. The Netherlands*.¹ In *Sanoma*, a disclosure order was not approved by an independent organ, and the ECtHR concluded that this amounted to a violation of Article 10. Since the Criminal Procedure Act is to be applied in conformity with international law, cf. Section 4, we agree with Aarli on this point. However, it is of utter importance in this field that the law provides sufficiently clear norms and procedural safeguards. Even though a subsequent judicial review can show that a disclosure order not approved by an independent organ amounts to a violation of Article 10, this will be poor consolation for the media.¹ This was also emphasized by the ECtHR in *Telegraaf Media v. The Netherlands*.¹ It can thus be argued that Section 210 should be changed to make it in line with Article 10.

When it comes to seizure of documents or other objects, this cannot be carried out if the possessor can refuse to testify about the content of the object, cf. Section 204. Also these cases will rely on an assessment pursuant to Section 125, and thus the provision is in line with Principle 6 paragraph a of the Recommendation.

If the possessor is not obliged to testify, a seizure order has to be given by the court, cf. the third subsection of Section 205.¹ The police can however seize the documents for the purpose of bringing the question of seizure to the court, but will then have to seal the documents in a closed envelope in the presence of a representative of the possessor.¹

The criteria for ordering disclosure or seizing objects must be considered sufficiently clear and precise, as they are linked to the provisions regarding the duty to testify. And – maybe with an exception for Section 210 – satisfactory procedural safeguards are established.

9.5. Communication control – interception of communication and covert audio surveillance

The conditions for use of communication control are laid down in Chapter 16a and 16b of the Criminal Procedure Act.

Pursuant to Section 216 a, the court may make an order permitting the police to carry out communication surveillance when any person is “with just cause” suspected of an act or attempt at an act

- a) that is punishable pursuant to statute by imprisonment for a term of 10 years or more, or
- b) that contravenes sections 121, 123, 125, 126, 127 cf. 123, 128 first sentence, 129, 136 a, 231, 332 cf. 231, 335 cf. 231, 337 cf. 231 or 340 cf. 231, or that contravenes Section 5 of the Act relating to the control of the export of strategic goods, services and technology, etc.¹

The surveillance can be conducted towards telephones, computers etc. that the suspect possesses or which it may be assumed that he will use.

Pursuant to the first subsection of Section 216 c, a permission to carry out communication control may only be given if it must be assumed that such audio surveillance or control will be of “substantial significance” for the clarification of the case and that such clarification will otherwise be made “substantially more difficult”. If the controlled telephone belongs to an editor or a journalist, permission for communication control may only be given if there are “special grounds” for doing so, cf. second subsection. This higher threshold is however not applicable if the editor or journalist is himself suspected in the case.

If there is a “great risk” that the investigation will be impaired by delay, an order from the prosecution authority may take the place of a court order, cf. Section 216 d. The decision shall as soon as possible, and not later than 24 hours after the control has begun, be submitted to the court for approval. But if the time-limit ends at a time outside the court’s ordinary office hours, the time-limit is extended until the court reopens.

When it comes to covert audio surveillance, this can only be conducted when a person is “with just cause” suspected of committing an act or attempt at an act that contravenes

- a) sections 131 or 133, of the Penal Code¹
- b) sections 232, second paragraph, 275 or 328, cf. section 79 paragraph c, of the Penal Code¹, or
- c) sections 275 cf. 157 or 275 cf. 159, of the Penal Code¹

Also in these cases it must be assumed that such audio surveillance will be of “substantial significance” for the clarification of the case and that such clarification will otherwise be made “substantially more difficult”. Audio surveillance of an editorial office or the like where an editor or a journalist is having work related conversations, permission for communication control may only be given if there are “special grounds” for doing so. This higher threshold is however not applicable if the editor or journalist is himself suspected in the case.

It is the court that issues the order, but in those special instances mentioned in Section 216 d, an order from the prosecution authority may take the place of a court order.

9.6. Use of coercive measures to avert or prevent serious crimes

The criteria for use of coercive measures to *avert* serious crimes are laid down in Section 222 d. Since the provision is long and complex, we will provide it in its entirety:

The court may make an order permitting the police to use as part of the process of investigation such coercive measures as are referred to in chapters 15, 15 a, 16, 16 a and 16 b when there are reasonable grounds for believing that any person is going to commit an act that contravenes

- a) sections 131 or 134, of the Penal Code,
- b) sections 232, second paragraph, 274 or 328, cf. section 79 paragraph c, of the Penal Code, or
- c) sections 275, cf. 157 or 275, cf. 159, of the Penal Code

Such permission may also be granted to the Police Security Service when there is reason to believe that any person is going to commit an act that contravenes

- a) Sections 111, 113, 115, 117, 119, 123, 126, 128 first sentence, 129, 133, 135, 136-a or 142, of the Penal Code,
- b) Section 5 of the Act relating to the control of the export of strategic goods, services and technology, etc.
- c) Sections 139, 140, 192, 194, 238, 239, 240, 241, 242, 355, 356, 357 or 358 of the Penal Code and that is committed for the purpose of sabotage, or
- d) sections 251, 253, 254, 263, 273 or 275 of the Penal Code and that is directed against members of the Royal Family, the Storting (parliament), the Government, the Supreme Court or representatives of equivalent bodies in other states.

Permission may only be granted if it must be assumed that intervention will provide information of substantial significance for making it possible to avert the act and that such averting will otherwise be impeded to a substantial degree. Permission to use such coercive measures as are referred to in sections 200 a, 202 x, 216 a and 216 m may only be granted when special reasons so warrant. Permission may only be granted to the Police Security Service to carry out covert audio surveillance, cf. section 216 m, when there is reason to believe that any person is going to commit an act that contravenes sections 90, 91, 91 a, 147 a, 152 a or 153 a of the Penal Code.

If delay entails a great risk that it will not be possible to prevent an act referred to in the first or second paragraph, an order from the prosecuting authority may be substituted for a court order. Any such decision shall be submitted to a court for approval as soon as possible, and not later than 24 hours after the coercive measure has been applied. As far as possible, the decision shall be in writing and shall state what the case concerns and the purpose of using the coercive measures. An oral decision shall be written down as soon as possible. Section 216 d, first paragraph, third to fifth sentences, and second paragraph shall apply correspondingly.

The provisions of chapters 15, 15 a, 16, 16 a and 16 b shall apply correspondingly in so far as they are appropriate. The provisions of sections 216 i, 242 and 242 a apply to all use of coercive measures pursuant to this section.

When it comes to coercive measures aimed at *preventing* serious crimes, the criteria are laid that in Section 17 d of the Police Act. It reads:

The court may make an order permitting the Police Security Service to use as part of its preventive activity such coercive measures as are referred to in sections 200, 200 a, 202 c, 208 a, 210 a, 211, 212, 216 a, 216 b, or 216 m of the Criminal Procedure Act if it is reason to investigate whether any person is preparing an act that contravenes

- a) sections 131, 133 or 134, of the Penal Code,
- b) sections 121 to 126, of the Penal Code, or
- c) sections, 251, 253, 254, 256, 263, 273, 274 or 275 of the Penal Code and that is directed against members of the Royal Family, the Storting (parliament), the Government, the Supreme Court or representatives of equivalent bodies in other states.

Permission may only be granted if it must be assumed that intervention will provide information of substantial significance for making it possible to prevent the act, that such prevention will otherwise be impeded to a substantial degree, and that the intervention does not appear as disproportionate, taking into consideration the nature of the case and other circumstances. Permission to use such coercive measures as are referred to in sections 200 a, 202 a, 216 a, and 216 m may only be granted when special reasons so warrant. Permission to search someone's private home may not be granted pursuant to this provision.

If delay entails a great risk that it will not be possible to prevent an act referred to in first paragraph, paragraph c, an order from the chief or the assistant chief of the Police Security Service may be substituted for a court order, except from such covert audio surveillance as referred to in Section 216 m of the Criminal Procedure Act. Any such decision shall be submitted to a court for approval as soon as possible, and not later than 24 hours after the coercive measure has been applied. As far as possible, the decision shall be in writing and shall state what the case concerns and the purpose of using the coercive measures. An oral decision shall be written down as soon as possible. Section 216 d, first paragraph, third to fifth sentences, and second paragraph shall apply correspondingly.

The chief or the assistant chief of the Police Security Service may on the same conditions as referred to in the first paragraph cf. the second paragraph permit use of coercive measures as referred to in sections 202 b and 216 l of the Criminal Procedure Act.

While it is not possible in this setting to go into all of the details, we would like to highlight certain points regarding the criteria for use of communication control:

Firstly, there are no rules protecting journalistic sources from unintended disclosure, i.e. where the communication control is not directed towards a journalist. This does however not, as the ECtHR pointed out in *Weber and Savaria v. Germany*¹, in itself amount to a violation of Article 10.

Secondly, The Criminal Procedure Act and the Police Act open up for communication control to investigate, avert or prevent a lot of different criminal acts. These provisions are of varied precision. An example is the fifth subsection of Section 131 of the Penal Act, which states that any person “who has an intent” to complete an act of terrorism, and who undertakes actions that “facilitate and points towards” the completion, will be sentenced for attempt. As Section 131 of the Penal Act does not specify which actions that are prohibited, the decisive question will be whether the person has an intent to complete the terror act. When combining this with Section 17 of the Police Act, which entails the Police Security Service to use communication control to “investigate whether any person is preparing” for such preparations, the result is a very vague norm. As a scholar has put it, this combination gives the Police Security Service a “carte blanche to monitor broad segments of the Norwegian people”.¹ Another lawyer has argued that this regime could have a chilling effect on potential sources, and that the actual protection of sources is to a great extent illusive.¹

Thirdly, the need for a court’s decision to conduct communication control constitutes an important procedural safeguard. But as shown, there are exceptions from this main rule in cases of urgency. And even though the measures shall be submitted to a court for approval, we would again like to stress that such review *post factum* will be poor consolation for the media.

10. Can journalists rely on encryption and anonymity online to protect themselves and their sources against surveillance?

The Norwegian press are obligated to protecting their sources in accordance with the Ethical Code of Practice for the Press (printed press, radio, television and net publications)¹⁰⁰, which is a regulation adopted by the Norwegian Press Association. Section 3.4 reads as following:

«Protect the sources of the press. The protection of sources is a basic principle in a free society and is a prerequisite for the ability of the press to fulfil its duties towards society and ensure the access to essential information.»

The Association of Norwegian Editors¹⁰¹ have addressed the importance of use of encryption in order to protect their sources. The technology site of the *Norwegian Broadcasting Corporation (NRK)*, *NRKbeta*¹⁰² was one of the first Norwegian broadcastings to use advance encryption on their news tips page. In many cases the source is unaware of the technological risk of revealing their identity when contacting the media.¹⁰³

¹⁰⁰ Adopted by the Norwegian Press Association June 13. 2015. <http://presse.no/pfu/etiske-regler/vaer-varsom-plakaten/vvpl-engelsk/>

¹⁰¹ <http://livestream.com/accounts/3722443/events/3761505> and <http://www.dn.no/meninger/debatt/2016/04/06/2144/Medier/stopp--og-tenk>

¹⁰² <https://nrkbeta.no/about/>

¹⁰³ Anders Brenna, *Digitalt Kildevern* (2012) p. 27-29.

According to The Criminal Procedure Act¹⁰⁴ Section 216 a,

«The court may make an order permitting the police to carry out communications surveillance when any person is with the just cause suspected of an act or attempt at an act

- a) that is punishable pursuant to statute by imprisonment for a term of 10 years or more, or
- b) b) that contravenes sections 90, 91, 91 a, 94, cf. 90, 104 a, first paragraph, second sentence, or 104 a, second paragraph, cf. first paragraph, second sentence, or section 162 or 317, cf. 162, of the Penal Code, or that contravenes section 5 of the Act relating to control of the export of strategic goods, services and technology, etc.»

Any increase of the maximum penalty because of repletion or concurrence of felonies shall not be taken into account.

A decision permitting communications surveillance may be made even though a penalty may not be imposed by reason of the provisions of section 44 or 46 of the Penal Code. This also applies when the situation has entailed that the suspect has not manifested guilt.

Communications surveillance may consist of audio surveillance of conversations or other communications conducted to or from specific telephones or which it may be assumed he will use. Identification of communication apparatus by means of technological equipment, cf. Section 216 b, second paragraph (c), which is done by surveillance of conversations or other communications, shall also be regarded as communications surveillance.

Such permission may be given regardless of who owns or supplies the network or service that is used for the conversation or communication. The police may order the owner or supplier of the network or service to provide such assistance as is necessary for effecting the surveillance.»

The Police Law Act¹⁰⁵ section 17 d provides the Norwegian Police Security Service (PST) with an authorization to engage in communications control in purely preventive purposes.

The objective is that PST is responsible internal security, whilst the *Norwegian Intelligence Service Intelligence* is responsible to national external security. Act of 20 March 1998 relating to the Norwegian Intelligence Service, Section 3 reads as following:

Section 3. *The Norwegian Intelligence Service shall procure, process and analyse information regarding Norwegian interests viewed in relation to foreign states, organizations or private individuals, and in this context prepares threat analyses and intelligence assessments to the extent that this may help to safeguard important national interests (...).*¹⁰⁶

In 2006 the Norwegian Parliament established the *Norwegian Surveillance and Security Services* (EOS-utvalget). Their mandate is to monitor the surveillance against the public, and secure that surveillance is accordance with the human rights.¹⁰⁷

¹⁰⁴ The Criminal Procedure Act with subsequent amendments, the latest made by Act of 30 June 2006 No. 53. <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19810522-025-eng.pdf>

¹⁰⁵ The Police Act of 21 December 2005 No. 130. It is only the Police Act of 1995 which is available in English; <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19950804-053-eng.pdf>.

¹⁰⁶ Act of 20 March 1998 relating to the Norwegian Intelligence Service No. 11.

<http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19980320-011-eng.pdf>

¹⁰⁷ Lov om kontroll med etterretnings-, overvåknings- og sikkerhetstjeneste (EOS-kontrollloven) LOV-1995-02-03-7 § 2.

This regulation must be interpreted in light of the fundamental right to freedom of speech, in accordance with Article 100 in the Norwegian Constitution¹⁰⁸ and Article 10 of ECHR. The ECHR is incorporated as part of the Norwegian legislation.¹⁰⁹ Article 8 ECHR regards to the right to respect for private and family life is also relevant in this issue.

According to the Personal Data Act¹¹⁰ Section 11 A on Basic requirements for the processing of personal data, the controller shall ensure that personal data which are processed are processed only when this is authorised pursuant to the law.

In 2013, the Intelligence Battalion of Northern Norway failed to meet this requirement, when they illegally processed information on nine journalists.¹¹¹ The Data Inspectorate issued a fine of NOK 75.000, - as sanction.

The *Fritt Ord Foundation* and one of Norway's most experienced media law attorney Jon Wessel-Aas' rapport on the freedom of press, stated that the Norwegian press is faced with challenges through the potentially *chilling effect* this may have on the sources willingness to use ordinary communication channels to inform of confidential information.¹¹²

In 2012 Norwegian law enforcement began investigating lawyer Sigurd Klomsæt for leaking documents concerning the 22.07 terrorist attacks to the media. Phone logs were presented as evidence during the trial to show that the lawyer had been in contact with journalists. The lawyer was found guilty of leaking the documents and lost his legal license.¹¹³

Klomsæt and The Association of Norwegian Editors argued in his appeal to the Norwegian Supreme Court that the disclosure of the transcript of telecommunications is in violation of

¹⁰⁸ Article 100 of The Constitution, as laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll and subsequently amended, most recently in March 2016, reads as following:

«There shall be freedom of expression. No one may be held liable in law for having imparted or received information, ideas or messages unless this can be justified in relation to the grounds for freedom of expression, which are the seeking of truth, the promotion of democracy and the individual's freedom to form opinions. Such legal liability shall be prescribed by law. Everyone shall be free to speak their mind frankly on the administration of the State and on any other subject whatsoever. Clearly defined limitations to this right may only be imposed when particularly weighty considerations so justify in relation to the grounds for freedom of expression. Prior censorship and other preventive measures may not be applied unless so required in order to protect children and young persons from the harmful influence of moving pictures. Censorship of letters may only be imposed in institutions. Everyone has a right of access to documents of the State and municipalities and a right to follow the proceedings of the courts and democratically elected bodies. Limitations to this right may be prescribed by law to protect the privacy of the individual or for other weighty reasons. The authorities of the state shall create conditions that facilitate open and enlightened public discourse.»

¹⁰⁹ Act of 21 May 1999 no. 30 relating to the strengthening of the status of human rights in Norwegian law (The Human Rights Act).

¹¹⁰ Act of 14 April 2000 No. 31 relating to the processing of personal data (Personal Data Act).

¹¹¹ https://www.datatilsynet.no/globalassets/global/05_vedtak_saker/2014/14-00062-9-vedtak-om-overtredelsesgebyr-etterretningsbataljonen-nord-norge.pdf

¹¹² http://www.frittord.no/images/uploads/files/Pressefrihetens_kaar_JW-Aa.pdf

¹¹³ LB-2013-63938-2

journalists' rights to protection of sources in accordance with the Criminal Procedure Act section 125,¹¹⁴ and that this violates the right to privacy and freedom of expression in accordance with ECHR Article 8 and Article 10. But the Court concluded with the fact that a journalist refuses to provide source, does not preclude prosecutors from finding the source using other methods.¹¹⁵

11. Are whistle-blowers explicitly protected under law protecting journalistic sources? Is there another practice protecting whistle-blowers? Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

«*Whistle-blower*» is defined as any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector.¹¹⁶ The Norwegian legislation does not provide further definition of the term. Whistle-blowers are however protected pursuant to Section 2-4 of the Working Environment Act¹¹⁷, which reads as following:

Section 2-4. Notification concerning censurable conditions at the undertaking

(1) *An employee has a right to notify concerning censurable conditions at the undertaking.*

(2) *The employee shall follow an appropriate procedure in connection with such notification. The employee has notwithstanding the right to notify in accordance with the duty to notify or the undertaking's routines for notification. The same applies to notification to supervisory authorities or other public authorities.*

(3) *The employer has the burden of proof that notification has been made in breach of this provision.*

The Working Environment Act regulates the statutory the employee's right of notification concerning censurable conditions at the undertaking. The law provides protection against retaliation and requires employers to develop routines and arrangements for internal notification in their establishments¹¹⁸. All establishments in the private and public sectors are covered by the legislation. The rules apply to all employees in all sorts of positions, and to all circumstances where an employee is to notify about concerning censurable conditions.¹¹⁹ This implies that the

¹¹⁴ *Act relating to legal procedure in criminal cases [The Criminal Procedure Act] With subsequent amendments, the latest made by Act of 30 June 2006, Section 125 first para.:*

The editor of a printed publication may refuse to answer questions concerning who is the author of an article or report in the publication or the source of any information contained in it. The same applies to questions concerning who is the source of other information that has been confided to the editor for use in his work.

¹¹⁵ Rt-2013-1282, para. 45.

¹¹⁶ Appendix to Recommendation CM/Rec(2014)7.

¹¹⁷ Act of 17. June 2005 No. 62 relating to working environment, working hours and employment protection, etc. (Working Environment Act) as subsequently amended, last by the Act of 14. December 2012 No. 80.

¹¹⁸ Section 3-6 of the Working Environment Act, reads as following:

«The employer shall, in connection with systematic health, environment and safety work, develop routines for internal notification or implement other measures that facilitate internal notification concerning censurable conditions at the undertaking pursuant to section 2-4, if the circumstances in the undertaking so indicate.»

¹¹⁹ Ot.prp. no. 84 (2005-2006) p.50.

act applies to all circumstances from routine discrepancy reporting to the extraordinary extent of notifying the media about corruption.

An employee is generally entitled to notify, although information enclosed about the reprehensible conditions or injuries can damage business interests. Even if the information weakens the company's reputation or lead to lower sales records for products. Employees shall not be faced with dismissal or other negative consequences as a result of their notification.

This legislation must be interpreted in light of the fundamental right to freedom of speech, in accordance with Article 100 in the Norwegian Constitution¹²⁰ and Article 10 of The European Convention on Human Rights (ECHR). ECHR is incorporated as part of the Norwegian legislation.¹²¹ Employees have the right to express their opinion on matters relating to the business they work in. The right to notify concerning censurable conditions at the undertaking in accordance with Section 2-4 is an expression of the constitutional freedom of expression.

An employee is always entitled to notify the supervisory or other public authorities. Such notification is always considered to be properly and legally. Employees also have the opportunity to alert the media or otherwise make information available to the general public. In cases where internal reporting or notification to the supervisory authorities fails or is insufficient it is crucial that the employee has the opportunity to notify other channels of information. The employee must, however, take into account that this usually means greater risk than by notification through other methods.¹²²

The Parliamentary Ombudsman has expressed concern regards to the developments in the public sector¹²³, where the findings indicate that freedom of speech is weaker than one would assume given the amendments to § 100 of the Norwegian Constitution as well as the protection of whistle-blowers regulated in the Working Environment Act.

¹²⁰ Article 100 of The Constitution, as laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll and subsequently amended, most recently in March 2016, reads as following:

«There shall be freedom of expression. No one may be held liable in law for having imparted or received information, ideas or messages unless this can be justified in relation to the grounds for freedom of expression, which are the seeking of truth, the promotion of democracy and the individual's freedom to form opinions. Such legal liability shall be prescribed by law. Everyone shall be free to speak their mind frankly on the administration of the State and on any other subject whatsoever. Clearly defined limitations to this right may only be imposed when particularly weighty considerations so justify in relation to the grounds for freedom of expression. Prior censorship and other preventive measures may not be applied unless so required in order to protect children and young persons from the harmful influence of moving pictures. Censorship of letters may only be imposed in institutions. Everyone has a right of access to documents of the State and municipalities and a right to follow the proceedings of the courts and democratically elected bodies. Limitations to this right may be prescribed by law to protect the privacy of the individual or for other weighty reasons. The authorities of the state shall create conditions that facilitate open and enlightened public discourse.»

¹²¹ Act of 21 May 1999 no. 30 relating to the strengthening of the status of human rights in Norwegian law (The Human Rights Act).

¹²² <http://www.arbeidstilsynet.no/binfil/download2.php?tid=92254> and
<http://www.fafo.no/~fafo/images/pub/2014/20352.pdf> p.107.

¹²³ <https://www.sivilombudsmannen.no/ytringsfrihet-for-offentlig-tilsatte/undersokelse-av-eget-tiltak-offentlig-ansattes-ytringsfrihet-article4165-452.html>

Police Detective Robin Schaefer is a recent example of whistle-blower. He perceived serious shortcomings in the investigation of the eight-year-old girl's death. The case was dismissed as suicide. His superiors rejected his criticism of the investigation, and he eventually led the case to be reopened.¹²⁴

Working Environment Act does not limit the employee from notifying anonymously. Yet, duty of confidentiality and defamation may restrict the right to notify. These restrictions may relate to divulge trade secrets, personal data e.g. However, an employee's right to notify can only be restricted by law. Confidentiality agreements, instructions, regulations etc. that limits this right is therefore illegal. An employer may not restrict employees' ability to inform the media or public authorities.

Protection against retaliation in connection with notification also applies if the employee obtains information or otherwise that he or she is planning or considering notifying.¹²⁵ This may occur in circumstances where the employee is copying documents or threatens to notify the media the concerning censurable conditions are not corrected. The methods the employee is operating within shall however be legal. An employee may not, for example enter someone else e-mail account in violation of the Personal Data Act.¹²⁶

Ethical Code of Practice for the Press (printed press, radio, television and net publications)¹²⁷ is a regulation adopted by the Norwegian Press Association. Each editor and editorial staff member is required to be familiar with these ethical standards of the press, and to base their practice on this code. The ethical practice comprehends the complete journalistic process from research to publication.

«3.5. Do not divulge the name of a person who has provided information on a confidential basis, unless consent has been explicitly given by the person concerned.»

In the precedent *Goodwin v. the United Kingdom*¹²⁸ the case concerned a disclosure order imposed on a journalist requiring him to reveal the identity of a whistle-blower who provided information on a company's confidential corporate plan. There was not, in the European Court of Human Rights' view, a reasonable relationship of proportionality between the legitimate aim pursued by

¹²⁴ <http://www.bt.no/nyheter/lokalt/Etterforskeren-fryktet-Monika-8-var-drept-Sjefene-ba-ham-holde-seg-unna-saken-3195873.html>

¹²⁵ Section 2-5 of the Working Environment Act, reads as following:

«(1) Retaliation against an employee who notifies pursuant to section 2-4 is prohibited. If the employee submits information that gives reason to believe that retaliation in breach of the first sentence has taken place, it shall be assumed that such retaliation has taken place unless the employer substantiates otherwise.

(2) The first paragraph applies correspondingly in connection with retaliation against an employee who makes known that the right to notify pursuant to section 2-4 will be invoked, for example by providing information.

(3) Anyone who has been subjected to retaliation in breach of the first or second paragraph may claim compensation without regard to the fault of the employer. The compensation shall be fixed at the amount the court deems reasonable in view of the circumstances of the parties and other facts of the case. Compensation for financial loss may be claimed pursuant to the normal rules.»

¹²⁶ Act of 14 April 2000 No. 31 relating to the processing of personal data (Personal Data Act).

¹²⁷ Adopted by the Norwegian Press Association June 13. 2015. <http://presse.no/pfu/etiske-regler/vaer-varsom-plakaten/vvpl-engelsk/>

¹²⁸ *Goodwin v. United Kingdom* No. 17488/90

the disclosure order and the means deployed to achieve that aim and the Court ruled on a violation of his right to freedom of expression under Article 10 of the ECHR. If journalists are forced to reveal their sources the role of the press as public watchdog could be undermined due to the «*chilling effect*» that such disclosure would have on the free flow of information.¹²⁹

In more recent case such as *Financial Times*¹³⁰ and *Autoweek*,¹³¹ the Court ruled in both cases there has been a violation of Article 10, and stated in *Autoweek* the following;

«(...) the Court emphasises that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources.»¹³²

ECHR restrictive practice can be interpreted as the Court goes further to underline the importance of the long-term perspective such as the chilling effect in their assessment¹³³. This approach is a contrast to the Norwegian case *Rt. 1997 p.1734 Ulovlig basehopping*. Nevertheless, in the ruling *Rt.2010 p. 1381 Finneren* the Supreme Court of Norway emphasized the negative impact of the chilling effect and the consequences it may have on the press's watchdog role.¹³⁴

Many Norwegian scholars are of the impression that the ECHR are more attentive to the standard of the chilling effect than Norwegian courts.¹³⁵

12. Conclusion

12.1. Protection for Journalists Not to Disclose Their Source of Information

With the nature of Norwegian legislation being a part of the explanation, explicit legislation providing the specific journalist protection for non-disclosure when it comes to their sources does not exist.

The Norwegian Press Association makes sure that the Norwegian press follows their self-imposed code of ethics and responds to and investigates complaints made by the public. This is merely a self-regulating mechanism and is not considered to be legally binding.

The constitution does provide some protection through its § 100 that states the right to freedom of expression. Norwegian legal method allows for a comprehensive interpretation; thus a case can be made that the provision protects journalists from disclosing their sources.

¹²⁹ *Goodwin v. United Kingdom* No. 17488/90, para. 39: «Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest.»

¹³⁰ *Financial Times Ltd & Ors v United Kingdom* No. 821/03

¹³¹ *Sanoma Uitgevers B.V. v. the Netherlands* No. 38224/03

¹³² *Sanoma Uitgevers B.V. v. the Netherlands* No. 38224/03 para. 71.

¹³³ NOU 2011: 12 ch. 12.3.3.

¹³⁴ *Rt-2010-1381* Para. 62.

¹³⁵ <http://www.klassekampen.no/article/20150729/ARTICLE/150729795>

12.2. Provisions that Prohibits the Disclosure of Sources

Provisions that prohibits the disclosure of a source does not exist in Norwegian legislation. The general rule of law on the subject is that the source is not to be disclosed but the journalist can be compelled to do so if one of the few exceptions found in The Criminal Procedure Act § 125 or The Dispute Act § 22-11 applies.

The Code of Ethics, even though not legally binding, is followed by the press. All though all sanctions that the Norwegian Press Complaints Commission have at their disposal are merely reprimands these may be damaging to the professional reputation of a journalist.

There has been a discussion on whether or not the commission should be able to impose fines on those who violates the Code of Ethics, but the general opinion is that the Code of Ethics and provisions of law should be held separately and that if fines are to be imposed the proper provisions should be decided by parliament.

12.3. Defining “Journalist” and the Scope of Source Protection

Norwegian legislation makes no attempt at defining “journalists” and the term is not really used in legislation. As the person responsible for publications, the editor has a more central role in legislation. Both The Dispute Act and The Criminal Procedure Act uses the term “editor of a printed publication” which can be interpreted as the editor of any newspaper, magazine, publication in paper or on the Internet.

That the term “printed publication” was to be given a broad meaning was established by the supreme court in Rt. 1992 s. 39 (The spider). The court states that they, with regards to the provision, “find it natural to understand this so that it is the very journalistic work that should be protected”. In the same ruling the court states that the provision must be seen in a “long-term perspective” hence also covering internet publications.

12.4. Legal Safeguards for the Protection of Journalistic Sources

The legal safeguards are for the most part enshrined in two provisions, the Dispute Act (2005) article 22-11 and the Criminal Procedure Act, article 12. The articles state that in order to rule for disclosure the court must determine if “important social interests” indicates that the “information should be given”, and it must also be “of substantial significance for the clarification of the case”.

The legal safeguards only apply if someone is either sued or charged with a criminal offence. However, in combination with the press’ self-regulatory mechanism (the Code of Ethics and the Norwegian Press Complaints Commission) make up a system where both legal and ethical breaches are sanctioned.

12.5. National Legislation in Relation to Recommendation No R (2007)7

Source protection in Norway is enshrined in The Criminal Procedure Act section 125 paragraphs 1 and 2 for criminal cases and under the Dispute act section 22-11 paragraphs 1 and 3 for civil cases and states that an editors and other media workers may refuse to provide evidence about the identity of their sources. Section 100 of the constitution furthermore protects the right to source protection.

However, there are limitations to the protection of sources. These limitations are found in the Criminal Procedure Act section 125 paragraph 3 and the Dispute Act section 22-11 paragraph 2. The limits of these provisions has been further established by the Supreme Court. The cases Rt. 2015-1286 (Rolfesen) and Rt. 2013-1290 (Brennpunkt) have been crucial for the development of the rule of law on the subject.

In the Rolfesen-case the PST (Police Secret Service) had seized unpublished film material from a Norwegian film maker (Rolfesen). The material contained footage of recruited fighter for ISIS. The court ruled that the protection of journalistic could not be compromised even if it could prevent major crime.

In the Brennpunkt-case a source in the police had tried to sell secret documents from the criminal investigation of the case against the now convicted terrorist Anders Behring Breivik. The news desk who the source had made the offer to refused the offer and the Norwegian Bureau for the Investigation of Police Affairs demanded that they disclosed the source. The court ruled on non-disclosure.

12.6. Interest in Disclosure V Interest in Non-Disclosure

The assessment of which interests that can outweigh non-disclosure must be carried out in accordance with ECHR article 10 and ECtHR case law. A disclosure can only be ordered if there exists an “overriding requirement in the public interest” and if the circumstances are of a sufficiently vital and serious nature.

In the case of Rt-2013-1290 (Brennpunkt) the Supreme Court followed the guidance of the Explanatory Memorandum of the Recommendation No R (2000) 7 and found that “police corruption” and “breach of police confidentiality” couldn’t be defined as “major crime” and justify disclosure.

The two basic terms of The Criminal Procedure Act 125 paragraph 3 and the Dispute Act 22-11 paragraph 2, has to be fulfilled if the court is to, based on an overall assessment, order the evidence to be presented or the source to be revealed. This assessment is based on a wide balancing of interests.

12.7. Balancing Different Interests in Light of ECtHR Case Law

The Supreme Court follows the principles laid down by ECHR when balancing different interests. Especially in the Rt-1992-39 (Edderkoppen), Rt-2004-140 (Dørvakt) and Rt-2013-1290 (Brennpunkt) cases, the competing interests were weightier than in both *Goodwin* and *Financial Times*. Still the Supreme Court gave more importance to an effective source protection.

The Court has also underlined 1) the need for a long time perspective, 2) that an effective source protection is in the public's interest, and that a limited protection could have a chilling effect on potential sources, and 3) that it is not decisive whether the source or other individuals have acted illegally or blameworthy.

12.8. Electronic Surveillance and Anti-Terrorism Law

There is not a general prohibition of investigative measures conducted to reveal the identity of a source. Section 170a of the Criminal Procedure Act states that if there is "sufficient reason" the police may use coercive methods as long as it, in view of "the nature of the case and other circumstances", would not be considered a "disproportionate intervention". The provision is to be applied in accordance with the obligations laid down by the ECHR.

12.9. Encryption and Anonymity Online

The Association of Norwegian Editors have addressed the importance of using encryption to protect sources. Many news outlets are using advanced encryption pre-emptively because many sources may not know the technological risks they are taking when contacting media.

The Criminal Procedure Act Section 216 a states that the court may authorize the police to carry out communications surveillance where a person is, with just cause, suspected of a serious offence.

The Police Law Act section 17 d provides the Norwegian Police Security Service (PST) with an authorization to engage in communications control in purely preventive purposes.

The provisions give the police leeway to gather information that may lead to solving a case. In the case Rt-2013-1282 the accused argued that the disclosure of transcripts of telecommunications was in violation of journalists' rights to protection of sources in accordance with The Criminal Procedure Act section 125. The Supreme Court stated that the fact that a journalist refuses to provide source, does not preclude prosecutors from finding the source using other methods

12.10. Whistle-Blowers

Whistle-blowers are protected pursuant to Section 2-4 of the Working Environment Act which states that employees have a "right to notify" concerning censurable conditions. The employees are protected by law against retaliation from the employer. The protection given by provision must be seen in context with the fundamental freedom of speech, protected by article 100 in the Constitution.

The Working Environment Act does not limit the employees from notifying anonymously but they may be bound by duty of confidentiality and defamation restricting the right to notify.

13. Table of Provisions

Provisions in native language	Corresponding translation
<p>Vær varsom-plakaten</p> <p>Etiske normer for pressen (trykt presse, radio, fjernsyn og nettpublikasjoner)</p> <p>Den enkelte redaktør og medarbeider har ansvar for å kjenne pressens etiske normer og plikter å legge disse til grunn for sin virksomhet.</p> <p>Presseetikken gjelder hele den journalistiske prosessen, fra innsamling til presentasjon av det journalistiske materialet.</p> <p>1. Pressens samfunnsrolle</p> <p>1.1. Ytringsfrihet, informasjonsfrihet og trykkefrihet er grunnelementer i et demokrati. En fri, uavhengig presse er blant de viktigste institusjoner i demokratiske samfunn.</p> <p>1.2. Pressen ivaretar viktige oppgaver som informasjon, debatt og samfunnskritikk. Pressen har et spesielt ansvar for at ulike syn kommer til uttrykk.</p> <p>1.3. Pressen skal verne om ytringsfriheten, trykkefriheten og offentlighetsprinsippet. Den kan ikke gi etter for press fra noen som vil hindre åpen debatt, fri informasjonsformidling og fri adgang til kildene. Avtaler om eksklusiv formidling av arrangementer skal ikke være til hinder for fri</p>	<p>Code of Ethics of the Norwegian Press</p> <p>Ethical Code of Practice for the Press (printed press, radio, television and net publications). Adopted by the Norwegian Press Association June 13. 2015.</p> <p>Each editor and editorial staff member is required to be familiar with these ethical standards of the press, and to base their practice on this code. The ethical practice comprehends the complete journalistic process from research to publication.</p> <p>1. The Role of the Press in Society</p> <p>2.1. Freedom of Speech, Freedom of Information and Freedom of the Press are basic elements of a democracy. A free, independent press is among the most important institutions in a democratic society.</p> <p>2.2. The press has important functions in that it carries information, debates and critical comments on current affairs. The press is particularly responsible for allowing different views to be expressed.</p> <p>2.3. The press shall protect the freedom of speech, the freedom of the press and the principle of access to official documents. It cannot yield to any pressure from anybody who might want to prevent open debates, the free flow of information and free access to sources. Agreements concerning exclusive event reporting shall not preclude</p>

<p>nyhetsformidling.</p> <p>1.4. Det er pressens rett å informere om det som skjer i samfunnet og avdekke kritikkverdige forhold. Det er pressens plikt å sette et kritisk søkelys på hvordan mediene selv fyller sin samfunnsrolle.</p> <p>1.5. Det er pressens oppgave å beskytte enkeltmennesker og grupper mot overgrep eller forsømmelser fra offentlige myndigheter og institusjoner, private foretak eller andre.</p> <p>2. Integritet og troverdighet</p> <p>2.1 Den ansvarlige redaktør har det personlige og fulle ansvar for mediets innhold og avgjør med endelig virkning spørsmål om redaksjonelt innhold, finansiering, presentasjon og publisering. Redaktøren skal opptre fritt og uavhengig overfor personer eller grupper som av ideologiske, økonomiske eller andre grunner vil øve innflytelse på det redaksjonelle innholdet. Redaktøren skal verne om redaksjonens produksjon av fri og uavhengig journalistikk.</p> <p>2.2 Redaktøren og den enkelte redaksjonelle medarbeider skal verne om sin uavhengighet, integritet og troverdighet. Unngå dobbeltroller, verv, oppdrag eller bindinger som kan skape interessekonflikter eller føre til spekulasjoner om inhabilitet.</p> <p>2.3 Vis åpenhet om bakenforliggende forhold som kan være relevante for publikums oppfatning av det journalistiske innholdet.</p> <p>2.4. Redaksjonelle medarbeidere må ikke utnytte sin stilling til å oppnå private fordeler, herunder motta penger, varer eller tjenester, som kan oppfattes å være kompensasjon fra</p>	<p>independent news reporting.</p> <p>2.4. It is the right of the press to carry information on what goes on in society and to uncover and disclose matters, which ought to be subjected to criticism. It is a press obligation to shed critical light on how media themselves exercise their role.</p> <p>1.5. It is the task of the press to protect individuals and groups against injustices or neglect, committed by public authorities and institutions, private enterprises, or others.</p> <p>2. Integrity and credibility</p> <p>2.1 The responsible editor carries personal and full responsibility for the contents of the media and has the final decision in any questions regarding editorial content, financing, presentation and publication. The editor shall act freely and independently towards any persons or groups who – for ideological, economic or other reasons – might want to exercise an influence over the editorial content. The editor shall safeguard the editorial staff's production of free and independent journalism.</p> <p>2.2 The editor and the individual editorial staff member must protect their independence, integrity and credibility. Avoid dual roles, positions, commissions or commitments that create conflicts of interest connected to or leading to speculations of disqualification.</p> <p>2.3 Be open on matters that could be relevant for how the public perceive the journalistic content.</p> <p>2.4 Members of the editorial staff must not exploit their position in order to achieve</p>
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<p>utenforstående for redaksjonelle ytelser.</p> <p>2.5. En redaksjonell medarbeider kan ikke pålegges å gjøre noe som strider mot egen overbevisning.</p> <p>2.6. Svekk aldri det klare skillet mellom journalistikk og reklame. Det skal være åpenbart for publikum hva som er kommersielt innhold. Skillet skal være tydelig også ved lenking eller andre koblinger. Avvis kommersielt innhold som kan forveksles med det enkelte mediums journalistiske presentasjon.</p> <p>2.7 Journalistisk omtale av produkter, tjenester, merkenavn og kommersielle interesser, også mediets egne, skal være journalistisk motivert og ikke fremstå som reklame. Oppretthold et klart skille mellom markedsaktiviteter og redaksjonelt arbeid. Gi aldri tilsagn om journalistiske motytelser for reklame. Unngå ukritisk videreformidling av PR-stoff.</p> <p>2.8 Skjult reklame er uforenlig med god presseskikk. Kommersielle interesser skal ikke ha innflytelse på journalistisk virksomhet, innhold eller presentasjon. Hvis redaksjonelt stoff er sponset, eller et program har produktplasseringer, skal dette være åpenbart for publikum. Sponsing skal alltid være tydelig merket. Sponsing eller produktplassering i nyhets- og aktualitetsjournalistikk eller journalistikk rettet mot barn, er uforenlig med god presseskikk. Direkte utgifter til journalistisk virksomhet skal som hovedregel betales av redaksjonen selv. Ved unntak skal publikum gjøres tydelig oppmerksom på hva som er finansiert av utenforstående interesser.</p> <p>2.9 Redaksjonelle medarbeidere må ikke motta pålegg om oppdrag fra andre enn den</p>	<p>personal gain, including receiving money, goods or services, that can be perceived as compensation from outsiders for editorial benefits.</p> <p>2.5 A member of the editorial staff cannot be ordered to do anything that is contrary to his or her convictions.</p> <p>2.6 Never undermine the clear distinction between editorial copy and advertisements. It must be obvious to the public what is deemed to be commercial content. The distinction must be obvious also when using web links and other connective means. Decline any commercial content that can be confused with the individual medium's journalistic presentation.</p> <p>2.7. Editorial mention of products, services, brand names and commercial interests, including the media's own, must be motivated by editorial considerations and must not appear as an advertisement. Maintain an obvious distinction between marketing activities and editorial work. Turn down any offers of journalistic favours in return for advertisements. Avoid indiscriminate reproduction of PR material.</p> <p>2.8 Hidden advertising is incompatible with good press practice. Commercial interests must not influence journalistic activities, content or presentation. If the editorial material is sponsored, or a programme has product placements, this must be obvious to the public. Sponsorship must always be clearly marked. Sponsorship or product placement in news or current affairs journalism or journalism directed at children is incompatible with good press practice. Direct expenses for journalistic activities must in the main be paid by the editorial department itself. In the event of an</p>
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<p>redaksjonelle ledelsen.</p> <p>3. Journalistisk atferd og forholdet til kildene</p> <p>3.1. Kilden for informasjon skal som hovedregel identifiseres, med mindre det kommer i konflikt med kildevernet eller hensynet til tredjeperson.</p> <p>3.2. Vær kritisk i valg av kilder, og kontroller at opplysninger som gis er korrekte. Det er god presseskikk å tilstrebe bredde og relevans i valg av kilder. Vær spesielt aktsom ved behandling av informasjon fra anonyme kilder, informasjon fra kilder som tilbyr eksklusivitet, og informasjon som er gitt fra kilder mot betaling.</p> <p>3.3. Det er god presseskikk å gjøre premissene klare i intervjusituasjoner og ellers overfor kilder og kontakter. Avtale om eventuell sitatsjekk bør inngås i forkant av intervjuet, og det bør gjøres klart hva avtalen omfatter og hvilke tidsfrister som gjelder. Redaksjonen selv avgjør hva som endelig publiseres.</p> <p>3.4. Vern om pressens kilder. Kildevernet er et grunnleggende prinsipp i et fritt samfunn og er en forutsetning for at pressen skal kunne fylle sin samfunnsoppgave og sikre tilgangen på vesentlig informasjon.</p> <p>3.5. Oppgi ikke navn på kilde for opplysninger som er gitt i fortrolighet, hvis dette ikke er uttrykkelig avtalt med</p>	<p>exception, the audience must be made aware of what is financed by external interests.</p> <p>2.9 Members of the editorial staff must not accept assignments from anyone other than editorial management.</p> <p>3. Journalistic Conduct and Relations with the Sources</p> <p>3.1. The source of information must, as a rule, be identified, unless this conflicts with source protection or consideration for a third party.</p> <p>3.2. Be critical in the choice of sources, and make sure that the information provided is correct. It is good press practice to aim for diversity and relevance in the choice of sources. If anonymous sources are used, or the publication is offered exclusivity, especially stringent requirements must be imposed on the critical evaluation of the sources. Particular caution should be exercised when dealing with information from anonymous sources, information from sources offering exclusivity, and information provided from sources in return for payment.</p> <p>3.3. Good press conduct requires clarification of the terms on which an interview is being carried out. This also pertains to adjacent research. Any agreement regarding quote check should be made in advance of the interview, and it should be made clear what the agreement includes and what deadlines apply. The editors decide for themselves what should finally be published.</p> <p>3.4. Protect the sources of the press. The protection of sources is a basic principle in a free society and is a prerequisite for the ability of the press to fulfil its duties towards society and ensure the access to essential</p>
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<p>vedkommende.</p> <p>3.6. Av hensyn til kildene og pressens uavhengighet skal upublisert materiale som hovedregel ikke utleveres til utenforstående.</p> <p>3.7. Pressen har plikt til å gjengi meningsinnholdet i det som brukes av intervjuobjektets uttalelser. Direkte sitater skal gjengis presist.</p> <p>3.8. Endring av avgitte uttalelser bør begrenses til korrigerende av faktiske feil. Ingen uten redaksjonell myndighet kan gripe inn i redigering og presentasjon av redaksjonelt materiale.</p> <p>3.9. Opptre hensynsfullt i den journalistiske arbeidsprosessen. Vis særlig hensyn overfor personer som ikke kan ventes å være klar over virkningen av sine uttalelser. Misbruk ikke andres følelser, uvitenhet eller sviktende dømmekraft. Husk at mennesker i sjokk eller sorg er mer sårbare enn andre.</p> <p>3.10. Skjult kamera/mikrofon eller falsk identitet skal bare brukes i unntakstilfeller. Forutsetningen må være at dette er eneste mulighet til å avdekke forhold av vesentlig samfunnsmessig betydning.</p> <p>3.11. Pressen skal som hovedregel ikke betale kilder og intervjuobjekter for informasjon. Vis moderasjon ved honorering for nyhetstips. Det er uforenlig med god presseskikk å ha betalingsordninger som er egnet til å friste mennesker til uberettiget å trå innenfor andres privatsfære eller gi fra seg personsensitiv informasjon.</p>	<p>information.</p> <p>3.5. Do not divulge the name of a person who has provided information on a confidential basis, unless consent has been explicitly given by the person concerned.</p> <p>3.6. In consideration of the sources and the independence of the press, unpublished material as a main rule should not be divulged to third parties.</p> <p>3.7. It is the duty of the press to report the intended meaning in quotes from an interview. Direct quotes must be accurate.</p> <p>3.8. Changes of a given statement should be limited to corrections of factual errors. No one without editorial authority may intervene in the editing or presentation of editorial material</p> <p>3.9. Proceed tactfully in journalistic research. In particular show consideration for people who cannot be expected to be aware of the effect that their statements may have. Never abuse the emotions or feeling of other people, their ignorance or their lack of judgment. Remember that people in shock or grief are more vulnerable than others.</p> <p>3.10. Hidden cameras/microphones or false identity may only be used under special circumstances. The condition must be that such a method is the only possible way to uncover cases of essential importance to society.</p> <p>3.11. The press shall as a rule not pay sources or interviewees for information. Exercise moderation when paying a consideration for news tips. It is incompatible with good press practice to employ payment schemes</p>
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<p>4. Publiseringsregler</p> <p>4.1. Legg vekt på saklighet og omtanke i innhold og presentasjon.</p> <p>4.2. Gjør klart hva som er faktiske opplysninger og hva som er kommentarer.</p> <p>4.3. Vis respekt for menneskers egenart og identitet, privatliv, etnisitet, nasjonalitet og livssyn. Vær varsom ved bruk av begreper som kan virke stigmatiserende. Fremhev ikke personlige og private forhold når dette er saken uvedkommende.</p> <p>4.4. Sørg for at overskrifter, henvisninger, inngresser og inn- og utannonseringer ikke går lenger enn det er dekning for i stoffet. Det er god presseskikk å oppgi kilden når opplysninger er hentet fra andre medier.</p> <p>4.5. Unngå forhåndsdomming i kriminal- og rettsreportasje. Gjør det klart at skyldspørsmålet for en mistenkt, anmeldt, siktet eller tiltalt først er avgjort ved rettskraftig dom. Det er god presseskikk å omtale en rettskraftig avgjørelse i saker som har vært omtalt tidligere.</p> <p>4.6. Ta hensyn til hvordan omtale av ulykker og kriminalsaker kan virke på ofre og pårørende. Identifiser ikke omkomne eller savnede personer uten at de nærmeste pårørende er underrettet. Vis hensyn overfor mennesker i sorg eller ubalanse.</p> <p>4.7. Vær varsom med bruk av navn og bilde og andre klare identifikasjonstegn på personer</p>	<p>designed to tempt people, without due cause, to invade the privacy of others or to disclose sensitive personal information.</p> <p>4. Publication Rules</p> <p>4.1. Make a point of fairness and thoughtfulness in contents and presentation.</p> <p>4.2. Make plain what is factual information and what is comment.</p> <p>4.3. Always respect a person's character and identity, privacy, ethnicity, nationality and belief. Be careful when using terms that create stigmas. Never draw attention to personal or private aspects if they are irrelevant.</p> <p>4.4. Make sure that headlines, introductions and leads do not go beyond what is being related in the text. It is considered good press conduct to reveal your source when the information is quoted from other media.</p> <p>4.5. In particular avoid presumption of guilt in crime and court reporting. Make it evident that the question of guilt, whether relating to somebody under suspicion, reported, accused or charged, has not been decided until the sentence has legal efficacy. It is a part of good press conduct to report the final result of court proceedings, which have been reported earlier.</p> <p>4.6. Always consider how reports on accidents and crime may affect the victims and next-of-kin. Do not identify victims or missing persons unless next-of-kin have been informed. Show consideration towards people in grief or at times of shock.</p> <p>4.7. Be cautious in the use of names and photographs and other clear identifiers of</p>
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<p>som omtales i forbindelse med klanderverdige eller straffbare forhold. Vis særlig varsomhet ved omtale av saker på tidlig stadium av etterforskning, i saker som gjelder unge lovovertridere, og der identifiserende omtale kan føre til urimelig belastning for tredjeperson. Identifisering må begrunnes i et berettiget informasjonsbehov. Det kan eksempelvis være berettiget å identifisere ved overhengende fare for overgrep mot forsvarsløse personer, ved alvorlige og gjentatte kriminelle handlinger, når omtales identitet eller samfunnsrolle har klar relevans for de forhold som omtales, eller der identifisering hindrer at uskyldige blir utsatt for uberettiget mistanke.</p> <p>4.8. Når barn omtales, er det god presseskikk å ta hensyn til hvilke konsekvenser medieomtalen kan få for barnet. Dette gjelder også når foresatte har gitt sitt samtykke til eksponering. Barns identitet skal som hovedregel ikke røpes i familietvister, barnevernssaker eller rettssaker.</p> <p>4.9. Vær varsom ved omtale av selvmord og selvmordsforsøk. Unngå omtale som ikke er nødvendig for å oppfylle allmenne informasjonsbehov. Unngå beskrivelse av metode eller andre forhold som kan bidra til å utløse flere selvmordshandlinger.</p> <p>4.10. Vær varsom med bruk av bilder i annen sammenheng enn den opprinnelige.</p> <p>4.11. Vern om det journalistiske fotografiets troverdighet. Bilder som brukes som dokumentasjon må ikke endres slik at de skaper et falskt inntrykk. Manipulerte bilder kan bare aksepteres som illustrasjon når det tydelig fremgår at det dreier seg om en montasje.</p> <p>4.12. For bruk av bilder gjelder de samme</p>	<p>persons in referring to contentious or punishable matters. Special caution should be exercised when reporting cases at the early stage of investigation, cases concerning young offenders and cases in which an identifying report may place an unreasonable burden on a third party. Identification must be founded on a legitimate need for information. It may, for instance, be legitimate to identify someone where there is imminent danger of assault on defenceless individuals, in the case of serious and repeated crimes, if the identity or social position of the subject is patently relevant to the case being reported on, or where identification protects the innocent from exposure to unjustified suspicion.</p> <p>4.8. Reporting on children, it is considered good press conduct to assess the implications that media focusing could cause in each case. This also pertains when the person in charge or parent, has agreed to exposure. As a general rule the identity of children should not be disclosed in reports on family disputes or cases under consideration by the childcare authorities or by the courts.</p> <p>4.9. Be cautious when reporting on suicide and attempted suicide. Avoid reporting that is not necessary for meeting a general need for information. Avoid description of methods or other matters that may contribute to provoking further suicidal actions.</p> <p>4.10. Exercise caution when using photos in any other context than the original.</p> <p>4.11. Protect the credibility of the journalistic photograph. Photos used as documentation must not be altered in a way that creates a false impression. Manipulated photos can only be accepted as illustrations if it is evident that it in actual fact is a picture collage.</p>
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<p>aktsomhetskrav som for skriftlig og muntlig fremstilling.</p> <p>4.13. Feilaktige opplysninger skal rettes og eventuelt beklages snarest mulig.</p> <p>4.14. De som utsettes for sterke beskyldninger skal så vidt mulig ha adgang til samtidig imøtegåelse av faktiske opplysninger. Debatt, kritikk og nyhetsformidling må ikke hindres ved at parter ikke er villig til å uttale seg eller medvirke til debatt.</p> <p>4.15. De som er blitt utsatt for angrep skal snarest mulig få adgang til tilsvaret, med mindre angrep og kritikk inngår som ledd i en løpende meningsutveksling. Ha som krav at tilsvaret er av rimelig omfang, holder seg til saken og har en anstendig form. Tilsvaret kan nektes dersom den berørte part, uten saklig grunn, har avvist tilbud om samtidig imøtegåelse i samme spørsmål. Tilsvaret og debattinnlegg skal ikke utstyres med redaksjonell, polemisk replikk.</p> <p>4.16. Vær varsom med å lenke fra digitale utgaver til innhold som bryter med god presseskikk. Sørg for at lenker til andre medier eller publikasjoner er tydelig merket. Det er god presseskikk å informere brukere av interaktive tjenester om hvordan publikasjonen registrerer og eventuelt utnytter bruken av tjenestene.</p> <p>4.17. Dersom redaksjonen velger ikke å forhåndsredigere digitale meningsutvekslinger, må dette bekjentgjøres på en tydelig måte for de som har adgang til disse. Redaksjonen har et selvstendig ansvar for så snart som mulig å fjerne innlegg som bryter med god presseskikk.</p>	<p>4.12. The use of pictures must comply with the same requirements of caution as for a written or oral presentation.</p> <p>4.13. Incorrect information must be corrected and, when called for, an apology given, as soon as possible.</p> <p>4.14. Those who have been subjected to strong accusations shall, if possible, have the opportunity to simultaneous reply as regards factual information. Debates, criticism and dissemination of news must not be hampered by parties being unwilling to make comments or take part in the debate.</p> <p>4.15. Those who have been the subject of an attack shall have the chance to reply at the earliest opportunity, unless the attack and criticism are part of a running exchange of views. Any reply should be of reasonable length, be pertinent to the matter and seemly in its form. The reply can be refused if the party in question has rejected, without an objective reason, an offer of presenting a contemporaneous rejoinder on the same issue. Replies and contributions to the debate should not be accompanied by polemic editorial comment.</p> <p>4.16. Beware that digital publication pointers and links could bring you to other electronic media that do not comply with the Ethical Code. See to it that links to other media or publications are clearly marked. It is considered good press conduct to inform the users of interactive services on how the publication registers you, and possibly exploits your use of the services.</p> <p>4.17. Should the editorial staff choose not to pre-edit digital chatting, this has to be announced in a clear manner for those accessing the pages. The editorial staff has a</p>
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<p><i>Ord og bilder er mektige våpen. Misbruk dem ikke!</i></p>	<p>particular responsibility, instantly to remove inserts that are not in compliance with the Ethical Code.</p>
<p>Straffeprosessloven § 125</p> <p>Redaktøren av et trykt skrift kan nekte å svare på spørsmål om hvem som er forfatter til en artikkel eller melding i skriftet eller kilde for opplysninger i det. Det samme gjelder spørsmål om hvem som er kilde for andre opplysninger som er betrodd redaktøren til bruk i hans virksomhet.</p> <p>Samme rett som redaktøren har andre som har fått kjennskap til forfatteren eller kilden gjennom sitt arbeid for vedkommende forlag, redaksjon, pressebyrå eller trykkeri.</p> <p>Når vektige samfunnsinteresser tilsier at opplysningen gis og den er av vesentlig betydning for sakens oppklaring, kan retten etter en samlet vurdering likevel pålegge vitnet å oppgi navnet. Dersom forfatteren eller kilden har avdekket forhold som det var av samfunnsmessig betydning å få gjort kjent, kan vitnet bare når det finnes særlig påkrevd pålegges å oppgi navnet.</p> <p>Når svar gis, kan retten beslutte at det bare skal gis til retten og partene i møte for lukkede dører og under pålegg om taushetsplikt.²</p> <p>Bestemmelsene i paragrafen her gjelder tilsvarende for kringkastingssjef og for medarbeidere i kringkasting³ eller annen</p>	<p>The Criminal Procedure Act § 125</p> <p>The editor of a printed publication may refuse to answer questions concerning who is the author of an article or report in the publication or the source of any information contained in it. The same applies to questions concerning who is the source of other information that has been confided to the editor for use in his work.</p> <p>Other persons who have acquired knowledge of the author or the source through their work for the publishers, editors, press agency or printers in questions have the same right as the editor.</p> <p>When important social interests indicate that the information should be given and it is of substantial significance for the clarification of the case, the court may, however, on an overall evaluation order the witness to reveal the name. If the author or source has revealed matters that it was socially important to disclose, the witness may be ordered to reveal the name only when this is found to be particularly necessary.</p> <p>When an answer is given, the court may decide that it shall only be given to the court and the parties at a sitting in camera and under an order to observe the duty of secrecy.</p>

<p>medievirksomhet som i hovedtrekk har samme formål som aviser og kringkasting.</p>	<p>The provisions of this section apply correspondingly to any director or employee of any broadcasting agency.</p>
<p>Twisteloven § 22-11</p> <p>(1) Redaktøren av et trykt skrift kan nekte å gi tilgang til bevis om hvem som er forfatter til en artikkel eller melding i skriftet eller kilden for opplysninger i det. Det samme gjelder bevis om hvem som er kilden for andre opplysninger som er betrodd redaktøren til bruk i dennes virksomhet.</p> <p>(2) Når vektige samfunnsinteresser tilsier at opplysning etter første ledd gis, og det er av vesentlig betydning for sakens oppklaring, kan retten etter en samlet vurdering likevel gi pålegg om at beviset skal framlegges eller at navnet skal opplyses. Dersom forfatteren eller kilden har avdekket forhold som det var av samfunnsmessig betydning å få gjort kjent, kan slikt pålegg bare gis når det er særlig påkrevd at navnet gjøres kjent.</p> <p>(3) Reglene i denne paragraf gjelder tilsvarende for</p> <p>a) andre som har fått kjennskap til forfatteren eller kilden gjennom sitt arbeid for vedkommende forlag, redaksjon, pressebyrå eller trykkeri, og</p> <p>b) medarbeidere i kringkasting eller annen medievirksomhet som i hovedtrekk har</p>	<p>The Dispute Act § 22-11</p> <p>(1) The editor of a printed publication may refuse to provide access to evidence about who is the author of an article or report in the publication or the source of any information contained in it. The same applies to evidence about who is the source of other information that has been confided to the editor for use in his work. Other persons who have acquired knowledge of the author or the source through their work for the publishers, editors, press agency or printing office in question have the same right as the editor.</p> <p>(2) If important public interests require that evidence referred to in subsection (1) is presented and it is of considerable importance to the clarification of the case, the court may nevertheless, based on an overall assessment, order the evidence to be presented or the source to be revealed. If the author or source has discovered circumstances that it is in the public interest to publicise, such an order may only be made if it is particularly necessary for the name to be publicised.</p> <p>(3) The provisions in this section apply correspondingly to</p> <p>a) other persons who have acquired knowledge of the author or the source through their work for the publishers, editors, press agency or printing office in question, and</p> <p>b) colleagues in broadcasting or other media</p>

samme formål som aviser og kringkasting.	undertaking that in the main has the same purpose as newspapers and broadcasting.
Grunnloven § 110 Ytringsfrihet bør finne sted.	The Constitution § 110 There shall be freedom of expression.

ELSA POLAND

Contributors

National Coordinator
Aleksandra Duda

National Academic Coordinator
Dorota Głowacka

National Researchers
Aleksandra Baranowska
Maria Honka
Maciej Kalmanowicz
Małgorzata Kosucka
Alicja Okrucieńska
Natalia Sałata
Katarzyna Smyk
Aleksandra Staromiejska
Angelika Anna Woźniak
Magdalena Zgłobica

National Linguistic Editors
Daria Leszczyńska
Natalia Rogólska

National Academic Supervisor
Dr. Dobrochna Ossowska-Salamonowicz

1. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information?

The Republic of Poland by the means of ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms committed to ensure the protection of freedom of speech. The European Court of Human Rights through its judgments granted the press the widest scope of protection, also including the protection of journalistic sources¹. Therefore, member states were somehow obliged to provide protection also in the field. Currently, under Polish law regulations regarding this matter are contained in the Press Law (hereinafter in the Report: PL)² and in the Criminal Procedure Code (hereinafter in the Report: CPC)³.

1.1 What type of legislation provides this protection?

We cannot talk about granting any regulations the importance of constitutional rank as the Polish Constitution⁴ provides only a brief regulation regarding the press in Article 14, which introduces the principle of freedom of the press and other sources of social communication. The regulation contained in this Article is of the essence, because without the guarantee of this freedom, the media could not fulfill its primary task. Moreover, in the Article 54 every citizen is guaranteed the freedom of expression and the right to obtain and disseminate information. Paragraph 2 constitutes the prohibition of the preventive censorship, as well as the licensing of the press. More specific regulations were given the statutory character.

1.2 How exactly is this protection construed in national law?

The starting point for describing mechanisms of the protection of journalistic sources is Article 15 of the PL, which in the paragraph 1 gives each author the so-called the right to remain anonymous⁵, that is, the right to maintain the confidentiality of his or her name. A journalist can sign the press material with his or her name, pseudonym, or share it anonymously. All people in possession of any information regarding the journalists are obliged to comply with this choice.

¹Goodwin vs. UK [1996] The European Court of Human Rights Reports of Judgments and Decisions 1996 r.-II.

²Journal of Laws no 5 item 24 (The Act on the Press Law of January 28 1984) 1984 as amended [Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe].

³Journal of Laws no 89 item 555 (The Criminal Procedure Code of June 6 1997) 1997 as amended [Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego].

⁴Journal of Laws no 78 item 483 (The Constitution of the Republic of Poland of 2 April 1997) 1997 [Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.].

⁵I. Zielinko, *Tajemnica dziennikarska w prawie prasowym* [2009] Prokuratura i Prawo no 2009/7-8 148 [Polish].

The right to maintain the confidentiality of journalistic source is provided in paragraph 2 of the Article mentioned above. The Polish legislator not only gives the journalist that right, but it also obliges him to maintain the confidentiality of data which might make the identification of the author of the press material possible and force him to not disclosure any information which announcement could violate the legally protected interests of third parties.

It is therefore necessary to precisely determine who can be considered a journalist. In accordance with Article 7.2.5 the journalist is a person engaged in editing, creating or preparing press materials, remaining in the employment relationship with the publisher or engaged in such activities on behalf of and under the authority of the editorial office.

Limits and prerequisites determining the qualification of the person performing this job to a group of journalists are not clearly defined⁶. In the light of the applicable regulation a group of journalists consists of two categories of people – those employed under an employment contract or those connected with the editorial office by another legal relationship, which is a derivative of authorization for editing, creating or preparing press material. People who create texts for publication, but remain unrelated to the editorial team are, according to the law, excluded from this profession. Therefore, the regulation defines a journalist as a person whose status is granted by the editorial office.⁷

The journalist has a duty to maintain the confidentiality of every personally identifiable information about author or informant. It will be therefore any data allowing the direct or indirect (for example, through the identification number if the entity has access to the registry) recognition of following persons: the author of the press material, letter to the editorial office or of other material of this nature. This apply also to refraining from disclosure of any identification data of other people providing the information published or submitted for publication - but only if they reserved the right to non-disclosure of the data. There is no regulations relating to form of this reservation therefore it should be interpreted in accordance with the Civil Code.⁸ It means that the declaration of intent may be expressed by any behavior of that person which manifests his intention sufficiently. Moreover, to non-disclosure is subject all information, if its disclosure might violate the third parties' interests protected by law. All of this data is covered by the so-called "journalist's privilege". Its scope extends also to employees in editorial offices, press publishing houses and other organizational units.

The PL does not specify the nature or type of data that is subject to the non-disclosure rule. Jurisprudence explains that the concept of "all the data" should be understood as the personal data according to the Act on Personal Data Protection⁹. If all conditions are met, as data should be considered:

⁶E. Ferenc-Skrzydello, *Prawo prasowe: komentarz* (4th edn, Legalis 2013) 89 [Polish].

⁷T. Kononiuk, B. Michalski, *Problemy prawne zawodu dziennikarskiego* (Elipsa 1998) 47 [Polish].

⁸The Journal of Laws no 16 item 93 (The Civil Code of April 23 1964) 1964 as amended [Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny].

⁹The Journal of Laws no 133 item 883 (The Act on the Protection of Personal Data of August 29 1997) 1997

- information (each),
- about an individual,
- the individual person must be identified or his or her identity can be recognised indirectly.¹⁰

The conditions for exemption from a journalist's privilege are governed by Article 16 of the PL. A journalist and other entities, which are subject to the journalist's privilege, are exempt from it in a case when the author or a person passing the material protected by the privilege agrees to the disclose his or her name or the material itself, as well as when the information, press material, letter to the editorial office or other material of this nature concerns one of the most serious crimes referred to in Article 240 of the Criminal Code (hereinafter in the Report: CC)¹¹. This provision contains a closed list of crimes, for example: mass assassination; the use of unacceptable methods or means of warfare; violation of international law, murder; hostage taking; terrorist offenses.

In the event when information, press material, letter to the editorial office or other material of this nature concerns an offense referred to in Article 240 of the CC, the person subject to the confidentiality is exempted from by the virtue of law, but then another duty is in force – the obligation to immediately provide this information to law enforcement authorities. This mechanism, however, can be initiated only if the information is reliable¹².

Moreover, Article 180.2 of the CPC contains regulation limiting the journalist's privilege – allowing hearing of a person subject to confidentiality as to the facts latent every time when all of the following conditions are fulfilled jointly: it is necessary for the sake of justice and circumstances cannot be established on the basis of another evidence. At the same time, the concept of good interest of justice should be understood as the need to establish objective truth, but only if it is not possible to determine it otherwise¹³. The exemption from journalist's privilege may only be granted by the court at the request of the prosecutor. The Constitutional Court ruled that this provision is in compliance with the Constitution of the Republic of Poland¹⁴.

The legislator, however, stipulated that the hearing of the journalist cannot concern any circumstances indicating the authorship press material, letter to the editorial office, other material of this nature or allowing establishing the identity of the sources of information, if the

[Ustawa z dnia 29 sierpnia 1997 r. o ochronie danych osobowych].

¹⁰J. Barta, P. Fajgielski, R. Markiewicz, *Ochrona danych osobowych* (LEX 2015 no 10222) [Polish].

¹¹Journal of Laws no 88 item 553 (The Criminal Code of June 6 1997) 1997 as amended [Ustawa z dnia 6 czerwca 1997 r. Kodeks karny]. The text of Article 16 of the Press Law indicates Article 254 of the Criminal Code, however, since the publication of the law has there was an amendment to the Criminal Code, which has never been included in the amendment above. Therefore, the text of this Article shall be, in fact, referred to Article 240 of the Criminal Code of 1997, which contains the amended provision of the same matter.

¹²M. Brzozowska-Pasięka, M. Olszyński, J. Pasięka, *Prawo prasowe: komentarz* (LexisNexis 2013) 116 [Polish].

¹³Decision I KZP 26/02 [2002] The Supreme Court OSNKW 2003 no 1-2 item 6 [Polish].

¹⁴Decision SK 64/03 [2004] The Constitutional Tribunal OTK Series A 2004 no 10 item 107 [Polish].

right to non-disclosure has been reserved. Thus, the absolute protection of sources has been introduced, and courts are not allowed to interfere with it. However, if the information concerns the crimes contrary to Article 240.2 of the CC mentioned above, protection of sources does not apply.

Attention should also be paid to the practice of requesting telecommunications data of journalists, such as billing or IP addresses, or even texts messages from administrators of these data, such as mobile operators. On the basis of this information, while examining journalists' contacts, it is possible to establish the identity of their interlocutors. Such activities can be perceived as a workaround of the guarantee of journalist's privilege, however there are some discrepancies in jurisprudence opinions¹⁵. Moreover, the Supreme Audit Office after the inspections ordered by the President of the Constitutional Court concerning the obtaining and processing data from billings, made some recommendations regarding the introduction of solutions that will create additional guarantees for those whose professions are professions of "public trust", for example by making obtaining data dependent on the consent of the court or other independent body¹⁶.

Polish legislation does not provide any special restrictions regarding the use of wiretapping in relation to journalists, the legislator failed to introduce any regulations concerning this matter. The use of phone tapping with regard to the journalists is generally acceptable on general basis¹⁷. It results in the creation of the field to commit violations in the protection of journalist's privilege. Regardless of critical evaluation of the lack of specific regulations in this field, sources other than documents are not subject to any kind of protection, despite their helpfulness in determining the data covered by the journalist's privilege, which is one of the most protected secrets in the Polish legal system. This seems to be at least an oversight of the legislator, demanding its response in order to prevent potential breaches and to ensure a greater level of protection of journalistic sources.

This issue should be also considering in terms on European Court of Human Rights case law. The Court in his judgment in the case of *Tillack v. Belgium*¹⁸ ruled that that the press plays an essential role in a democratic society and that the protection of journalistic sources was a basic condition for press freedom. The Court also repeatedly confirmed this statement in other cases like *Financial Times Ltd & Others v. United Kingdom*¹⁹ or *Fressoz and Roire v. France*²⁰ and every time it was emphasized how crucial that matter is.

¹⁵B. Kosmus, G. Kuczyński (ed), *Pravo Prasowe. Komentarz* (2nd edn, C.H. Beck 2013) 95 [Polish].

¹⁶ *NIK na temat billingów* <<https://www.nik.gov.pl/aktualnosci/bezpieczenstwo/nik-na-temat-billingow.html>> accessed 20 February 2016 [Polish].

¹⁷G. Musialik, *Dopuszczalność stosowania podsłuchu telekomunikacyjnego w stosunku do osób zobowiązanych do zachowania tajemnicy zawodowej na gruncie Kodeksu postępowania karnego z 1997 roku* [1998] *Palestra* 1998/11-12 86 [Polish].

¹⁸*Tillack v. UK* [2007] The European Court of Human Rights Reports of Judgments and Decisions 2007.

¹⁹*Financial Times and Others v. UK* [2009] The European Court of Human Rights Reports of Judgments and Decisions 2009.

2. Is there in domestic law a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

The journalistic secrecy is one of the substantial guarantees of the freedom of press and a legal guarantee of trust and intimacy in the press relationships between a journalist and an author of the press material²¹. It has been implemented in the PL not as a journalist's right, but his obligation²². The goal of this regulation is both to protect people providing confidential information to media and to ensure the press' control function.

The regulation of the journalistic privilege is situated in the CPC²³ in the section dedicated to an inadmissible evidence due to its connection with the obligation to give testimony in the criminal procedure²⁴. A journalist has a right to refuse to testify on the circumstances to which this obligation refers unless he is released from the duty to professional confidentiality by the competent court. The inadmissible evidence itself is defined in the Polish legal system as a norm that prohibits examining evidence to the court in specified situations or as a norm that impose restraints in obtaining evidence²⁵. The obligation of the professional confidentiality concerns a professional who obtained relevant information in connection with the performance of his professional duties²⁶. The protection of sources is also regulated in the PL²⁷ (hereinafter: PL) which provides its definition, its material and personal scope as well as exceptions from this rule²⁸. Article 15 and Article 16 of this Act are the fundamental legal basis of the aforementioned guarantee whereas the provisions of the CPC constitute *lex specialis* in this matter²⁹.

The material scope includes all the data allowing to identify an author of a material release, letter to the editor or other material of this nature, as well as other persons providing information published or submitted for publication if they have decided not to disclose such data. These categories include all information that may lead to the identification of their source, i.e. name or personal data. Confidential information e.g. a place of residence or wealth concerning a person who is already known by his name is not protected by the journalistic secrecy³⁰. Similarly, the

²⁰Fressoz and Roire v. France [1999] The European Court of Human Rights Reports of Judgments and Decisions 1999.

²¹J. Bafia, *Dziennikarska tajemnica zawodowa*, [1988] Prasa Polska no 2 8 [Polish]

²²I. Dobosz, *Prawo i etyka w zawodzie dziennikarza* (Wolters Kluwer SA 2008) 66 [Polish].

²³Journal of Laws no 89 item 555 (The Criminal Procedure Code of June 6 1997) 1997 as amended [Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego].

²⁴E. Kosowska-Korniak, *Prawnoprocesowe aspekty tajemnicy dziennikarskiej* [2014] Prokuratura i Prawo 2014 150 [Polish].

²⁵M. Cieślak, *Zagadnienia dowodowe w procesie karnym* (Wydawnictwo Prawnicze 1955) 264 [Polish].

²⁶E. Kosowska-Korniak, *Prawnoprocesowe aspekty...* [2014] Prokuratura i Prawo 2014 158 [Polish].

²⁷Journal of Laws no 5 item 24 (The Act on the Press Law of January 28 1984) 1984 as amended [Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe].

²⁸E. Kosowska-Korniak, *Prawnoprocesowe aspekty...* [2014] Prokuratura i Prawo 2014 150 [Polish].

²⁹Decision I KZP 15/94 [1994] The Supreme Court LEX no 20707 [Polish].

³⁰J. Sieńczyło-Chlabicz (ed), *Prawo mediów* (Wolters Kluwer SA 2015) 163 [Polish].

data of an informant whose identity is public is also not protected, i.e. a journalist cannot refuse to disclose a hiding place of a fugitive to investigative authorities³¹.

Once an informant reserves his identity, a journalist cannot disclose any information with which he could be identified. Each and every person collaborating with a journalist has a right to declare to stay anonymous³². According to Article 60 of the Civil Code³³ every act of an individual that sufficiently reveals his will constitutes to such a declaration that cannot be assumed, but it shall arise from a prominent statement of a person concerned³⁴.

Furthermore, the material scope of the journalistic privilege shall also include information disclosure of which could infringe third parties' interests protected by law. Also, not only an informant is protected, but also the circumstances possessed by a journalist that could infringe third parties' interests when published³⁵.

Reservation of identity by personal sources of information creates an obligation to protect informant's anonymity that is imposed on journalists, especially on editors and editors-in-chief. This obligation, by the virtue of Article 15.3 of the PL, concerns not only journalists but all people that are employed in editor's offices, press publishing houses or any other press organizational units. Consequently, it equally concerns technical support staff – secretaries, archivists, IT workers, as well as service workers such as cleaners, office-boys or doormen³⁶. However, although the professional confidentiality is expected from all the people mentioned above, the law grants only journalists with an absolute protection of source that results in an inadmissibility of evidence³⁷. Additionally, according to Article 16.3 a journalist shall inform an editor-in-chief about facts that are subject to professional confidentiality. The editor-in-chief is equally obligated to secrecy³⁸.

The exceptions from the journalistic secrecy in respect to the protection of journalistic sources are regulated in Article 16 of the PL and Article 180 of the CPC. Two situations are mentioned in the PL: 1) an author agrees to the disclosure of his identity, 2) the information or material concerns the crime expressed in Article 240 of the CC³⁹.

The first exception is an informant's consent expressed in any way including an electronic statement. A personal source of information that reserved its anonymity may waive the right to

³¹M. Zaremba, *Prawo prasowe: ujęcie praktyczne* (DIFIN 2007) 38 [Polish].

³²M. Brzozowska-Pasieka, M. Olszyński, J. Pasieka, *Prawo prasowe: komentarz* (LexisNexis 2013) 252 [Polish].

³³Journal of Laws no 16 item 93 (The Civil Code of April 23 1964) 1964 as amended [Ustawa z dnia 23 Kwietnia 1964 r. Kodeks cywilny].

³⁴Verdict I ACa447/97 [1997] The Court of Appeal not published [Polish].

³⁵E. Kosowska-Korniak, *Prawnoprocesowe aspekty...* [2014] Prokuratura i Prawo 2014 157 [Polish].

³⁶Verdict II SA/Wa 1570/08 [2009] The Provincial Administrative Court in Warsaw LEX no 519829 [Polish].

³⁷M. Brzozowska-Pasieka, M. Olszyński, J. Pasieka, *Prawo prasowe...* (LexisNexis 2013) 256 [Polish].

³⁸J. Sięńczyło-Chlabicz, *Prawo mediów* (Wolters Kluwer SA 2015) 164 [Polish].

³⁹Journal of Laws no 88 item 553 (The Criminal Code of June 6 1997) 1997 as amended [Ustawa z dnia 6 czerwca 1997 r. Kodeks karny].

keep his identity confidential and disclose it to the unlimited number of people or other entities as well as to the court and the prosecutor⁴⁰.

Article 16 of the PL also provides that a journalist is excused from the duty to professional confidentiality when the material acquired from an informant concerns the acts expressed in Article 240 of the CC. This article refers to the most serious crimes, i.e. the acts of terrorism. A journalist, analogically to every other person possessing the knowledge about a punishable preparation, attempt or commission of such an act, is obligated to promptly notify the investigative authorities. The right to refuse to testify or the possibility to release from the duty of professional confidentiality does not apply in these cases⁴¹. Lack of notification about a crime mentioned in Article 240 of the CC is a crime itself punishable by the terms of imprisonment, the maximum being no more than 3 years. In case of less serious crimes there is only a social responsibility to notify the investigative authorities. The essence of the *ratio legis* of this solution is to gather relevant information from a journalist about the most serious crimes. After learning that a crime mentioned in Article 240, a journalist has a duty to share that information with competent authorities without any delay⁴². Article 16 of the PL repeals the duty to professional confidentiality by virtue of law.

In the contrary to Article 16 of the PL which automatically exempts a journalist from secrecy, Article 180 CPC implements this possibility only by the court's decision and only after two conditions are jointly met: 1) the release is absolutely necessary for the interests of justice that is for establishing the objective truth⁴³, 2) no other evidence can verify the circumstances in question. The evidence is crucial to solve a case when there exists no possibility to establish facts with currently available means of proof and when at the same time all of the accessible sources of evidence are exhausted⁴⁴.

However, this does not concern the data enabling identification of people who give information that were published or are to be published if those people reserved confidentiality of the data (with an exception of the crimes from Article 240.1 of the CC). Here the journalistic privilege is absolute. Lack of this protection could discourage the informants from helping the media to transfer to the society information⁴⁵. Admittedly, there exists an absolute prohibition of releasing from professional confidentiality, however, according to the Supreme Court it doesn't mean that journalists cannot be examined on this matter once he himself waves the journalistic privilege, wants to testify and decides to breach his duties⁴⁶. The doctrine questions however the decision of the Supreme Court not being convinced that a journalist should be able to wave his privilege.

⁴⁰Decision I KZP 15/94 [1994] The Supreme Court LEX no 20707 [Polish].

⁴¹Ibidem.

⁴²Verdict II AKa 155/11 [2011] The Court of Appeal in Katowice LEX no 1129774 [Polish].

⁴³Decision III KK 278/04 [2004] The Supreme Court LEX no 145151 [Polish].

⁴⁴Decision I KZP 15/94 [1994] The Supreme Court LEX no 20707 [Polish].

⁴⁵J. Sobczak, *Tajemnica dziennikarska* [2005] *Studia Medioznawcze* 2005 no 1 19 [Polish].

⁴⁶Decision III KK 278/04 [2004] The Supreme Court LEX no 145151 [Polish].

Moreover, in such cases a journalist risks being punished on the basis of non-performance of the duty to protect the source.

Journalists can be held liable on the basis of the PL provisions (Article 49 of the PL) in case of disclosure of a secret or an infringement of the personal rights. Confidentiality of sources is not only a journalist's right but also his obligation which when breached results in a crime punishable with a restriction of personal liberty or a fine⁴⁷. The fine may amount from PLN 100 to PLN 1,080,000. Choosing a sanction the court takes under consideration defendant's income, his personal and family situation, his economic relationships and earning capabilities. The personal liberty limitation can be granted for the period varying from one month to two years and can consist in community service or in an obligation not to move from the current place of residence or any other place indicated by the court.

The legal basis for a journalist's liability for the breach of secrecy can be also found in Article 266.1 of the CC which states that everyone who against the law or against an accepted obligation reveals or uses an information which he collected in the connection with his position or in the course of exercising his professional duties, his public, social, economic or scientific activity is subject to a fine, limitation of personal liberty or imprisonment up to two years. He can also risk a lawsuit for an violation of personal rights on the basis of Article 23-24 of the Civil Code.

The state law is compliant with European regulations. The doctrine claims that the standard of protection of journalistic secrecy is even higher⁴⁸. Polish provisions implement an absolute prohibition of an exemption from the duty to professional confidentiality in case of all the data allowing identification of an author of a material release, letter to the editor or any other material of this nature, as well as other persons providing an information published or submitted for publication⁴⁹ except the situations from Article 16.3 of the PL.

3. Who is a “journalist” according to the national legislation? Is it in your view a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media actors? Is the protection of journalists' sources extended to anyone else?

An attempt to define who a journalist is was taken by the representatives of the sciences, such as social communication, political science, sociology and economics. Also the Polish legislature has tried to systematise this matter. However, doubts have not been dispelled even by the definition contained in Article 7.2.5 of the PL. According to this Article: “A journalist is a person engaged

⁴⁷M. Zaremba, *Prawo prasowe. Ujęcie praktyczne* (DIFIN 2007) 37 [Polish].

⁴⁸W. Sokolewicz, *Prasa i Konstytucja* (Wolters Kluwer SA 2011) 123 [Polish].

⁴⁹Decision III KK 278/04 [2004] The Supreme Court LEX no 145151 [Polish].

in editing, creating or preparing press materials, remaining in the employment relationship with the publisher or engaged in such activities on behalf of and under the authority of the editorial office"⁵⁰. In practice, the above definition raises reservations justified in many aspects. The first of them may be the need for a general amendment to the act. This need stems primarily from the development of new technologies, trends in communication, and the advantage of online media over the written press, and subsequently radio and television.

The new media are replacing the traditional way of communication, so the question arises whether it is necessary to register websites in the Court by their authors (for example popular bloggers), if such website meets the formal criteria of the press (so it is updated at least once a year and includes press material for example of informational nature).⁵⁰ The above definition is a sort of a closed list. The legislator made a clear enumeration. Thus, the definition which has existed in Polish law for over 32 year is difficult to expand. The fact that the Act states that a "journalist" is person remaining in an employment relationship with the editorial office is also controversial. The increasingly popular way to establish a legal relationship is conclude civil contracts with journalists in the form of contracts for services, contracts for specific works or so-called self-employment. In these cases is no employment relationship because under the Polish law these contracts are not employment contracts. This issue is regulated by the Act of 26 June 1974 - Labour Code (Journal of Laws 1974 No. 24, item. 141, as amended).

Article 22 states that:

Paragraph 1. By establishing an employment relationship, an employee undertakes to perform work of a specified type for the benefit of an employer and under his supervision, in a place and at the times specified by the employer; the employer undertakes to employ the employee in return for remuneration.

Paragraph 1¹. Employment under the conditions specified in § 1 is considered employment on the basis of an employment relationship, regardless of the name of the contract concluded between the parties.

Paragraph 1². Employment contracts cannot be replaced with a civil law contract where the conditions of the performance of work specified in § 1 remain intact.

Therefore, the legislature strongly denies that persons who have concluded an agreement under civil law (contract for services or for specific works) with the editorial office remain in the employment relationship. Is the party to such an agreement, who performs exactly the same tasks every day such as creating press materials as a person remaining with the editorial office in the employment relationship a journalist? In the face of the law, the only difference is the

⁵⁰Journal of Laws no 5 item 24 (The Act on the Press Law of January 28 1984) 1984 as amended [Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe] and Journal of Laws no 46 item 275 (Regulation of the Minister of Justice of 9 July 1990) 1990 [Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 16 marca 2010 r. w sprawie ogłoszenia jednolitego tekstu ustawy - Kodeks wykroczeń].

agreement concluded with the editorial office because in fact, these two people perform exactly the same job and this is the reason why both of them are called "journalist" in common parlance.

Doubts in the interpretation of the legal definition of the term "journalist" may also arise from the words: "engaged in such activities on behalf of and under the authority of the editorial office" because this provision may seem to be too general. The publication of letters from readers by some editorial offices also needs specific. If a reader writes a piece of text, delivers it to the editorial office and this text is then published shall it be tantamount to the fact that the reader fully is somehow a journalist? Therefore it is another issue that the legislator should take into account during any attempt to amend the PL.

Later, the PL defines the duties of a journalist, which determines the way of performing his work.

Article 10.1. The journalist's job is to serve the society and the state. The journalist has a duty to act in accordance with professional ethics and rules of social coexistence, within the limits prescribed by law.

2. The journalist, under the employment relationship, is obliged to carry out the general program line specified in the statute or the regulations of the editorial office in which he is employed.

3. The journalist's actions contrary to the paragraph 2 is a breach of employee's obligations.

Article 12.1. A journalist is obliged to:

- 1) Take special care and reliability during collection and use of press materials, especially to check the compliance with the truth of received messages or identification of their source,
- 2) Protect the personal interests and also the interests of bona fide whistle-blowers and others who trusted him,
- 3) Ensure the use of a proper language and avoid using profanity.

12.2. The journalist is not allowed to carry out concealed advertising activities involving obtaining personal or financial benefit from the person or other entity interested in advertising.

The PL in addition to the responsibilities of the journalist, also regulates professional prohibitions. For acting to the detriment of the informant or the editorial office, or failure to comply with their obligations journalists can be held liable both civilly and criminally if the journalist disclose information covered journalist's privilege or preserves and spread the image and personal data of third parties without their consent.

Article 13.1. It is forbidden to publish in the press the opinion as to the outcome of the judicial proceedings before the judgment in the first instance is given.

2. It is forbidden to publish in the press personal information and image of people against whom preliminary proceedings or prosecution are conducted as well as personal data and the image of witnesses, victims and injured unless they agree to it.

Such an approach to the journalist's duties also is somehow limiting. Every profession should be of course closed within the framework and have the rights and obligations determined. However, it must be noted that the Act provides far more prohibitions than orders for a person carrying out the profession of a journalist.

The scope of protection of other media actors is not so high due to Polish PL. For example the PL does not protect freelance journalists, who are self employed. The protection of other media actors should be higher, so their work and their rights will be covered with protection better.

Summing up, the statutory definition of a journalist is incomplete and it seems a bit outdated. A rational legislator should therefore also go with the times and constantly amend the legislation so as to somehow keep up to date with progressive fast-paced changes in communications and media trends. In the age of the Internet, the fastest and most reliable medium in the opinion of the majority of society are the new media. Furthermore, it would be a good practice of the legislator if the employment status of a journalist was regulated. Hence, either the civil contracts concluded by journalists should be taken into consideration in the definition or editorial offices should be obliged by law to hire journalists on the basics of employment contracts in private and in public media. Only then can we talk about the logical solutions and life-sized law.

4. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

Under Polish law the protection of journalistic sources is provided in both Polish indigenous law - the Constitution of the Republic of Poland (hereinafter: Constitution) and statutes, and also in the mechanisms of the European Union law, which are implemented into the national system or used directly. These solutions provide control and protection from the outside - guaranteed by the state bodies, as well as within the internal structures, using so-called self-regulatory mechanisms.

At the level of the European Union law, the basic form of the protection is provided in the Article 10 of the European Convention on Human Rights⁵¹ (hereinafter: ECHR, ratified by Poland on 19 January 1993), which states **the 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.

⁵¹ Convention for the Protection of Human Rights and Fundamental Freedoms: http://www.echr.coe.int/Documents/Convention_POL.pdf [access: 24.02.2016].

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 European Court of Human Rights (hereinafter: the Court) has repeatedly indicated that the Article 10 of the ECHR protects not only the content and substance of ideas or information but also the way in which they are communicated.⁵² Under the Court's case law, the press enjoys the widest possible protection, which also extends to the confidentiality of journalists' sources of information. A similar view seems to be shared by representatives of the Polish doctrine, for example Marek Antoni Nowicki, the President of the Helsinki Foundation for Human Rights, in the commentary to that Article: *"The judgments of the Convention's bodies provide sufficient grounds for the conclusion that the protection resulting from Article 10 of the Convention extends to all kinds of statements expressing opinions, ideas or information, regardless of their content, and way of communicating, especially of a political nature, and on matters of public concern."*⁵³

Ireneusz C. Kamiński in an article published in the Quarterly of Human Rights of 2014 states that: *"The Court not only almost always ruled a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, but it did it also unanimously. Exceptionally, when the national authorities will present very convincing arguments, it is decided in favor of the state."*⁵⁴ As it can be noticed on the basis of the European law and jurisprudence, the protection of the secrecy should be treated as a very important right, and withdrawal from it should be marginal, and certainly not pursuing the interests of the state bodies.

The case law of the Court has a very large impact on legislation and jurisprudence of the courts of the Member States, including Polish, and it provides guidance in the development of individual solutions and reforms in the field of PL and the protection of journalistic sources.

The main conclusion resulting from the above article may be that **as a general rule the repeal of the journalistic privilege is unacceptable.** It is allowed only in **exceptional cases strictly defined by law, and in particular procedure.**

The journalistic privilege is also provided in **the Constitution.** The freedom of press belongs to the goods protected by this Act, but it is not expressed in its provisions explicitly, however it results from Chapter II, in particular from Article 54.1, according to which: *"Everyone shall have the freedom to express their opinions and to acquire and disseminate information,"* as well as from Article 49

⁵² Complaint *Remuszko against Poland* (No 1562/10): <http://www.hfhrpol.waw.pl/obserwatorium/images/Remuszko%20Amicus%20ETPC.pdf> [access: 3.03.2016].

⁵³ *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, VII. edition; LEX/el., 2015; No 487388.

⁵⁴ The Press Law of January 28 1984 [Ustawa z dnia 26 stycznia 1984 r. prawo prasowe]; Dziennik Ustaw [Journal of Law] No 5 item 24 as amended.

"The freedom and privacy of communication is granted. Their restriction may be imposed only in cases specified in the Act and in the manner specified therein."

The most detailed regulations regarding the protection of journalistic privilege under Polish law were, however, placed in the statutes, i.e., the PL⁵⁵, the CC⁵⁶ and the CPC.⁵⁷

Under the Polish PL the protection of the journalistic privilege is treated in a slightly different way than in the meaning of the ECHR or even the Constitution. Article 15 of the PL provides that:

1. The author of the press material has the right to maintain the confidentiality of his name.
2. The journalist has a duty to maintain the confidentiality of:
 - 1) the data enabling the identification of an author of the press material, letter to the editor or any other material of this nature, as well as other persons providing information published or submitted for publication if they have decided not to disclose such data,
 - 2) any information disclosure of which could infringe third parties' interests protected by law
3. The duty referred to in paragraph 2 also applies to other employees in editorial offices, publishing houses and other press organizational units.

First of all, the paragraph 2 of the above Article should be considered. According to its provisions, **the protection of journalistic sources is not a privilege of a journalist, but his statutory duty.** This provision extends the protection not only to a journalist, but also to a person providing information and his interests. Article 16 of the PL also plays a very important role:

1. A journalist is exempted from the journalistic privilege, as referred to in Article 15.2, if the information, press material, letter to the editorial office or other material of this nature concerns an offense referred to in Article 254 of the CC or the author or the person transferring such material to the journalist's information only agrees to the disclosure of her name or the material.
2. The exemption referred to in paragraph 1 also applies to other employees in editorial offices, publishing houses and other organizational units.
3. The Chief Editor should be informed to the essential extent about facts that are subject to the journalistic privilege; information or other material entrusted to him may be disclose only in cases specified in paragraph 1.

⁵⁵ Ireneusz C. Kamiński, *Ochrona dziennikarskich źródeł - drzwi bardzo wąsko uchylone*, Kwartalnik o Prawach Człowieka, 2014, no 3, p. 14-19.

⁵⁶ The CC of June 6 1997 [Ustawa z dnia 6 czerwca 1997 r. Kodeks karny]; Dziennik Ustaw [Journals of Laws] 2015 items 396, 541, 1549, 1707, 1855; Dziennik Ustaw [Journal of Laws] No 88 item 553 as amended.

⁵⁷ The Criminal Procedure Code of June 6 1997 [Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego] Dziennik Ustaw [Journals of Laws] No 88; items 21, 290, 396, 1185, 1186, 1334, 1788, 1855, 2281.

In the paragraph 1 the legislator refers to the catalog of offences listed in the CC, that a journalist should disclose. Due to the absence of appropriate amendments, the PL refers to Article 254 of the CC, but now a catalog of offences which exempts a journalist from the journalistic privilege is contained in Article 240 of the CC.

The above provision of the CC provides that a journalist is responsible for the failure to inform about the preparations for the heaviest crimes under the Polish law referred to in Articles: Article 118 (acts with the purpose of extermination), 118a (mass attack on people), 120-124 (usage of means of mass extermination), 127 (coup d'état - an act of depriving the Republic of Poland of its independence, of detaching a portion of its territory or of using force to overthrow its constitutional system), 128 (usage of force to remove a constitutional authority of the Republic of Poland), 130 (espionage), 134 (attack on the President of the Republic of Poland), 140 (terrorist attack), 148 (homicide), 163 (causing an event that endangers the life or health of many people, or property to a significant extent), 166 (piracy in sea or airspace), 189 (illegal imprisonment), 252 (taking a hostage) or acts of terrorism. This provision, however, shows that in these particular cases, a journalist not only has the right to notify investigative authorities, but it is also his duty. Moreover, for lack of such notification a journalist is criminally liable – the maximum penalty is imprisonment for up to 3 years.

The special nature of the exemption from the journalistic privilege is emphasized also by the provisions of the CPC. According to Article 180.3 among other journalists have the right to refuse to testify regarding the privilege associated with their duties. The prosecutor or the court may, however, in exceptional cases, exempt the journalist from the obligation of confidentiality. This provision raises a lot of controversy in practice and is considered (among others in positions of non-governmental organizations dealing with the protection of human rights) as a basis for abuses and groundless compelling of the journalists to reveal sources of information. Additional protection is also provided in paragraph 2 of the above Article, according to which additional premises for exemption from the journalistic privilege is the necessity to obtain information for the sake of justice and the fact that this circumstance is not possible to determine by any other evidence. According to the paragraph 3 this exemption cannot apply to data allowing the disclosure of the "informant" if he has reserved his anonymity. The paragraph 3 is not used in cases referred to in Article 240.1 of the CC. Refusal to disclose information by a journalist does not exclude his responsibility for the crime he committed by publishing information.

Each decision by the Court gives the journalist the right to appeal. It can be performed on a regular basis and the Polish Law does not provide any special rules regarding appeal due to protection of journalistic sources. The second instance is the Court of Appeal. If the formal premises are fulfilled, the possibility of a cassation complaint to the Supreme Court is possible after exploiting the legal possibilities in all instances. The right to complaint to Constitutional Tribunal also can be performed, if the courts decision is based on a regulation assumed to be against the Polish Constitution.

In conclusion, the protection of journalistic sources in Poland, resulting from the ECHR, and the Constitution guarantees a wide range of protection, both the journalist and his informant. These acts emphasize how important goods are the freedom of expression and the ability to

express it, without exposing to negative consequences. The legislator assumes that it is of the essence to proportionally balance this good with other overriding values, which results in a catalog of circumstances and prerequisites, excluding the obligation of journalistic privilege.

Regarding the implementation of laws concerning the issues raised earlier, the general principles and sources of law in Poland should be referred to. The ultimate act of law in Poland is the Constitution which is a direct source of the principle of protection of journalistic privilege. The Constitution states that its provisions should be applied directly. Moreover, the acts, which are the sources of universally binding law must be consistent with the Constitution and introduce more detailed legislative solutions in the field of the protection. Also, its restriction is allowed only within the limits of the constitutional provisions. Apart from these source, a very important for the Polish legislation are directly applicable European Union Regulations and Directives, binding the State itself, that is obliged to implement solutions, which usually takes place just under a statutory legislation. The judgments of the European Court of Human Rights whose rulings are also an important clue for the state bodies should not be ignored as well. This institution is providing the possibility of defending their rights in terms of protection of journalistic sources for Polish citizens.

In an independent way, the institution of Ombudsman appears to be useful in the matters of protection of journalistic sources. In a morally or legally unclear situations, he can act on behalf of the journalist and perform such actions as legislative initiative, complaint or at least a statement. He can also act as one of the parts in the lawsuit.

The extremely important role played by the protection of sources of information is emphasized in the Polish legislation, among others, by a strictly defined catalog of cases and the procedures according to which it may be limited. For that reason, the self-regulatory mechanisms whereby people under the protection may require it through internal mechanisms provided for in the structures is small. Much more important competences were be entrusted to the state authorities state and judiciary system. There are, however some cases in which the self-regulatory mechanisms were used, but its nature is rather subsidiary to the public mechanisms.

5. In the respective national legislation are the limits of non-disclosure of the information in line with the principles of the Recommendation No R (2000) 7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

5.1. Polish regulation of non-disclosure of journalistic sources

5.1.1. The Polish Constitution

Grounds of the principle of non-disclosure of journalistic sources can we found in Article 14 of The Polish Constitution⁵⁸ which is introduces the principle of freedom of the press and other sources of social communication. This principle is extended in Article 54 of The Polish Constitution⁵⁹. According to this provision is introduces freedom of expression, and the acquisition and dissemination of information. Whereas is prohibited preventive censorship of the mass media.

5.1.2. The Press Law

The Article 15 of the PL⁶⁰ regulates the institution of the duty of confidentiality journalism in general, specifying its content and scope, which does not include the circumstances referred to in Article 16 of the PL.

5.1.3. The Code of Criminal Procedure

The limits of the principle of non-disclosure of journalistic sources sets Article 180.3 of the Code of Criminal Procedure (hereinafter referred to as CCP)⁶¹. This regulation suffers restrictions in

⁵⁸Journal of Laws no 78 item 483 (The Constitution of the Republic of Poland of 2 April 1997) 1997 [Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.].

⁵⁹W. Skrzydło, *Komentarz do art. 14 Konstytucji Rzeczypospolitej Polskiej* [w:] W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (Wolters Kluwer SA 2013) [Polish].

⁶⁰Journal of Laws no 5 item 24 (The Act on the Press Law of January 28 1984) 1984 as amended [Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe].

accordance with Article 180.4 of the CCP, if the information relates to offenses referred to in Article 240.1 of the CC (hereinafter: CC)⁶². Regulation contained in Article 180.3 of the CCP complements and narrows the application of the procedure for exemption from the professional secrecy stated in the Article 180.2 of the CCP according to the journalist's privilege⁶³. It is assumed that the provisions concerning the possibility of exemption from the journalist's privilege constitute a relative prohibition of evidence, which after fulfilling the conditions specified in the CCP allows presenting certain source of evidence in court, despite the exclusion of the admissibility of its application in the process⁶⁴.

5.2. Relations between the regulations from the Press Law and the Criminal Procedure Code

The various relations between the journalist's privilege and the regulations from the PL Act have become a contentious issue inside the society. Being in this situation The Supreme Court ruled that regulations of the CCP must be interpreted as *lex specialis* due to the Article 15 of the PL⁶⁵. It should be noted that the provisions of the CCP fragmentary regulate the issues and apply journalist permissions to refuse their testimony as to the circumstances covered by the secret of journalism⁶⁶. Although this view has been developed by the Supreme Court under the previous regime of the criminal proceedings, it has not lost on the news and was confirmed by the resolution of the Supreme Court of 22 of November 2002⁶⁷. According to this ruling the prohibition of Article 180 paragraph 3 of the CCP specifies the content of the journalist's privilege referred to in Article 15 of the PL and is unconditional. Contrary to the view expressed in the decision of the Supreme Court of 15 December 2004⁶⁸ this absolute nature should be treated as a failure to questioning by the court reporter in the field of non-disclosure of information sources despite not invoke by him on the journalist's privilege and its willingness to disclose⁶⁹. It is crucial to highlight that the journalist is not a dispatcher of the information which enables identification of the source entrusted to him but its depositary⁷⁰ which obliges him to keep the secrecy under the threat of criminal sanction from Article 266.1 of the CC⁷¹.

⁶¹Journal of Laws no 89 item 555 (The Criminal Procedure Code of June 6 1997) 1997 as amended [Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego].

⁶²Journal of Laws no 88 item 553 (The Criminal Code of June 6 1997) 1997 as amended [Ustawa z dnia 6 czerwca 1997 r. Kodeks karny].

⁶³M. Rusinek, *Tajemnica zawodowa i jej ochrona w polskim procesie karnym* (Wolters Kluwer SA 2007) 108 [Polish].

⁶⁴Z. Kwiatkowski, *Zakazy dowodowe w procesie karnym* (Wydawnictwo Uniwersytetu Śląskiego 2001) 81 [Polish].

⁶⁵Decision I KZP 15/94 [1994] The Supreme Court Legalis no 28402 [Polish].

⁶⁶Ibidem.

⁶⁷Decision I KZP 26/02 [2002] The Supreme Court Legalis no 55320 [Polish].

⁶⁸Decision III KK 278/04 [2004] The Supreme Court LEX Legalis no 67737 [Polish].

⁶⁹T. Grzegorzczak, J. Tylman, *Polskie postępowanie karne* (LexisNexis 2014) 470 [Polish].

⁷⁰A. Bojańczyk, *Karnoprosowe znaczenie zgody dziennikarza na składanie zeznań co do okoliczności objętych tajemnicą zawodową (wokół postanowienia Sądu Najwyższego z 15 grudnia 2004 r.)* [2005] *Palestra* 2005 no 9-10 30 [Polish].

5.3. Procedures of the limits of non-disclosure of journalistic sources.

5.3.1. Council of Europe's regulations

According to the Principle 3 of the Recommendation No. R (2000) 7⁷² the limits of non-disclosure of journalistic sources must comply with the restrictions from Article 10, paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms⁷³. Moreover, this disclosure may be due to the parent interest public and in the absence of the existence of alternative sources of evidence. In respect to these requirements the national legislature is free to create their own regulations which should be applied at all stages of any proceedings where the right of non-disclosure might be invoked.

5.3.2. The limits of non-disclosure of journalistic sources based on the CCP.

Under Article 180.2 of the CCP the decision to exempt the right of non-disclosure of journalistic sources, at any stage of the proceedings the court shall subject for the sake of justice and the lack of any possibility to establish the facts which are relevant to the issue of privileged journalism on the basis of other evidence. The only body authorised to examine whether an exemption from the obligation of maintain the journalist's privilege is the court. Other authorities must make a request to the court.

Legislator in case of journalists in opposition to other professions who are entitled to profession secrecy protection narrows the scope for exemption from the non-disclosure of the information. Such an exemption cannot involve the disclosure of personally identifiable 's press release, letter to the editor or other material of this nature, as well as the identification of the persons providing the information published or submitted for publication, if these people have reserved non-disclosure the above data (art. 180 § 3 of the CCP)⁷⁴. This provision provides both protection of the right to anonymity (for example the author's right not to disclose his name), as well as sources of information and at the same time confirms a norm in Article 15.2.1 of the PL⁷⁵. On the other hand, the diversification of the letters in the enumeration placed in the before mentioned article should be understood equally the letters which weren't mentioned to be

⁷¹D. Szumilo-Kulczycka, *Glosa do postanowienia SN z 15 grudnia 2004 r. III KK 278/04* [2005] Państwo i Prawo 2005 no 12 123 [Polish].

⁷²Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2fd2> accessed 1 May 2016.

⁷³European Convention on Human Rights <http://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 1 May 2016.

⁷⁴T. Grzegorzczuk, *Komentarz do art. 180 Kodeksu postępowania karnego* [w:] T. Grzegorzczuk *Kodeks postępowania karnego. Tom I. Artykuły 1-467* (LEX el. 2014) [Polish].

⁷⁵Z. Kwiatkowski, *Zakazy dowodowe w procesie karnym* (Wydawnictwo Uniwersytetu Śląskiego 2001) 163 [Polish].

published. Otherwise, they should be treated as text submitted for publication which disposition is contained in a specific Article 7.2.4 of the PL where there is legal definition of press material⁷⁶.

According to the Article 180.4 of the CCP the journalist can be released from the duty of confidentiality according to the scope from Article 180.3 of the CCP. This one applies to the information on criminal offences enlisted in the Article 240.1 of the CC in respect of which there is a legal obligation to notify⁷⁷. *Ratio legis* of this rule is to provide opportunity to maintain from journalist information on most serious crimes⁷⁸. It applies to crimes specified in Articles 118, 118a, 120-124, 127, 128, 130, 134, 140, 148, 163, 166, 189, 252 of CC, that means: the crime of genocide; mass assassination; the use of weapons of mass destruction; production and proliferation of weapons of mass destruction ; a war crime ; inhumane treatment of civilian; forced service in enemy armed forces; attack on the independence and territorial integrity, as well as the existence and functioning of the constitutional order of the Republic of Poland; the attack on the constitutional authorities of the Republic of Poland ; espionage for foreign intelligence ; assassination of the President of the Republic of Poland; the attack on a unit of the Armed Forces of the Republic of Poland; murder; bring an event that threatens the life or health of many persons or property in large sizes; take control of the ship or aircraft; unlawful deprivation of human freedom ; or take hostages. It also applies to terrorist crimes, which defines Article 115 § 20 CC. as an offense punishable by imprisonment of a maximum of at least 5 years, committed to: serious intimidation of many people; forcing public authority of Republic of Poland or any other state or the authority of an international organization to take or refrain from certain actions; cause serious disturbances in the system or the economy of the Republic of Poland , another state or an international organization , as well as threats to commit such an act .

The use of the term “journalist” in Article 180.3 and 180.4 of the CCP provides the conclusion that the possibility of limiting the scope of the exemption from the obligation to maintain confidentiality does not apply to other employees in the editorial office, publishing press release, press organizational unit which have an access to protected information. Thus, a distinction is made on the secrecy of "journalism" and "journalist"⁷⁹. It has a crucial meaning from the point of view of admissibility to exempt from the obligation of secrecy and it means that in the case of other persons, the principle of non-disclosure of journalists' sources is not subject to an absolute prohibition of proof and they can be exempted from the secrecy in accordance with the procedure set out in Article 180.2 of the CCP.

5.3.3. The limits of non-disclosure of journalistic sources according to civil procedure

⁷⁶Decision I KZP 26/02 [2002] The Supreme Court Legalis no 55320 [Polish].

⁷⁷T. Grzegorzczuk, *Komentarz do art. 180 Kodeksu postępowania karnego* [w:] T. Grzegorzczuk *Kodeks postępowania karnego. Tom I. Artykuły 1-467* (LEX el. 2014) [Polish].

⁷⁸J. Sieńczyło-Chlabicz (ed), *Prawo ...* (Wolters Kluwer SA 2015) 154 [Polish].

⁷⁹*Ibidem*.

On the margins should be added that in Polish civil procedure even the court cannot exempt journalist from keeping the secrecy⁸⁰. In accordance to the Article 261.2⁸¹ of the code of Civil Procedure the journalist who is a witness at the same time may refuse to answer to the question, if the testimony would be combined with a substantial violation of professional secrecy.

5.4. Conclusion

The analysis of Polish regulation applying to the principle of non-disclosure of journalistic sources substantially corresponds to the standards developed in Recommendation No. R (2000) 7. In the field of criminal procedure must be noted that the possibility of exemption the reporter from the obligation of secrecy regarding sources of information is excluded by the court. This absolute prohibition of evidence suffers one exception, when the information relates to offenses of a unique specification for which there is a legal obligation to inform. It is possible to assume that this principle is limited in exceptional circumstances such as a special public interest in the prosecution and prevention of serious crimes. It is absolute to highlight that this principle accuses only to the journalist. Nevertheless, the other people who have the access to the sources of information in relation with their workplace might be exempt from the secrecy of journalism in this field in accordance with the Article 180.2 of the CCP. And in the case of civil procedure it can be assumed that there is a ban on unlimited disclose of journalistic sources.

6. In the Recommendation No R (2000) 7 the following principles should be respected when the necessity of disclosure is stated: absence of reasonable alternative measures, outweighing legitimate interest (protection of human life, prevention of major crime, defence of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the disclosure outweigh the interest in the non-disclosure?

According to current regulation, the confidentiality of journalistic sources is not only a professional privilege but also an obligation regulated by the national law. It includes all the data enabling the identification of an author of a press material, letter to the editor or any other material of this nature, as well as other persons providing an information published or submitted for publication if they have decided not to disclose such data, and also any information

⁸⁰Decision I KZP 26/02 [2002] The Supreme Court Legalis no 55320 [Polish].

⁸¹Journal of Laws no 16 item 93 (The Civil Code of April 23 1964) 1964 as amended [Ustawa z dnia 23 Kwietnia 1964 r. Kodeks cywilny].

disclosure of which could infringe third parties' interests protected by law⁸². This obligation concerns not only journalists but all people that are employed in editorial offices, publishing houses or any other press organizational units. The breach of journalistic confidentiality is punishable with a restriction of personal liberty or a fine⁸³.

The Polish law foresees a couple of situations in which the disclosure of sources is allowed or ordered. Firstly, a journalist may be released from confidentiality by the very person that provided information. An author of the material or a person providing information to the editor may consent for a disclosure of their name or the sources aforementioned.

Secondly, the PL restricts the application of the journalistic privilege in respect of an editor-in-chief. It introduces an obligation to inform him to the essential extent about facts that are subject to professional confidentiality. Editor-in-chief is a person who is competent to make a decision about the whole activity of the editor's office. His legal responsibility for publication was specifically regulated because of the informant's right to stay anonymous and the complexity of the editor's office structure which engages a numerous number of employees and positions compromising the determination of a person who met the criteria of a prohibited act⁸⁴. Consequently, journalists are obligated to disclose to the editor-in-chief information to the essential extent even if they are subject to journalistic confidentiality.

The PL in the Article. 16.1 exempts a journalist from the confidentiality of sources in case of acquiring information about the crimes listed in the art. 240 of the CC⁸⁵ (hereinafter: CC). The provision introduces the criminal liability of persons who having credible information about punishable preparation, attempt or commission of an act listed below do not immediately notify an investigative authority. The catalog of those acts includes:

- acts with the purpose of extermination (art. 118 of the CC)
- mass attack on people (art. 118a of the CC)
- usage of means of mass extermination (art. 120 of the CC)
- manufacturing, amassing, purchasing, trading in, storing, transporting or dispatching a means of mass extermination (art 121 of the CC)
- impermissible attacks and means of warfare (art. 122 of the CC)
- homicide or causing a grievous bodily harm on prisoners of war or civilians (art. 123 of the CC)
- other violations of the international law against prisoners of war or civilians (art. 124 of the CC)

⁸²Journal of Laws no 5 item 24 (The Act on the Press Law of January 28 1984) 1984 as amended [Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe] Article 15.2.

⁸³Journal of Laws no 5 item 24 (The Act on the Press Law of January 28 1984) 1984 as amended [Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe] Article 49.2.

⁸⁴J. Barta, R. Markiewicz, A. Matlak (ed) *Prawo mediów* (LexisNexis 2005) 710 [Polish].

⁸⁵The Press Law was not amended together with the Criminal Code amendment and the today's provision refers to the previous Code. This issue is currently regulated with Article 240 of the Criminal Code.

- coup d'état (an act of depriving the Republic of Poland of its independence, of detaching a portion of its territory or of using force to overthrow its constitutional system) (art. 127 of the CC)
- usage of force to remove the constitutional authority of the Republic of Poland (art. 128 of the CC)
- espionage (taking part in the activities of a foreign intelligence services against the Republic of Poland (art. 130 of the CC)
- attack on the President of the Republic of Poland (art. 134 of the CC)
- terrorist attack (art. 140 of the CC)
- homicide (art. 148 of the CC)
- causing an event that endangers the life or health of many people, or property to a significant extent (art. 163 of the CC)
- piracy on sea or in airspace (art. 166. of the CC)
- illegal imprisonment (art. 189 of the CC)
- taking a hostage (art. 252 of the CC)
- acts of a terrorism

The obligation to disclose the source in the cases listed above is not subject to any kind of a decision but comes automatically, and is justified by the reasonable public interest. It should be indicated that Article 240.2 of the CC revokes the punishability of non-disclosure in two situations. The first one applies when there is sufficient ground to assume that the competent authorities know about a criminal act that is being prepared, attempted or was committed. The second one applies when a journalist prevented committing a crime. The structure of this regulation allows restricting the exemption of the journalistic confidentiality from application to its essential minimum.

Derogations from the protection of sources can also be found in the Article 180 of the CPC. The provision emphasizes that the persons who are bound to professional secrecy may be interrogated on the confidential information only if it is absolutely necessary for the interests of justice and no other evidence can be used to determine the truth in respect of the facts in question. The structure of this regulation reflects the principles expressed in the Recommendation No. R (2000) 7, particularly principles 3 (*Limits to the right of non-disclosure*) 4 (*Alternative evidence to journalists' sources*) and 5 (*Conditions concerning disclosures*). The rule of protection of sources authorises journalists to refuse to testify on facts that are the subject matter of this obligation. The court may however exempt them from the confidentiality for the interests of justice and unless specific acts do not stipulate otherwise. The court's decision may be appealed against.

The exemption from the professional secrecy cannot concern the data allowing an identification of an author of a press material, letter to the editor or any other material of this nature, as well as other persons providing an information published or submitted for publication if they have decided not to disclose such data (this rule does not apply to the cases from the Article 240 of the CC aforementioned). Refusal to reveal this information does not exclude a journalist's criminal liability if the publication of the gathered information meets the criteria of a crime.

The Code of the Criminal Procedure foresees also the protection of the devices that store data subject to confidentiality that were acquired or found during a detention or a search of a disposer. According to Article 225 the authority conducting the evidentiary proceedings may confiscate the data subject to journalistic confidentiality however he is not authorised to examine them. He has a duty to deliver without any delay the documents containing protected information in a stamped package to the court or a prosecutor. Only later the decision is made whether to return the material to its original holder or to exempt the journalistic privilege. The materials acquired as a result of a confiscation are subject to inadmissibility of evidence. The information that is subject to journalistic confidentiality is also protected from the very journalist who gathered them. The jurisprudence of the Supreme Court emphasizes the imperative nature of the dictate to protect the sources and the fact that the statute introduces an obligation (not a right).

The structure of Article 15.2.1 of the PL distinctly proves that a journalist is not a disposer of the secret referred to in Article 15.2.1 of the PL who can dispose of it freely and at his own discretion, but a **depository** who is absolutely obligated to keep in secret any informant's personal data of which he might be aware. The informant himself is the disposer and he is entitled (but not obligated) to stipulate that a journalist should keep any data that may lead to his identification confidential. Therefore, the situation changes dramatically only from the moment when an informant does not reserve his right to stay anonymous (Article. 15.2.1 in fine of the PL). Then it is the journalist – following a prominent consent of an informant – who becomes a disposer of that data. However, it should be emphasized that in such cases the data itself cease to be protected with the journalistic confidentiality⁸⁶.

Furthermore, it also should be noted that the journalistic privilege refers to persons who provide information. By 'information' one should understand statements of facts, generalizations, hypothesis, analysis. Within the meaning of the statute, purely subjective opinions, invectives or threats are not included in this definition. The personal data of an informant whose identity is already public does not fall within the Act as well. For instance, one cannot refuse to give the investigative authorities information about a place of stay of a fugitive from prison referring to journalistic privilege. It is also irrelevant whether the information were gathered legally or what was the informant's motivation⁸⁷.

Taking into consideration the above analysis, it should be concluded that Polish law and the jurisprudence of the Supreme Court pursues the all of objectives of the *Recommendation No R (2000) 7*. The journalistic secrecy and the protection of journalistic sources constitute an **obligation** from which the exemption is possible by operation of law in strictly-defined cases that are justified with a specific interest. The catalogue consists of the most serious crimes that can be prevented thanks to this regulation. In other cases the court may decide to revoke the confidentiality rule if the interest of justice so requires and only if there is no alternative and

⁸⁶Decision II KK 184/05 [2005] The Supreme Court LEX no 163969 [Polish].

⁸⁷M. Zaremba, *Prawo prasowe. Ujęcie praktyczne* (DIFIN 2007) 27 [Polish].

reasonable means to acquire the information in question. Legal protection of the sources in the Polish legal system fulfills the standards and requirements set in the *Recommendation No R (2000)* 7.

7. In the light of the case law of the European Court of Human Rights how do national courts apply the respective laws with regard to the right to protect sources? In particular, how do they balance the different interests at stake?

In the Polish legal system the journalistic secrecy is regulated in the PL in Article 15 and Article 16. The protection of the journalistic sources' identity is legitimised by freedom of press protected with Article 14 and Article 54.1 of the Constitution of the Republic of Poland. The provisions relevant in this matter are also located in the CPC in Article 180.2 to 180.5 that regulate the exemption from the journalistic secrecy⁸⁸. Under these rules there comes a problem of the interpretation of the word 'a journalist' in relation to the personal scope of the regulation. The legal definition determined in Article 7 of the PL states that 'a journalist is a person who edits, creates or prepares a press material being employed in the editor's office or pursuing such an activity for and under authorization of the editor's office'. In her commentary⁸⁹ Mrs Ewa Ferenc-Szydelko explains that such an interpretation of this provision regulates the status of a journalist in an extensive way and thus expands the protection provided by the journalistic confidentiality.

The European Court of Human Rights (hereinafter: the Court) on numerous occasions⁹⁰ emphasized the importance of Article 10 of the European Convention of Human Rights (hereinafter: ECHR) granting the journalists with the broadest possible scope of protection. The examples of such a protection are as follows:

- *Voskuil v. Holland* – this case concerns a journalist who exercised the journalistic privilege trying not to reveal the personal data of his informants after his article about investigation on gun trafficking was published. The journalist was detained for over two weeks. In this case the Court pronounced a violation of Article 5 and Article 10 of the ECHR.
- *Telegraaf Media Nederland Landelijke Media B.V. and others v. Holland* – In this case the plaintiffs were dictated to transfer to the national authorities the documents that could reveal the identity of sources. Two journalists were put under surveillance. The Court emphasized the importance of the protection of sources for the society and the fact that the confidentiality of data may supposedly have a positive effect on potential informants. The judges pronounced also a violation of Article 8 and Article 10 of the ECHR.

⁸⁸A. Sakowicz (ed), *Kodeks postępowania karnego: komentarz* (6th edn, LEX 2015) [Polish].

⁸⁹E. Ferenc-Skrzydłko, *Prawo prasowe: komentarz* (Legalis 2013) [Polish].

⁹⁰*Factsheet - Protection of Journalistic Sources*

<http://www.echr.coe.int/Documents/FS_Journalistic_sources_ENG.pdf> accessed 26 February 2016.

- Roemen and Schmit v. Luxembourg - this case revolved around a search conducted in order to uncover a journalist's source. The Court stated that, such action (unproductive or not) is a more drastic measure than an order to divulge the source's identity. The Court held that there has been a violation of Article 10 of the Convention with respect to the first applicant and a violation of Article 8 of the Convention regarding the second applicant.
- Financial Times Ltd and Others v. The United Kingdom - Due to the Court's verdict in this case there had been a violation of Article 10 of the Convention. The applicants' right to freedom of expression was violated due to a court disclosure order in 2001 obliging them to provide documents for the purpose of identifying an anonymous journalistic source, whereas the company obtained the order based on insufficient interests.

In the Polish legal system the resolution of the Supreme Court of 19 January 1995 (reference number: I KZP 15/94) is of a great significance for the journalistic privilege⁹¹. In this ruling the judges stressed the possibility to exempt⁹² a witness from the journalistic secrecy but only if his testimony is absolutely necessary to make a decision and there is no other possibility to acquire relevant information. Such exemption may only occur in the case of absence of reasonable alternative measures. It played a crucial role in the development of the journalistic privilege. In relation to this decision remains another one issued by the Supreme Court on 24 April 2010 (reference number: WZ 36/10) which states that 'the information a journalist acquired from a spokesperson of the government administration for a purpose of publication in a press article are not protected with the journalistic confidentiality regulated in Article 15.2 of the PL'⁹³. The Supreme Court ruled in favor of a complaint on the exemption from the journalistic secrecy that was lodged by a journalist whose information was needed in the preparatory proceedings. The Supreme Court decided that the information in question was not subject to the journalistic privilege, hence it would be unfounded to exempt it.

The protection of journalistic privilege was also a matter of the Constitutional Tribunal's (hereinafter: the Tribunal) verdict of 30 July 2014 (reference number: K 23/11)⁹⁴. The Tribunal emphasized that a specific protection of the sources is essential to media to function as a guard of democracy and pluralism. The Tribunal also pointed that generally it is not possible to abstractly describe the relationship between the protection of the journalistic secrecy and the interest of justice. It is also worth to mention prof. Jacek Sobczak who in his commentary⁹⁵ to the PL presents the view that the scope of protection of journalistic secrecy is broader than the scope of protection of the medical secrecy or the legal profession privilege and refers to its

⁹¹E. Ferenc-Skrzydello, *Pravo prasowe: komentarz* (Legalis 2013) [Polish].

⁹² *Stanowisko Helsińskiej Fundacji Praw Człowieka w sprawie poszanowania gwarancji tajemnicy dziennikarskiej* <http://www.hfhr.pl/wp-content/uploads/2014/06/HFPC_stanowisko_19062014_FNL.pdf> accessed 26 February 2016 [Polish].

⁹³E. Ferenc-Skrzydello, *Pravo prasowe: komentarz* (Legalis 2013) [Polish].

⁹⁴ *Informacja prawna o wyroku Trybunału Konstytucyjnego z dnia 30 lipca 2014 r. (K 23/11) dotyczącym kontroli operacyjnej stosowanej przez służby policyjne i ochrony państwa* <http://www.senat.gov.pl/gfx/senat/userfiles/public/k8/komisje/2015/ku/infopraw/k_23_11_inf.pdf> accessed 06 March 2016 [Polish].

⁹⁵J. Sobczak, *Pravo prasowe. Komentarz* (Legalis 2008) [Polish].

imperative character in respect of Article 180.3 of the CPC. Also decision issued in the recent case of a journalist against the Central Anticorruption Bureau (hereinafter: CAB) follow the case law of the Court⁹⁶. The plaintiff sued the CAB for the breach of the information autonomy rule, illegal interference in the privacy of communication, violation of freedom of expression and of freedom of press through circumvention of the guarantees originating from the journalistic privilege. The Helsinki Foundation for Human Rights (hereinafter: HFHR) joined the legal proceedings submitting a statement about the violation of Article 8 and Article 10 of the Convention. The Regional Court in Warsaw in its ruling of 22 May 2012 responded favorably to the claim dismissing it only partially, and ordered CAB to remove all the gathered data about the plaintiff and to apologise him in 3 newspapers. According to Dorota Głowacka, who is a representative of the HFHR in this case, 'the verdict has a precedent character: it is the first time when a court set restrictive limits to the possibility of using telecommunication billings by the intelligence agencies that have the broadest access.'⁹⁷. The appeal lodged by the CAB was dismissed as a whole.

The *Goodwin v. the United Kingdom*⁹⁸ is the key case for the journalistic secrecy protection. A journalist (the plaintiff) challenged an order to disclose the identity of his source of information concerning insolvency plans of Tetra Company. According to the Court the order to disclose the information was disproportional to its purpose what constitutes a violation of Article 10 of the Convention. Furthermore, the Court pointed the priority of freedom of speech in the case in question 'therefore, it should be recalled that the interest of democratic society in securing a free press outweigh considerations taken into account by the Convention institutions for control purposes pursuant to Article 10.2, when comparing competing interests in the case'. Comparing the conclusions in this case with the law application by the Polish courts, the Supreme Court's resolution of 22 November 2002 (reference number: I KZP 26/02) should be analyzed⁹⁹. The case considers a crime of Article 212.1 of the CC that is defamation. An article was signed with a pen name of a journalist what forced the District Court to demand disclosure of his personal data from the editor. The editor appealed against this decision and eventually the case was investigated by the Supreme Court. The Regional Court argued for the disclosure as applying the confidentiality data rule of Article 180.3 of the CPC would result, in its opinion, in 'total impunity of persons who publish in the press under pseudonyms and commit a crime under Article 212.2 of the CPC'. The Supreme Court took an opposite position ruling that: 'the prohibition to exempt a journalist from confidentiality of the data allowing identification of an

⁹⁶ *Rozpoczął się proces red. Bogdana Wróblewskiego przeciwko CBA* <http://www.obserwatorium.org/index.php?option=com_content&view=article&id=4074:rozpocz-si-proces-red-bogdana-wroblewskiego-przeciwko-cba&catid=40:zkraju&Itemid=34> accessed 06 March 2016 [Polish].

⁹⁷ *Pozyskiwanie billingów naruszyło dobra osobiste dziennikarza. CBA przegrało proces z red. Bogdanem Wróblewskim* <http://www.obserwatorium.org/index.php?option=com_content&view=article&id=4203:-pozyskiwanie-billingow-naruszylo-dobra-osobiste-dziennikarza-cba-przegrao-proces-z-red-bogdanem-wroblewskim&catid=40:zkraju&Itemid=34> accessed 06 March 2016 [Polish].

⁹⁸ I.C. Kamiński, *Ograniczenia swobody wypowiedzi dopuszczalne w Europejskiej Konwencji Praw Człowieka: analiza krytyczna* LEX 2010) [Polish].

⁹⁹ A. Gerecka-Żolyńska, *Glosa do uchwały Sądu Najwyższego z dnia 22 listopada 2002 r., I KZP 26/02* [2004] OSP LEX [Polish].

author of a press material, letter to the editor or any other material of this nature, as well as other persons providing an information published or submitted for publication if they have decided not to disclose such data, regulated in Article 180.3 of the CPC specifies the meaning of journalistic secrecy introduced with Article 15 of the PL. The prohibition is absolute and cannot be violated with an application of Article 2.1 and Article 9 of the CPC⁹. Thus, the Supreme Court acknowledges the right to journalistic secrecy. The judges also concluded that the legislator places the freedom of press above the interests of justice.

Interesting results come from the comparison of the Court's verdict in Nordisk Film & TV A/S against Denmark with the Supreme Court's resolution of 19 January 1995 (reference number: I KZP 15/94) and the Supreme Court's decision of 15 December 2004 (reference number: III KK 278/04)¹⁰⁰. The Court dismissed a claim of a journalist who didn't want to hand to the authorities the records gathered when he penetrated a pedophile organization under cover. The Court emphasized that such a claim is not legitimate and that the disclosure of information in this case is proportional to the value of purpose the national authorities aimed to achieve, that is prevention of serious crime and sexual abuse of minors. The aforementioned resolution of the Supreme Court implied that there exist circumstances that can justify an exemption from journalistic secrecy¹⁰¹. It should be presumed that the Court's case should fall under such a circumstance. On the other hand, the decision III KK 278/04 allows a journalist to breach the secrecy when the court has no measures to exempt him from confidentiality given an absolute prohibition of Article 180.3 of the CPC. This way the Supreme Court left for a journalist a window open for situations when an intervention of the authorities is necessary.

Given the reflections above, it should be concluded that the Polish courts properly apply the European Court of Human Rights jurisprudence. Analyzing the case law mentioned in this report one can spot that more emphasis is put on protection of the journalistic secrecy, and in broader sense freedom of press or freedom of expression, than on protection of the state's interests or the individualised interests of the opposing party. At the same time, the jurisprudence does not grant the journalistic privilege an absolute protection (except from the information listed in Article 180.3 CPC where the confidentiality should be absolute) and leaves a possibility of exemption or justified breach by a journalist himself. Here the last judgment should be mentioned – the Supreme Court's verdict of 18 September 2015 (reference number: I CSK 724/14) where it was explicitly underlined that the journalistic privilege protects the informants not a journalist's individual interest which is a proper interpretation of this regulation's purposes. Taking into consideration all the elements analyzed, it should be concluded that the Polish courts grant the journalistic secrecy a broad scope of protection, they develop in this direction and at the same time they keep objectively rational, balanced and proportional approach which is in compliant to the *Recommendation No R (96) 4* and the *Recommendation No R (2000) 7*.

¹⁰⁰Gabriel-Węglowski, *Glosa do postanowienia SN z dnia 15 grudnia 2004 r., III KK 278/04* [2009] OSP LEX [Polish].

¹⁰¹E. Ferenc-Skrzydłko, *Pravo prasowe: komentarz* (Legalis 2013) [Polish]. See also W. Lis (ed), *Status prawny dziennikarza* (LEX 2014) [Polish].

8. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

The main purpose of the reporter's privilege has been is to enable protection of informants from whom the journalists have acquired indispensable information. Regarding the reporter's privilege, Article 180 of the CPC is of the utmost importance as it accords the possibility to interrogate a journalist. Article 15 and Article 16 of the PL shall also be taken into consideration. The source and constitutional guarantees of above mentioned Articles are to be found in the Constitution of the Republic of Poland - Article 14 states the freedom of the press and Article 54(1) guarantees the freedom of expression.¹⁰²

CPC's regulations define conditions of interrogation legality and thus the conditions of disclosure of the informant's identity. On that topic, opinion issued by Polish Supreme Court¹⁰³ is the prevailing one. It states that the reporter's privilege is subject to an absolute evidentiary prohibition as to the possibility of disclosing the source or handing over a letter to the editor, with the exception of the cases enumerated in Article 240 of the CC, mentioned earlier in point 6 of this Report. PL recognises the reporter's privilege even broader imposing the obligation not only to keep in secrecy data enabling identification of press material's author, but also a letter to the editor or a different material which possesses such trades. Moreover, it extends this obligation to employees working in editorial offices, publishing houses or press units^{104 105}. However, none of these paragraphs sheds light upon enquiry activities or operational activities carried out on or towards persons that might be bound by the reporter's privilege. What is more, aforementioned regulations will not be found in any of the quoted legislation or in the „anti-terrorist law” simply because the Polish law does not define nor envisage such specialistic regulations. Its potential material scope is to be found in numerous, individual acts such as the Law on Police or the Law on Central Anti Corruption Bureau. The issue of criteria and the application of existing laws towards journalists remain mainly a matter of doctrine as well as the jurisprudence. Nevertheless, it should be underlined that certain regulations not only do not protect the journalist, but also pose a threat to the protection of his source (for example the easiness of acquiring phone bills). To sum up, in the Polish law there is no specific guarantees

¹⁰²W. Sokolewicz, *Uwagi do wybranych zagadnień praw jednostki* [w:] Kędzia Z Rost A (ed), *Współczesne wyzwania wobec praw człowieka w świetle polskiego prawa konstytucyjnego* (Wydawnictwo Naukowe UAM 2009) 309 [Polish].

¹⁰³Decision I KZP 26/02 [2002] The Supreme Court Legalis no 55320 [Polish] and an approving gloss A. Gerecka-Żołyńska, OSP 2004 no 1 item 5 [Polish].

¹⁰⁴E. Ferenc-Skrzydelko, *Prawo prasowe: komentarz* (Legalis 2013) [Polish].

¹⁰⁵J. Sobczak *Prawo prasowe. Komentarz* (Legalis 2008) [Polish].

protecting informants. Moreover, there is a lack of complex control schemes over operational activities directed towards journalists which manifests *inter alia* in the prior control deficiency in regards to bugging a journalist.

On the grounds of recent changes in the criminal procedure¹⁰⁶ we are obliged to avail ourselves of the line of reasoning expressed before the amendment. Also, it shall be noted that an amendment on the Law on Police came into force 7 February 2016, which alters (once more) rules relating to certain operational activities. Aforementioned modification was widely contested by the Polish Ombudsman¹⁰⁷, the National Council of Judiciary in Poland, the District Chamber of Legal Advisors and Non-Governmental organizations¹⁰⁸ like the Amnesty International¹⁰⁹ or the Helsinki Foundation for Human Rights¹¹⁰. This opposition stems from the passage that if in the course of the operational control, the information subject to the reporter's privilege has been acquired, it is up to the court to decide whether that information is admissible or not and if it can be used in the investigation. What is more, only prosecutor's office will have the power to bring an interlocutory appeal. The catalogue of people authorised to acknowledge the justness of the reporter's privilege was also contested. Doubts are also raised by the issue of providing data first to the case-leading prosecutor and then to the court¹¹¹.

In the absence of distinct regulations, criteria that allow the collection of evidence against journalists do not differ significantly from general regulations. Aforementioned Article 240 of the CC treats the reporter's privilege as if it did not exist, as it enumerates crimes that must be reported to the authorities no matter the notifier's status¹¹². It catalogues serious crimes such as homicide or coup d'état. *A maiori ad minus*, if the reporter's privilege does not apply to the journalist's interrogation, under no circumstances can it be applicable to enquiry activities or operational activities.

The list specified in the Article 240 of the CC is narrowed down. In the event of any other breach of law, general criminal proceedings rules and specific rules must apply. One of the law-

¹⁰⁶For example amendments that entered into force 1/07/2015r. (Dz.U.2013.1247 and Dz.U.2015.396).

¹⁰⁷ *Do MC oraz GIODO ws. dostępu służb do danych internetowych w projekcie ustawy o Policji* <<https://www.rpo.gov.pl/content/do-mc-oraz-giodo-ws-dostepu-sluzb-do-danych-internetowych-w-projekcie-ustawy-o-policji>> accessed 1 February 2016 [Polish] and *Do Marszałka Sejmu i Marszałka Senatu ws. projektu ustawy o Policji* <<https://www.rpo.gov.pl/pl/content/do-marszalka-sejmu-i-marszalka-senatu-ws-projektu-ustawy-o-policji>> accessed 1 February 2016 [Polish].

¹⁰⁸ *Apel NGOśóv do Sejmu o ochronę prawa do prywatności* <https://amnesty.org.pl/no_cache/aktualnosci/strona/article/8725.html> accessed 1 February 2016 [Polish].

¹⁰⁹ *Polska: Zmiany w ustawie o policji rażąco naruszają prawa człowieka* <https://amnesty.org.pl/no_cache/aktualnosci/strona/article/8739.html> accessed 1 February 2016 [Polish].

¹¹⁰ *Uwagi Helsińskiej Fundacji Praw Człowieka do poselskiego projektu ustawy o Policji oraz niektórych innych ustaw (druk sejmowy nr 154)* <http://www.hfhr.pl/wp-content/uploads/2015/12/HFPC_opinia_ustawa_o_policji_30122015.pdf> accessed 1 February 2016 [Polish].

¹¹¹ *Written Comments by the Helsinki Foundation for Human Rights 9 February 2016* <http://www.hfhr.pl/wp-content/uploads/2016/02/Amicus_Bureau_of_Investigative_Journalism_pko_Wielkiej_Brytanii.pdf> accessed 06 March 2016.

¹¹²J. Skorupka (ed), *Kodeks Postępowania Karnego. Komentarz* (19th edn, C.H. Beck 2015) [Polish] and Decision I KZP 26/02 [2002] The Supreme Court Legalis no 55320 [Polish].

regulated activities is the search and the property seizure described in the chapter 25 of the CPC. Upon a written prosecutor's or court's request¹¹³, property that might act as evidence or that is subject to seizure shall be surrendered¹¹⁴. If a person does not comply with the claim on the voluntary basis, a search warrant might be issued and by order of the court, a prosecutor can conduct the search or by order of the court or a prosecutor, the police can conduct the search. The organ entitled to conduct the search must be explicitly designated in the competent authority order¹¹⁵. However, if a searchee declares that the document found is of a protected content (and reporter's privilege is one of those), such a document is being transferred to the prosecutor (according to the respectful legislation) or the court without being read¹¹⁶, to confirm its protection. Aforementioned statement must refer to a specific document.¹¹⁷ This restriction is not applicable when the proprietor of a document or information is a suspect or when he is either the recipient or author of personal nature writing¹¹⁸. It is acknowledged, that if the fragile nature of the information is being learned by the body that conducted the seizure after having acquainted with the information, the order of transferring the document to the prosecutor or the court is still in force¹¹⁹.

Article 218 of the CPC obliges offices, institutions, entities active in the field of postal service or telecommunication service, custom offices, transport entities and undertakings to give out a parcel, correspondence or data only on prosecutor's or court's demand. An analogous regulation is to be found in the Article 19 of the Law on Police that covers preliminary activities undertaken by police with the aim of prevention, detection, determination of perpetrators, as well as obstention and consolidation of the evidence that relate to charges that are **publicly prosecuted** or relate to an intentional crime when other measures have been proved ineffective or unsuitable. The so called „operational activities” comprise of correspondence and parcel content monitoring, the application of technical measures enabling a clandestine acquisition of information, evidence and its recording (in particular the content of phone conversations and different information transmitted via telecommunication's network). It is a **non-public activity** that might be authorised only in certain cases that have been enumerated by the law¹²⁰. This kind of a control is ordained by a district court within its territorial jurisdiction upon National Police Chief's written motion that can be filed only after having obtained National Chief Prosecutor's written consent.¹²¹

¹¹³In urgent cases, also the police or other authorized unit.

¹¹⁴Journal of Laws no 89 item 555 (The Criminal Procedure Code of June 6 1997) 1997 as amended [Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego] Article 217.

¹¹⁵B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki (ed), *Kodeks postępowania karnego. Komentarz* (Wolters Kluwer SA 2015) 730 [Polish].

¹¹⁶Grzegorzczuk J. Tylman, *Polskie postępowanie karne* (LexisNexis 2014) 540 [Polish].

¹¹⁷M. Rusinek, *Tajemnica zawodowa i jej ochrona w polskim procesie karnym* (Wolters Kluwer SA 2007) [Polish].

¹¹⁸P. Kruszyński, M. Błoński, M. Zbrojewska, *Dowody i postępowanie dowodowe w procesie karnym* (C.H. Beck 2015) 224 [Polish].

¹¹⁹M. Rusinek, *Tajemnica zawodowa ...* (Wolters Kluwer SA 2007) [Polish].

¹²⁰Journal of Laws no 30 item 179 (The Act on Police Law of the 6 April 1990) 1990 [Ustawa z dnia 6 kwietnia 1990 r. o Policji] Article 19 (1-1-8).

¹²¹B. Opaliński, M. Rogalski, P. Szustakiewicz (ed), *Ustawa o Policji. Komentarz* (Legalis 2015) [Polish].

None of these regulations contain specific mechanisms of handling correspondence nor they mention the reporter's privilege. The issuance of journalists' phone bills is being widely commented on by the doctrine. For years, it has been established that due to the possibility of tracking down the informant, disclosing such data in the course of proceedings is impermissible¹²². A phone bill is perceived to be a document that is protected by the reporter's privilege, thereby it is under protection of the Article 226¹²³ and the Article 180 of the CPC¹²⁵. This thesis was also affirmed by the Warsaw District Court in the sentence issued on 26 April 2013¹²⁶. Despite explicit remarks made by the Constitutional Tribunal¹²⁷ and once declared intentions of the legislator, the new Law on Police does not include a passage that would state that courts shall give the consent for acquiring phone bills of people covered by the reporter's privilege. Moreover, the law includes provisions that facilitate the access to data from internet service providers. It was highlighted and criticized by the the Chamber of Press Publishers who pointed out that these regulations allow to monitor on-going journalist's work giving no effect to provisions included in the PL or Article 180.3 of the CPC¹²⁸. What is more, even the reporter himself may not be aware that he is being investigated, thereby he cannot take any action in order to protect his information's source¹²⁹.

Different matter is the conversation's control and consolidation. Again, no distinct provision considering journalists will be found, yet general regulations that tackle this matter are *per se* restrictive. Bugging is acceptable only in the stage of preliminary activities and in relation to crimes enumerated in the Article 237.3 of the CPC¹³⁰. A decision on enabling this procedure is issued by the court in a **decree** on prosecutor's request where he outlines the objective and subjective scope of control¹³¹. It must serve to detect and obtain evidence valuable to an on-going proceeding or it must act as a deterrent to committing a new crime. In court's decision the

¹²²M. Rusinek, *Tajemnica zawodowa ...* (Wolters Kluwer SA 2007) [Polish].

¹²³Journal of Laws no 89 item 555 (The Criminal Procedure Code of June 6 1997) 1997 as amended [Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego] Article 226.

¹²⁴ *Kontrola bilingów w świetle gwarancji chroniących osobowe źródła informacji dziennikarskiej* <<http://www.obserwatorium.org/images/biuletyn%20nr%2024%20www.pdf>> accessed 6 March 2016 [Polish].

¹²⁵Ibidem

¹²⁶Decision I ACa 1002/12 [2013] The Supreme Court Legalis no 1048905 [Polish].

¹²⁷Decision K 23/11 [2014] The Constitutional Tribunal Journal of Laws no 2014 item 1055 [Polish].

¹²⁸ *Stanowisko Izby Wydawców Prasy w sprawie projektu nowelizacji ustawy o Policji i niektórych innych ustaw* <http://www.iwp.pl/pliki/Stanowisko_IWP_ws_nowelizacji_ustawy_o_policji.pdf> accessed 6 March 2016 [Polish].

¹²⁹ *Written Comments by the Helsinki Foundation for Human Rights 9 February 2016* <http://www.hfhr.pl/wp-content/uploads/2016/02/Amicus_Bureau_of_Investigative_Journalism_pko_Wielkiej_Brytanii.pdf> accessed 06 March 2016.

¹³⁰ P. Kruszyński, M. Błoński, M. Zbrojewska *Dowody i postępowanie ...* (C.H. Beck 2015) 191 [Polish].

¹³¹In case of exceeding those, for example by detecting a different crime enumerated in the catalogue or detecting a person that committed the crime that is being under investigation but is not encompassed by the control, it is possible to file a motion for permission of the use of information acquired through bugging in the criminal proceedings.

qualification of the act, a person, data carrier, indication of time¹³² for which the bug can be set and a justification with the analysis of bugging aim must be indicated. It seems that if the information covered by the reporter's privilege is being divulged with no such intention, as a side effect to a proceeding not related to the reporter's privilege matter, introducing further restrictions would be unjustified. On the other hand, if the motion that is filed with the court states that the aim of the control is to track the identity of an informant, it appears to be essential to exempt the controlled entity from the obligation of professional secrecy. Since the reporter's privilege is considered to be peremptory, conduct of such a control shall be impermissible¹³³. The list of measures that can be applied to a journalist with the aim of exposing its informant is somehow reduced. Unfortunately, provisions concerning this matter are scattered in at least a dozen or so law regulations, usually they are not outright enough, which makes them less transparent and accessible. Provisions itself, when they happen to have a separated passage concerning the reporter's privilege are formulated in a specific way not necessarily understandable for a person with no legal background. Moreover, required criteria are most commonly formal ones. If a different than formal type of basis appears (for example uselessness of different means) it is within court's discretionary decision how to react on it. Nevertheless, both doctrine and judicature have a preference to giving the reporter's privilege a sound status and stretching it onto various elements even in case of no such direct regulation (so was at least until now). The effect of latest amendment cannot be predicted. However, it is certain that it vests in the police and different units more privileges not respecting the Polish Constitutional Tribunal's recommendations on protecting rights of individuals.

9. Can journalists rely on encryption and anonymity online to protect themselves and their sources against surveillance?

Polish legislation does not provide specific regulations concerning the encryption of journalists' personal data and protection of its information sources in the context of internet publications. However, journalists and their informants are protected from disclosing above mentioned information on the account of the reporter's privilege. Regulations referring to the reporter's privilege limit or - in case of the right to anonymity - exclude the possibility to divulge author's personal data.

Discreet check in the form of *inter alia* collecting technology data is carried out with the aim of prevention, detection, perpetrator's determination, as well as obtention and consolidation of evidence of the crime committed intentionally. Above mentioned crime is to be initiated by

¹³²The maximum of 3 months, with the possibility of prolongation for the next 3 months, for the same person - (temporal scope). P. Kruszyński, M. Błoński, M. Zbrojewska - *Dowody i postępowanie...*(C.H. Beck 2015) 203 [Polish].

¹³³B. Augustyniak, K. Eichstaedt, M. Kurowski, D. Świecki (ed), *Kodeks postępowania karnego. Komentarz* (Wolters Kluwer SA 2015) 763 [Polish].

public prosecution for example in case of organizing children's adoption with the aim of achieving benefits, president's assassination or IT data damage¹³⁴.

On the grounds of the Article 15.1 of the PL, the article's author is entitled to keep his personal data in secret. That means that the journalist can either use a nickname or remain anonymous. Aforementioned entitlement results also from the Article 47 and the Article 51 of the Constitution of the Republic of Poland.

Article 47 of the Polish Constitution stipulates that everybody has the right to the protection of his private life, family life, honor and reputation and the right to make decisions concerning his private life. According to this rule, the Constitution by defining such elements as „protection of the privacy”, creates an obligation towards public authorities to refrain from interfering in these life domains and guarantees suitable protection against every activity that could infringe upon aforementioned regulation. This right, however is not absolute¹³⁵. The Constitutional Tribunal explicitly determined that „The right to privacy, as well as other rights and liberties do not have an absolute dimension and by the sake of it they can be subject to limitations. These limitations shall however comply with constitutional requirements. They must be supported by different constitutional norms, principles or values. The limitation's degree shall remain in proportion to interests' significance. Due to the proportionality principle it is indispensable to compare the protected good with the sacrificed good and to orchestrate colliding interests”¹³⁶. The European Court of Human Rights has a very similar outlook on this matter. According to its judgment, restriction of the right to privacy protection stated in the Article 8 of the ECHR is necessary in a democratic country to safeguard the state and the public security as well as the economic prosperity of the country, the protection of the national order and the prevention of disorder, the protection of health and morality, as well as the protection of rights and freedoms of other people.” It states that „the notion of necessity means that state's interference corresponds to the urgent social need and (...) is proportional to the legally legitimate aim, that has to be achieved”¹³⁷.

Article 51 of the Polish Constitution specifies the right to the personal data protection. Pursuant to its provisions, nobody can be obliged by any other mean but the law to disclose his personal information and the public authorities cannot obtain, collect and share information on its citizens other than necessary in a democratic country. Additionally, everybody is entitled an access to official documents and datasets that concern him and has the right to request information's rectification and information's cancelation when incorrect, incomplete or collected in violation of the law. What needs to be underlined is the fact that the rules and the mode of

¹³⁴Journal of Laws no 5 item 24 (The Act on the Press Law of January 28 1984) 1984 as amended [Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe] Article 5 [Polish].

¹³⁵B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, (C.H.Beck 2012) 298 [Polish].

¹³⁶Decision K 23/11 [2014] The Constitutional Tribunal LEX 34599 [Polish].

¹³⁷Haase vs. Germany [2004] The European Court of Human Rights Reports of Judgments and Decisions, 11057/02

information's collection and transmission are determined by law¹³⁸. One of the Constitutional Tribunal's judgments states that aforementioned article of the Polish Constitution strongly emphasizes the protection of an individual against public authorities due to the fact that the subject obliged to execute the law set in this Article is the public authority itself¹³⁹.

Article 180(3) of the CPC constitutes the right to anonymity. According to the regulation, journalist's exemption from a professional secrecy cannot refer to data that will enable the identification of publication's author if the author himself has reserved the right not to disclose this information. Aforementioned ban is of an absolute character and cannot be violated or altered via the application of different provisions¹⁴⁰. Thereby, the court cannot request the journalist to disclose data that will enable to track down the informant. The ban to divulge personal data applies also to aforementioned data administrator and all others in possession of author's any personal data¹⁴¹. To be able to invoke this law, the author must explicitly express the desire to remain anonymous because aforementioned law is not a presumable law. As a manifestation of such a will, the author may sign the article using a nickname. It shall be underlined, that according to the Polish Supreme Court's sentence, the identity protection right encompasses not only journalists, but also authors of press materials no matter if the material is categorised as a publication or not¹⁴².

In accordance with the Police Law act's amendment that entered into force 7 February 2016, materials that might contain information protected by the reporter's privilege (that applies also to data on informants) collected by the police and other services as a result of a discreet check is transferred by the Prosecutor's Office to the court. The court may lift the reporter's privilege when such an action is necessary for the justice system and the fact in question cannot be determined on the grounds of different evidence. Thereby, information concerning journalists' sources collected by surveillance methods shall be used in court only in particular cases. Exemption from the reporter's privilege is possible only when journalist's hearing on classified information is essential to solve a criminal case. This necessity means the exhaustion of different evidence methods and inability to determine facts by means of different evidence methods¹⁴³. Also, the Article 168a of the CPC is of a vital value as it prohibits conducting and using evidence acquired by committing an offense in court.

Newly adopted regulations on surveillance in Poland arouse a wave of controversy in both legal and reporter's environment. According to many lawyers, recent amendments grant too much leeway to the authorities regarding telecommunication's and internet's control. It may act as a real threat to the freedom of expression since on the grounds of new regulations the police and

¹³⁸Journal of Laws no 78 item 483 (The Constitution of the Republic of Poland of 2 April 1997) 1997 [Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.] Article 51.

¹³⁹Decision K 19/01 [2002], The Constitutional Tribunal LEX 52918 [Polish].

¹⁴⁰Decision I KZP 26/02 [2002] The Supreme Court OSNKW 2003 no 1-2 item 6 [Polish].

¹⁴¹Decision II SA/Wa 1570/08 [2009], The Provincial Administrative Court in Warsaw LEX no 519829 [Polish].

¹⁴²Decision II SA/Wa 1488/09 [2010], The Provincial Administrative Court in Warsaw LEX no 619970 [Polish].

¹⁴³Decision I KZP 15/94 [1994] The Supreme Court LEX no 20707 [Polish]

other services do not have to file an enquiry with the internet service provider to receive data that they need. However, these concerns cannot be confirmed until the provisions are applied in practice for a longer period of time.

10. Are whistle-blowers explicitly protected under law protecting journalistic sources? Is there another practice protecting whistle-blowers? Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

According to the Article 5 of the PL, „every citizen, in compliance with the rule on the freedom of speech and the right to criticism, may provide information to the press. Nobody can be exposed to harm or allegation on account of communicating information to the press if he has acted within the legal framework”¹⁴⁴. This provision is based on the rule of the freedom of expression that is stated in the Article 54 of the Constitution of the Republic of Poland and in the Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter CPHRFF). Although CPHRFF refers to the freedom of expression as well as receiving and transmitting - also beyond the borders - information, the European Court of Human Rights derived from it a wider meaning *inter alia* directly connected with the media's functioning.¹⁴⁵

Despite the lack of a legal definition, the doctrine provides a description that an informant is a citizen that provides information to a journalist. He is a, so called, source of information¹⁴⁶. Moreover, a whole catalogue of persons that are not informants was set by the judicature (intermediaries or messengers).

It is worth noting, that the definition of a whistle-blower established in the Recommendation of the Council of Europe Ministers' Committee (reference number: CM/Rec (2014)7) differs from the definition of an informant set in the Polish PL which might cause certain interpretative complications. However, the Polish law does not have a definition of the aforementioned whistle-blower or the employee-informant. Transparency International underlines that a term „whistle-blower” applies not only to a full-time employee, but also to anybody who is in possession of an inside knowledge related to functioning of the entity - a consultant, a person hired on the grounds of the civil law, an intern, a volunteer, or a former employee¹⁴⁷.

¹⁴⁴Journal of Laws no 5 item 24 (The Act on the Press Law of January 28 1984) 1984 as amended [Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe] Article 5.

¹⁴⁵W. Sokolewicz, *Prasa i Konstytucja* (Wolters Kluwer SA 2011) 20 [Polish].

¹⁴⁶M. Zaremba, *Tajemnica zawodowa dziennikarza a jego odpowiedzialność prawną, a gdzie miejsce wydania?* [2003] *Studia Medioznawcze* 28 [Polish].

¹⁴⁷Kobylińska, M. Folta, *Sygnaliści - ludzie, którzy nie potrafią milczeć. Doświadczenia osób ujawniających nieprawidłowości w instytucjach i firmach w Polsce* (Fundacja Instytut Spraw Publicznych 2015) 7 [Polish].

It is obvious that a whistle-blower can become a source of journalistic information when he takes a decision to notify the press about irregularities occurring in the workplace (only if this data is perceived as confidential information). Hence, whistle-blowers and informants do not enjoy the same scope of protection, that is why a stark separation between these two groups shall be made.

Information is a statement about facts or different declarations like generalizations, hypothesis, analysis or facts' evaluations. That being said, opinions of a purely subjective character are not information (the Supreme Court's ruling of 20 October 2005; case reference number: IIKK184/05).¹⁴⁸ Also the difference between whistle-blowers' and informants' actions should be taken into consideration. The former approaches journalists directly and reporter's main aim is to pass this news to the public. The latter often notifies company's control authorities or trade unions but that of course does not exclude the possibility of divulging it to the mass media for example on a personal blog.

The main fear that whistle-blowers face is a situation of retaliation, mobbing or even position degradation or termination of employment contract due to the breach of professional secrecy. Persons reporting irregularities fall into supervisor's or employer's disfavor as it may draw the unwanted attention towards the company. That is why it is of an essential value to create mechanisms that will allow to protect individuals who report wrongdoings that occur in the workplace. Some crucial provisions according to this kind of situations are stated in chapter IIa of Polish Labour Code¹⁴⁹.

In the Polish law system there is no singular act that would holistically regulate the matter of „irregularities in a workplace” signalization and protection related to this issue¹⁵⁰. Some legal protection tools are regulated in the Key Witness Act, the CPC (incognito witness)¹⁵¹ or in the Personal Data Protection Act.¹⁵²

It is to be underlined, that certain scope of whistle-blower's protection is to be found in the Polish Labour Code. It is stated in beforementioned Chapter IIa which respects to the equal treatment in employment. But what acts on its disadvantage is that it applies only to employees with an employment contract which totals only to 70% of workers in Poland. The remaining 30% are people hired under the civil law regulations and are not subject to Labour Law's provisions. As a result, international standards on whistle-blower's protection are not being complied with. In Poland many complaints against an employer are being filed in with the court to recognise the termination of employment as unfounded. The judge is allowed to examine

¹⁴⁸M. Zaremba, *Pravo prasowe- ujęcie praktyczne* (DIFIN 2007) 38 [Polish].

¹⁴⁹Journals of Laws no 24 item 141 (The Labour Code of June 26 1974) 1974 [Ustawa z dnia 26 czerwca 1974 r. Kodeks pracy].

¹⁵⁰A. Wojciechowska- Nowak, *Ochrona sygnalistów w Polsce. Stan obecny i rekomendacje zmian* (Instytut Spraw Publicznych 2012) 9 [Polish].

¹⁵¹Journal of Laws no 89 item 555 (The Criminal Procedure Code of June 6 1997) 1997 as amended [Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego].

¹⁵²Journal of Laws no 133 item 883 (The Act on the Protection of Personal Data of August 29 1997) 1997 [Ustawa z dnia 29 sierpnia 1997 r. o ochronie danych osobowych].

reasons for contract termination but only those that are included in the notice of termination¹⁵³. That solution was supposed to protect employee against presenting new reasons by the employer. However, it triggered a situation where notices of termination do not include real reasons for the contract termination and the court cannot investigate whether the real reason for employer's dismissal was of a different nature. It is a pernicious obstacle for the whistle-blower's protection because it leads to covering a real reason for the contract termination in a way that it becomes impossible to bring it up to the court's attention.

A vital aspect of a whistle-blower's protection is that according to the 1729 Resolution of the Council of Europe, point 6.1.1 he must act in good faith. The obligation to protect whistle-blowers who act in good faith results directly from the Article 12.1.2 of the PL. In legal proceedings, the employee must prove the authenticity of facts revealed in case the employer brings up disloyalty charge. Polish judges consider that regulation as a hindrance and not as an element of whistle-blower's protection, because they (the whistle-blowers) could seek to acquire evidence in a dishonest and illegal manner. In the judge's opinion „if regulations allowing to assume and not dwell upon the topic that he acted in good faith and his base was solid not fictitious or caused by excessive imagination existed - then yes. However, we do not have such regulations”¹⁵⁴. Whistle-blowers that decide to divulge information about the workplace irregularities via media can use as a protection mechanism the possibility of not revealing their personal data. Then, the whistle-blower will enjoy the guarantees that result from the Article 12 and 14 of the PL. A journalist cannot bypass this regulation and it is only the informant that can exempt him from his reporter's privilege. In the event of legal proceedings the journalist can call on the informants to come forth, but he cannot force him to do that¹⁵⁵. Both parties are bonded by mutual trust and also both parties are the administrators of the information provided. The exemption from the reporter's privilege may happen by the virtue of law (statutory exemption)¹⁵⁶. The only exception is when the identity of an informant can be revealed without his explicit consent is a situation when the information divulged relates to the occurrence that bears the characteristics of the Article 240 of the CC.

One of the fundamental and the most important sort of the journalistic privilege is the secret of informant's identity. The Article 12.1 of the PL explicitly states the protection of the, so called, informants. It stipulates that a journalist is obliged to protect: „(...)2. personal rights and moreover interest of informants and other people that put confidence in him and act in good faith¹⁵⁷”. The protection of informants is intertwined with the journalistic privilege, however aforementioned provision steps forward and orders to protect all kind of informant's interests (material and non-material) when he confided in a journalist¹⁵⁸. The Article 15.2.1 of the PL

¹⁵³Wojciechowska A. Wojciechowska- Nowak, *Ochrona sygnalistów ...* (Instytut Spraw Publicznych 2012) 11 [Polish].

¹⁵⁴A. Wojciechowska- Nowak, *Ochrona sygnalistów ...* (Instytut Spraw Publicznych 2012) 12 [Polish]

¹⁵⁵I. Dobosz, *Prawo prasowe. Podręcznik* (Wolters Kluwer SA 2011) 229 [Polish].

¹⁵⁶J. Sińczycło- Chłabicz, *Prawo mediów* (Wolters Kluwer SA 2015) 167 [Polish].

¹⁵⁷Journal of Laws no 5 item 24 (The Act on the Press Law of January 28 1984) 1984 as amended [Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe] Article 12 [Polish].

¹⁵⁸I. Dobosz, *Prawo i etyka w zawodzie dziennikarza* (Wolters Kluwer SA 2008) 63 [Polish].

points out a journalist's obligation to keep in secret the data that might enable *inter alia* the informant's identification. Moreover, an informant can exercise his right to authorise the publication until it has been published.

What is more, a criminal responsibility (either a fine or a prison sentence) is previewed for obstructing or suppressing press criticism. Regulation found in the Article 44.1 of the PL has a wide scope of application, it applies not only to journalists but (at the same time) to their informants. Every entity that suppresses press critics fall within the scope of such liability, which means that this Article relates not only to individuals, but also to state authorities and enterprises.

In the ECHR case law, guarantees resulting from the Article 10.1 of the Convention are being underlined and the case of *Wojtas - Kaleta vs. Poland* confirms this warranty. The plaintiff, who was a journalist, was accused by her employee of breaching the TVP rules and as a consequence, was reprimanded for criticizing in an open letter TVP's activities. The Tribunal judged the breach of the Article 10 of the Convention and that aforementioned provision is applicable to a working place and also civil servants are entitled to make use of it. Thereby, it shall be assumed that the reporter's privilege under the Convention is a protected value within the frame of the freedom of information's transmission¹⁵⁹.

To sum up, the Polish legislation does not fulfill Strasbourg's standards when it comes down to whistle-blower's protection. A partial regulation concerning whistle-blower's legal situation is to be found in several acts, however there is no single act that would serve as a basis to start legal proceedings on the grounds of infringements in the work place. The only just and admissible mechanism to fight phenomena of corruption and breach of workers' rights is filing a complaint with the European Court of Human Rights in Strasbourg invoking the breach of provision 10 on the freedom of information's transmission of the Convention. In the event when the whistle-blower decides to disclose the classified information to the media, he becomes a journalistic source of information and is protected by the PL regulations. It needs to be noted that the Polish Ombudsman Adam Bodnar together with Adam Płoszka stated that: „In Poland, despite numerous exhortations from the part of NGOs (especially the Batory's foundation) no law on protecting workers who, in public interest, disclose irregularities in their work place was passed. Politicians do not seem to notice that whistle-blower's protection brings no expenses but benefits. This approach is best pictured by many international entities that adopt internal procedures that allow the functioning of whistle-blowers”¹⁶⁰.

On the other hand, informant's situation is radically different due to the protection privileges he is accorded under the Polish PL. No state authority, except the court, is entitled to coerce journalist into divulging informant's identity, if that would mean the possibility of exposing him to damage. In Poland, the journalistic privilege in respect to a personal source of information is

¹⁵⁹I. Dobosz, *Prawo i etyka...* (Wolters Kluwer SA 2008) 74 [Polish].

¹⁶⁰*Europa uczy się ochrony sygnalistów dzięki Snowdenowi* <<https://wszystkoconajwazniejsze.pl/adam-bodnar-adam-ploszka-europa-uczy-sie-ochrony-sygnalistow-dzieki-snowdenowi/>> accessed 6 March 2016 [Polish].

peremptory (which means that no authority is authorised to exempt a journalist from this professional secrecy).

11. Conclusion

Having considered all of the above it seems relevant to point out the most important remarks. Although the Polish Constitution which is the most important piece of legislation does not directly regulate the issue of protection of journalists' sources, it is clear beyond doubt that the other statutory acts provide such protection. It is regulated primarily in the Press Law and in the Criminal Procedure Code. It should be noted, however, that none of these acts gives a legal definition of journalistic sources, which is intended treatment of the legislature. With no such regulation the protection provided in the statutory acts may be subject to a wide range of entities, without limitation to journalists only. Due to the fact that the legal disclosure of the journalists' sources of information by a journalist without possibility to hold him accountable covers only a narrow range of situations it should be recognised that under Polish law journalist's privilege seems to be the rule rather than the exception. An exemption the privilege can be performed by the court of law at the request of the prosecutor, which further strengthens the protection of journalists. It is also worth mentioning that the powers conferred on the authorities of the state and the judiciary effectively displaces the self-regulatory mechanisms, giving them the marginal and subsidiary importance.

Having regard to all of the report it should be stated that under the standards provided by the European Union law are maintained in the Polish law, and in case of particular aspects it is safe to say that they far exceed them, especially in the field of protection of journalist's privilege. Therefore, the requirements stated in both the Recommendation No R (96) 4 and Recommendation No R (2000) 7 are met.

Also in the light of the decisions of the European Court of Human Rights the decisions of Polish courts of law are in no way inferior to the jurisdiction of other European countries.

On the other hand, however, it should be noted that in the Polish legal system operate some oversight, because in spite of the regulations mentioned above is still possible to breach the journalist's privilege, for example through the use of wiretapping regarding a journalist. Another problem may be the fact that provisions of law regarding protection of journalists' sources are located in several legal acts, which can be difficult for a person who is not a lawyer.

12. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

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13. Table of Provisions

Provisions in native language	Corresponding translation
<p>Artykuł 14 Konstytucji Rzeczypospolitej Polskiej</p> <p>Rzeczpospolita Polska zapewnia wolność prasy i innych środków społecznego przekazu.</p>	<p>Article 14 of the Constitution of Republic of Poland</p> <p>The Republic of Poland shall ensure freedom of the press and other means of social communication.</p>
<p>Artykuł 47 Konstytucji Rzeczypospolitej Polskiej</p> <p>Każdy ma prawo do ochrony prawnej życia prywatnego, rodzinnego, czci i dobrego imienia oraz do decydowania o swoim życiu osobistym.</p>	<p>Article 47 of the Constitution of Republic of Poland</p> <p>Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.</p>
<p>Artykuł 49 Konstytucji Rzeczypospolitej Polskiej</p> <p>Zapewnia się wolność i ochronę tajemnicy komunikowania się. Ich ograniczenie może nastąpić jedynie w przypadkach określonych w ustawie i w sposób w niej określony.</p>	<p>Article 49 of the Constitution of Republic of Poland</p> <p>The freedom and privacy of communication is granted. Their restriction may be imposed only in cases specified in the Act and in the manner specified therein</p>
<p>Artykuł 51 Konstytucji Rzeczypospolitej Polskiej</p>	<p>Article 51 of the Constitution of Republic of Poland</p>

<p>1. Nikt nie może być obowiązany inaczej niż na podstawie ustawy do ujawniania informacji dotyczących jego osoby.</p> <p>2. Władze publiczne nie mogą pozyskiwać, gromadzić i udostępniać innych informacji o obywatelach niż niezbędne w demokratycznym państwie prawnym.</p> <p>3. Każdy ma prawo dostępu do dotyczących go urzędowych dokumentów i zbiorów danych. Ograniczenie tego prawa może określić ustawa.</p> <p>4. Każdy ma prawo do żądania sprostowania oraz usunięcia informacji nieprawdziwych, niepełnych lub zebranych w sposób sprzeczny z ustawą.</p> <p>5. Zasady i tryb gromadzenia oraz udostępniania informacji określa ustawa.</p> <p>Artykuł 54 Konstytucji Rzeczypospolitej Polskiej.</p> <p>1. Każdemu zapewnia się wolność wyrażania swoich poglądów oraz pozyskiwania i rozpowszechniania informacji.</p> <p>2. Cenzura prewencyjna środków społecznego przekazu oraz koncesjonowanie prasy są zakazane. Ustawa może wprowadzić obowiązek uprzedniego uzyskania koncesji na prowadzenie stacji radiowej lub</p>	<p>1. No one may be obliged, except on the basis of statute, to disclose information concerning his person.</p> <p>2. Public authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic state ruled by law.</p> <p>3. Everyone shall have a right of access to official documents and data collections concerning himself. Limitations upon such rights may be established by statute.</p> <p>4. Everyone shall have the right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute.</p> <p>5. Principles and procedures for collection of and access to information shall be specified by statute.</p> <p>Article 54 of the Constitution of Republic of Poland</p> <p>1. The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.</p> <p>2. Preventive censorship of the means of social communication and the licensing of the press shall be prohibited. Statutes may require the receipt of a permit for the operation of a radio or television station.</p>
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telewizyjnej.

Artykuł 5 Ustawy Prawo Prasowe

1. Każdy obywatel, zgodnie z zasadą wolności słowa i prawem do krytyki, może udzielać informacji prasie.

2. Nikt nie może być narażony na uszczerbek lub zarzut z powodu udzielenia informacji prasie, jeżeli działał w granicach prawem dozwolonych.

Artykuł 7 Ustawy Prawo Prasowe

2. W rozumieniu ustawy:

4) materiałem prasowym jest każdy opublikowany lub przekazany do opublikowania w prasie tekst albo obraz o charakterze informacyjnym, publicystycznym, dokumentalnym lub innym, niezależnie od środków przekazu, rodzaju, formy, przeznaczenia czy autorstwa,

5) dziennikarzem jest osoba zajmująca się redagowaniem, tworzeniem lub przygotowywaniem materiałów prasowych, pozostająca w stosunku pracy z redakcją albo zajmująca się taką działalnością na rzecz i z upoważnienia redakcji.

Article 5 of the Press Law

1. Every citizen, in compliance with the rule on the freedom of speech and the right to criticism, may provide information to the press.

2. Nobody can be exposed to harm or allegation on account of communicating information to the press if he has acted within the legal framework

Article 7 of the Press Law

2. For the purposes of the Act:

4) press material is any published or submitted for publication in the press text or image of informative, journalistic, documentary or otherwise, regardless of the media, the type, form, or by destination,

5) The journalist is a person engaged in editing, creating or preparing press materials, remaining in the employment relationship with the publisher or engaged in such activities on behalf of and under the authority of the editorial office.

Artykuł 10 Ustawy Prawo Prasowe

1. Zadaniem dziennikarza jest służba społeczeństwu i państwu. Dziennikarz ma obowiązek działania zgodnie z etyką zawodową i zasadami współżycia społecznego, w granicach określonych przepisami prawa.

2. Dziennikarz, w ramach stosunku pracy, ma obowiązek realizowania ustalonej w statucie lub regulaminie redakcji, w której jest zatrudniony, ogólnej linii programowej tej redakcji.

3. Działalność dziennikarza sprzeczna z ust. 2 stanowi naruszenie obowiązku pracowniczego.

Artykuł 12 Ustawy Prawo Prasowe

1. Dziennikarz jest obowiązany:

1) zachować szczególną staranność i rzetelność przy zbieraniu i wykorzystaniu materiałów prasowych, zwłaszcza sprawdzić zgodność z prawdą uzyskanych wiadomości lub podać ich źródło,

2) chronić dobra osobiste, a ponadto interesy działających w dobrej wierze informatorów i innych osób, które okazują mu zaufanie,

3) dbać o poprawność języka i unikać używania wulgaryzmów.

2. Dziennikarzowi nie wolno prowadzić

Article 10 of the Press Law

1. The journalist's job is to serve the society and the state. The journalist has a duty to act in accordance with professional ethics and rules of social coexistence, within the limits prescribed by law.

2. The journalist, under the employment relationship, is obliged to carry out the general program line specified in the statute or the regulations of the editorial office in which he is employed.

3. The journalist's actions contrary to the paragraph 2 is a breach of employee's obligations.

Article 12 of the Press Law

1. A journalist is obliged to:

1) Take special care and reliability during collection and use of press materials, especially to check the compliance with the truth of received messages or identification of their source,

2) Protect the personal interests and also the interests of bona fide whistle-blowers and others who trusted him,

3) Ensure the use of a proper language and avoid using profanity.

ukrytej działalności reklamowej wiążącej się z uzyskaniem korzyści majątkowej bądź osobistej od osoby lub jednostki organizacyjnej zainteresowanej reklamą.

Artykuł 13 Ustawy Prawo Prasowe

1. Nie wolno wypowiadać w prasie opinii co do rozstrzygnięcia w postępowaniu sądowym przed wydaniem orzeczenia w I instancji.

2. Nie wolno publikować w prasie danych osobowych i wizerunku osób, przeciwko którym toczy się postępowanie przygotowawcze lub sądowe, jak również danych osobowych i wizerunku świadków, pokrzywdzonych i poszkodowanych, chyba że osoby te wyrażą na to zgodę.

Artykuł 14 Ustawy Prawo Prasowe

1. Publikowanie lub rozpowszechnianie w inny sposób informacji utrwalonych za pomocą zapisów fonicznych i wizualnych wymaga zgody osób udzielających informacji.

2. Dziennikarz nie może odmówić osobie udzielającej informacji autoryzacji dosłownie cytowanej wypowiedzi, o ile nie była ona uprzednio publikowana.

3. Osoba udzielająca informacji może z ważnych powodów społecznych lub osobistych zastrzec termin i zakres jej opublikowania.

4. Udzielenia informacji nie można

2. The journalist is not allowed to carry out concealed advertising activities involving obtaining personal or financial benefit from the person or other entity interested in advertising.

Article 13 of the Press Law

1. It is forbidden to publish in the press the opinion as to the outcome of the judicial proceedings before the judgment in the first instance is given.

2. It is forbidden to publish in the press personal information and image of people against whom preliminary proceedings or prosecution are conducted as well as personal data and the image of witnesses, victims and injured unless they agree to it.

Article 14 of the Press Law

1. Publishing or spreading in any way information preserved by using audio and visual records requires the consent of the persons providing information.

2. A journalist cannot refuse to authorize the person providing the information cited verbatim statements, as long as it was not previously published.

3. The person providing the information may reserve the term and the scope of publication

<p>uzależniać, z zastrzeżeniem wynikającym z ust. 2, od sposobu jej skomentowania lub uzgodnienia tekstu wypowiedzi dziennikarskiej.</p> <p>5. Dziennikarz nie może opublikować informacji, jeżeli osoba udzielająca jej zastrzegła to ze względu na tajemnicę zawodową.</p> <p>6. Nie wolno bez zgody osoby zainteresowanej publikować informacji oraz danych dotyczących prywatnej sfery życia, chyba że wiąże się to bezpośrednio z działalnością publiczną danej osoby.</p> <p>Artykuł 15 Ustawy Prawo Prasowe</p> <p>1. Autorowi materiału prasowego przysługuje prawo zachowania w tajemnicy swego nazwiska.</p> <p>2. Dziennikarz ma obowiązek zachowania w tajemnicy:</p> <p>1) danych umożliwiających identyfikację autora materiału prasowego, listu do redakcji lub innego materiału o tym charakterze, jak również innych osób udzielających informacji opublikowanych albo przekazanych do opublikowania, jeżeli osoby te zastrzegły nieujawnianie powyższych</p>	<p>from important social or personal reasons.</p> <p>4. Issuance of information should not be dependent, subject to point 2, on the way it was commented or agreed text of journalistic expression.</p> <p>5. The journalist cannot publish information if the person giving it has reserved it because of professional secrecy.</p> <p>6. It is forbidden to publish information and data relating to the private sphere of life, unless it is connected directly to the public activity of a person without the consent of the interested person.</p> <p>Article 15 of the Press Law</p> <p>1. The author of the press material has the right to maintain the confidentiality of his name.</p> <p>2. The journalist has a duty to maintain the confidentiality of:</p> <p>1) the data enabling the identification of an author of the press material, letter to the editor or any other material of this nature, as well as other persons providing information published or submitted for publication if they have decided not to disclose such data,</p>
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<p>danych,</p> <p>2) wszelkich informacji, których ujawnienie mogłoby naruszać chronione prawem interesy osób trzecich.</p> <p>3. Obowiązek, o którym mowa w ust. 2, dotyczy również innych osób zatrudnionych w redakcjach, wydawnictwach prasowych i innych prasowych jednostkach organizacyjnych.</p> <p>Artykuł 16 Ustawy Prawo Prasowe</p> <p>1. Dziennikarz jest zwolniony od zachowania tajemnicy zawodowej, o której mowa w art. 15 ust. 2, w razie gdy informacja, materiał prasowy, list do redakcji lub inny materiał o tym charakterze dotyczy przestępstwa określonego w art. 254 Kodeksu karnego albo autor lub osoba przekazująca taki materiał wyłącznie do wiadomości dziennikarza wyrazi zgodę na ujawnienie jej nazwiska lub tego materiału.</p> <p>2. Zwolnienie, o którym mowa w ust. 1, dotyczy również innych osób zatrudnionych w redakcjach, wydawnictwach prasowych i innych prasowych jednostkach organizacyjnych.</p> <p>3. Redaktor naczelny powinien być w niezbędnych granicach poinformowany o sprawach związanych z tajemnicą zawodową dziennikarza; powierzoną mu informację albo inny materiał może ujawnić jedynie w</p>	<p>2) any information disclosure of which could infringe third parties' interests protected by law</p> <p>3. The duty referred to in paragraph 2 also applies to other employees in editorial offices, publishing houses and other press organisational units.</p> <p>Article 16 of the Press Law</p> <p>1. A journalist is exempted from the journalistic privilege, as referred to in Article 15.2, if the information, press material, letter to the editorial office or other material of this nature concerns an offense referred to in Article 254 of the CC or the author or the person transferring such material to the journalist's information only agrees to the disclosure of her name or the material.</p> <p>2. The exemption referred to in paragraph 1 also applies to other employees in editorial offices, publishing houses and other organisational units.</p> <p>3. The Chief Editor should be informed to the essential extent about facts that are subject to the journalistic privilege;</p>
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<p>wypadkach określonych w ust. 1.</p> <p>Artykuł 44 Ustawy Prawo Prasowe</p> <p>1.Kto utrudnia lub tłumi krytykę prasową - podlega grzywnie albo karze ograniczenia wolności.</p> <p>Artykuł 49 Ustawy Prawo Prasowe</p> <p>Kto narusza przepisy art. 3, 11 ust. 2, art. 14, 15 ust. 2 i art. 27 - podlega grzywnie albo karze ograniczenia wolności.</p> <p>Artykuł 115 Kodeksu Karnego</p> <p>§ 20. Przepęstwem o charakterze terrorystycznym jest czyn zabroniony zagrożony karą pozbawienia wolności, której górna granica wynosi co najmniej 5 lat, popełniony w celu:</p> <ol style="list-style-type: none">1) poważnego zastraszenia wielu osób,2) zmuszenia organu władzy publicznej Rzeczypospolitej Polskiej lub innego państwa albo organu organizacji międzynarodowej do podjęcia lub zaniechania określonych czynności,3) wywołania poważnych zakłóceń w ustroju lub gospodarce Rzeczypospolitej Polskiej, innego państwa lub organizacji	<p>information or other material entrusted to him may be disclose only in cases specified in paragraph 1.</p> <p>Article 44 of the Press Law</p> <p>1. Who impedes or suppresses press criticism is subject to a fine or imprisonment.</p> <p>Article 49 of the Press Law</p> <p>Whoever violates the provisions of art. 3, 11. 2., 14, 15. 2 and art. 27 is subject to a fine or imprisonment.</p> <p>Article 115 of the Criminal Code</p> <p>§ 20. An offense of a terrorist is an offense punishable by imprisonment of a maximum of at least 5 years, committed to:</p> <ol style="list-style-type: none">1) serious intimidation of many people,2) to compel public authority Polish Republic or any other state or the authority of an international organization to perform or abstain from certain activities,3) calls serious disturbances in the system or the economy of the Republic of Polish, another state or an international organization - as well as threats to commit such an act.
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międzynarodowej - a także groźba popełnienia takiego czynu.

Artykuł 240 Kodeksu Karnego

§ 1. Kto, mając wiarygodną wiadomość o karalnym przygotowaniu albo usiłowaniu lub dokonaniu czynu zabronionego określonego w art. 118, 118a, 120-124, 127, 128, 130, 134, 140, 148, 163, 166, 189, 252 lub przestępstwa o charakterze terrorystycznym, nie zawiadamia niezwłocznie organu powołanego do ścigania przestępstw,

podlega karze pozbawienia wolności do lat 3.

§ 2. Nie popełnia przestępstwa określonego w § 1, kto zaniechał zawiadomienia, mając dostateczną podstawę do przypuszczenia, że wymieniony w § 1 organ wie o przygotowywanym, usiłowanym lub dokonanym czynie zabronionym; nie popełnia przestępstwa również ten, kto zapobiegł popełnieniu przygotowywanego lub usiłowanego czynu zabronionego określonego w § 1.

§ 3. Nie podlega karze, kto zaniechał zawiadomienia z obawy przed odpowiedzialnością karną grożącą jemu samemu lub jego najbliższemu.

Artykuł 266 Kodeksu Karnego

§ 1. Kto, wbrew przepisom ustawy lub przyjętemu na siebie zobowiązaniu, ujawnia

Article 240 of the Criminal Code

§ 1. Whoever, having reliable information concerning a punishable preparation or attempt, or commission of a prohibited act specified in Article 118, 118a, 120-124, 127, 128, 130, 134, 140, 148, 163, 166, 189 252 or a terrorist offense, does not promptly inform an agency responsible for prosecuting such offences shall be subject to the penalty of deprivation of liberty for up to 3 years.

§ 2. Whoever abstained from informing, having sufficient knowledge to assume that an agency competent to prosecute knew of the prohibited act specified in § 1, planned, attempted or committed, shall be deemed to have not committed an offence specified in § 1; whoever prevented the commission of a prepared or attempted prohibited act shall also be deemed to have not committed

an offence specified in § 1.

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§ 3. Whoever abstained from informing because of fear of a penal liability threatening himself or his next of kin, shall also not be subject to penalty.

Article 266 of the Criminal Code

§ 1. Whoever, in violation of the law or obligation he has undertaken, discloses or uses information with which he has become

lub wykorzystuje informację, z którą zapoznał się w związku z pełnioną funkcją, wykonywaną pracą, działalnością publiczną, społeczną, gospodarczą lub naukową, podlega grzywnie, karze ograniczenia wolności albo pozbawienia wolności do lat 2.

§ 2. Funkcjonariusz publiczny, który ujawnia osobie nieuprawnionej informację niejawną o klauzuli "zastrzeżone" lub "poufne" lub informację, którą uzyskał w związku z wykonywaniem czynności służbowych, a której ujawnienie może narazić na szkodę prawnie chroniony interes, podlega karze pozbawienia wolności do lat 3.

§ 3. Ściganie przestępstwa określonego w § 1 następuje na wniosek pokrzywdzonego.

Artykuł 168a Kodeksu Postępowania Karnego

Dowodu nie można uznać za niedopuszczalny wyłącznie na tej podstawie, że został uzyskany z naruszeniem przepisów postępowania lub za pomocą czynu zabronionego, o którym mowa w art. 1 § 1 Kodeksu karnego, chyba że dowód został uzyskany w związku z pełnieniem przez funkcjonariusza publicznego obowiązków służbowych, w wyniku: zabójstwa, umyślnego spowodowania uszczerbku na zdrowiu lub pozbawienia wolności.

Artykuł 180 Kodeksu Postępowania Karnego

§ 1. Osoby obowiązane do zachowania w tajemnicy informacji niejawnych o klauzuli

acquainted with in connection with the function or work performed, or public, community, economic or scientific activity pursued shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.

§ 2. A public official who discloses to an unauthorised person information which is an official secret or information with which he has become acquainted in the performance of his official duties and whose disclosure can endanger a legally protected interest shall be subject to the penalty of deprivation of liberty for up to 3 years.

§ 3. The prosecution of the offence specified in § 1 shall occur on a motion of the injured person.

Article 168a Criminal Procedure Code

Evidence cannot be considered inadmissible solely on the ground that it was obtained in violation of the rules of procedure or by means of an offense referred to in Article 1 § 1 of the Criminal Code, unless the evidence has been obtained in connection with the performance of duties by a public official, as a result of: murder, willful causing bodily injury or imprisonment.

Article 180 Criminal Procedure Code

§ 1. Persons obligated to preserve an official secret, or secrets connected with their

tajności "zastrzeżone" lub "poufne" lub tajemnicy związanej z wykonywaniem zawodu lub funkcji mogą odmówić zeznać co do okoliczności, na które rozciąga się ten obowiązek, chyba że sąd lub prokurator dla dobra wymiaru sprawiedliwości zwolni te osoby od obowiązku zachowania tajemnicy, jeżeli ustawy szczególne nie stanowią inaczej. Na postanowienie w tym przedmiocie przysługuje zażalenie.

§ 2. Osoby obowiązane do zachowania tajemnicy notarialnej, adwokackiej, radcy prawnego, doradcy podatkowego, lekarskiej, dziennikarskiej lub statystycznej mogą być przesłuchiwane co do faktów objętych tą tajemnicą tylko wtedy, gdy jest to niezbędne dla dobra wymiaru sprawiedliwości, a okoliczność nie może być ustalona na podstawie innego dowodu. W postępowaniu przygotowawczym w przedmiocie przesłuchania lub zezwolenia na przesłuchanie decyduje sąd, na posiedzeniu bez udziału stron, w terminie nie dłuższym niż 7 dni od daty doręczenia wniosku prokuratora. Na postanowienie sądu przysługuje zażalenie.

§ 3. Zwolnienie dziennikarza od obowiązku zachowania tajemnicy nie może dotyczyć danych umożliwiających identyfikację autora materiału prasowego, listu do redakcji lub innego materiału o tym charakterze, jak również identyfikację osób udzielających informacji opublikowanych lub przekazanych do opublikowania, jeżeli osoby te zastrzegły nieujawnianie powyższych danych.

§ 4. Przepisu § 3 nie stosuje się, jeżeli informacja dotyczy przestępstwa, o którym mowa w art. 240 § 1 Kodeksu karnego.

§ 5. Odmowa przez dziennikarza ujawnienia danych, o których mowa w § 3, nie uchyla

profession or office may refuse to testify as to the facts to which this obligation extends, unless they have been released by the court or the state prosecutor from the obligation to preserve such a secret for the sake of the interests of justice, unless the specific acts provide otherwise. This order shall be subject to interlocutory appeal.

§ 2. Persons obligated to preserve secrets such as lawyers, physicians or journalists, may be examined as to the facts covered by these secrets, only when it is necessary for the sake of the interest of justice, and the facts cannot be established on the basis of other evidence. The court shall decide on examination or permission for examination during the hearing without parties presence within no longer than 7 days from the date of receipt of prosecutors motion. This order of the court shall be subject to interlocutory appeal.

§ 3. Releasing a journalist from the obligation to preserve a secret may not concern data enabling identification of the author of press material, letter to the editorial office or other material of the same nature, as well as identification of persons imparting information published or passed to be published, if these persons reserved the right to keep the data secret.

§ 4. The provision of § 3 shall not apply, if the information regards the offence referred to in Article 240 § 1 of the Criminal Code.

§ 5. The refusal of a journalist to disclose the

jego odpowiedzialności za przestępstwo, którego dopuścił się publikując informację.

Artykuł 218 Kodeksu Postępowania Karnego

§ 1. Urzędy, instytucje i podmioty prowadzące działalność w dziedzinie poczty lub działalność telekomunikacyjną, urzędy celne oraz instytucje i przedsiębiorstwa transportowe obowiązane są wydać sądowi lub prokuratorowi, na żądanie zawarte w postanowieniu, korespondencję i przesyłki oraz dane, o których mowa w art. 180c i 180d ustawy z dnia 16 lipca 2004 r. – Prawo telekomunikacyjne (Dz. U. Nr 171, poz. 1800, z późn. zm.), jeżeli mają znaczenie dla toczącego się postępowania. Tylko sąd lub prokurator mają prawo je otwierać lub zarządzić ich otwarcie.

2. Postanowienie, o którym mowa w § 1, doręcza się adresatom korespondencji oraz abonentowi telefonu lub nadawcy, którego wykaz połączeń lub innych przekazów informacji został wydany. Doręczenie postanowienia może być odroczone na czas oznaczony, niezbędny ze względu na dobro sprawy, lecz nie później niż do czasu prawomocnego zakończenia postępowania.

§ 3. Pozbawioną znaczenia dla postępowania karnego korespondencję i przesyłki należy niezwłocznie zwrócić właściwym urzędowi, instytucjom lub przedsiębiorstwom wymienionym w § 1.

data referred to in § 3, shall not exempt him

from liability for an offence he committed by publishing information.

Article 218 of the Criminal Procedure Code

§ 1. Offices, institutions and entities operating in post and telecommunications fields, customs houses, and transportation institutions and companies, shall be obligated to surrender to the court or state prosecutor upon demand included in their order, any correspondence, transmissions and data referred to in Article 180c and 180d of the Act of 16 July 2004. - Telecommunications Law (Journal of Law No 171, item. 1800, as amended.) significant to the pending proceedings. Only the court and a state prosecutor shall be entitled to inspect them or to order their inspection.

§ 2. The order referred to in § 1, shall be delivered to the addressees of the correspondence and telephone subscriber or broadcaster, whose list of calls or other communications information was released.

The announcement of the order may be adjourned for a prescribed period, necessary to promote the proper conduct of the case but not later than until the final conclusion of the proceedings.

§ 3 Correspondence and transmissions irrelevant to the criminal proceedings should be returned to the appropriate offices, institutions or companies as set forth in § 1, without delay.

Artykuł 225 Kodeksu Postępowania Karnego

§ 1. Jeżeli kierownik instytucji państwowej lub samorządowej albo też osoba, u której dokonano zatrzymania rzeczy lub u której przeprowadza się przeszukanie, oświadczy, że wydane lub znalezione przy przeszukaniu pismo lub inny dokument zawiera informacje niejawne lub wiadomości objęte tajemnicą zawodową lub inną tajemnicą prawnie chronioną albo ma charakter osobisty, organ przeprowadzający czynność przekazuje niezwłocznie pismo lub inny dokument bez jego odczytania prokuratorowi lub sądowi w opieczętowanym opakowaniu.

§ 2. Tryb wskazany w § 1 nie obowiązuje w stosunku do pism lub innych dokumentów, które zawierają informacje niejawne o klauzuli "zastrzeżone" lub "poufne" albo dotyczą tajemnicy zawodowej lub innej tajemnicy prawnie chronionej, jeżeli ich posiadaczem jest osoba podejrzana o popełnienie przestępstwa, ani w stosunku do pism lub innych dokumentów o charakterze osobistym, których jest ona posiadaczem, autorem lub adresatem.

§ 3. Jeżeli obrońca lub inna osoba, od której żąda się wydania rzeczy lub u której dokonuje się przeszukania, oświadczy, że wydane lub znalezione w toku przeszukania pisma lub inne dokumenty obejmują okoliczności związane z wykonywaniem funkcji obrońcy, organ dokonujący czynności pozostawia te dokumenty wymienionej osobie bez zapoznawania się z ich treścią lub wyglądem. Jeżeli jednak oświadczenie osoby nie będącej obrońcą budzi wątpliwości, organ dokonujący czynności przekazuje te dokumenty z zachowaniem rygorów

Article 225 of the Criminal Procedure Code

§ 1. If the head of a State or local government institution subject to search or the person from whom objects have been seized, or whose premises are searched, declares that a writing or other document surrendered or discovered during the search,

contains information relating to State, official, professional or other secrets protected by law, or that this information is of a personal nature, those conducting the search shall immediately transmit such writing or other document without prior reading, to the state prosecutor or the court, in a sealed container.

§ 2. The procedure described in § 1 shall not apply to writings and other documents relating to official, professional or other secrets protected by law if they are in the possession of a person suspected of an offence, nor to writings and other document of a personal nature of which such person is an owner, author or addressee.

§ 3. If a defence counsel or other person of whom surrendering objects is demanded, or

whose premises are searched, declares that writings or other documents discovered in the course of a search, relate to facts connected with the performance of the function of the defence counsel, the agency conducting the actions shall leave these documents with such person, without ascertaining their contents or appearance. When the declaration of a person not being a defence counsel gives rise to doubts, the agency conducting the actions shall transmit

określonych w § 1 sądowi, który po zapoznaniu się z dokumentami zwraca je w całości lub w części, z zachowaniem rygorów określonych w § 1, osobie, od której je zabrano, albo wydaje postanowienie o ich zatrzymaniu dla celów postępowania.

§ 4. Wydaną, odebraną lub znaną w toku przeszukania dokumentację psychiatryczną organ przeprowadzający czynność przekazuje, z zachowaniem rygorów określonych w § 1, sądowi lub prokuratorowi.

Artykuł 237 Kodeksu Postępowania Karnego

§ 3. Kontrola i utrwalanie treści rozmów telefonicznych są dopuszczalne tylko wtedy, gdy toczące się postępowanie lub uzasadniona obawa popełnienia nowego przestępstwa dotyczą:

- 1) zabójstwa,
- 2) narażenia na niebezpieczeństwo powszechne lub spowodowania katastrofy,
- 3) handlu ludźmi,
- 4) uprowadzenia osoby,
- 5) wymuszania okupu,
- 6) uprowadzenia statku powietrznego lub

the documents, in accordance with the requirements set forth in § 1 to the court. Having acquainted itself with the documents, the court shall return them all or in part, in accordance with requirements set forth in § 1, to the person from whom they were taken, or issue an order for their seizure for the purposes of the proceedings.

§ 4. The psychiatric records delivered, received or found during a search the authority carrying out the operation shall, under conditions referred to in § 1, pass to the court or the prosecutor.

Article 237 of the Criminal Procedure Code

§ 3. The surveillance and recording of the content of telephone conversations is allowed only when proceedings are pending or a justified concern exists, about the possibility of a new offence being committed regarding:

- 1) homicide,
- 2) causing a danger to the public or causing a catastrophe,
- 3) trade in humans or white slavery,
- 4) the abduction of a person,
- 5) the demanding of a ransom,

<p>wodnego,</p> <p>7) rozboju, kradzieży rozbójniczej lub wymuszenia rozbójniczego,</p> <p>8) zamachu na niepodległość lub integralność państwa,</p> <p>9) zamachu na konstytucyjny ustrój państwa lub jego naczelné organy, albo na jednostkę Sił Zbrojnych Rzeczypospolitej Polskiej,</p> <p>10) szpiegostwa lub ujawnienia informacji niejawnych o klauzuli tajności "tajne" lub "ściśle tajne";</p> <p>11) gromadzenia broni, materiałów wybuchowych lub radioaktywnych,</p> <p>12) fałszowania oraz obrotu fałszywymi pieniędzmi, środkami lub instrumentami płatniczymi albo zbywalnymi dokumentami uprawniającymi do otrzymania sumy pieniężnej, towaru, ładunku albo wygranej rzeczowej albo zawierającymi obowiązek wpłaty kapitału, odsetek, udziału w zyskach lub stwierdzenie uczestnictwa w spółce,</p> <p>13) wytwarzania, przetwarzania, obrotu i przemytu środków odurzających, prekursorów, środków zastępczych lub substancji psychotropowych,</p> <p>14) zorganizowanej grupy przestępczej,</p> <p>15) mienia znacznej wartości,</p> <p>16) użycia przemocy lub groźby bezprawnej</p>	<p>6) the highjacking of an aircraft or a ship,</p> <p>7) robbery or robbery with violence,</p> <p>8) the attempt against the sovereignty or independence of the State,</p> <p>9) the attempt against the constitutional order of the State or on its supreme agencies, or against a unit of the Armed Forces of the Republic of Poland,</p> <p>10) spying or disclosing a State secret,</p> <p>11) amassing weapons, explosives or radioactive materials,</p> <p>12) the forging of money,</p> <p>13) the drug trafficking,</p> <p>14) organised crime group,</p> <p>15) property of significant value,</p> <p>16) the use of violence or unlawful threats in</p>
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<p>w związku z postępowaniem karnym,</p> <p>17) łapownictwa i płatnej protekcji,</p> <p>18) stręczycielstwa, kuplerstwa i sutenerstwa,</p> <p>19) przestępstw określonych w rozdziale XVI ustawy z dnia 6 czerwca 1997 r. - Kodeks karny (Dz.U. Nr 88, poz. 553, z późn. zm.) oraz w art. 5-8 Rzymskiego Statutu Międzynarodowego Trybunału Karnego, sporządzonego w Rzymie dnia 17 lipca 1998 r. (Dz.U. z 2003 r. Nr 78, poz. 708), zwanego dalej "Statutem".</p> <p>Artykuł 23 Kodeksu Cywilnego</p> <p>Dobra osobiste człowieka, jak w szczególności zdrowie, wolność, cześć, swoboda sumienia, nazwisko lub pseudonim, wizerunek, tajemnica korespondencji, nietykalność mieszkania, twórczość naukowa, artystyczna, wynalazcza i racjonalizatorska, pozostają pod ochroną prawa cywilnego niezależnie od ochrony przewidzianej w innych przepisach.</p> <p>Artykuł 24 Kodeksu Cywilnego</p> <p>§ 1. Ten, czyje dobro osobiste zostaje zagrożone cudzym działaniem, może żądać zaniechania tego działania, chyba że nie jest ono bezprawne. W razie dokonanego naruszenia może on także żądać, ażeby osoba, która dopuściła się naruszenia, dopełniła czynności potrzebnych do</p>	<p>connection with criminal proceedings.</p> <p>17) bribery and accepting bribes,</p> <p>18) pimping and prostitution,</p> <p>19) the offenses referred to in Chapter XVI of the Act of 6 June 1997. - Criminal Code (Journal of Laws No. 88, item. 553, as amended) and in art. 5-8 of the Rome Statute of the International Criminal Court, signed in Rome on 17 July 1998. (Journal of Laws of 2003. No. 78, pos. 708), hereinafter the "Statute".</p> <p>Article 23 of the Civil Code</p> <p>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</p> <p>Article 24 of the Civil Code</p> <p>§ 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</p>
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usunięcia jego skutków, w szczególności ażeby złożyła oświadczenie odpowiedniej treści i w odpowiedniej formie. Na zasadach przewidzianych w kodeksie może on również żądać zadośćuczynienia pieniężnego lub zapłaty odpowiedniej sumy pieniężnej na wskazany cel społeczny.

§ 2. Jeżeli wskutek naruszenia dobra osobistego została wyrządzona szkoda majątkowa, poszkodowany może żądać jej naprawienia na zasadach ogólnych.

§ 3. Przepisy powyższe nie uchybiają uprawnieniom przewidzianym w innych przepisach, w szczególności w prawie autorskim oraz w prawie wynalazczym.

Artykuł 60 Kodeksu Cywilnego

Z zastrzeżeniem wyjątków w ustawie przewidzianych, wola osoby dokonującej czynności prawnej może być wyrażona przez każde zachowanie się tej osoby, które ujawnia jej wolę w sposób dostateczny, w tym również przez ujawnienie tej woli w postaci elektronicznej (oświadczenie woli).

Artykuł 22 Kodeksu Pracy

§ 1. Przez nawiązanie stosunku pracy pracownik zobowiązuje się do wykonywania pracy określonego rodzaju na rzecz pracodawcy i pod jego kierownictwem oraz w miejscu i czasie wyznaczonym przez pracodawcę, a pracodawca - do zatrudniania

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.

Article 60 of the Civil Code

Subject to the exceptions provided for in the law, the intention of a person performing a legal act may be expressed by any behavior of that person which manifests his intention sufficiently, including the intent being expressed in electronic form (declaration of intent).

Article 22 of the Labour Code

§ 1. By establishing an employment relationship, an employee undertakes to perform work of a specified type for the benefit of an employer and under his supervision, in a place and at the times specified by the employer; the employer

pracownika za wynagrodzeniem.

§ 1¹. Zatrudnienie w warunkach określonych w § 1 jest zatrudnieniem na podstawie stosunku pracy, bez względu na nazwę zawartej przez strony umowy.

§ 1². Nie jest dopuszczalne zastąpienie umowy o pracę umową cywilnoprawną przy zachowaniu warunków wykonywania pracy, określonych w § 1.

Artykuł 10 Europejskiej Konwencji Praw Człowieka

1. Każdy ma prawo do wolności wyrażania opinii. Prawo to obejmuje wolność posiadania poglądów oraz otrzymywania i przekazywania informacji i idei bez ingerencji władz publicznych i bez względu na granice państwowe. Niniejszy przepis nie wyklucza prawa Państw do poddania procedurze zezwoleń przedsiębiorstw radiowych, telewizyjnych lub kinematograficznych.

Artykuł 261 Kodeksu Postępowania Cywilnego

§ 2. Świadek może odmówić odpowiedzi na zadane mu pytanie, jeżeli zeznanie mogłoby narazić jego lub jego bliskich, wymienionych w paragrafie poprzedzającym, na odpowiedzialność karną, hańbę lub dotkliwą i bezpośrednią szkodę majątkową albo jeżeli zeznanie miałoby być połączone z

undertakes to employ the employee in return for remuneration.

§ 1¹. Employment under the conditions specified in § 1 is considered employment on the basis of an employment relationship, regardless of the name of the contract concluded between the parties.

§ 1². Employment contracts cannot be replaced with a civil law contract where the conditions of the performance of work specified in § 1 remain intact.

Article 10 of the European Convention on Human Rights

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.

Article 261 of the Civil Procedure Code

§ 2. A witness may refuse to answer to the question if the testimony could expose him or his relatives, listed in paragraph above, to criminal liability, disgrace or severe and direct property damage, or if the testimony would be connected with violation of substantial

<p>pogwałceniem istotnej tajemnicy zawodowej. Duchowny może odmówić zeznań co do faktów powierzonych mu na spowiedzi.</p>	<p>professional secrecy. The priest can refuse to testify as to the facts entrusted to him during the confession.</p>
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ELSA PORTUGAL

Contributors

National Coordinator

João Pedro Guimarães

National Academic Coordinator

Alberto Arons de Carvalho

National Researchers

Ana Ruiz

João Pedro Martins

Leonor Catela

Mafalda Guimarães

Miguel Mota Delgado

Nádia Reis

Paulo Ferreira

Victor Hugo

National Linguistic Editor

Sara Alexandre

National Academic Supervisor

João Pedro Figueiredo

INTRODUCTION

The Portuguese approach to the protection of journalistic sources is best understood when the country's recent history is taken into consideration. In fact, Portugal experienced over four decades of dictatorship where freedom of expression, as well as many other facets of individual freedom, was heavily repressed, with obvious impact in the way press and journalists in general conducted their work. The *Estado Novo*, or the New State, as the dictatorship was named, not only developed an efficient propaganda machine, but also controlled the news released by the press through censorship commissions, excluding all subjects harmful to the regime and preventing them from reaching public domain.

It is of no wonder that the collapse of the authoritarian regime in the mid-seventies gave birth to a democratic state keen on making sure that its people would have the freedom to think, speak and write their own minds, while simultaneously developing an intricate legal and constitutional system solid enough to provide protection to those freedoms as well as human dignity in general. The following report exposes how both legal and constitutional Portuguese laws protect journalistic sources.

1. Does the National Legislation Provide (Explicit or Otherwise) Protection of the Right of the Journalists Not to Disclose Their Source of Information? What Type of Legislation Provides This Protection? How Exactly is This Protection Construed in National Law?

That protection begins at the highest level in the Portuguese legal system, in the Constitution of the Portuguese Republic, with article 38 stating that “**freedom of press is guaranteed**” [38(1)], while disclosing that freedom of press implies, among other things, “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**” [38(2, b)]. This protection is supported by article 135 of the Code of Criminal Procedure, which states in its clause 1 that “the religion or religious confession ministers and the attorneys, doctors, **journalists**, members of credit institutions and all other persons to whom the law allows or imposes secrecy **may exempt themselves from testifying on facts covered by secrecy**”. However, said article doesn't completely rule out those professionals from testifying on such facts, since clause 3 stipulates that “a higher jurisdiction than the court where the exemption has been invoked or - where the exemption has been argued before the Supreme Court of Justice - the plenary of criminal sections, may decide that the witness will testify regardless of professional secrecy whenever justified, according to the principle of prevailing interest considering, in particular, the need for evidence in order to clarify the truth, the gravity of the crime and the need to protect legal assets. Intervention is ordered by the judge, ex officio or upon request”. As such, something which happens in many other aspects of the Portuguese Law, **the principle of prevalence of the public interest** serves as a **limitation of the protection of professional secrecy** in criminal procedures.

Professional secrecy is, as demonstrated, undetachable from the rightful exercise of journalism, as well as many other professional areas. However, the concept of professional secrecy has a

wide range of connotations; in Portugal it is the duty of every professional association to develop and fixate the content of such concept for their respective field of activity. To decide whether something is covered by **professional secrecy**, the question to be asked is whether the person acquired such knowledge due to their **professional activity**; should the answer be affirmative, then those facts are indeed covered by the constitutional and legal provisions displayed above.

The special regulation on press and journalists comprehends, but is not limited to, three very important diplomas: the Press Law (Law no. 2/99m of 13 January 1999), the Journalist's Statute (Law no. 1/99, of 13 January 1999) and the Journalists' Code of Ethics. The latter provides an important element to the subject of our research, since it states that "identification of one's sources is essential for a journalist. They must **not reveal, not even in court, their confidential sources** except in cases where the journalist has been used by their source in order to channel false information. Opinions shall always be kept clearly separate."

The extent of the legal protection given to journalists regarding the non-disclosure of their sources of information in Portugal, can be portrayed as a consequence of the protection of professional secrecy since it is one of the most important parts of the work of a journalist. Additionally, the fact that freedom of press stands strong as one of the banners of our comprehension of a modern state, with its due feature in the Constitution of the Portuguese Republic, provides the frame of reference from which the Portuguese law shapes, both directly and sometimes as a side effect, the ruling of cases by the country's judicial system.

Taking everything into consideration, it's important to disclose what does fall under the scope of this legal protection and provide, or at least contribute to, a definition of "journalistic source". Portuguese case-law, as well as advisory opinions from the Office of the Chief Public Prosecutor of the Republic, has been important contributors to this task: the latter issued, in 1995, an advisory opinion (no. PGRP00000760) which stated that "**the concept of information source** comprehends not only the **people**, as authors of statements, opinions and judgments issued to a journalist, but also **files and journalistic archives**, be it in written support, sound or image". More recently, in 2009, the Supreme Court of Justice, in case no. 12153/09.8TDPRT-A.P1.S1, stated that "the right to not disclose journalistic sources can be defined as the **ability the journalist has to not identify his/her informants**, when vowed to respect their confidentiality, and to decline granting access to the supports that might reveal such identity. Such right is intricately related to the exercise of an active journalistic investigation, which **implies the right to professional secrecy**, that is, the absence of obligation of revealing the sources of news, wherever they come from, (...), without the fear of being sanctioned, by any means, for not revealing who shared with them such information". A teleological interpretation of what is said above can thus be translated into a concept of "journalistic source" that ranges from people to files, documents, archives, and any other means of information that support the exercise of journalism by the professional in question.

2. Is There, in Domestic Law, a Provision That Prohibits a Journalist From Disclosing His/Her Sources? How Exactly Is This Prohibition Construed In National Law? What is The Sanction?

One information (...) assumes a trust and loyal relation between the informant and the journalist. It requires compliance with certain rules. As a general rule, the journalist shall maintain the sources' identity confidentiality.

Castanheira, J. P.

The Constitution of the Portuguese Republic (CRP) is the most important source of law of the Portuguese legal system: it is the **primary source of legal production**, which, as Santos Justo refers, positively and negatively determines the hierarchically lower sources. Its rules are binding: as article 3, n^o3 from the CRP states, constitutional laws should be respected by the legislator, as well as the judge and any other public entities.

According to **article 37, n^o1 from the 1976's CRP**, freedom of expression and information is guaranteed to all citizens: "**Everyone** has the right to freely express and divulge their thoughts in words, images or by any other means, as well as the right to inform others, inform themselves and be informed without hindrance or discrimination." Number 3 of the aforementioned article typifies that "Infractions committed in the exercise of the profession are subject to the general principles of the criminal law or the law governing administrative offences".

The media assume a preponderant role in affecting freedom of expression and creativity. However, it is imperative to guarantee the journalists' right to search and diffuse to the public "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".¹

In ***Goodwin vs United Kingdom***, the European Court of Human Rights (**ECtHR**) considered the journalistic sources protection as "one of the cornerstones of press freedom". Otherwise, those sources could be compelled to not inform the public, breaking the triad "source, journalist, society".

With this, journalists' **professional secrecy** can be defined as the right to not disclose the identities of their sources. From this emerges a legal and deontological obligation to keep secret regarding their origin. Its importance can be highlighted by the way it has been included in several international sources, such as article 10 of the European Convention on Human Rights, Report of the Committee on Culture, Science and Education of the Parliamentary Assembly (2010) on the protection of journalists' sources.

¹ Paragraph 49 of the judgment ***Handyside vs United Kingdom*** (5493/72), **ECtHR**, 1976.

According to the Council of Europe case-law, the journalists' right to professional secrecy should not be seen as an absolute right; it can only be restricted to prevent, not repress, or even for major crimes.

The views on this issue have evolved throughout the years. In 1982, article 38.º, n.º 2, b) was seen as recognising an absolute right. However, in 1987, with the Code of Criminal Procedure (CCP) coming into force, article 135 admitted the possibility of a court demanded testimony where journalists would disclose their sources. Since then, many changes were made to liken it to the regulation of the Council of Europe.

On its number 2, the CCP article typifies that professional secrecy only occurs when the facts are known in the act of the profession. The following number refers that this right can be restricted under two circumstances: i) when there are no other ways to reveal the truth; ii) when the court sentence can lead to three or more years of imprisonment due to unlawful and gross negligence. Number 4 states that a judicial decision can only be taken before the representative organism of the profession in appreciation is listened.

According to number 6 of the Portuguese Journalists' Code of Ethics, the right to secrecy has been transformed into a duty. However, the Journalist's Statute, in article 14 (1) a), refers that journalists have the duty to inform readers with rigour and impartiality, abstaining from sensationalism and clearly demarcating facts from opinions.

Regarding the aforementioned, two exceptions are made when using the right to secrecy: **i)** The journalist is morally disobliged to keep silence about the identity's source or to respect commitments made when the information is given to have illegitimate benefits or to convey false information. **ii)** Whenever it results in a violation of the secret of justice.

2.1. Sanction When a Journalist Reveals His/Her Sources

The Portuguese Penal Code, in article 195 (Breach of secrecy), states that "Who, without consent, reveals secrets that others have been privy to because of their condition, occupation, employment, profession or art is punishable with imprisonment up to 1 year or with a fine up to 240 days." The Journalist's Statute also establishes fines for violation of its disposal, fine which are applied by ERC, *Entidade Reguladora para a Comunicação Social*, or the Regulation Entity for Social Communication (infractions of the articles 8 to 12) and CCPJ, Comissão da Carteira Profissional de Jornalista, or the Professional Journalist Commission.

The Journalist's Statute, however, says in number 1 of **article 11**, that "without prejudice to the provisions established in penal procedure law, journalists **are not required to reveal** their information sources, and their silence is not liable to any direct or indirect sanction". Number 3 of the aforementioned article refers that, "In the event that a journalist is ordered to reveal his sources under the terms of criminal procedure law, the court must specify the scope of the facts upon which the journalist is obliged to give evidence."

Even though journalists can benefit from this right, they shall always use as a fundamental criteria the sources identification (**article 14 (1) f)** of Journalist's Statute). Only this guarantees the information's credibility, dismissing the risks of its manipulation.

3. Who is a “Journalist” According to the National Legislation? Is it in Your View a Restricted Definition for the Purpose of the Protection of Journalistic Sources? What is the Scope of Protection of Other Media Actors? Is the Protection of Journalists’ Sources Extended to Anyone Else?

According to article 1 of the *Estatuto do Jornalista, Lei nº1/99, de 13 de Janeiro*, (Journalist's Statute, Law nº1/99, January 13) a journalist is considered to be anyone who, as their main, permanent and gainful occupation, exercises editorial functions of research, collection, selection and treatment of facts, news or opinions via texts, images or sounds, intended for exposure, for informational purposes, via the press, a news agency, radio, television or via any other electronic means of dissemination. To add to this, number 2 of the same article clarifies the definition, stating that: “It is not journalism the performance of the duties referred to in the preceding paragraph when performed in the service of publications to primarily promote activities, products, services or entities of commercial or industrial nature.” Therefore, an agent that exercises these promotional activities cannot be considered a ‘journalist’ *proprio sensu*.

Pursuant to article 2 of the above mentioned law, citizens over 18 years old or in full use of their civil rights may be journalists.

The law continues to clarify this definition, namely by specifying that citizens who, regardless of whether or not they effectively pursue the profession, have performed journalistic activities as their main, permanent and gainful occupation for a continuous period of 10 years, or for 15 years on an interrupted basis, are also considered to be journalists, provided that they request and keep updated their respective professional license. [Article 1(3)].

Furthermore, the Statute goes on to further narrow the use of the term ‘journalist’, when it renders the pursuit of this profession incompatible with the performance of functions that can be grouped into three specific areas: of commercial nature (advertising, marketing, public relations...), institutional nature (military, police...), and political nature (sovereign bodies holders or other political office, executive positions in local government body). This incompatibility is not exactly a departure from the concept of ‘journalist’; a journalist who performs an incompatible function with the journalistic activity does not automatically cease to be a journalist, but they do suffer consequences for such a conduct. They have to cease all journalistic activity for the duration of twelve months (article 21(2), c) of the Journalist's Statute), as well as hand in their respective professional license to the *Comissão da Carteira Profissional de Jornalista* (Journalist Professional Committee). On top of this, the practice constitutes an administrative offence that, in addition to a fine of € 200 to € 5000, may be the object of additional penalty of disqualification from the practice of the profession for a period of 12 months, taking into account the severity and the agent's fault (article 20 (2) of Journalist’s Statute).

Finally, the Statute determines that in order to pursue the journalistic profession, individuals must hold the respective professional license, issued only after the completion of a mandatory internship. (Articles 4 and 5).

According to national legislation, the definition of 'journalist' fits in the broader definition proposed by 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 – which defines the term 'journalist' as any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication. The adopted definition of the term 'journalist' is, obviously, interconnected with the protection of journalistic sources – in other words, it's a prerequisite for granting that protection.

According to article 6/ c) of the same law, clarified by article 11, the professional secrecy guarantee is considered one of the journalists' fundamental rights. It is, above all, a constitutional imperative according to article 38/ 2/ b) of *the Constituição da República Portuguesa* (Constitution of the Portuguese Republic).

The journalists' professional secrecy does not concern the content of the information but rather the right not to disclose sources of information.²

Without prejudice to criminal procedure law, journalists are not only not required to disclose their sources of information, but their silence is also not subjected to any penalty. [Article 11(1)].³

Additionally, journalists shall be informed in advance, by the judicial authorities by which they are called to testify, about the content and extent of the right to non-disclosure of information sources, under penalty of the testimonies' nullity. [Article 11(2)].⁴

The right of journalists not to disclose sources of information and not be punished for it allows and builds a special relationship of trust between the journalist and the source of information. It is, therefore, not only an essential element to the practice of journalism, but also a prerequisite to ensure freedom of information.⁵

² As mentioned in the opinion of the Advisory Council of the Attorney General of the Republic, approved on February 22, 1996, "the concept of source of information includes not only people (as authors of statements, opinions and judgments), as well as documents, privileged sources of information, and any kind of information collected (including audio-visual recordings and written material). 'Source of information', in a broad sense, includes any and every object (thing), situation or event (of any kind or nature, such as an accident, a spectacle, a public demonstration, etc.) which give the journalist any type of information (written, audio or visual)." Thusly is concluded in the opinion that "the concept of source of information covers not only the origin, which can be human or not, but also the device itself in which it is poured, stored or archived." In short, the right to confidentiality, as well as give the holder the right not to reveal the persons' identity who provided information also includes non-availability of informational materials or the revelation of how the information was collected (cfr. ERC Deliberation 14/DR-I/2008, January 30).

³ Article 11(1) of the *Estatuto do Jornalista, Lei n°1/99, de 13 de Janeiro* (Journalist Statute, Law n°1/99, January 13).

⁴ Article 11(2) of the *Estatuto do Jornalista, Lei n°1/99, de 13 de Janeiro* (Journalist Statute, Law n°1/99, January 13).

⁵ Cfr. MARIA MANUEL BASTOS e NEUZA LOPES, *Comentário à Lei de Imprensa e ao Estatuto do Jornalista*, 1ª ed., Coimbra Editora, 2011, p. 231.

As Jónatas Machado⁶ highlights, the journalists' professional secrecy regarding sources of information begun as a deontological imperative of pragmatic nature, however today it is a principle of legal and constitutional nature able to ensure freedom of information and press – particularly important at a time when information journalism expands.

Several international instruments recognise the importance of journalists' professional secrecy, namely: i) the 1994 European Parliament Resolution on the Confidentiality of Journalists' sources, ii) the Resolution on Journalistic Freedoms and Human Rights, (adopted at the 4th European Ministerial Conference on Mass Media Policy – Prague, December 1994), and iii) the Council of Europe Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information.

The importance of confidentiality is also recognised by the article 14/ 2/ a) of the *Estatuto do Jornalista* (Journalist's Statute) and n°6 of the *Código Deontológico do Jornalista* (Journalist's Conduct Code) which sets the protection of confidentiality of information sources as a journalist's duty.⁷

This protection was (and remains) originally intended for journalists working for the traditional mass media (eg. newspapers, broadcasters). However, some have argued that there is no reason to limit such protection to these individuals and then apply a different regime to those working professionally in the collection and dissemination of information via new means of communication such as the Internet. In spite of this, Portuguese legislation has not changed its conservative position.

This being said, member States may find it difficult to define the characteristics of the professional work of journalists who exclusively use these new means of communication, in order to justify the same protection, due to the development of new professions in this area. Regarding this debate, the *Entidade Reguladora para a Comunicação Social*, (Regulatory Entity for Media), henceforth *ERC*, issued a deliberation (n° 202-2015) on New Media and the redefinition of the concept of '*órgão de comunicação social*' (media actor). Although this decision concerns regulatory purposes, it gives us some guidelines on the notion (still not unanimously accepted) adopted for 'media actor'.

The Recommendation CM/Rec (2011) 7 (of the Committee of Ministers to Member States on a new notion of media) gives us a broad notion of media⁸, which points to:

⁶ Cfr. JÓNATAS MACHADO, *Liberdade de expressão, Dimensões constitucionais da esfera pública no sistema social*, in *Stvdia Ivridica*, n° 65, do BFDUC, Coimbra, 2002, p. 579.

⁷ Cfr. MARIA MANUEL BASTOS e NEUZA LOPES, *op. cit.*, p. 233.

⁸ Which encompasses all actors involved in the production and dissemination, to potentially large numbers of people, of content (for example information, analysis, comment, opinion, education, culture, art and entertainment in text, audio, visual, audio-visual or other form) and applications which are designed to facilitate interactive mass communication (for example social networks) or other content-based large-scale interactive experiences (for example online games), while retaining (in all these cases) editorial control or oversight of the contents.

- A new reality, with new and traditional actors, which requires a media concept that suits a fluid and multidimensional reality;
- The need for all the actors, new and traditional, to support a framework that clearly establishes their rights and duties.

Thus, taking into account and based on the Recommendation (2011) 7, *ERC* proposes the following decisive criteria for the definition of new media:

- a) Produces, aggregates or disseminates *media* content;
- b) Submits the content to editorial control and treatment *a priori*;
- c) Intends to act as a *media* actor;
- d) Reaches and spreads to a potential audience;
- e) Respects professional standards;
- f) Is a service with economic consideration;
- g) Is under Portuguese Jurisdiction;
- h) There's continuity/permanence of the project.

In light of the exposed, it can be said that *media actors* are the outlets who pursue a social communication activity, present themselves as a service, show respect for the standards of the profession, have an expansive vocation and provide content subjected to editorial treatment and organised as a coherent whole.

In a *media* organisation the existence of *a priori* editorial control is imperative. It may also be exercised *a posteriori*, cumulatively, but the second will not be sufficient to fulfil the requirements. Within these, we highlight that news-oriented media should be subjected to stricter rules because of how important both the dissemination of information and the public interest are.⁹

4. What Are the Legal Safeguards for the Protection of Journalistic Sources? How Are the Laws Implemented? How Are the Legal Safeguards Combined with Self-Regulatory Mechanisms?

4.1 What Are the Legal Safeguards for the Protection of Journalistic Sources?

4.1.1 Legal Safeguards for the Protection of Journalistic Sources during Criminal Trial

Article 11(1) of the Portuguese *Statute of the Journalist* (“SoJ”) (Estatuto do Jornalista) generally refers to the situations in Portuguese criminal procedure law where journalists can be

⁹ ERC Deliberation 202/2015 (OUT), August 12 2015: New Media – On a redefinition of the concept of ‘*órgão de comunicação social*’ (media actor), p. 65.

judicially ordered to disclose their sources.^{10 11} *In concreto*, Article 11(1) SoJ refers to **Article 135 of the Portuguese Criminal Procedure Code** (“PCPC”) (Código de Processo Penal) titled ‘Professional Secrecy’.¹² Article 135 CPC regulates the procedural issue of *escusa de segredo profissional* (exception of professional secrecy) /*quebra de sigilo profissional* (disclosure of professional secrecy) by which, verified certain conditions, a journalist may be excused from (issue of *escusa de segredo profissional*) or ordered to (issue of *quebra de sigilo profissional*) testify on facts covered by professional secrecy, **including sources**.¹³

The issue of *escusa de segredo profissional/quebra de sigilo profissional* develops in the following manner¹⁴: a. Request to be excused [135(1) PCPC]; b. Necessary inquiries by the competent judicial authority on the *legitimacy* of the request, including audition of the profession’s representative body [135(2) and (4) PCPC]; c. Decision by the judge on the **legitimacy** of the request: i) The judge declares the *illegitimacy* of the request and orders the deposition [135(2) PCPC], or ii) The judge declares the *legitimacy* of the request and refers *ex officio* to the appellate court the decision on the question of the *justification* of the request [135(3) PCPC]; Decision by the higher court on the **justification** of the request: i) The court declares the request *unjustified* and orders the deposition [135(3) PCPC], or ii) the court declares the request *justified*.

Hence, the issue of *escusa de segredo profissional/quebra de sigilo profissional* is divided into two stages:¹⁵ i) the stage related to the question on the *legitimacy* of the request, regulated by article 135(2) PCPC, and ii) the stage related to the question on the *justification* of the request, regulated by article 135(3) PCPC. Only the court before which the request was made is competent to decide on the *legitimacy* of request [135(2) PCPC]. Only the appellate court to whom the request was made is competent to decide on the *justification* of the request [135(3) PCPC]. If the request is

¹⁰ The disclosure of journalistic sources can only take place during criminal procedure, Neuza Lopes and Maria Manuel Bastos, *Comentário à Lei da Imprensa e ao Estatuto do Jornalista* (Coimbra Editora 2011) [Portuguese] [Lopes/Bastos], 229-240.

¹¹ Article 178(5) of the Portuguese Constitution (“CRP”) establishes that investigative parliamentary commissions (“IPC”) enjoy all powers of investigations attributed to judicial authorities. IPC’s cannot, however, exercise the judicial function [Article 114 CRP]. Considering that the acts of inquiry aimed at asserting the *legitimacy* of the request, provided in Article 135(2) CRP, are not materially jurisdictional, both the *Procuradoria Geral da República* (“PGR”) (Attorney General) and the *Alta Autoridade para a Comunicação Social* (“AACS”) (High Authority for the Media) have agreed that these commissions may proceed with the necessary inquiries and, if they find the request *illegitimate*, order the deposition [Article 135(2) PCPC], Advisory Opinion of the PGR n.º 56/94; Deliberation of the AACS June 26 1996. More controversial is the question of the application of Article 135(3) PCPC to the activity of the IPC, specifically as to whether these commissions may refer to a higher court the decision on the *justification* of the request. The AACS distanced itself from the PGR, considering that these commissions could not refer this judgement to a different organ of sovereignty, inserted outside of its functional chain; Deliberation of the AACS June 26 1996.

¹² Even if this provision applies generically to the disclosure professional secrets, journalists are expressly discriminated among an exemplifying list of professions featured in article 135(1) PCPC.

¹³ Lopes/Bastos 229-240; Paulo Pinto de Albuquerque, *Comentário ao Código de Processo Penal à Luz da Constituição da República Portuguesa e da Convenção Europeia dos Direitos do Homem* (Universidade Católica, Lisboa 2011) [Portuguese] [Pinto de Albuquerque], 376-391.

¹⁴ Pinto de Albuquerque, 377.

¹⁵ The incident of *quebra de sigilo profissional* will have one stage only if the party requesting to be excused does not appeal after the court’s judgement on the *illegitimacy* of the request.

made before the *Supremo Tribunal de Justiça*, only the *pleno das secções criminais* is competent to decide on the *justification* of the request [135(3) PCPC].

4.1.2 The Legitimacy of the Request

According to article 135(2) PCPC, if the judicial authority before which the issue of *escusa de segredo profissional* is brought has reasonable doubts about the **legitimacy** of the request, it should proceed with the necessary inquiries and, if it finds the request *illegitimate*, order, or ask the court to order, the deposition. According to article 135(4), **the profession's representative body must be heard** before the judgement on the *legitimacy* of the request.¹⁶

The judgement on the **legitimacy** of the request focuses on certain preliminary *formal* requirements, in the absence of which a judge may order the deposition without the need for a judgment on the *substance* (the **justification**) of the request.¹⁷ These requirements are aimed at determining whether or not the facts are covered by *professional secrecy*.¹⁸ The request is illegitimate in the following cases:¹⁹ a. the applicant i) does not practice journalism professionally, i.e. regularly, or ii) does not fulfil the prescribed legal requirements for the practice of journalism;²⁰ b. the facts were not known in the context of the applicant's professional activity;²¹ c. the law does not provide the applicant with the right to professional secrecy;²² d. the specific requirements fixed in the professional statutes are not met.²³

4.1.3 The Justification of the Request

The judgment on the justification of the request is the moment where the *substance* of the request is considered.²⁴ In the wording of article 135(3) PCPC, the competent judicial body determines whether the **breach of professional secrecy** is justified. If the breach of professional secrecy is

¹⁶ This rule is understood due to the profession's representative body special position in verifying certain facts necessary for the judgement on the *legitimacy* of the request, namely if the applicant meets the specific requirements fixed in the professional statutes, Pinto de Albuquerque, 381. In Portugal, for the purposes of Article 135(2) PCPC, the profession's representative body in the context of journalism is the *Sindicato dos Jornalistas*. Indeed, since the *Comissão da Carteira Profissional de Jornalista* ("CCPJ") (Commission of the Journalist Professional Card does not have representative functions, Article 3 of the Regulation of the Journalist Professional Card [Regulamento da Carteira Profissional de Jornalista], it should be heard the journalists union with the biggest representation, in this case the *Sindicato dos Jornalistas* (Journalist' Union). This reading is in accordance with Article 11(6) SoJ, which refers to the journalists union with the biggest representation the representative functions, setting aside the CCPJ, Lopes/Bastos, 236.

¹⁷ Pinto de Albuquerque, 379.

¹⁸ Lopes/Bastos, 234.

¹⁹ Pinto de Albuquerque, 378.

²⁰ Pinto de Albuquerque, 378-379.

²¹ Pinto de Albuquerque, 379; Oporto Court of Appeal judgement of July 7 2010].

²² Pinto de Albuquerque, 379.

²³ *Idem*.

²⁴ Portuguese Constitutional Court judgement n. 7/87 [1987].

justified the request is, accordingly, *unjustified* and the competent judicial body **may** order the deposition with breach of professional secrecy (issue of *quebra do sigilo profissional*).

Article 135(3) PCPC determines that the breach of professional secrecy must be justified according to the **principle of prevalence of the preponderant interest**,²⁵ fixing three elements to densify this norm: i) the indispensability of the deposition for the determination of the truth; ii) the necessity of protection of legal goods; iii) the seriousness of the crime.

4.1.3.1 *The Indispensability of the Deposition for the Determination of the Truth*

The element of **indispensability of the deposition for the determination of the truth** means that the determination of the truth is irreversibly harmed if the journalist does not testify on the facts covered by professional secrecy²⁶ and, correspondingly, the determination of the truth cannot be achieved through other means, i.e. there are no alternative ways to determine the truth other than the breach of professional secrecy.²⁷

4.1.3.2 *The Necessity of Protection of Legal Goods*

The element of **necessity of protection of legal goods** corresponds to a *pressing social need* of disclosure of information covered by professional secrecy, according to the interpretation of article 8 ECtHR provided by the ECtHR in *Sunday Times v. United Kingdom*²⁸ and by the Committee of Ministers of the Council of Europe in Recommendation N.º R (2000) 7.²⁹ Consequently, the breach of professional secrecy should not be ordered in the case of particular crimes, with the possible exception of particular crimes with notorious social impact.³⁰ Moreover, there is no *pressing social need* of breach of professional secrecy where there is founded reasons to believe that there may be cause for exemption of responsibility or termination of the criminal procedure.³¹

4.1.3.3 *The Seriousness of the Crime*

The **seriousness of the crime** must be determined in abstract and *in concreto*. In abstract, the concept of *serious crime* should be interpreted in accordance with article 187(1)(a) PCPC, i.e. crimes with a maximum sentence of more than three years.³² This means that the competent

²⁵ Frederico de Lacerda da Costa Pinto, “A Atividade Jornalística à Luz da Jurisprudência Penal” in eds Carlos Blanco de Morais, Maria Luísa Duarte and Raquel Alexandra Brízida Castro *Media, Direito e Democracia* (Almedina 2014) [Portuguese] 268-273.

²⁶ Oporto Court of Appeal Judgement of July 5 2006 [2006].

²⁷ Pinto de Albuquerque, 379.

²⁸ *Sunday Times v. United Kingdom*, ECtHR

²⁹ Recommendation n.º R (2000) 7; Pinto de Albuquerque, 379.

³⁰ Pinto de Albuquerque, 380.

³¹ *Idem*.

³² Given the material similitude of the protection of the *right to privacy* operated by article 187 PCPC with the protection of the *right to professional secrecy* operated by article 135 PCPC, Pinto de Albuquerque considers that the

judicial authority should not order the deposition in case of crimes with a limited maximum of three years. This minimum abstract corresponds with the requisite of *sufficiently vital and serious nature* of the circumstances that justify the breach of professional secrecy, as interpreted by the ECtHR in *Goodwin v. United Kingdom*.³³ *In concreto*, and even if the crime meets the standard set in article 187(1)(a) *ex vi* article 135(3), the seriousness of the crime must be determined in the context of the *concrete circumstances* in which the crime occurred.³⁴ This *in concreto* assessment does not take place however, by demand of the law, in the case of *crimes de denúncia obrigatória pela testemunha chamada a depor* (crimes of mandatory complaint by the witness called to testify)³⁵. In these crimes the judgement on the *seriousness of the crime* was made *ex ante* by the legislator, who imposes the complaint of the crime.³⁶

4.1.4. Legal Safeguards for the Protection of Journalistic Sources During Criminal Investigation

Article 11(6, 7, 8) SoJ establishes a special framework for the seizure of materials used by journalists in the exercise of their profession that can reveal the identity of sources. First, article 11(6) establishes that, during criminal investigation, the search in media outlets can only take place when ordered or authorised by a judge, who personally presides that operation. Before the search, the judge notifies the Journalists' Union so that this body, or its delegate, is present during the search, under the condition of confidentiality. Second, article 11(7) SoJ determines that the materials used by journalists in the exercise of their profession can only be seized during searches to media outlets, or anywhere else under the same conditions, when a warrant has been issued, in cases where the law permits the *quebra de sigilo profissional*. Third, article 11(8) SoJ determines that the materials obtained under the conditions established by article 11(6, 7) SoJ, which can reveal the identity of sources of information, are sealed and sent to the competent court to order the *quebra de sigilo profissional*, which can only allow for it to be used as proof when the *quebra de sigilo profissional* has been effectively ordered.

4.2. How Are the Laws Implemented?

4.2.1. Appeals

Since it terminates the issue, the judgment by the court of first instance on the *illegitimacy* of the request can be subject to appeal by the applicant.³⁷ On the contrary, the decision by the court of

standard to interpret the concept of *serious crime* present in article 135 PCPC should be the one of article 187 PCPC, Pinto de Albuquerque, 380.

³³ *Goodwin v. United Kingdom*, ECtHR.

³⁴ This is namely to determine the presence of circumstances that may result in the reduction of the agent's culpability and, thus, do not justify the breach of professional secrecy, Pinto de Albuquerque, 380.

³⁵ These are crimes where, even if the identity of the suspect is unknown, certain persons (police officials and public officials) must make a complaint [242.º PCPC], Pinto de Albuquerque, 639-641.

³⁶ Pinto de Albuquerque, 380.

³⁷ Pinto de Albuquerque, 378.

first instance on the *legitimacy* of the request must refer *ex officio* the decision on the justification of the request to the higher court and, consequently, is not subject to appeal.³⁸

The judgment of the higher court on the *justification* of the request can be subject to appeal.³⁹ If the higher court is the *Tribunal de Relação* (TR) questions arise as to whether the judgment can be subject to appeal to the *Supremo Tribunal de Justiça*.⁴⁰

4.2.2 Audition of the Profession's Representative Body

4.2.2.1 Audition at the Request of the Higher Court

As it is clear from the reference of article 135(4) to article 135(3), the *higher court* shall proceed to the audition of the profession's representative body.⁴¹

4.2.2.2 The Nature of the Profession's Representative Body's decision

Article 135(4) determines that the profession's representative body must be heard under the *terms* and with the *effects* set out in the legislation applicable to that body. This could mean that the court is bound in its decision on both the *legitimacy* and the *justification* of the request by the profession's representative body decision.⁴² Pinto de Albuquerque considers this interpretation unconstitutional by violation of the principles of independence of the courts and of the pursuit of the real truth.⁴³ Furthermore, to this author, such interpretation would result in an inadmissible shortening of the defences' safeguards protected by articles 2, 32 and 203(1) of the *Constituição da República Portuguesa* and article 6 of the European Convention on Human Rights, as interpreted in *Beaumont v. France*, where it was found a violation of this provision where the court was bound by the decision of the foreign affairs minister.⁴⁴ The Portuguese courts have consistently applied this provision as to mean that the profession's representative body decision is *non-binding*.⁴⁵

³⁸ *Idem*.

³⁹ *Ibidem*.

⁴⁰ On the basis of article 399 PCPC, and since it consists in an appeal of the decision by the *Tribunal da Relação* ("TR") (Court of Appeal) on the justification of the breach of professional secrecy, Pinto de Albuquerque (Pinto de Albuquerque, 378) and the *Supremo Tribunal de Justiça* ("STJ") (Portuguese Supreme Court) (Portuguese Supreme Court Judgement of February 16 2005) have considered that the judgement of the of the TR can be subject to appeal to the STJ. However, this interpretation is not stable in the case law of the STJ. Indeed, against this interpretation, on the basis of the expression "*em recurso*" found in article 400(1)(c) PCPC cf. Portuguese Supreme Court Judgement of February 16 2005 and June 2 2010. This latter interpretation was considered in accordance with the Portuguese Constitution on the Tribunal Constitutional ("TC") (Portuguese Constitutional Court) judgments nos. 589/2005 and 673/2005.

⁴¹ Lisbon Court of Appeal judgement of September 24 2008 [2008].

⁴² Pinto de Albuquerque, 381.

⁴³ *Idem*.

⁴⁴ Pinto de Albuquerque, 381; *Beaumont v. France*, ECtHR.

⁴⁵ Portuguese Supreme Court judgment of April 21 2005 [2005]; Oporto Court of Appeal judgement of November 3 2004 [2004]; Guimarães Court of Appeal judgement of November 5 2007 [2007]; Lisbon Court of Appeal

4.3. How Are the Legal Safeguards Combined with Self-Regulatory Mechanisms?

4.3.1. Self-regulatory mechanisms

In Portugal, limits to journalists' freedom to disclose their sources exist only under soft law instruments. Indeed, Point 6 of the Portuguese Journalists' Code of Ethics defines as a **duty** of the journalist the non-disclosure of sources, even in court. This provision contains only one exception: the circumstance under which a journalist is used by their source in order to channel false informations. In this case, the Portuguese Journalists' Code of Ethics allows the journalist to disclose its source.

Violations of the duties established under the Portuguese Journalists' Code of Ethics [Código Deontológico do Jornalista] are reviewed by the *Conselho Deontológico do Sindicato dos Jornalistas* (Journalists Union Ethics Council) [40(c) Statute of the Journalists Union ("SoJU")], with no further consequence resulting to the journalist who chooses to reveal its source. [40(c) SoJU].

4.3.2 Legal safeguards

Under Portuguese law, there is no legal command that *prohibits* journalists from disclosing their sources. There are, however, legal commands that, under exceptional circumstances, *obligate* journalists to do so⁴⁶.

Considering the general prohibition of disclosure of sources established under self-regulatory mechanisms⁴⁷, in certain cases, journalists will face a conflict of duties: the *ethic* obligation (soft law) not to disclose the source will be in conflict with *legal* obligation (hard law) to do so.

judgment of September 24 2008m [2008]; Évora Court of Appeal judgement of October 7 2010 [2010]; Pinto de Albuquerque, 381-382.

⁴⁶ *Supra* 4.1 and 4.2

⁴⁷ *Supra* 4.3.1

5. IN the Respective National Legislation Are the Limits of Non-disclosure of the Information in Line With the Principles of the *Recommendation No R (2000) 7*? What Are the Procedures Applied? Is the Disclosure Limited to Exceptional Circumstances, Taking Into Consideration Vital Public or Individual Interests at Stake? Do the Authorities First Search for and Apply Alternative Measures, Which Adequately Protect Their Respective Rights and Interests and at the Same Time are Less Intrusive With Regard to the Right of Journalists not to Disclose Information?

In order to understand whether the Portuguese system is in line with the principles of the *Recommendation No R (2000) 7*, we must examine not only the substantive law, but especially the procedure law, which exposes the limits, the exceptions and the methods concerning the right of journalists not to disclose information.

Such right is directly linked to the exercise of active investigation journalism, which implies the right to professional secrecy. This means that journalists are not obliged to reveal their sources of information, whoever they may be, without the fear of sanction for not revealing those sources⁴⁸.

The protection of those sources corresponds to a right with fundamental value in democracy, constitutionally protected by article 38 of the Portuguese Constitution⁴⁹.

In Portugal, the right of journalists not to disclose information is not designed in absolute terms⁵⁰, but as a relative right, inasmuch as it allows breaches in certain situations, i.e. only in exceptional circumstances and by jurisdictional imposition, by its own initiative or by a criminal investigation entity⁵¹.

⁴⁸ As mentioned in the Legal Advice nr. 205/77, of 97.11.03 of the Republic's General Attorney Office, «a newspaper is not free if its information sources are not».

⁴⁹ The freedom of expression is directly related to the principles of democracy, as highlighted by Martins, João Zenha, «O segredo Jornalístico, a protecção das fontes de informação e o incidente processual penal de quebra de escusa de depoimento», *Revista do Ministério Público*, nr. 106, p. 91 (2006).

⁵⁰ Although the Portuguese Constitution determines that it is up to the law to restrain its scope and ensure its exercise, the truth is «the law cannot limit the right of journalists not to disclose information; it can only ensure its protection», as stated by Canotilho, J.J. Gomes and Vital Moreira, «Constituição da República Portuguesa Anotada», Vol. 1, 4th Edition, Coimbra Editora, pp. 583 ss (2007). See Constitutional Court, Judgement nr. 7/87, of 9 January 1987, DR 1st Series of 09 February 1987.

⁵¹ Martins, João Zenha, «O segredo Jornalístico, a protecção das fontes de informação e o incidente processual penal de quebra de escusa de depoimento», *Revista do Ministério Público*, nr. 106, pp. 106 ss. (2006)

In the Portuguese system, it is unanimous that professional secrecy is a moral and deontological duty, as well as a legally acknowledged right, but it is not an established judicial duty, because there is no applicable sanction upon breach of the commitment⁵².

Regarding the applicable legislation to this matter, in particular, article 135 of the Portuguese Criminal Procedure Law, article 22. of the Portuguese Press Law and article 11 of the Portuguese Journalist's Statute⁵³, «facing the hypothesis of the matter regarding the obligation of a witness' deposition in court being raised, the journalist, before a fact which he aims to remain confidential, and before invoking secrecy, must analyse if he is before a matter which could effectively be invoked as secrecy and, thereafter, analyse if he is not standing before a situation where the criminal justice's administration needs, inescapably, its testimony»⁵⁴.

Article 135 of the Portuguese Criminal Procedure Law has a binary structure⁵⁵ regarding the right of journalists not do disclose information. On the one hand, the situation provided in number 2 of the article refers to situations when the journalist invokes their right not to disclose information as an excuse to not provide a statement, leading the judicial authority to have to either i) accept the plea; or to ii) investigate the legitimacy of the excuse and, if illegitimacy is concluded, the judicial authority can order or request the court to order the provision of the statement⁵⁶. On the other hand, if the judicial authority concludes that the excuse is legitimate it can, under the number 3 of the article, initiate the procedures for a possible breach of secrecy.

With the excuse being legitimate, only the breach of secrecy may oblige the provision of the information that is being covered by the secrecy. However, the breach of secrecy imposes forethought of supremacy among the interests in conflict, which the legislator must report to a superior court.⁵⁷

⁵² Supreme Court of Justice, Judgement of 09 February 2011, Process nr. 12153/09.8TDPRT-A.P1.S1. <<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/419c71a453f271a98025789600528ea9?OpenDocument>> accessed at 14 January 2016.

⁵³ The article 135. of the Portuguese Criminal Procedural Law applies in civil lawsuits, according with the article 417., nr. 3, al. c) and nr. 4 of the Portuguese Civil Procedure Law.

⁵⁴ Gaspar, António Henriques, «Código de Processo Penal Comentado», Coimbra, Almedina, pp. 554 ss (2014).

⁵⁵ Martins, João Zenha, «O segredo Jornalístico, a protecção das fontes de informação e o incidente processual penal de quebra de escusa de depoimento», *Revista do Ministério Público*, nr. 106, pp. 103 ss. (2006)

⁵⁶ In this situation, there is no secrecy, therefore the law does not impose the making of any judgement of weighing the interests in a way to determine which should prevail. A distinct situation is the legitimate excuse. The legitimacy of excuse necessarily results from the circumstance of the fact being under secrecy. See Supreme Court of Justice, Judgement of 09 February 2011, Process nr. 12153/09.8TDPRT-A.P1.S1. <<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/419c71a453f271a98025789600528ea9?OpenDocument>> accessed at 14 January 2016.

⁵⁷ The breach of secrecy is of the jurisdiction of a superior court (Court of Appeal or Supreme Court of Justice). See Supreme Court of Justice, Judgement of 22 November 1995, Process nr. 048411. <<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/94fb0bb1b37d2dfa802568fc003aeacd?OpenDocument>> accessed at 14 January 2016.

It is precisely this judgement in which number 3 of article 135 oversees the assumption of a specific incident – incident of breach of professional secrecy – to be mentioned in the court immediately superior to the one where the excuse was conducted⁵⁸.

Therefore it is necessary to carry out a practical agreement⁵⁹, which involves the analysis of the case, the interests at stake, the underlying conflict⁶⁰ and the principle of proportionality in its three aspects:

1. Necessity: The Court must analyse the effective risk of the application of the law, measuring the need to apply it towards the possible damage caused to the right of journalists not to disclose information.⁶¹

2. Appropriate/suitable: There has to be an evaluation of the set of possible measures which must be adopted in order to, without obscuring the core of the right of journalists not to disclose information, elect an ideal means of action. In this plan, based on a state of greater interest, and from the moment the breach of professional secrecy has been determined, the court must only proceed when there is an imperative public interest and if the circumstances present are sufficiently vital and of such a serious nature.⁶² Then, a set of potentially adaptable measures is selected based on the weighing of the prognoses.⁶³

See, also, Supreme Court of Justice, Judgement of 09 February 2011, Process nr. 12153/09.8TDPRT-A.P1.S1. <<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/419c71a453f271a98025789600528ea9?OpenDocument>> accessed at 14 January 2016.

⁵⁸ The professional secrecy breach incident is a specific incident of the testimonial evidence. See Oporto's Court of Appeal, Judgment of 05 July 2006, Process nr. 0642079. <<http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/d3389035e96b6d6c802571ab00360234?OpenDocument>> accessed at 14 January 2016.

See, also, Coimbra's Court of Appeal, Judgment of 08 November 2006, Process nr. 1429/06. <<http://www.dgsi.pt/jtrc.nsf/c3fb530030ea1c61802568d9005cd5bb/dea564d069b7436f8025722500425678?OpenDocument>> accessed at 14 January 2016.

⁵⁹ In any case, the Court must act with criteria of extreme compulsory moderation and doubled caution in the weighing analysis of the value of presence.

⁶⁰ Here in confrontation: the individual citizen rights of information, the principle of freedom of press, the public interest in the investigation of the crimes, the freedom of the press, and the discovery of criminals for public peace. See Supreme Court of Justice, Judgement of 09 February 2011, Process nr. 12153/09.8TDPRT-A.P1.S1. <<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/419c71a453f271a98025789600528ea9?OpenDocument>> accessed at 14 January 2016.

⁶¹ Martins, João Zenha, «O segredo Jornalístico, a protecção das fontes de informação e o incidente processual penal de quebra de escusa de depoimento», *Revista do Ministério Público*, nr. 106, p. 109 (2006).

⁶² Martins, João Zenha, «O segredo Jornalístico, a protecção das fontes de informação e o incidente processual penal de quebra de escusa de depoimento», *Revista do Ministério Público*, nr. 106, p. 110 (2006).

⁶³ See Lisbon's Court of Appeal, Judgment of 20 August 2002, Process nr. 0065289. <<http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/b3cb71f0992b095580256c9f0039fe4a?OpenDocument>> accessed at 14 January 2016, where the Court decided that the state's interest prevails over the professional journalist secret.

3. Forbid of excess: Within the reasonable alternatives, there must be chosen the least damaging one, as long as the material truth related to the object of the process is ensured. In any case, the chosen measure must never affect the core of the professional secrecy, damaging it from any sort of fruition.⁶⁴

The breach of secrecy is the ultimate way to directly prevent a crime or a situation of violence, and, moreover, cases in which a threat to national security is foreseen. This last circumstance demands a genuine fidelity for a purpose, and it must be sustained by evidence that the expression or information in question places a great threat to a legitimate interest of national security, in which the imposed restriction is the least restrictive means to protect the said interest.⁶⁵ Also that the restriction is compatible with the democratic principles which lead the Court to perform a balanced process, in a case-by-case basis.⁶⁶

After the decision of the court, which requires a breach of professional secrecy, the opportunity should be given to the journalist to present the motives to sustain the invoking of the secrecy⁶⁷. However, this does not happen, calling into question if our system is in line with the principles of the *Recommendation No R (2000) 7*.

See, also, Évora's Court of Appeal, Judgment of 15 December 2009, Process nr. 377/08.0TALGS-A.E1. <<http://www.dgsi.pt/jtre.nsf/134973db04f39bf2802579bf005f080b/9c0d9294b2b7435280257de100574f1c?OpenDocument>> accessed at 14 January 2016.

⁶⁴ Martins, João Zenha, «O segredo Jornalístico, a protecção das fontes de informação e o incidente processual penal de quebra de escusa de depoimento», *Revista do Ministério Público*, nr. 106, pp. 120 ss (2006). See Supreme Court of Justice, Judgement of 09 February 2011, Process nr. 12153/09.8TDPRT-A.P1.S1. <<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/419c71a453f271a98025789600528ea9?OpenDocument>> accessed at 14 January 2016.

⁶⁵ Condesso, Fernando, «Direito da Comunicação Social – Lições», Coimbra, Almedina pp. 207 ss (2007); Gaspar, António Henriques, «Código de Processo Penal Comentado», Coimbra, Almedina, p. 555 (2014).

⁶⁶ The Supreme Court of Justice, Judgement of 09 February 2011, Process nr. 12153/09.8TDPRT-A.P1.S1. <<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/419c71a453f271a98025789600528ea9?OpenDocument>> accessed at 14 January 2016, decided that the breach of professional secrecy is essential when the right to privacy is violated before all public community.

⁶⁷ Martins, João Zenha, «O segredo Jornalístico, a protecção das fontes de informação e o incidente processual penal de quebra de escusa de depoimento», *Revista do Ministério Público*, nr. 106, pp. 127 ss (2006).

6. In the *Recommendation No R (2000) 7* the Following Principles Should Be Respected When the Necessity of Disclosure is Stated: Absence of Reasonable Alternative Measures, Outweighing Legitimate Interest (Protection of Human Life, Prevention of a Major Crime, Defence of a Person Accused or Convicted of Having Committed a Major Crime). Under Which Criteria Can the Interest in the Disclosure Outweigh the Interest in the Non-disclosure?

Under Portuguese law, the problem arises only in the context of Criminal Law as a procedural issue of breach of professional secrecy. Undoubtedly, crimes have a social impact and represent an undeniable social concern, and for those reasons it is entirely justified that the efficiency of criminal justice has to prevail over the duty of professional secrecy.

Therefore, article 135, paragraph 3, of the Portuguese Criminal Procedure Code, provides that the court “may decide to provide testimony with professional secrecy breaking whenever this proves justified under the principle of the prevalence of major interest, particularly taking in account the indispensability of the testimony to the discovery of truth, the seriousness of the crime and the need for protection of legal interests”, a legal standard in tune with article 11, paragraph 1, of the Portuguese Statute of Journalist, which determines that “**without prejudice to criminal procedural law**, journalists are not required to disclose their sources of information, not in his silence subject to any sanction, direct or indirectly” (emphasis added). Concerning this rule, the Proposed Law n.º 76/X, a proposal that preceded the Law that modified the Journalist's Statute⁶⁸, suggested the rule should narrow the scope of “public interest” included in the criminal procedure rule mentioned above. Accordingly, the new article 11.º, n.º 3, of the Journalist's Statute, which did not come into force as we will see right below, should state something close to the following: “the disclosure of information sources can only be ordered by the court in accordance with the provisions of the criminal procedure law, where necessary for the investigation of serious crimes against persons, including, inter alia, crimes against life and physical integrity, as well as for the investigation of serious crimes against state security or serious cases of organised crime, since it is established that the disclosure of information is fundamental to the discovery of the truth and that their information much could hardly be obtained otherwise”⁶⁹.

⁶⁸ Which came into force by the Law n.º 1/99, January 13th

⁶⁹. As can be read in prefatory note, “thus making it necessary to circumscribe the concept of “overriding interest”, whose judicial consideration paragraph 3 of article 135 of the Criminal Procedure Code does depend, at present, the possibility of breach of professional secrecy of the journalist of the framework law of greater dignity assets in our system, such as life and physical integrity, as well as national security, and serious cases of organised crime, is reduced to just limits the margin of subjective assessment of the judge's determination, as enshrined in international texts cited above. At the same time, it is limited to those cases where the situations likely to cease materials used by journalists, initiatives that, when taking place in media organ, should always be chaired by a judge and can count on the presence of representative that professional class. It protects the material that can be seized in the course of an authorized search, so you can only access the competent court to determine the breach of secrecy and that only be

However, the President of the Portuguese Republic didn't issue the Proposed Law n ° 130/X, the draft that had incorporated that recommendation, as he vetoed the decree, backing his decision by emphasising that the rule “would allow cross interpretations, giving room for vagueness and legal insecurity in a particularly sensitive field either for the journalistic activity or for the efficiency of the criminal justice”.

Nevertheless, and following the ruling *Goodwin v. United Kingdom*, the international leading case concerning this matter, at the end of the day both Portuguese scholars and courts have interpreted the concept of absolute need of the statement like the recommendation mentioned above: there is an absolute need of disclosure if the testimony, the journalists themselves, hinders the finding of the truth by not giving their statement and as long as it covers crucial facts that the court can't get access otherwise, this is to say, by other legitimate mean. To some extent, the concept of absolute need is mainly connected to a pressing social need and calls for a balancing process. This is to say that there is ground for breaching the duty of secrecy due to sufficiently, vital and serious natures of social circumstances. The disclosure of information identifying the source should therefore be limited to exceptional circumstances where vital public or individual interests are at stake and can be convincingly established such as activities which may contribute to or result in such crimes as murder, manslaughter, severe bodily injury, crimes against national security, or serious organised crimes. However, both scholars and doctrine have agreed that the breach of duty of secrecy must be denied when it comes to particular crimes⁷⁰ unless the crime has a significant social impact, or when it comes to crimes with penalties that cap at three years. Furthermore, the excuse is illegitimate when: (i) the material or data show no connection with the professional secret; (ii) are concerned with information, facts or news not published or intended for publication; (iii) information obtained illicitly because if there is no right of access to information due to the law forbidding so, then the secrecy on the information thus obtained is not worthy of protection; (iv) where the source of information, gave their

used as evidence in cases that fall is admitted by law”. Furthermore, “4 - Should be ordered disclosure of the sources in the preceding paragraph, the court shall specify the scope of the facts on which the journalist is obliged to give evidence. 5 - When there is place to disclosure of information sources in accordance with paragraph 3, the judge may, by order of its own motion or the journalist's request to restrict the free public assistance or the provision of testimony arises excluding advertising, getting involved in the act required the duty of secrecy on the reported facts. 6 - The information directors of media and managers or their proprietary organisation managers, as well as anyone in them performing functions may not, except with the written permission of the journalists involved, disclose their sources of information, including journalistic text files, sound or image of the company or any documents likely to disclose it. 7 - The search in the media can only be ordered or authorised by the judge, who personally chairs the diligence, previously warning the president of the union of journalists with greater representation for the same, or his delegate, may be present under confidentiality reserve. 8 - The material used by journalists in the exercise of their profession can only be seized during the searches in the media provided for in the preceding paragraph or made elsewhere by court warrant in the cases and for the purposes set out in paragraph 3. 9 - the material obtained in any of the actions set out in the preceding paragraphs that allow the identification of a source of information is sealed and forwarded to the competent court to order the disclosure of information, which can only authorise its use as evidence in the cases and terms referred to in paragraph 3”.

⁷⁰. Note: a “particular crime”, according to Portuguese law, means those crimes whose prosecution on a complaint and prosecution of the offence.

consent.

As ruled by the Portuguese Supreme Court of Justice, “the right to secrecy is not defined, in Portugal, in absolute terms, but only as a relative right, one that requires a framework which allows the legal obligation of breakage in certain situations, although exceptional in nature and by judicial imposition, on its own initiative or criminal (...) the breach of professional secrecy by decision of the superior court and the refusal of the legitimacy of decision is subject to a weighting of judgment which equates, firstly, to divide the principle of trust that is a breach of secrecy and, secondly, the prevalence of major interest represented by the fact that it breaks to be essential for the discovery of fact, the severity of crime and the need for protection of legal interests. It being understood that the operation of such requirements is cumulative, it is equally true that the law refers to vague concepts that for some, implies an analog inquiry into the meaning of the concepts employed in the teleology of the CPP [Portuguese Code of Criminal Procedure]. In this speech there is the insuperable tendency to an attempt to gauge depending on their abstract penalty or legal and offended, as well as the criterion of the gravity of the crime. We believe that ultimately, what is at issue is the proportionality of the means employed - where the breach of professional secrecy - and the purposes to be achieved”⁷¹.

7. In the Light of the Case-Law of the European Court of Human Rights, How Do National Courts Apply the Respective Laws With Regard to the Right to Protect Sources? In Particular, How Do They Balance the Different Interests at Stake?

As we have seen earlier, Portuguese Law protects journalistic sources directly (via the protection of journalists' professional secrecy) and indirectly (as a dimension of the freedom of expression and freedom of press). There are cases, however, where procedure law gives the judge power to authorise the removal of the obligation of professional secrecy - mostly in the field of criminal procedure - with due accordance of the respective council of the professional association, and journalists are no exception. In 2011, the Portuguese Supreme Court of Justice (*Supremo Tribunal de Justiça*) denied the appeal of a judgment (no. 12153/09.8TDPRT-A.P1.S1) regarding the topic exposed above and sustained the decision of breaking professional sigil, stating that only then would the court be able to pursue the discovery of material truth - which, in light of the interests at stake, was taken as the prevailing interest, for that matter.

The aforementioned judgment portrays how the Portuguese courts traditionally treat press-related cases as scenarios of a collision of rights that have the same dignity in the eyes of the Constitution, taking into consideration personality rights (honour, reputation, image, privacy) on one hand and freedom of expression (and other rights connected to the press and journalists) on the other. For years, law suits based on claims related to violations of the right to privacy and

⁷¹.See ac. 09/02/2011 do STJ (SANTOS CABRAL), proc. nr. 12153/09.8TDPRT-A.P1.S1 (available on www.dgsi.pt).

honour by the press ended in heavy civil compensations on behalf of the idea that, in a scenario of collision of rights with equal constitutional value, the limit of one's extension is the essential core of the other - and in these cases, the courts usually stood by the defence of the rights related to the personality. This led to several complaints in the ECtHR that opposed the Portuguese Republic to journalists and press entities considered guilty in Portuguese courts, resulting in several condemnations for the Portuguese Republic because of what the ECtHR has seen as a direct violation of article 10 of the Convention.

Recent Portuguese case law, however, seems to have adopted, if not fully, at least partially, the criteria established by the ECtHR to rule cases related to the press and freedom of expression. Indeed, it has become normal to find references to the Convention for the Protection of Human Rights and Fundamental Freedoms in Portuguese case law. Such has happened in case no. 755/13.2TVLSB.L1-7, from the Lisbon Court of Appeal - Tribunal da Relação de Lisboa - where it was stated that “Article 10, paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms allows the for the exercise of freedom of expression as become the general rule”, as well as case no. 941/09.0TVLSB.L1.S1 also from the Lisbon Court of Appeal which asserted that “The European Court of Human Rights (ECtHR) has stressed that the freedom of press is one of the pillars of freedom of information, and that national authorities cannot, by principle, stop journalists from investigating and collecting information of public interest and of reproducing such information, as it is inherent to the functioning of a democratic society”. The latter mentioned case also determined that “regarding the conflict between judicial secrecy and the freedom of expression and information, the ECtHR has been against restrictions to freedom of expression that aren't deemed necessary, namely when such information is already in the public domain”. These decisions showcase a trend where the application of the national law is overall more coherent with the principles crystallised in the ECtHR Case Law.

8. What are the Criteria for Using Electronic Surveillance and Anti-terrorism Laws, Which May Include Measures Such as Interceptions of Communications, Surveillance Actions and Search or Seizure Actions in Order to Identify Journalists' Sources of Information? Are the National Law Provisions Accessible, Precise, Foreseeable and Include Clear Legislative Norms in the Context of Surveillance and Anti-terrorism Provisions?

Electronic surveillance mechanisms, as understood by the Portuguese legislator⁷², consist of the observation or listening of persons, places, or activities—usually in a secretive or unobtrusive manner—with the aid of electronic devices such as cameras, microphones, tape recorders, or wire taps.

⁷² Available in English at: http://www.gddc.pt/codigos/code_criminal_procedure.html.

The goal of electronic surveillance, when used in law enforcement, is to gather evidence of a crime or to accumulate intelligence about suspected criminal activity⁷³.

This issue is extremely sensitive, for it causes a collision between an individual's fundamental rights, as protected by the Portuguese Constitution, and the State's interest in the pursuit of a criminal investigation. In truth, the use of electronic devices to keep surveillance over a person can implicate the violation of the investigated individual's right to privacy (protected by article 26 of the Portuguese Constitution) and freedom of speech (article 37 of the Portuguese Constitution), for example.

In fact, from a constitutional standpoint, what at stake when electronic surveillance mechanisms are employed is the autonomous right to privacy of a citizen's correspondence and communications, as protected by Article 34 (1) of the Portuguese Constitution. However, this legal value may only be compromised by virtue of criminal procedure law.

In view of its controversial nature, the admissibility of electronic surveillance mechanisms is subject to a number of strict criteria:

1. Exceptional nature – according to the Portuguese legal order, regardless of the type of crime in question, the violation of a fundamental right resulting from its collision with a different protected legal interest must be justified by the superior nature of the latter in relation to the former. It is noteworthy that, to this date, there have yet to occur any cases in which the respect for professional privilege is extended to journalists and the protection of their sources.
2. Principle of proportionality – in light of article 187 of the Portuguese Code of Criminal Procedure, the interception and tape recording of telephone conversations or communications may only be authorised during the inquiry where there are grounds for believing that this step is indispensable for the discovery of the truth or that the evidence would, by any other means, be impossible or very hard to collect. Hence, a judgement of proportionality, necessity and adequacy is in order when assessing the admissibility of the evidence gathered;
3. Principle of legality - an authorisation for the employment of electronic surveillance mechanisms must be granted by means of a reasoned and well-founded order issued by the Examining Judge and upon the request of the Public Prosecution Service, hence being subject to a high degree of formal requirements, indispensable in safeguarding the investigated individual from arbitrary incursions by the authorities;
4. Specification of a time-limit - the interception and recording of any conversations or communications are authorised, as per Portuguese criminal procedural law, for a maximum time-limit of three months, renewable for equal periods, provided that the respective requirements for

⁷³ JOSÉ MANUEL DAMIÃO DA CUNHA, *O Regime Legal das Escutas Telefónicas, Algumas Breves Reflexões*, Porto, 2015, pp. 6 ss.

admissibility have been met;

5. Respect for professional privilege - no interception and recording of telephone conversations or communications between the defendant and his defence counsel is allowed unless the judge has reasonable grounds to believe that conversation or communication in question is the object or the constitutive element of a criminal offence;

6. The recording of conversations or communications cannot be used in the scope of any other proceedings, either on-going or to be instituted, unless exceptions are provided in special legislation.

Pertaining to the **identification of journalists' sources of information**, there are so far no examples of any case-law in which the use of electronic surveillance mechanisms has been employed to this end.⁷⁴

However, as per Article 126 (3) of the Code of Criminal Procedure, which concerns the inadmissibility of means of evidence obtained in violation of an individual's fundamental right to privacy through unauthorised intrusions into that individual's correspondence or telecommunication's records, the legislator has been careful to place the validity of the use of such means of evidence under the consent of the targeted individual.⁷⁵ This norm puts into place a mechanism that renders the use of those means of evidence as relatively invalid⁷⁶ – in other words, the employment of such means of evidence as the ones foreseen in Article 126 (3) is only relatively invalid. The ones set forth in Article 126, (1) and (2), however, are to be considered invalid at all times.⁷⁷

Hence, the system differentiates the regime applicable based on consent, which can be provided *ex ante* or *ex post factum*. But who is in a position to give such consent? The legitimacy depends on whom is considered as the the lawful holder of the right violated in a particular case.⁷⁸ Therefore, when a journalist is concerned, the general rule would apply: if the evidence had been collected through electronic surveillance mechanisms employed without the journalist's authorisation, their use would be relatively prohibited – for it would be possible to consent on it later on.

When that consent is lacking, legal privileges entailing secret-keeping privilege must be analysed. For example, some doctrine has stepped forward and defended that journalists should enjoy some of the privilege usually awarded to medical professionals and lawyers – as agents in the so-called “institutional relationships”. This standpoint is, to some extent, present in Article 11 of

⁷⁴ http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=199A0187&nid=199&tabela=leis&pagina=1&ficha=1&so_miolo=&nversao=#artigo

⁷⁵ STJ – Case no. 08P3375, 16-04-2009.

⁷⁶ STJ - Case no. 97/06.0JRLSB.S1, 04-11-2009.

⁷⁷ PAULO PINTO DE ALBUQUERQUE, *Comentário do Código de Processo Penal*, UCE, Dezembro 2007, p. 326.

⁷⁸ TRP – Case no. 35/08.5JAPRT.P1.

the Journalist Statute⁷⁹.

Additionally, the legislation must be foreseeable. In fact, as the European Court of Human Rights has made sure to stress in its recent case law: *“The domestic law must be sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures.”*⁸⁰

Furthermore, the legal method adopted by the Portuguese legislator was extensively thorough in order to assure clarity, accessibility, precision and foreseeability of the legislation⁸¹. Article 187 of the Code of Criminal Procedure⁸² identifies all the circumstances in which the adoption of electronic surveillance mechanisms may be admissible:

1. Drug-related offences;
2. Possession of a prohibited weapon and illicit trafficking in weapons;
3. Smuggling offences;
4. Threat with the commission of a criminal offence or abuse and simulation of danger signals;
5. Escape from justice, whenever the defendant has been sentenced for a criminal offence foreseen in the preceding sub-paragraphs;
6. Illegal restraint, kidnapping and taking of hostages;
7. Offences against cultural identity and personal integrity, as provided for in Book II, Title III, of the Criminal Code and in the Criminal Law on Violations of International Humanitarian Law;
8. Offences against State security foreseen in Book II, Title V, Chapter I, of the Criminal Code - in which it is admissible to include the sensitive topic of terrorism, though there is no specific mention to it when analysing the admissibility of electronic surveillance mechanism;
9. Counterfeiting of currency or securities equivalent to currency foreseen in articles 262, 264 - to the extent that it refers to article 262 - and article 267 – to the extent that it refers to articles 262 and 264 - of the Criminal Code;

⁷⁹ Law 1/99, 1st of January, available in Portuguese at:

http://www.pgdlisboa.pt/leis/lei_busca_assunto_diploma.php?buscajur=fontes&artigo_id=&pagina=1&ficha=1&nid=136&tabela=leis&diplomas=&artigos.

⁸⁰ *Case of Roman Zakharov v. Russia* (application No. 47143/06) [2015] Reports of Judgments and Decisions 2015, para 229.

⁸¹ JOSÉ MANUEL DAMIÃO DA CUNHA, *O Regime Legal das Escutas Telefónicas, Algumas Breves Reflexões, cit.*, pp. 12.

⁸² Available in English at: http://www.gddc.pt/codigos/code_criminal_procedure.html.

10. Offences covered by a convention on the safety of air or maritime navigation.⁸³

In addition, it is also required of the sitting judge in charge of the case to verify the relevance of the elements collected through the employment of electronic surveillance mechanisms, in order to guarantee that the violation of the individual's right to privacy is exclusively limited to the scope of the investigation. This criminal procedure principle means that if, by chance, a journalist's source happens to be disclosed in the midst of a recording set in place by electronic surveillance mechanisms, that information would not be admissible in Court, since it would fall outside the limited scope granted by the recording authorisation.

Hence, in a literal, positivist-oriented interpretation of the law⁸⁴, any other situations shall not be rendered admissible by the judiciary. Since the identification of journalists' sources of information was omitted, it must not be, by itself, considered as targeted by the Portuguese legislator.

As such we can conclude that there are no legal provisions that may subject journalists to be electronically surveyed in order to aid in the identification of sources.

Regarding the subject of terrorism – though not specifically detailed in the Code of Criminal Procedure, the parliamentary law n.º 52/2003, 22 of August⁸⁵ does give the reader a broader sense of what the term *terrorism* entails in the Portuguese legal order. However, while relevant in determining the definition of terrorist activities, this document remains silent as to any evidentiary standards.

In conclusion, the Portuguese legal system is mute regarding how to judge cases pertaining to the disclosure of journalistic sources, even when it comes to the subject terrorism.

9. Can Journalists Rely on Encryption and Anonymity Online to Protect Themselves and Their Sources Against Surveillance?

9.1. Measures Taken by Governments to Monitor the Internet

Portugal does not have any legal framework specifically regulating encryption or anonymity online.

Regardless of the fact that Portugal does not yet have any case-law concerning the journalistic right to encryption and anonymity online, it is imperative to ponder about an adjacent matter, specifically the measures taken by governments to monitor the Internet, as these may necessarily

⁸³ Available in English at: http://www.gddc.pt/codigos/code_criminal_procedure.html.

⁸⁴ CLÁUDIO LIMA RODRIGUES, *Da valoração dos conhecimentos fortuitos obtidos durante a realização de uma escuta telefónica*, in *Verbo Jurídico*, 2015, pp. 2 ss.

⁸⁵ Available in Portuguese at http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=119&tabela=leis

entail the unwarranted capture and retention of private communications data from ordinary citizens, as well as suspected criminals.

These concerns have become more serious as governments have increasingly attempted to push for the preservation of traffic data for longer periods, and as Internet Service Providers have begun to play a more proactive role in monitoring certain types of activity, for example copyright violation.⁸⁶

9.2. Constitutional Protection Guarantees Against Surveillance

Portuguese legislation provides several Constitutional protections against surveillance, namely the article 38 [2/b)] ensures the freedom of media press specifically by the journalistic right to professional secrecy. Nevertheless, this is not an absolute guarantee to the extent that the professional secrecy is protected "under the law". That is, not only is legislative action required to densify the right to secrecy, as this densification can legitimately condition the exercise of that right, in consideration with other constitutionally protected property.

So far, an overview upon the generic anonymity issues has been introduced, however it is required a focused assay over Constitutional online guarantees.

Regarding this specific issue, the Portuguese Constitution assures the protection of online personal data by a state independent entity – National Committee for Data Protection – as well as the applicable rules to personal data automated treatment, connection, steaming and use in article 35 (2).

The number 4 of the same Constitutional article forbids the access to personal data by others, beside the exceptions provided by law.

9.3. Limits Outlined to the Right to Encryption

At this moment, an examination across the limits outlined of the right to encryption and anonymity is required, imposed by the Portuguese Code of Criminal Procedure in order to ensure security.

Article 135 establishes the legal regime for the professional secrecy. Likewise the other rules already stated, article 135 (1) allows journalists to keep professional secrecy and excuse themselves to testify about the facts covered by it.

If there are doubts about the legitimacy of the excuse, the judicial authority before which the incident has taken place shall make the necessary inquiries. After these inquiries, that judicial

⁸⁶ https://www.un.org/en/terrorism/ctitf/pdfs/ctitf_internet_wg_2009_report.pdf

authority may order or request the court to order the testimony if it considers the excuse illegitimate [135 (2)].

The court superior to the one where the incident has been raised, or in case the incident has been raised before the Supreme Court, the criminal sections, all together, may decide to demand testimony, breaking professional secrecy, whenever this proves justified under the principle of the prevalence of major interest, particularly in view of the indispensability of the testimony to the discovery of the truth, the seriousness of the crime and the need for protection of legal interests. The intervention is raised by the court of its own volition or at request [135 (3)].

In the cases specified under paragraphs 2 and 3, the decision of the judicial authority or court is taken, after hearing the Journalists' Union, on the terms and with the effects of the legislation applicable to that organism [135 (4)].

9.4. Cybercrime Law

The Convention on Cybercrime⁸⁷ came into force in Portugal on July 1st 2010, even though Portuguese legislation already had a legal instrument regarding specifically to online surveillance. That legislation is called Cybercrime Law (Law 109/2009, 15th September) and it implements the Council Framework Decision,⁸⁸ of February 24, on attacks against information systems, adapting to the national law the Convention of Cybercrime of the European Council.

Always complying to the Journalist's Statute and the Code of Criminal Procedure, the Portuguese Cybercrime Law allows the search in a computer system, if it becomes necessary for the production of proof, for specific and determined computer data stored in that computer system [15 (1)].

The criminal police agency may proceed with the search, without prior authorisation of the judicial authority when:

_ That authorisation is voluntarily consented by those who have the availability or control of such data, forasmuch as the consent given be documented in any way;

_ In the case of terrorism, violent or highly organised crime when there is founded evidence of the imminent commission of a crime which put at serious risk the life or safety of any person [15 (3)].

Article 16 allows the criminal police agency to apprehend computer data under the authorisation of the competent judicial authority. Nevertheless, this article must be confronted with the Journalist's Statute - which should be considered special rule and therefore, applied prevalently –

⁸⁷ <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185>

⁸⁸ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32005F0222&from=EN>

on its article 11 (7) which establishes that the material used by journalists in the exercise of their occupation can only be seized during the searches in the media ordered or authorised by the judge, who personally presides the diligence, previously warning the president of the Journalists' Union so that they or their delegates may be present under confidentiality [11 (6)], or made under the same conditions elsewhere by court warrant in cases where it is legally permissible to break the professional secrecy.

Furthermore, the use of interception of communications is admissible in proceedings relating to crimes:

- _ Established in this law; or
- _ Committed by means of a computer system or for which it is necessary the collection of evidence in electronic form, when such crimes are established in article 187 of the Code of Criminal Procedure [18 (1)].

Nevertheless, the interception and computer data transmission log can only be authorised during the investigation, if there is reason to believe that the diligence is essential to the discovery of truth or that evidence would be otherwise impossible or very difficult to obtain, by reasoned order of the investigating judge and upon request of the accusation [18 (2)].

10. Are Whistle-Blowers Explicitly Protected Under Law Protecting Journalistic Sources? Is There Another Practice Protecting Whistle-Blowers? Is the Legislation Prohibiting Authorities and Companies from Identifying Whistle-Blowers?

In Portugal, there is no legislation that explicitly regulates whistleblowing in the context of journalism, as there is no law that specifically addresses the problem. In fact, and in contrast to what happens in other jurisdictions, notably the US and the UK, the phenomenon of whistleblowing, taken as a whole, is not subject to any explicit legal regulations in Portugal⁸⁹, something which happens in other countries such as Germany, Spain and Italy.

In fact, Portuguese law only contains a general principle of protection against unfair treatment for public officials, employees of state-owned companies and for the private sector⁹⁰ – article 4,

⁸⁹ With exception to the whistleblowing in the banking and financial sector where there are normative traces, although not worthy of the name legal rules, but merely soft law. Thus, it should be mentioned that the Resolution No. 765/2009 of the CNDP (National Commission for Data Protection) spoke about the “existence of codes of ethics in larger companies, which have consecrated the whistleblowing system in order to avoid fraudulent practices.”. In Deliberation it is assumed that in addition to private interests, there may be, “reflexively (...) the public interest to promote accountability and transparency in companies and contribute to financial security in the markets International. ”

⁹⁰ With Law no. 30/2015, of 22 of April, Portugal extended article 4. of the Law no. 19/2008 of 21 of April to also protect whistle-blowers in the private sector.

no. 1 of the Law no 19/2008 of 21 of April⁹¹: “The officials from the Public Administration and State-owned companies, as well as private sector employees who report offences they become aware of in the exercise of their functions, or because of those functions, cannot suffer any disadvantages, including non-voluntary transfer or dismissal”. However, this principle is not supported by any additional regulations or provisions⁹² and “does not explain how whistle blowers can seek redress for reprisals, what types of redress are available (beyond a job transfer), and how the anonymity of whistle blowers would be protected”⁹³.

Moreover, the same article, in its number three, paragraph c), states that those employees «benefit, with the due adjustments, from the measures set forth in Law no. 93/99, of 14 of July, amended by Law no 29/2008, of 4 of July, and by Law no. 42/2010 of 3 of September, which regulates the witnesses' protection measures in criminal procedure».

In Law no. 25/2008, of 5 of June⁹⁴, we find a legal provision about the Disclosure of information protection, concerning money laundering and terrorism, which states the following: “1 - The disclosure in good faith by the entities covered by this Law, in compliance with the obligations laid down in Articles 16, 17 and 18, shall not constitute a breach of any restriction on disclosure of information, imposed by any legislative, regulatory or contractual provision, and shall not involve the persons providing it in liability of any kind. 2 - Any person, who even due to mere negligence, reveals or favours the discovery of the identity of the person that provided the information, in accordance with the articles referred to in the foregoing paragraph, shall be punishable by deprivation of liberty for a maximum of three years or by a fine”.

Nevertheless, we must consider the case law and doctrinal development without losing sight of certain international instruments.⁹⁵

Generally speaking, a whistle-blower, in the employment context, means that workers who, without it being their specific duty, denounce, internally or externally (that is to say, within the organisation to which they belong to or directly outside of the organisation), conducts of the company which amount to criminal offences, misdemeanours or perhaps simple torts or even moral or ethical misconducts.

⁹¹ Which approves anti-corruption measures.

⁹² This principle is viewed «as a weak provision, enacted in response to international pressure», as stated by Transparency International, Whistleblowing in Europe: legal protections for whistle-blowers in the EU, pp. 12 and 71 (2013), <http://www.transparency.org/whatwedo/publication/whistleblowing_in_europe_legal_protections_for_whistle-blowers_in_the_eu> accessed at 02 June 2016.

⁹³ OECD, Portugal: follow-up to the phase 3 report & recommendations, p. 6 (2015), <<https://www.oecd.org/daf/anti-bribery/Portugal-Phase-3-Written-Follow-Up-Report-ENG.pdf>> accessed 02 June 2016.

⁹⁴ Law regarding combating money laundering and the financing of terrorism.

⁹⁵ Thus, the ILO Convention No. 158 in his art. 5, c), which gives the employee the right to “make a complaint or participate in a procedure established against an employer for alleged violations of laws or regulations, or appeal to the competent administrative authorities”.

First, the protection of the whistle-blower is justified by the public interest that should prevail over the duty of secrecy and confidentiality of the employee towards the employer. This public interest is linked to weighty social reasons, namely the need to prevent or stop behaviours harmful to the general interest. It seems undisputed that the behaviours that embody crimes are covered (eg. tax crimes), although it is debatable whether the complaint of criminal trifles are also protected. Furthermore, the whistle-blower is also protected in the complaining of other situations where there is no liability under criminal law such as the administrative offences, because public or community interest is still relevant. In some cases, it may even include certain behaviours that are torts (eg. contractual defaults) or certain unethical behaviours.

Second, the whistle blower has to act in good faith, that is to say, having to believe that the information they are disseminating is true⁹⁶. The worker does not lose the protection when the information is false just because of this fact; when providing protection it is relevant to decide whether or not it was reasonable for someone placed on the employee's position to believe that the information was true. The decisive factor is that at the time of the complaint, there is a reasonably founded suspicion of the employer's unlawful conduct even though later inquiries conclude that they do not correspond to the truth. Thus, those workers who know or should know that the information is false are not protected. In Portuguese law a more pragmatic view of whistleblowing dominates, in the sense that the personal intention of the whistle-blower is irrelevant. In detail, for the guarantee of protection it's immaterial if the act is retaliation or reprisal for the employer because the protection order exists to encourage the reporting of harmful behaviours irrespective of the motivations that underpin the complaint. In contrast, Portuguese case law has already decided that "the worker is not prevented, nor violates the duty of loyalty towards the employer, to report situations to substantiate breach of legal obligations, particularly in hygiene and sanitary conditions of the workplace. However, when such a complaint is made, it is up to the worker to prove the veracity of the alleged facts; otherwise, in not doing so, they are violating duties of loyalty, respect and defence of the good name of their employer"⁹⁷.

Third, there is a preference for internal complaining, since this gives the employer an opportunity to correct their behaviour, and it is also less damaging to their image. However, it has been accepted that the worker move immediately to other forms of external reporting, for example, public bodies (police, regulatory, research, etc.) when the behaviour corresponds to a serious crime or when the internal complaints bring a serious and well-founded risk of retaliation by the employer. It is understood that an employee who intends to economically profit from the information obtained, for example, selling it to the media, will not be protected.

⁹⁶ According to Transparency International, Whistleblowing in Europe: legal protections for whistle-blowers in the EU, p.71(2013), <http://www.transparency.org/whatwedo/publication/whistleblowing_in_europe_legal_protections_for_whistle-blowers_in_the_eu> accessed at 02 June 2016, «Whistle-blowers in Portugal have extremely limited legal protections, and they can be criminally prosecuted or face civil lawsuits for defaming others».

⁹⁷ See ac. 08/10/2012 do TRP (PAULA LEAL DE CARVALHO), proc. nr. 346/11.2TTVRL.P2 (available on www.dgsi.pt).

Fourth, and this is a requirement especially designed for cases of internal complaints, the complaints should be made in a formal way. The worker must be correct and courteous in the way they complain, and not display overtones of indiscipline, by provoking or insulting others. A complaint that doesn't follow regulations can be seen as a disciplinary offence.

The protection of the whistle blower does not only grant anonymity but also and above all, protection against disciplinary action of any kind and unjust dismissal. However Portuguese Law does not state the best mechanisms to sustain the anonymity not the measures to ensure that dismissals are not unjust or cloaked. Unfortunately, the Portuguese system lacks a dedicated whistle blower protection framework.

11. Conclusion

The Portuguese Constitution explicitly provides protection of the right of journalistic sources. This highest level of protection is followed by other laws in the Portuguese system that grant the best safeguard possible for both journalists and their sources. After the collapse of *Estado Novo*, the 40 year long authoritarian regime, the new democratic state established the protection of fundamental rights and freedoms.

One of the matters addressed in the paper is the existence, or lack thereof, of domestic law that prohibits journalists from disclosing their sources, and any sanctions that might be associated with such prohibition. In Portugal, the journalistic right to protection of sources and professional secrecy is currently considered a relative right of the journalist; article 135 of the Portuguese Code of Criminal Procedure admits the possibility of criminal courts being able to demand testimonies from journalists in which they disclose their sources and information in cases where it's the only way of ascertaining the truth or when the crime in question can lead to a prison sentence longer than three years. When the violation of the secrecy is forced by the courts, the journalist suffers no consequence, otherwise they can be fined or even imprisoned (Portuguese Penal Code article 195 and Journalist's Statute articles 8 and 12).

The Portuguese legislation has also several provisions that approach and are in accordance with the broader definition of Recommendation No. R (2000) 7. The protection provided to the journalists is also extended to other media actors which enriches our legal systems of safeguarding this fundamental rights.

Regarding the legal safeguards for the protection of journalistic sources, these come into play during criminal trials. Article 135 of the Portuguese Code of Criminal Procedure regulates the procedural issues of exception of professional secrecy and disclosure of professional secrecy, and determines the situations in which a journalist may be excused from or ordered to testify on facts covered by professional secrecy, including sources. This request has to be justified by the serious nature of the crime and take into consideration the indispensability of the deposition for determining the truth. According to Portuguese law, there is no legal requisite that prohibits journalist from disclosing their sources; that duty is laid out in soft law only (the Portuguese Journalists Code of Ethics and a Journalist's Statute).

Professional secrecy is a moral and deontological duty and a legally acknowledged right but there are some cases where the court can decide that there is a need to breach professional secrecy. Nevertheless, it is given the opportunity to the journalist to present the motives that sustain the invoking of the secrecy. Taking into consideration that this does not happen we should question if our system is in line with the principles of the *Recommendation No R (2000) 7*.

Under Portuguese law, interest in disclosure of journalistic sources outweigh the interest in nondisclosure when it comes to criminal law. Crime is a matter of social concern, its dealings a matter of public interest, and the efficiency of the criminal justice something which can prevail over professional secrecy, something laid out in article 135 of the Portuguese Code of Criminal Procedure. The Portuguese Supreme Court of Justice has ruled that the right to professional secrecy is not, in Portugal, defined in absolute terms, but is a relative right, one that bows to superior public interests.

The Portuguese courts have emerged from a more radical position, where the national law and the safeguard of personality rights deserved stronger protection when in conflict with freedom of expression and information, to a point where, in harmony with the Convention and the ECtHR, the prevalence of freedom of expression and information stands as a general rule, along with the protection of journalistic professional secrecy, which can only be violated if doing so is the sole way of unveiling the material truth.

In Portugal, the matter of electronic surveillance is an extremely sensitive topic, due to the fact that it causes a collision between an individual's fundamental right to privacy and the state's interest in the pursuit of a criminal investigation. The admissibility of electronic surveillance mechanisms is subject to a number of strict criteria dictated by the law and in a limited amount of situations, described in article 187 of the Portuguese Code of Criminal Procedure (the discovery of journalistic sources not amongst them). There have been so far no examples of case law in which the use of electronic surveillance mechanisms has been employed to the identification of journalists sources of information. We can conclude that there are no legal provisions that may subject journalists to be electronically surveilled in order to aid in the identification of their sources.

Encryption and anonymity online are not regulated within the Portuguese legal system. Nevertheless, the Portuguese constitution protects against surveillance.

Finally, Portugal lacks any legislation that explicitly regulates whistleblowing in the context of journalism; Portuguese law only contains a general principle of protection against unfair treatment for public officials, employees of stat-owned companies and for the private sector, but doesn't have a framework that protects whistle-blowers.

12. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

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13. Table of Provisions

Provisions in native language	Corresponding translation
<p>Constituição da República Portuguesa, Artigo 2º:</p> <p>A República Portuguesa é um Estado de direito democrático, baseado na soberania popular, no pluralismo de expressão e organização política democráticas, no respeito e na garantia de efetivação dos direitos e liberdades fundamentais e na separação e interdependência de poderes, visando a realização da democracia económica, social e cultural e o aprofundamento da democracia participativa.</p>	<p>Constitution of the Portuguese Republic</p> <p>Article 2</p> <p>(Democratic state based on the rule of law)</p> <p>The Portuguese Republic is a democratic state based on the rule of law, the sovereignty of the people, plural democratic expression and political organization, respect for and the guarantee of the effective implementation of the fundamental rights and freedoms, and the separation and interdependence of powers, with a view to achieving economic, social and cultural democracy and deepening participatory democracy.</p>
<p>Constituição da República Portuguesa, Artigo 3º:</p> <p>1. A soberania, una e indivisível, reside no povo, que a exerce segundo as formas previstas na Constituição.</p> <p>2. O Estado subordina-se à Constituição e funda-se na legalidade democrática.</p> <p>3. A validade das leis e dos demais atos do Estado, das regiões autónomas, do poder local e de quaisquer outras entidades públicas depende da sua conformidade com a</p>	<p>Constitution of the Portuguese Republic</p> <p>Article 3</p> <p>(Sovereignty and legality)</p> <p>1. Sovereignty is single and indivisible and lies with the people, who exercise it in the forms provided for in the Constitution.</p> <p>2. The state is subject to the Constitution and is based on democratic legality.</p> <p>3. The validity of laws and other acts of the</p>

<p>Constituição.</p>	<p>state, the autonomous regions, local government and any other public entities is dependent on their conformity with the Constitution.</p>
<p>Constituição da República Portuguesa, Artigo 37º:</p> <p>1. Todos têm o direito de exprimir e divulgar livremente o seu pensamento pela palavra, pela imagem ou por qualquer outro meio, bem como o direito de informar, de se informar e de ser informados, sem impedimentos nem discriminações.</p> <p>2. O exercício destes direitos não pode ser impedido ou limitado por qualquer tipo ou forma de censura.</p> <p>3. As infrações cometidas no exercício destes direitos ficam submetidas aos princípios gerais de direito criminal ou do ilícito de mera ordenação social, sendo a sua apreciação respetivamente da competência dos tribunais judiciais ou de entidade administrativa independente, nos termos da lei.</p> <p>4. A todas as pessoas, singulares ou coletivas, é assegurado, em condições de igualdade e eficácia, o direito de resposta e de retificação, bem como o direito a indemnização pelos danos sofridos.</p>	<p>Constitution of the Portuguese Republic</p> <p>Article 37</p> <p>(Freedom of expression and information)</p> <p>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.</p> <p>2. Exercise of these rights may not be hindered or limited by any type or form of censorship.</p> <p>3. Infractions committed in the exercise of these rights are subject to the general principles of the criminal law or the law governing administrative offences, and the competence to consider them shall pertain to the courts of law or an independent administrative entity respectively, as laid down by law.</p> <p>4. 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.</p>

**Constituição da República Portuguesa,
Artigo 38:**

1. É garantida a liberdade de imprensa.
2. A liberdade de imprensa implica:
 - a) A liberdade de expressão e criação dos jornalistas e colaboradores, bem como a intervenção dos primeiros na orientação editorial dos respetivos órgãos de comunicação social, salvo quando tiverem natureza doutrinária ou confessional;
 - b) O direito dos jornalistas, nos termos da lei, ao acesso às fontes de informação e à proteção da independência e do sigilo profissionais, bem como o direito de elegerem conselhos de redação;
 - c) O direito de fundação de jornais e de quaisquer outras publicações, independentemente de autorização administrativa, caução ou habilitação prévias.
3. A lei assegura, com carácter genérico, a divulgação da titularidade e dos meios de financiamento dos órgãos de comunicação social.
4. O Estado assegura a liberdade e a independência dos órgãos de comunicação social perante o poder político e o poder económico, impondo o princípio da especialidade das empresas titulares de órgãos de informação geral, tratando-as e apoiando-as de forma não discriminatória e impedindo a sua concentração, designadamente através de participações múltiplas ou cruzadas.
5. O Estado assegura a existência e o funcionamento de um serviço público de rádio

Constitution of the Portuguese Republic

Article 38

(Freedom of the press and the media)

1. Freedom of the press is guaranteed.
2. Freedom of the press implies:
 - a) 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, save when the latter is doctrinal or religious in nature;
 - b) 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 editorial boards;
 - c) The right to found newspapers and any other publications, without the need for any prior administrative authorisation, bond or qualification.
3. In generic terms, the law shall ensure that the names of the owners of media entities and the means by which those entities are financed are publicised.
4. The state shall ensure the freedom and independence of media entities from political power and economic power by imposing the principle of specialisation 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

<p>e de televisão.</p> <p>6. A estrutura e o funcionamento dos meios de comunicação social do sector público devem salvaguardar a sua independência perante o Governo, a Administração e os demais poderes públicos, bem como assegurar a possibilidade de expressão e confronto das diversas correntes de opinião.</p> <p>7. As estações emissoras de radiodifusão e de radiotelevisão só podem funcionar mediante licença, a conferir por concurso público, nos termos da lei.</p>	<p>interlocking interests.</p> <p>5. The state shall ensure the existence and operation of a public radio and television service.</p> <p>6. The structure and modus operandi of public sector media must safeguard their independence from the Government, the Administration and the other public authorities, and must ensure that all different currents of opinion are able to express themselves and confront one another.</p> <p>7. Radio and television broadcasting stations may only operate with licences that are granted under competitive public selection processes, as laid down by law.</p>
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**Constituição da República Portuguesa,
Artigo 178º:**

1. A Assembleia da República tem as comissões previstas no Regimento e pode constituir comissões eventuais de inquérito ou para qualquer outro fim determinado.
2. A composição das comissões corresponde à representatividade dos partidos na Assembleia da República.
3. As petições dirigidas à Assembleia são apreciadas pelas comissões ou por comissão especialmente constituída para o efeito, que poderá ouvir as demais comissões competentes em razão da matéria, em todos os casos podendo ser solicitado o depoimento de quaisquer cidadãos.
4. Sem prejuízo da sua constituição nos termos gerais, as comissões parlamentares de inquérito são obrigatoriamente constituídas sempre que tal seja requerido por um quinto dos Deputados em efetividade de funções, até ao limite de uma por Deputado e por sessão legislativa.
5. As comissões parlamentares de inquérito gozam de poderes de investigação próprios das autoridades judiciais.
6. As presidências das comissões são no conjunto repartidas pelos grupos parlamentares em proporção com o número dos seus Deputados.
7. Nas reuniões das comissões em que se discutam propostas legislativas regionais, podem participar representantes da Assembleia Legislativa da região autónoma proponente, nos

Constitution of the Portuguese Republic

Article 178 (Committees)

1. The Assembly of the Republic shall have the committees provided for in the Rules of Procedure, and may form ad hoc committees of inquiry or for any other given purpose.
2. Committees shall be composed in proportion to the number of seats each party holds in the Assembly of the Republic.
3. Petitions addressed to the Assembly shall be considered by the committees or by a committee formed especially for the purpose, which may consult the other committees with competence for the matter in question. In all cases any citizens may be asked to testify.
4. Without prejudice to their formation in accordance with the normal provisions, parliamentary committees of inquiry shall obligatorily be formed whenever a motion is made to that effect by one fifth of all the Members of the Assembly of the Republic in full exercise of their office, up to a limit of one per Member and per legislative session.
5. Parliamentary committees of inquiry have the investigative powers of the judicial authorities.
6. The chairmanships of the various committees shall be divided between the parliamentary groups in proportion to the number of Members of the Assembly of the Republic in each group.
7. Representatives of the Legislative Assembly of the proposing autonomous region may participate in the committee meetings at which

<p>termos do Regimento.</p>	<p>regional legislative proposals are discussed, as laid down in the Rules of Procedure.</p>
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**Código de Processo Penal, Artigo 135 –
Segredo Profissional**

1. Os ministros de religião ou confissão religiosa e os advogados, médicos, jornalistas, membros de instituições de crédito e as demais pessoas a quem a lei permitir ou impuser que guardem segredo podem escusar-se a depor sobre os factos por ele abrangidos.
2. Havendo dúvidas fundadas sobre a legitimidade da escusa, a autoridade judiciária perante a qual o incidente se tiver suscitado procede às averiguações necessárias. Se, após estas, concluir pela ilegitimidade da escusa, ordena, ou requer ao tribunal que ordene, a prestação do depoimento.
3. O tribunal superior àquele onde o incidente tiver sido suscitado, ou, no caso de o incidente ter sido suscitado perante o Supremo Tribunal de Justiça, o pleno das secções criminais, pode decidir da prestação de testemunho com quebra do segredo profissional sempre que esta se mostre justificada, segundo o princípio da prevalência do interesse preponderante, nomeadamente tendo em conta a imprescindibilidade do depoimento para a descoberta da verdade, a gravidade do crime e a necessidade de proteção de bens jurídicos. A intervenção é suscitada pelo juiz, oficiosamente ou a requerimento.
4. Nos casos previstos nos n.os 2 e 3, a decisão da autoridade judiciária ou do tribunal é tomada ouvido o organismo representativo da profissão relacionada com o segredo profissional em causa, nos termos e com os efeitos previstos na legislação que a esse organismo seja aplicável.
5. O disposto nos n.os 3 e 4 não se aplica ao segredo religioso.

Code of Criminal Procedure

Article 135

Professional secrecy

1. The religion or religious confession ministers and the attorneys, doctors, journalists, members of credit institutions and all other persons to whom the law allows or imposes secrecy may exempt themselves from testifying on facts covered by secrecy.
2. In the event of grounded doubts as to the legitimacy of the exemption, the judicial authority before which the exemption has been invoked makes the necessary investigations. If, after the investigation, it is found that the exemption is illegitimate, the authority shall order, or require the court to order, the witness to testify.
3. A higher jurisdiction than the court where the exemption has been invoked or - where the exemption has been argued before the Supreme Court of Justice - the plenary of criminal sections, may decide that the witness will testify regardless of professional secrecy whenever justified, according to the principle of prevailing interest considering, in particular, the need for evidence in order to clarify the truth, the gravity of the crime and the need to protect legal assets. Intervention is ordered by the judge, ex officio or upon request.
4. In cases foreseen by paragraphs 2 and 3 above, the judicial authority or court takes the decision after hearing the representative body of the profession bound by professional secrecy, under the terms and for the purposes

	<p>of the law applying to that professional body.</p> <p>5. The provisions of paragraphs 3 and 4 do not apply to religious secrecy.</p>
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<p>Código de Processo Penal, Artigo 187º - Admissibilidade:</p> <p>1. A interceção e a gravação de conversações ou comunicações telefónicas só podem ser autorizadas durante o inquérito, se houver razões para crer que a diligência é indispensável para a descoberta da verdade ou que a prova seria, de outra forma, impossível ou muito difícil de obter, por despacho fundamentado do juiz de instrução e mediante requerimento do Ministério Público, quanto a crimes:</p> <p>a) Puníveis com pena de prisão superior, no seu máximo, a 3 anos.</p>	<p>Code of Criminal Procedure</p> <p>Article 187</p> <p>Admissibility</p> <p>1 - Interception and tape recording of telephone conversations or communications may only be authorized during the inquiry where there are grounds for believing that this step is indispensable for the discovery of the truth or that the evidence would, by any other means, be impossible or very hard to collect. Such authorization shall be granted by means of a reasoned order issued by the Examining Judge and upon the request of the Public Prosecution Service, as regards the following criminal offences:</p> <p>a) Criminal offences to which a custodial sentence with a maximum limit over three years applies</p>
<p>Código de Processo Penal, Artigo 242º - Denúncia Obrigatória:</p> <p>1. A denúncia é obrigatória, ainda que os agentes do crime não sejam conhecidos:</p> <p>a) Para as entidades policiais, quanto a todos os crimes de que tomarem conhecimento;</p> <p>b) Para os funcionários, na aceção do artigo 386.º do Código Penal, quanto a crimes de que tomarem conhecimento no exercício das suas funções e por causa delas.</p> <p>2. Quando várias pessoas forem obrigadas à denúncia do mesmo crime, a sua apresentação por uma delas dispensa as restantes.</p> <p>3. Quando se referir a crime cujo procedimento dependa de queixa ou de acusação particular, a</p>	<p>Code of Criminal Procedure</p> <p>Article 242</p> <p>Mandatory Complaint</p> <p>1. The complaint is mandatory, even if the crime agents are not known:</p> <p>a) for law enforcement agencies, regarding all the crimes of which they become aware;</p> <p>b) for employees within the meaning of Article 386 of the Penal Code, regarding the crimes of which they become aware in the exercise of</p>

<p>denúncia só dá lugar a instauração de inquérito se a queixa for apresentada no prazo legalmente previsto.</p>	<p>their duties and because of them.</p> <p>2. Where several people are required to do the same criminal complaint, the submission by one exempts the remaining.</p> <p>3. When referring to a crime whose procedure depends on complaint or private prosecution, the complaint only gives rise to establishment of inquiry if it is filed within the legally prescribed period.</p>
<p>Código de Processo Penal, Artigo 399º - Princípio Geral:</p> <p>É permitido recorrer dos acórdãos, das sentenças e dos despachos cuja irrecorribilidade não estiver prevista na lei.</p>	<p>Criminal Procedure Code</p> <p>Article 399</p> <p>General Principle</p> <p>It is permitted to appeal judgements (from collective courts), the rulings (from singular courts) and orders which are not unappealable according to the law.</p>

<p>Código de Processo Penal,</p> <p>Artigo 400º -</p> <p>Decisões que Não Admitem Recurso:</p> <p>1. Não é admissível recurso:</p> <p>a) De despachos de mero expediente;</p> <p>b) De decisões que ordenam actos dependentes da livre resolução do tribunal;</p> <p>c) De acórdãos proferidos, em recurso, pelas relações que não conheçam, a final, do objecto do processo;</p> <p>d) De acórdãos absolutórios proferidos, em recurso, pelas relações, exceto no caso de decisão condenatória em 1.ª instância em pena de prisão superior a 5 anos;</p> <p>e) De acórdãos proferidos, em recurso, pelas relações que apliquem pena não privativa de liberdade ou pena de prisão não superior a 5 anos;</p> <p>f) De acórdãos condenatórios proferidos, em recurso, pelas relações, que confirmem decisão de 1.ª instância e apliquem pena de prisão não superior a 8 anos;</p> <p>g) Nos demais casos previstos na lei.</p> <p>2. Sem prejuízo do disposto nos artigos 427.º e 432.º, o recurso da parte da sentença relativa à indemnização civil só é admissível desde que o valor do pedido seja superior à alçada do tribunal recorrido e a decisão impugnada seja</p>	<p>Criminal Procedure Code</p> <p>Article 400</p> <p>Decisions with no chance of appeal:</p> <p>1. It is not admissible the appeal:</p> <p>a) Of mere expedient decisions;</p> <p>b) Of decisions ordering acts dependent on free resolution of the court;</p> <p>c) Of judgments given on appeal by the superior courts who do not know the matter of the process;</p> <p>d) Of acquittals judgments emitted on appeal, by superior courts, except in the event of conviction in 1st instance to sentence of imprisonment exceeding five years;</p> <p>e) Of judgments issued during appeal, by the superior courts that apply a non-custodial sentence or imprisonment not exceeding five years;</p> <p>f) Of condemnatory judgments delivered on appeal by the superior court, confirming a 1st instance decision and applying imprisonment not exceeding eight years;</p> <p>g) in other cases provided by law.</p> <p>2. Notwithstanding the provisions of Articles 427 and 432, the appeal of the part of the decision on the civil compensation is admissible only where the value of the order exceeds the jurisdiction of the appeal court and the</p>
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<p>desfavorável para o recorrente em valor superior a metade desta alçada.</p> <p>3. Mesmo que não seja admissível recurso quanto à matéria penal, pode ser interposto recurso da parte da sentença relativa à indemnização civil.</p>	<p>contested decision is unfavorable to the applicant in excess of half of this scope.</p> <p>3. Even if an appeal regarding the criminal matters is not admissible, it may be brought against the part of the sentence on the civil compensation.</p>
<p>Código Deontológico do Jornalista, Artigo 6º:</p> <p>O jornalista deve usar como critério fundamental a identificação das fontes. O jornalista não deve revelar, mesmo em juízo, as suas fontes confidenciais de informação, nem desrespeitar os compromissos assumidos, exceto se o tentarem usar para canalizar informações falsas. As opiniões devem ser</p>	<p>Journalists' Code of Ethics</p> <p>Article 6</p> <p>Identification of the sources is an essential criteria for the journalist. The journalist must not reveal, not even in the court, his/her confidential sources except when he/she has been abused by being given false information. Opinions shall always be attributed – separated</p>

<p>sempre atribuídas.</p>	<p>as such.</p>
<p>Estatuto do Jornalista, Artigo 1º - Definição de Jornalista:</p> <p>1 - São considerados jornalistas aqueles que, como ocupação principal, permanente e remunerada, exercem com capacidade editorial funções de pesquisa, recolha, selecção e tratamento de factos, notícias ou opiniões, através de texto, imagem ou som, destinados a divulgação, com fins informativos, pela imprensa, por agência noticiosa, pela rádio, pela televisão ou por qualquer outro meio electrónico de difusão.</p> <p>2 - Não constitui actividade jornalística o exercício de funções referidas no número anterior quando desempenhadas ao serviço de publicações que visem predominantemente promover actividades, produtos, serviços ou entidades de natureza comercial ou industrial.</p> <p>3 - São ainda considerados jornalistas os cidadãos que, independentemente do exercício efectivo da profissão, tenham desempenhado a actividade jornalística em regime de ocupação principal, permanente e remunerada durante 10 anos seguidos ou 15 interpolados, desde que solicitem e mantenham actualizado o respectivo título profissional.</p>	<p>Journalist's Statute Article 1</p> <p>Definition of journalists</p> <p>1 - A journalist is considered to be anyone who, as their main, permanent and gainful occupation, exercises editorial functions of research, collection, selection and treatment of facts, news or opinions via texts, images or sounds, intended for divulgation, for informational purposes, via the press, a news agency, radio, television or via any other electronic means of dissemination.</p> <p>2 - The pursuit of the functions referred to in the previous point, when performed for publications that predominantly aim to promote activities, products, services or entities of a commercial or industrial nature, does not constitute journalistic activity.</p> <p>3 – Citizens who, independently of whether or not they effectively pursue the profession, have performed journalistic activity as their main, permanent and gainful occupation for a continuous period of 10 years, or for 15 years on an interrupted basis, are also considered to be journalists, provided that they request and keep updated their respective professional license.</p>

<p>Estatuto do Jornalista, Artigo 2º - Capacidade:</p> <p>Podem ser jornalistas os cidadãos maiores de 18 anos no pleno gozo dos seus direitos civis.</p>	<p>Journalist's Statute</p> <p>Article 2</p> <p>Capacity</p> <p>Citizens over 18 years old or in full enjoyment of their civil rights may be journalists.</p>
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<p>Estatuto do Jornalista, Artigo 3º - Incompatibilidades:</p> <p>1 - O exercício da profissão de jornalista é incompatível com o desempenho de:</p> <p>a) Funções de angariação, concepção ou apresentação, através de texto, voz ou imagem, de mensagens publicitárias;</p> <p>b) Funções de marketing, relações públicas, assessoria de imprensa e consultoria em comunicação ou imagem, bem como de planificação, orientação e execução de estratégias comerciais;</p> <p>c) Funções em serviços de informação e segurança ou em qualquer organismo ou corporação policial;</p> <p>d) Serviço militar;</p> <p>e) Funções enquanto titulares de órgãos de soberania ou de outros cargos políticos, tal como identificados nas alíneas a), b), c), e) e g) do n.º 2 do artigo 1.º da Lei n.º 64/93, de 26 de Agosto, alterada pelas Leis n.os 39-B/94, de 27 de Dezembro, 28/95, de 18 de Agosto, 42/96, de 31 de Agosto, e 12/98, de 24 de Fevereiro, e enquanto deputados nas Assembleias Legislativas das Regiões Autónomas, bem como funções de assessoria, política ou técnica, a tais cargos associadas;</p> <p>f) Funções executivas, em regime de permanência, a tempo inteiro ou a meio tempo, em órgão autárquico.</p> <p>2 - É igualmente considerada actividade publicitária incompatível com o exercício do jornalismo a participação em iniciativas que</p>	<p>Journalist's Statute</p> <p>Article 3</p> <p>Incompatibilities</p> <p>1 - Pursuit of the profession of journalist is incompatible with performance of:</p> <p>a) Functions of procurement, conception or presentation of advertising messages, via texts, voice or image;</p> <p>b) Functions of marketing, public relations, press advisory and communication or image consulting services, as well as planning, orientation and execution of commercial strategies;</p> <p>c) Functions in information and security services or in any police agency or corporation;</p> <p>d) Military service;</p> <p>e) Functions as holders of positions in sovereign bodies or other political positions, as identified in paragraphs a), b), c), e) and g) of no. 2 of article 1 of Law no. 64/93, of 26 August, as amended by Laws nos. 39-B/94, of 27 December, 28/95, of 18 August, 42/96, of 31 August, and 12/98, of 24 February, and as elected representatives in the Legislative Assemblies of the Autonomous Regions, as well as functions of political or technical advisory services associated to such positions;</p> <p>f) Executive functions, on a permanent basis, either full time or part time, in a local government authority.</p>
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<p>visem divulgar produtos, serviços ou entidades através da notoriedade pessoal ou institucional do jornalista, quando aquelas não sejam determinadas por critérios exclusivamente editoriais.</p> <p>3 - Não é incompatível com o exercício da profissão de jornalista o desempenho voluntário de acções não remuneradas de:</p> <p>a) Promoção de actividades de interesse público ou de solidariedade social;</p> <p>b) Promoção da actividade informativa do órgão de comunicação social para que trabalhe ou colabore.</p> <p>4 - O jornalista abrangido por qualquer das incompatibilidades previstas nos n.os 1 e 2 fica impedido de exercer a respectiva actividade, devendo, antes de iniciar a actividade em causa, depositar junto da Comissão da Carteira Profissional de Jornalista o seu título de habilitação, o qual será devolvido, a requerimento do interessado, quando cessar a situação que determinou a incompatibilidade.</p> <p>5 - No caso de apresentação das mensagens referidas na alínea a) do n.º 1 do presente artigo ou de participação nas iniciativas enunciadas no n.º 2, a incompatibilidade vigora por um período mínimo de três meses sobre a data da última divulgação e só se considera cessada com a exibição de prova de que está extinta a relação contratual de cedência de imagem, voz ou nome do jornalista à entidade promotora ou beneficiária da publicitação.</p> <p>6 - Findo o período das incompatibilidades referidas nas alíneas a) e b) do n.º 1, o jornalista fica impedido, por um período de seis meses, de exercer a sua actividade em áreas editoriais relacionadas com a função que desempenhou,</p>	<p>2 - Participation in initiatives that aim to disseminate products, services or entities via the personal or institutional reputation of the journalist is also considered to constitute advertising activity, that is incompatible with the pursuit of journalism, when such participation is not determined by purely editorial criteria.</p> <p>3 - Performance of the following unpaid voluntary actions is not incompatible with the pursuit of the profession of a journalist:</p> <p>a) Promotion of activities of public interest or charity work;</p> <p>b) Promotion of the informational activity of the media outlet for which the journalist works or collaborates.</p> <p>4 - A journalist covered by any of the incompatibilities specified in nos. 1 and 2 is prevented from exercising the respective activity, and should, prior to commencing the activity in question, deposit his professional license with the Comissão da Carteira Profissional de Jornalista (Journalists' Professional License Committee), which will be returned at the request of the interested party, when the situation underlying the incompatibility ceases.</p> <p>5 - In the case of presentation of the messages referred to in paragraph a) of no. 1 of this article or participation in the initiatives listed in no. 2, the incompatibility will remain in force for a minimum period of three months from the date of the last disclosure and will only be considered to have ceased upon exhibition of proof of the termination of the contractual relationship involving assignment of the journalist's image, voice or name to the promoter or beneficiary of the advertising</p>
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como tais reconhecidas pelo conselho de redacção do órgão de comunicação social para que trabalhe ou colabore.

initiative.

6 - At the end of the period of the incompatibilities referred to in paragraphs a) and b) of no. 1, the journalist shall be prevented, for a 6-month period, to exercise his activity in editorial areas related to the function that he performed, as recognized by the editorial board of the media outlet for which he works or collaborates.

6 - At the end of the period of the incompatibilities referred to in paragraphs a) and b) of no. 1, the journalist shall be prevented, for a 6-month period, to exercise his activity in editorial areas related to the function that he performed, as recognized by the editorial board of the media outlet for which he works or collaborates.

<p style="text-align: center;">Estatuto do Jornalista,</p> <p style="text-align: center;">Artigo 4º - Título Profissional:</p> <p>1 - É condição do exercício da profissão de jornalista a habilitação com o respectivo título, o qual é emitido e renovado pela Comissão da Carteira Profissional de Jornalista, nos termos da lei.</p> <p>2 - Nenhuma empresa com actividade no domínio da comunicação social pode admitir ou manter ao seu serviço, como jornalista profissional, indivíduo que não se mostre habilitado, nos termos do número anterior, salvo se tiver requerido o título de habilitação e se encontrar a aguardar decisão.</p>	<p style="text-align: center;">Journalist's Statute</p> <p style="text-align: center;">Article 4</p> <p style="text-align: center;">Professional license</p> <p>1. In order to pursue the profession of journalist, it is necessary to hold the respective professional license, which shall be issued and renewed by the Comissão da Carteira Profissional de Jornalista (Journalists' Professional License Committee), under the terms of the law.</p> <p>2. No company operating in the field of the media may recruit or maintain under its service, as a professional journalist, an individual who cannot display the respective qualification, under the terms of the previous point, unless that person has requested a professional license and is awaiting the respective decision.</p>
<p style="text-align: center;">Estatuto do Jornalista, Artigo 5º - Acesso à Profissão:</p> <p>1. A profissão de jornalista inicia-se com um estágio obrigatório, a concluir com aproveitamento, com a duração de 24 meses, sendo reduzido a 18 meses em caso de habilitação com curso superior, ou a 12 meses em caso de licenciatura na área da comunicação social ou de habilitação com curso equivalente, reconhecido pela Comissão da Carteira Profissional de Jornalista.</p> <p>2. O regime do estágio, incluindo o acompanhamento do estagiário e a respetiva avaliação, será regulado por portaria conjunta dos membros do Governo responsáveis pelas</p>	<p style="text-align: center;">Journalist's Statute</p> <p style="text-align: center;">Article 5</p> <p style="text-align: center;">Access to the profession</p> <p>1. The profession of a journalist begins with an obligatory internship, that must be successfully completed, of 12-month duration, in the case of someone with a BA Honours degree (licenciatura) in the area of the media or a qualification from an equivalent course, or of 18-month duration in other cases.</p> <p>2. The internship regime, including the respective monitoring and evaluation of the</p>

<p>áreas do emprego e da comunicação social.</p>	<p>intern, shall be governed by a joint administrative rule to be issued by the members of the Government responsible for the areas of employment and the media.</p>
<p>Estatuto do Jornalista, Artigo 6º - Direitos:</p> <p>Constituem direitos fundamentais dos jornalistas:</p> <ul style="list-style-type: none"> a) A liberdade de expressão e de criação; b) A liberdade de acesso às fontes de informação; c) A garantia de sigilo profissional; d) A garantia de independência; e) A participação na orientação do respetivo órgão de informação. 	<p style="text-align: center;">Journalist's Statute</p> <p style="text-align: center;">Article 6</p> <p style="text-align: center;">Rights</p> <p>The following constitute fundamental rights of journalists:</p> <ul style="list-style-type: none"> a) Freedom of expression and creation; b) Freedom of access to information sources; c) Guarantee of professional secrecy; d) Guarantee of independence; e) Participation in coordination of the respective information organisation.

Estatuto do Jornalista, Artigo 11º - Sigilo Profissional:

1 - Sem prejuízo do disposto na lei processual penal, os jornalistas não são obrigados a revelar as suas fontes de informação, não sendo o seu silêncio passível de qualquer sanção, directa ou indirecta.

2 - As autoridades judiciárias perante as quais os jornalistas sejam chamados a depor devem informá-los previamente, sob pena de nulidade, sobre o conteúdo e a extensão do direito à não revelação das fontes de informação.

3 - No caso de ser ordenada a revelação das fontes nos termos da lei processual penal, o tribunal deve especificar o âmbito dos factos sobre os quais o jornalista está obrigado a prestar depoimento.

4 - Quando houver lugar à revelação das fontes de informação nos termos da lei processual penal, o juiz pode decidir, por despacho, oficiosamente ou a requerimento do jornalista, restringir a livre assistência do público ou que a prestação de depoimento decorra com exclusão de publicidade, ficando os intervenientes no acto obrigados ao dever de segredo sobre os factos relatados.

5 - Os directores de informação dos órgãos de comunicação social e os administradores ou gerentes das respectivas entidades proprietárias, bem como qualquer pessoa que nelas exerça funções, não podem, salvo mediante autorização escrita dos jornalistas envolvidos, divulgar as respectivas fontes de informação, incluindo os arquivos jornalísticos de texto, som ou imagem das empresas ou quaisquer

Journalist's Statute

Article 11

Professional secrecy

1 - Without prejudice to the provisions established in penal procedure law, journalists are not required to reveal their information sources, and their silence thereof is not liable to any direct or indirect sanction.

2 - The judicial authorities before which journalists are called to testify shall inform them previously, on penalty of nullity, regarding the content and extent of their right not to reveal their information sources.

3 - In the event that a journalist is ordered to reveal his sources under the terms of criminal procedure law, the court must specify the scope of the facts upon which the journalist is obliged to give evidence.

4 - When there are grounds for information sources to be revealed, under the terms of criminal procedure law, the judge may decide, by means of a dispatch, at his own initiative or at the journalist's request, to restrict the right of attendance to the general public or ensure that the testimony is provided without any public disclosure, wherein the intervening parties in the act are obliged to uphold a duty of confidentiality concerning the reported facts.

5 - Unless there is written authorisation from the journalists involved, the news editors of media outlets and the administrators or managers of the respective entities that own these outlets, as well as any person who exercises functions therein, cannot disclose the

<p>documentos susceptíveis de as revelar.</p> <p>6 - A busca em órgãos de comunicação social só pode ser ordenada ou autorizada pelo juiz, o qual preside pessoalmente à diligência, avisando previamente o presidente da organização sindical dos jornalistas com maior representatividade para que o mesmo, ou um seu delegado, possa estar presente, sob reserva de confidencialidade.</p> <p>7 - O material utilizado pelos jornalistas no exercício da sua profissão só pode ser apreendido no decurso das buscas em órgãos de comunicação social previstas no número anterior ou efectuadas nas mesmas condições noutros lugares mediante mandado de juiz, nos casos em que seja legalmente admissível a quebra do sigilo profissional.</p> <p>8 - O material obtido em qualquer das acções previstas nos números anteriores que permita a identificação de uma fonte de informação é selado e remetido ao tribunal competente para ordenar a quebra do sigilo, que apenas pode autorizar a sua utilização como prova quando a quebra tenha efectivamente sido ordenada.</p>	<p>respective information sources, including disclosure of journalistic archives constituted by text, sound or image of the companies or any other documents that may reveal these sources.</p> <p>6 - A search in the premises of media outlets may only be ordered or authorised by the judge, who personally presides over the intervention, and prior notice must be provided to the chairman of the most highly representative journalists' trade union in order to ensure that he, or his delegate, may be present during the search, subject to confidentiality.</p> <p>7 - The material used by the journalists in pursuit of their profession may only be seized during the searches in the premises of media outlets foreseen in the previous point or carried out elsewhere under the same conditions, by means of a search warrant issued by a judge, in cases in which it is legally permissible to breach professional secrecy.</p> <p>8 - The material obtained in any of the actions specified in the previous points that makes it possible to identify a source of information shall be sealed and submitted to the court with jurisdiction in this manner, in order to order that its confidentiality shall be breached, and the court may only authorize its use as evidence when it has effectively ordered the said breach of confidentiality.</p>
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<p>Estatuto do Jornalista, Artigo 14º - Deveres:</p> <p>1 - Constitui dever fundamental dos jornalistas exercer a respectiva actividade com respeito pela ética profissional, competindo-lhes, designadamente:</p> <ul style="list-style-type: none">a) Informar com rigor e isenção, rejeitando o sensacionalismo e demarcando claramente os factos da opinião;b) Repudiar a censura ou outras formas ilegítimas de limitação da liberdade de expressão e do direito de informar, bem como divulgar as condutas atentatórias do exercício destes direitos;c) Recusar funções ou tarefas susceptíveis de comprometer a sua independência e integridade profissional;d) Respeitar a orientação e os objectivos definidos no estatuto editorial do órgão de comunicação social para que trabalhem;e) Procurar a diversificação das suas fontes de informação e ouvir as partes com interesses atendíveis nos casos de que se ocupem;f) Identificar, como regra, as suas fontes de informação, e atribuir as opiniões recolhidas aos respectivos autores. <p>2 - São ainda deveres dos jornalistas:</p> <ul style="list-style-type: none">a) Proteger a confidencialidade das fontes de informação na medida do exigível em cada situação, tendo em conta o disposto no artigo 11.º, excepto se os tentarem usar para obter benefícios ilegítimos ou para veicular	<p>Journalist's Statute</p> <p>Article 14</p> <p>Duties</p> <p>1 - Journalists have the fundamental duty to exercise their respective activity in respect for professional ethics, and are specifically responsible for the following:</p> <ul style="list-style-type: none">a) Inform readers with rigour and impartiality, abstaining from sensationalism and clearly demarcating facts from opinions;b) Repudiate censorship or other forms of illegitimate constraint on the freedom of expression and the right to inform and disclose any form of conduct that will undermine the pursuit of these rightsc) Refuse functions or tasks that may undermine their independence and professional integrity;d) Respect the guidelines and objectives defined in the editorial statute of the media outlet for which they work;e) Seek to diversify their information sources and listen to all parties with justified interests in the matters that they deal with;f) Identify, as a general rule, their information sources, and attribute the retrieved opinions to the respective authors. <p>2 – Journalists also have the following duties:</p>
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<p>informações falsas;</p> <p>b) Proceder à rectificação das incorrecções ou imprecisões que lhes sejam imputáveis;</p> <p>c) Abster-se de formular acusações sem provas e respeitar a presunção de inocência;</p> <p>d) Abster-se de recolher declarações ou imagens que atinjam a dignidade das pessoas através da exploração da sua vulnerabilidade psicológica, emocional ou física;</p> <p>e) Não tratar discriminatoriamente as pessoas, designadamente em razão da ascendência, sexo, raça, língua, território de origem, religião, convicções políticas ou ideológicas, instrução, situação económica, condição social ou orientação sexual;</p> <p>f) Não recolher imagens e sons com o recurso a meios não autorizados a não ser que se verifique um estado de necessidade para a segurança das pessoas envolvidas e o interesse público o justifique;</p> <p>g) Não identificar, directa ou indirectamente, as vítimas de crimes contra a liberdade e autodeterminação sexual, contra a honra ou contra a reserva da vida privada até à audiência de julgamento, e para além dela, se o ofendido for menor de 16 anos, bem como os menores que tiverem sido objecto de medidas tutelares sancionatórias;</p> <p>h) Preservar, salvo razões de incontestável interesse público, a reserva da intimidade, bem como respeitar a privacidade de acordo com a natureza do caso e a condição das pessoas;</p> <p>i) Identificar-se, salvo razões de manifesto interesse público, como jornalista e não encenar</p>	<p>a) To protect the confidentiality of the information sources to the extent that is required in each situation, taking into account the provisions established in article 11, unless these sources attempt to use such protection in order to obtain illegitimate benefits or to convey false information;</p> <p>b) Rectify any errors or imprecisions that may be imputed to them;</p> <p>c) Refrain from formulating accusations without evidence and respect the presumption of innocence;</p> <p>d) Refrain from collecting declarations or images that have an impact on the dignity of persons in question, through exploitation of their psychological, emotional or physical vulnerability;</p> <p>e) Refrain from treating people in a discriminatory manner, specifically on account of their ancestry, sex, race, language, place of origin, religion, political or ideological convictions, education, economic situation, social condition or sexual orientation;</p> <p>f) Refrain from collecting images and sounds through the use of unauthorised means unless this is strictly necessary in order to guarantee the safety of the persons involved and the public interest so requires;</p> <p>g) Refrain from directly or indirectly identifying victims of crimes against sexual self-</p>
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<p>ou falsificar situações com o intuito de abusar da boa fé do público;</p> <p>j) Não utilizar ou apresentar como sua qualquer criação ou prestação alheia;</p> <p>l) Abster-se de participar no tratamento ou apresentação de materiais lúdicos, designadamente concursos ou passatempos, e de televotos.</p> <p>3 - Sem prejuízo da responsabilidade criminal ou civil que ao caso couber nos termos gerais, a violação da componente deontológica dos deveres referidos no número anterior apenas pode dar lugar ao regime de responsabilidade disciplinar previsto na presente lei.</p>	<p>determination and freedom, against personal honour or against the reservation of private life until a court hearing, and beyond, if the victim is under 16 years old, as well as minors who have been subject to sanctionary guardianship measures;</p> <p>h) Preserve, except on grounds of incontestable public interest, a reservation of intimacy, and respect for privacy, in accordance with the nature of the case and the condition of the persons in question;</p> <p>i) Identify themselves as a journalist, unless there are grounds of manifest public interest, and not stage or falsify situations in order to abuse the public's good faith;</p> <p>j) Not use or present any other person's work or creation as his own;</p> <p>l) Refrain from participating in the treatment or presentation of entertainment materials, specifically competitions or quizzes, and televoting programmes.</p> <p>3 - Without prejudice to any criminal or civil</p>
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liability arising in the case in question, under general terms of the law, breach of the ethical component of the duties specified in the previous point may only give rise to the disciplinary liability regime established in this law.

Estatuto do Jornalista	Journalist's Statute
<p style="text-align: center;">Artigo 20.º</p> <p style="text-align: center;">Contra-ordenações</p> <p>1 - Constitui contra-ordenação, punível com coima:</p> <p>a) De (euro) 200 a (euro) 5000, a infracção ao disposto no artigo 3.º;</p> <p>b) De (euro) 1000 a (euro) 7500:</p> <p>i) A infracção ao disposto no n.º 1 do artigo 4.º, no n.º 2 do artigo 15.º e no n.º 1 do artigo 17.º;</p> <p>ii) A inobservância do disposto no n.º 3 do artigo 5.º;</p> <p>c) De (euro) 2500 a (euro) 15 000:</p> <p>i) A infracção ao disposto no n.º 2 do artigo 4.º, no n.º 2 do artigo 7.º-A, no n.º 2 do artigo 7.º-B e no n.º 3 do artigo 15.º;</p> <p>ii) A violação dos limites impostos pelo n.º 4 do artigo 7.º-A e pelos n.os 3 e 4 do artigo 7.º-B;</p> <p>iii) A violação do disposto nos n.os 1 a 3 do artigo 12.º</p> <p>2 - A infracção ao disposto no artigo 3.º pode ser objecto da sanção acessória de interdição do exercício da profissão por um período máximo de 12 meses, tendo em conta a sua gravidade e a culpa do agente.</p> <p>3 - A negligência é punível, sendo reduzidos a</p>	<p style="text-align: center;">Article 20</p> <p style="text-align: center;">Administrative offences</p> <p>1 – The following constitute an administrative offence, punishable with a fine:</p> <p>a) From € 200 to € 5,000, breach of the provisions established in article 3;</p> <p>b) From € 1,000 to € 7,500:</p> <p>i) Breach of the provisions established in no. 1 of article 4, in no. 2 of article 15 and in no. 1 of article 17;</p> <p>ii) Failure to observe the provisions established in no. 3 of article 5;</p> <p>c) From € 2,500 to € 15,000:</p> <p>i) Breach of the provisions established in no. 2 of article 4, in no. 2 of article 7-A, in no. 2 of article 7-B and in no. 3 of article 15;</p> <p>ii) Breach of the limits stipulated by no. 4 of article 7-A and by nos. 3 and 4 of article 7-B;</p> <p>iii) Breach of the provisions established in nos. 1 a 3 of article 12</p> <p>2 - Breach of the provisions established in article 3 may be subject to an additional sanction of prohibition on pursuit of the profession for a maximum period of 12 months, in light of the respective gravity and</p>

<p>metade os limites mínimos e máximos previstos no n.º 1.</p> <p>4 - É punível a tentativa de comissão das infracções ao disposto nos n.os 1 e 2 do artigo 12.º</p> <p>5 - A instrução dos processos de contra-ordenação e a aplicação de coimas por infracção aos artigos 3.º, 4.º, 5.º, 7.º-A, 7.º-B, 15.º e 17.º é da competência da Comissão da Carteira Profissional de Jornalista.</p> <p>6 - A instrução dos processos das contra-ordenações e a aplicação das coimas por infracção aos artigos 8.º e 12.º é da competência da Entidade Reguladora para a Comunicação Social.</p> <p>7 - O produto das coimas por infracção aos artigos 3.º, 4.º, 5.º, 7.º-A, 7.º-B, 15.º e 17.º reverte em 60 % para o Estado e em 40 % para a Comissão da Carteira Profissional de Jornalista.</p> <p>8 - O produto das restantes coimas reverte integralmente para o Estado.</p>	<p>the degree of culpability of the agent.</p> <p>3 - Negligence is punishable with the minimum and maximum limits of the fines specified in no. 1 reduced by 50%.</p> <p>4 – An attempt to carry out infringements to the provisions established in nos. 1 and 2 of article 12 is also punishable.</p> <p>5 – The Comissão da Carteira Profissional de Jornalista (Journalists’ Professional License Committee) is responsible for drawing up the proceedings for administrative offence and application of fines, due to breach of articles 3, 4, 5, 7-A, 7-B, 15 and 17.</p> <p>6 – The Entidade Reguladora para a Comunicação Social (Regulatory Authority for the Media) is responsible for drawing up the proceedings for administrative offence and application of fines, due to breach of articles 8 and 12.</p> <p>7 – Revenues from fines due to breach of articles 3, 4, 5, 7-A, 7-B, 15 and 17 shall revert 60 % to the State and 40 % to the Comissão da Carteira Profissional de Jornalista (Journalists’ Professional License Committee).</p> <p>8 – Revenues from other fines will revert in full to the State.</p>
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<p>Código Penal, Artigo 195º - Violação de Segredo:</p> <p>Quem, sem consentimento, revelar segredo alheio de que tenha tomado conhecimento em razão do seu estado, ofício, emprego, profissão ou arte é punido com pena de prisão até um ano ou com pena de multa até 240 dias.</p>	<p>Penal Code</p> <p>Article 195</p> <p>Violation of Secrecy:</p> <p>Who, without consent, reveals another's secret that they became aware of because of their status, occupation, employment, profession or art is punished with imprisonment up to one year or a fine of up to 240 days.</p>
<p>Lei de Imprensa, Artigo 22º - Direitos dos Jornalistas:</p> <p>Constituem direitos fundamentais dos jornalistas, com o conteúdo e a extensão definidos na Constituição e no Estatuto do Jornalista: a) A liberdade de expressão e de criação; b) A liberdade de acesso às fontes de informação, incluindo o direito de acesso a locais públicos e respectiva protecção; c) O direito ao sigilo profissional; d) A garantia de independência e da cláusula de consciência; e) O direito de participação na orientação do respectivo órgão de informação.</p>	<p>Press Law</p> <p>Article 22</p> <p>Journalists' Rights</p> <p>The following constitute fundamental rights of journalists, with the content and the extent defined in the Portuguese Constitution and in the Journalist's Statute:</p> <ul style="list-style-type: none"> a) Freedom of expression and creation; b) Freedom of access to information sources, including right of access to public places and respective protection; c) The right to professional secrecy; d) The guarantee of independence and the conscience clause; e) The right of participation in the coordination of the respective organ of information.

Lei do Cibercrime, Artigo 15º - Pesquisa de Dados Informáticos:

- 1 - Quando no decurso do processo se tornar necessário à produção de prova, tendo em vista a descoberta da verdade, obter dados informáticos específicos e determinados, armazenados num determinado sistema informático, a autoridade judiciária competente autoriza ou ordena por despacho que se proceda a uma pesquisa nesse sistema informático, devendo, sempre que possível, presidir à diligência.
- 2 - O despacho previsto no número anterior tem um prazo de validade máximo de 30 dias, sob pena de nulidade.
- 3 - O órgão de polícia criminal pode proceder à pesquisa, sem prévia autorização da autoridade judiciária, quando:
- a) A mesma for voluntariamente consentida por quem tiver a disponibilidade ou controlo desses dados, desde que o consentimento prestado fique, por qualquer forma, documentado;
 - b) Nos casos de terrorismo, criminalidade violenta ou altamente organizada, quando haja fundados indícios da prática iminente de crime que ponha em grave risco a vida ou a integridade de qualquer pessoa.
- 4 - Quando o órgão de polícia criminal proceder à pesquisa nos termos do número anterior:
- a) No caso previsto na alínea b), a realização da diligência é, sob pena de nulidade, imediatamente comunicada à autoridade judiciária competente e por esta apreciada em ordem à sua validação;
 - b) Em qualquer caso, é elaborado e remetido à autoridade judiciária competente o relatório previsto no artigo 253.º do Código de Processo Penal.
- 5 - Quando, no decurso de pesquisa, surgirem razões para crer que os dados procurados se encontram noutra sistema informático, ou numa parte diferente do sistema pesquisado,

Cybercrime Law

Article 15

Search of computer data

- 1 - Where, in the course of proceedings, the collection of evidence, necessary to uncover the truth, requires that specified computer data, stored in a specific computer system, are obtained, the competent judicial authority shall authorize or order the search to that computer system, overseeing such investigations whenever possible.
- 2 - The order provided for in the preceding paragraph shall be valid for a maximum period of 30 days, on pain of being deemed null and void.
- 3 - Criminal police bodies shall undertake the search, without a prior authorization from the judicial authority:
- a) Where whoever holds or controls data under consideration voluntarily consents to the search, insofar as the consent is documented in any way;
 - b) In cases of terrorism, violent or highly-organized crimes, or where there is evidence to substantiate the imminent commission of a criminal offence threatening the life or integrity of any person.
- 4 - Where criminal police bodies undertake the search pursuant to the preceding paragraph:
- a) In the situation provided for in point b), the investigation shall be promptly communicated

mas que tais dados são legitimamente acessíveis a partir do sistema inicial, a pesquisa pode ser estendida mediante autorização ou ordem da autoridade competente, nos termos dos n.os 1 e 2.

6 - À pesquisa a que se refere este artigo são aplicáveis, com as necessárias adaptações, as regras de execução das buscas previstas no Código de Processo Penal e no Estatuto do Jornalista.

to the competent judicial authority, and assessed by the latter as far as the validation of the measure is concerned, on pain of being deemed null and void;

b) In any other situation, the report provided for in article 253 of the Criminal Procedure Code shall be drawn up and submitted to the competent judicial authority.

5 - Where, in the course of the search, there are grounds to believe that the data sought is stored in another computer system or part of it, and such data is lawfully accessible from the initial system, the search may be extended to the other system, by means of an authorization or order from the competent authority, pursuant to paragraphs 1 and 2.

6 – To the search referred to herein shall apply, duly adapted, the rules on execution of searches provided for in the Criminal Procedure Code and in the Journalists Statute.

**Lei do Cibercrime, Artigo 16º - Apreensão
de Dados Informáticos:**

1 - Quando, no decurso de uma pesquisa informática ou de outro acesso legítimo a um sistema informático, forem encontrados dados ou documentos informáticos necessários à produção de prova, tendo em vista a descoberta da verdade, a autoridade judiciária competente autoriza ou ordena por despacho a apreensão dos mesmos.

2 - O órgão de polícia criminal pode efectuar apreensões, sem prévia autorização da autoridade judiciária, no decurso de pesquisa informática legitimamente ordenada e executada nos termos do artigo anterior, bem como quando haja urgência ou perigo na demora.

3 - Caso sejam apreendidos dados ou documentos informáticos cujo conteúdo seja susceptível de revelar dados pessoais ou íntimos, que possam pôr em causa a privacidade do respectivo titular ou de terceiro, sob pena de nulidade esses dados ou documentos são apresentados ao juiz, que ponderará a sua junção aos autos tendo em conta os interesses do caso concreto.

4 - As apreensões efectuadas por órgão de polícia criminal são sempre sujeitas a validação pela autoridade judiciária, no prazo máximo de 72 horas.

5 - As apreensões relativas a sistemas informáticos utilizados para o exercício da advocacia e das actividades médica e bancária estão sujeitas, com as necessárias adaptações, às regras e formalidades previstas no Código de Processo Penal e as relativas a sistemas informáticos utilizados para o exercício da profissão de jornalista estão sujeitas, com as necessárias adaptações, às regras e formalidades previstas no Estatuto do Jornalista.

6 - O regime de segredo profissional ou de funcionário e de segredo de Estado previsto no artigo 182.º do Código de Processo Penal é

Cybercrime Law

Article 16

Seizure of computer data

1 - Where, in the course of a computer system search, or of another legitimate means of access to a computer system, computer data or documents necessary to the collection of evidence, in order to uncover the truth, are found, the competent judicial authority shall authorize or order the seizure thereof.

2 - Criminal police bodies are entitled to perform seizures, without any prior authorization from the judicial authority, in the course a computer system search lawfully ordered and executed pursuant to the preceding article, or where there is urgency or danger in delay.

3 - In case of seizure of computer data or documents the contents of which may disclose personal or intimate data, thus hindering the privacy of the respective holder or of a third party, on pain of being deemed null and void such data or documents shall be submitted to the judge, who shall weight their attachment to the file, taking into account the interests of the case.

4 - Seizures carried out by criminal police bodies shall always be validated by the judicial authority, within at the most 72 hours.

5 - Seizures related to computer systems used for legal, medical and bank practises shall comply with the rules and formalities provided for in the Criminal Procedure Code, duly adapted, and those related to computer systems

<p>aplicável com as necessárias adaptações.</p> <p>7 - A apreensão de dados informáticos, consoante seja mais adequado e proporcional, tendo em conta os interesses do caso concreto, pode, nomeadamente, revestir as formas seguintes:</p> <ul style="list-style-type: none">a) Apreensão do suporte onde está instalado o sistema ou apreensão do suporte onde estão armazenados os dados informáticos, bem como dos dispositivos necessários à respectiva leitura;b) Realização de uma cópia dos dados, em suporte autónomo, que será junto ao processo;c) Preservação, por meios tecnológicos, da integridade dos dados, sem realização de cópia nem remoção dos mesmos; oud) Eliminação não reversível ou bloqueio do acesso aos dados. <p>8 - No caso da apreensão efectuada nos termos da alínea b) do número anterior, a cópia é efectuada em duplicado, sendo uma das cópias selada e confiada ao secretário judicial dos serviços onde o processo correr os seus termos e, se tal for tecnicamente possível, os dados apreendidos são certificados por meio de assinatura digital.</p>	<p>used by journalists shall comply with the rules and formalities provided for in the Journalists Statute, duly adapted.</p> <p>6 - The regime governing professional, staff and State secret information, provided for in article 182 of the Criminal Procedure Code, shall apply, duly adapted.</p> <p>7 - Seizure of computer data, depending on what is deemed to be most appropriate or proportional, taking into account the interests of the case, may take the following forms:</p> <ul style="list-style-type: none">a) Seizing the computer system support equipment or the computer-data storage medium, as well as devices required to read data;b) Making a copy of those computer data, in an autonomous means of support, which shall be attached to the file;c) Maintaining by technological means the integrity of data, without copying or removing them; ord) Removing the computer data or blocking access thereto. <p>8 - In the situation of seizure provided for in point b) of the preceding paragraph, copies shall be made in duplicate, one of them being sealed and entrusted to the court clerk of services where the case has been brought and, where technically possible, seized data shall be certified by means of a digital signature.</p>
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**Lei 19/2008 de 21 de Abril, Artigo 4º -
Garantias dos Denunciantes:**

- 1 - Os trabalhadores da Administração Pública e de empresas do sector empresarial do Estado, assim como os trabalhadores do sector privado, que denunciem o cometimento de infrações de que tiverem conhecimento no exercício das suas funções ou por causa delas não podem, sob qualquer forma, incluindo a transferência não voluntária ou o despedimento, ser prejudicados.
- 2 - Presume-se abusiva, até prova em contrário, a aplicação de sanção disciplinar aos trabalhadores referidos no número anterior, quando tenha lugar até um ano após a respectiva denúncia.
- 3 - Os trabalhadores referidos nos números anteriores têm direito a:
 - a) Anonimato, excepto para os investigadores, até à dedução de acusação;
 - b) Transferência a seu pedido, sem faculdade de recusa, após dedução de acusação.
 - c) Beneficiar, com as devidas adaptações, das medidas previstas na Lei n.º 93/99, de 14 de julho, que regula a aplicação de medidas para a proteção de testemunhas em processo penal, alterada pelas Leis n.os 29/2008, de 4 de julho, e 42/2010, de 3 de setembro.

Law 19/2008 of 21 April,

Article 4

Safeguards for Whistle-blowers:

- 1 - The workers of the Public Administration and of State business companies, as well as private sector workers, who report offenses of which they become aware in the exercise of their duties or because of them can not, in any form, including non-voluntary transfer or dismissal, be harmed.
- 2 - It is presumed abusive, until proven otherwise, the application of disciplinary sanctions to workers referred to in the preceding paragraph, when taking place within one year after the complaint.
- 3 - The workers referred to in the preceding paragraphs are entitled to:
 - a) Anonymity, except to the researchers, until an indictment;
 - b) Transfer to their request without the option of being refused, after an indictment.
 - c) To benefit, mutatis mutandis, of the measures provided for in Law No. 93/99 of 14 July, which regulates the implementation of measures for the protection of witnesses in criminal proceedings, as amended by Laws Nos 29/2008 of 4 July, and 42/2010 of 3 September.

ELSA ROMANIA

Contributors

National Coordinator

Luiza Zus

National Academic Coordinator

Diana Ciobanu

National Researchers

Loredana Barbu

Ioana Bucă

Cristina Ciomoș

Maria Cojocaru

Teodora Dragomir

Andrei Dumbravă

Cristina Suciu

National Linguistic Editors

Alexandra Harabagiu

National Academic Supervisor

Diana Botău

Dragoș Chilea

Maria Crăciunean

Ion Galea

Carmen Moldovan

1. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

1.1. Introduction. The Controversial Issue of the Protection of Journalistic Sources

'If newspapers were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. Charlatans could not be exposed. Unfairness would go remedied. Misdeeds in the corridors of power would never be known.'

The above stated argument of Lord Denning in the *British Steen Corporation v. Granada Television Ltd* is found as a method of bringing to your attention the controversial issue of the protection of journalistic sources. This case dates back to the 1980s, so it can be easily found that it is not recent issue and that it subsists in countries worldwide.

Speaking of countries, Romania is certainly one of the European states that are embracing this subject. And, not ignoring the historical side, it can be outlined, for a better understanding of what will follow, that journalism, as a powerful source of information, developed gracefully with a strong West-European influence. Its evolution crashed when, after the Second World War, communism took over the political power. As it is well known, one of the main purposes of this movement was to eliminate all forms of freedom of speech and expression, media was limited to share only its ideology and any opposite position was rapidly and entirely eradicated. At the present moment, a deep scar that the previously mentioned historical period left upon the country can still be felt, even after more than twenty-five years since the revolution. The present times seem to be like a middle point, where implementing the European directives and regulations is a must - due to the statute of member of the European Union that Romania has, but, on the other hand, internal legislation is rather insufficient and, in many cases, European recommendations are not taken into consideration because of the different influences generated by personal interest.

To the evolution of journalism itself in its many forms, can be linked the right of citizens to be informed and the right of journalists to inform with the truth - because journalism can be good or bad but, without freedom, it will always be worth nothing. Furthermore, how can journalists reveal the truth if not by searching, digging after it in every corner, hearing from different people? But, if we take a case of a murder, for instance, a person would most likely not provide certain evidence without ensuring himself that his identity will remain a secret, for the sake of himself and his family. And this is where the term of source protection comes to attention. Also known as the confidentiality of sources, its main purpose is to prohibit authorities (including the courts) from compelling a journalist to reveal the identity of an anonymous source.

1.2. National Legislation and Its Construction

Taking it gradually, the first question is: Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? The short answer is "Yes!"; However, Romanian legislation does not provide an explicit

definition of journalistic sources in any of its legal texts, any such explanation for this exact term. The meaning is understood from the legislation that provides protection for sources, but there is no article that defines the terms. The more important question that has to be asked is whether these regulations are adequate enough in order to ensure the rights that journalists have. Taking the highest regulation Romania has, the Constitution (that provides the most important and imperative rules) we find that it does not offer an explicit article on the rights of a journalist not to disclose its source. Even so, it does offer a certain protection that can be understood by analyzing two important articles on the matter: article 30¹ - which ensures freedom of expression, and article 31² - which ensures the right of information and also clearly states that any censorship is prohibited and that no publication shall be suppressed. However, it is interesting how one of the paragraphs states 'The law may impose upon the mass media the obligation to make public their financing source'. This paragraph is the closest term that suggests the idea of source. From a legal perspective, a *per a contrario* interpretation leads to the fact that only the law has the force to reveal the financing source, and that would lead to a whole, entire protection of journalists information in other manners, such as protection of the source of information. *Lex ferenda*, it would be highly recommended to introduce a new paragraph where the discussed right is concretely introduced, in order to reduce the number of abuses and eliminate the confusion the lack of it causes. It is known that journalists have the right to protect the source based on the legislation provided, but there is no specific way to do it, but, indirectly, it can be linked to Criminal or Civil Law, depending from case to case.

Going one step lower on the scale of normative influence in Romania there is the new Civil Code that was published in 2011 after long disputes on how it should cover all the gaps the old Code had. Despite the effort, there is still no explicit article referring to the protection of journalists not to disclose their source of information. There are several articles on respecting human dignity and one's private life, which actually highlight what a journalist must prevent from violating (which is another person's private life) and not the journalist's professional protection.

Even lower on the power of law scale, we find different legislation that finally seem to offer a concrete answer to the question. Law n. 544/2011 (regarding the right of access to information) subscribes to the above mentioned regulation; it refers to personal rights and freedom of expression, but has no explicit content on source protection.

Taking a look at the 504/2002 regulation referring to broadcasting, in the 7th article we find the most explicit article Romanian legislation provides on this subject:

Article 7

¹ Article 30 of the Constitution of Romania:

(1) Freedom of expression of thought, opinions, faith and freedom of creation of any kind, spoken, written, through images, sounds or other means of public communication, are inviolable.

(2) Any kind of censorship is forbidden.

² Article 31 of the Constitution of Romania:

(1) A person's right to have access to any information that is of public interest cannot be restricted.

- (1) Confidentiality of information sources used in the design or development of news, shows or other elements of program services is guaranteed by law.
- (2) Any journalist (...) is free not to disclose information that could identify the source of information obtained directly linked to his professional activity.
- (3) It is considered information that could identify a source the following:
 - a) name and personal data as well as voice or image of a source;
 - b) factual circumstances of acquiring information by journalist;
 - c) the unpublished information provided by the journalist's source;
 - d) personal data of the journalist or radio speaker related work to obtain information disseminated.
- (4) The confidentiality of information sources obliges in return, responsibility for the accuracy of the information provided.
- (5) Persons who, through their professional relations with journalists, acquire knowledge of information that could identify a source by gathering, editorial treating or publishing such information will benefit of the same protection as journalists.
- (6) Disclosure of information sources can only be ordered by courts if this is necessary for the protection of national security or public order, and to the extent that such disclosure is necessary for solving the case facing the court when:
 - a) there does not exist or have been exhausted the alternatives to disclosure of similar effect;
 - b) the legitimate interest of disclosure exceeds the legitimate interest of non-disclosure.³

The article is precise, concrete and it provides the protection needed for journalists. The above comments on the need of such a regulation are satisfied in the document adopted by the Romanian Parliament in 2002. Even so, it would be preferable that this right is introduced in the Constitution of Romania, so that it would be respected as an imperative rule, not just as a result of the principle that states that if there is a special regulation, it shall except from the general rule and be applied thoroughly.

In the same positive spirit, there are two more regulations, which are more similar to a practical version offered for the professionals. Firstly, there is the Unified Code of Ethics which precisely presents in Article 15 that the journalist has the obligation of keeping the source confidential if they request so, and also if the disclosure of the source's identity can endanger its' life, physical and mental integrity or work. Furthermore, in the next paragraph, it is once again underlined that secrecy and protection of confidential sources is equally a right and an obligation of the journalist. Secondly, the Judiciary Superior Council elaborated a guide regarding the perspective of judges upon the subject with examples of situations when such an intrusion is permitted in the name of law, relevant European legislation, all of it in order to unify the practice of the courts.

The list of Romanian legislation that provides this type of protection has ended. Of course, comparing it to other modern legislation or the European directions, there is still more to be added for it to be perfected. Without taking into consideration that, as it was outlined several

³ Personal translation of Article 7 from Law n. 504/2002.

times, there is a need of taking the regulation to a higher scale in order to provide safety among citizens, there are actually methods of ensuring that the right exists, it is recognized by the state and it must be applied. From that point comes the need of knowledge, the urge to be sure that one can ask for his right to be respected and that the state will respect that right, and, in the end, that is the purpose of this project, the expansion on knowledge in order to protect the human being.

2. Is there in domestic law a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

2.1. Introduction

Romanian legislation encounters a severe gap in this matter, this being the reason why this prohibition is not mentioned in a clear disposition in the national order. Under those circumstances, in order to state this prohibition, several instruments of national and international origin have to be taken into consideration when recreating this prohibition in the national order. The New Civil Code recognizes freedom of speech as one of the fundamental rights, which indicates that the Romanian legislator considered it was vitally important to protect it, therefore it was described separately in Article 70: 'Everybody has the right to express himself freely'.⁴

Also, Romanian law is strongly bound to the European Court of Human Right's (hereinafter "ECHR") decisions, therefore the following article applies to the Romanian legislation too: Article 10 paragraph (1) states that '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 frontier. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. As it is obvious even at a simple glance, even in article 10 the Freedom of Speech is not an absolute right - it has its restrictions in order not to harm the exercise of the other rights.

This limit does not contradict to norms of the Convention because, as it is written in Article 10 paragraph (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'.

⁴ Personal translation of Article 70 from the New Romanian Civil Code.

This sensible line suggests that there are cases in which the source who has given the information cannot be disclosed as it may cause unwanted consequences on private life. This idea may be a compromise between the right of freedom of speech which empowers publishing important information and the right to protect private life, therefore free movement of information will be guaranteed in order to protect public interest.

2.2. Romania Between Treaties and Internal Law

2.2.1. International Vision of this Freedom and Its Effects in Romanian Law

Moreover, there are several restrictions mentioned in international law that have to be applied first in case there is any conflict between the Treaty and national legislation. This principle is mentioned in the Romanian Constitution in the 3rd paragraph of Article 11. Therefore, Treaties and Decisions of European Court of Human Rights are regarded as mandatory for national legislation.

Several international documents guarantee different rights to journalists among which there is the prohibition of disclosing their sources.

In this case, there is a Recommendation which was written regarding the problem of the confidentiality of the sources, more precisely R (2000) 7 which was adopted on 8 March 2000 in order to suggest the states to use all of their means protect the confidentiality of the sources of journalists. This recommendation prohibits disclosing of the sources which journalists use in order to provide with information and also institutes limitations to this right, conditions which are necessary in order to disclose a source, limitations of surveillance and perquisitions and also defence against self-accusation.

R (2000) 7 is the result of a well-known case which was solved a few years ago, *Goodwin v. United Kingdom*, where the Court decided on the conviction of the United Kingdom because of the means which were used against the journalist in order to disclose his sources. As it was said above, ECHR decisions are mandatory for European states, as well as Romania, and provide all the necessary guidelines in the proper approach of the human rights.

In the above mentioned case, the Court states the fact that the confidentiality of sources is one of the cornerstones of the freedom of press. The absence of this interdiction can cause fear to those who want to share information with the journalists and therefore leaving him helpless when it comes to informing people on issues concerning them. In those hypothetical conditions, the press cannot efficiently play its role of a watchdog of a modern democracy. Taking into consideration the importance of protection of the confidentiality of the sources and the negative effects which can be caused to the freedom of expression, The Court considers that this interference can be done only in extremely restrictive conditions.⁵

⁵ Radu Chiriță, *Conventia Europeana a Drepturilor Omului* (2nd edn, CH Beck 2008) 346 [Romanian].

Also, the Court reiterates this principle in a recent case, *Roemen and Schmit v. Luxemburg*. In this case, the Court states the fact that organizing perquisitions in order to clearly determine the source which has offered information is a serious interference in the freedom of expression and it can only be caused in exceptional circumstances.⁶

2.2.2. The Accepted Limits

This freedom of expression is not absolute though, it is emphasized the fact that there can be mainly two types of limitations. On the one hand there is the **general interest** of the population - which can be national security, prevention of a crime, protection of ethics and health, for instance. On the other hand, limitations can also have a **private** nature, so they could defend a person's dignity, for example.

Also, after reading the dispositions of the Convention, it can be said that not only the freedom is not limitless, but it also has two severe conditions which have to be respected in order to protect the journalist from judicial responsibility.

Therefore, the Convention mentions that the exercise of this freedom implies the following:

- **obligations** and **responsibility**,
- **restrictions** can be done only **by law** because of the importance of this freedom, so it can easily be observed that the state maintains a little part of its' power in order to protect the general interest so the information won't have a harmful effect for the people who can be influenced by it.
- the interference has to be mentioned in a **legal text** in a clear manner, to be **necessary** in a democratic state, to regard a **legitimate purpose**.⁷

2.3. The Approach of the National Law in the Light of International Circumstances

Romania has a particularly interesting position regarding this matter because of the legislative gap which it has encountered recently. Generally speaking, the freedom of expression in Romania is protected by the **Constitution** in Article 30, but the journalists' activity is protected only indirectly by (8) of the same article.

One of the best problems regarding this topic is that there is **no clear definition** of this type of activity in the national **legislation**. This fact causes serious problems when it comes to drawing the margins of its limitations. Besides this, the major problem is that the Law of Press n. 3/1974 does not produce any effects because of the Constitutional Court's practice which stated that currently this law is revoked, it cannot have any effects in the national order.

Even though the law itself was present in the national legislative order in a period of time when journalism was not protected as it has to be now, Article 63 mentioned the '**privilege of confidentiality**' which was regarded as a professional secret, and the law itself guaranteed a

⁶ *ibid* 347.

⁷ Corneliu Birsan, *Conventia Europeana a Drepturilor Omului. Comentariu pe Articole* (2nd edn, CH Beck 2006) 750 [Romanian].

protection for the journalist's activity which demonstrates that this law, regardless of its age, is **superior** to the current national instruments which only vaguely regard this topic.⁸

Therefore, the gap created by The Constitutional Court was not filled, not even by now, with a law that could consistently guarantee the prohibition of disclosing sources, Romanian legislation being by far one of the few countries in Europe which does not have a similar disposition in national order.

It should be also underlined the fact that in the actual version of Criminal Code Art 304 punishes the disclosure of confidential information, it states the following: Disclosure of information classified as service secret or not public (1) The unlawful disclosure of information classified as service secret, or which is not for the general public, by the person aware thereof owing to their professional responsibilities, if it affects the interests or the activity of a person, shall be punishable by no less than 3 months and no more than 3 years of imprisonment, or by a fine. Therefore the sanction exists regarding confidential information in general without any reference to the confidentiality of the sources. Also, another place where this idea is vaguely mentioned is the Romanian Labour Code art 247 it states that (1) The employer shall have disciplinary powers, i.e. the right to take, according to the law, disciplinary measures against its employees whenever it finds them liable of disciplinary offences. (2) A disciplinary offence is related to the work, consisting of a wilful action or lack of action of the employee, breaking the legal provisions, the rules of procedure, the individual employment contract or the applicable collective labour agreement, legal instructions and directions of the management. , but there is no clear provision which would include the journalist's sources in the category of confidential information which has to be protected. In any other parts of code there is no clear definition of confidential information or what it should regard. Therefore labour code institutes only general guidelines without any other explanations.

2.4. Conclusions

On the one side, Currently, Romania is one of the few states which is mostly helpless when it comes to protecting journalists' sources because of its lack of legislation on the issue, a fact which is not compatible with the EU principles in the area. On the other side, the lack of dispositions, which show the guidelines regarding this profession, and the way it has to be executed can cause disparity from the journalists side, who could eventually commit abuses because of the fact that law doesn't provide clear rules which have to be respected.

Therefore, in this context, Romania needs a new law that would include all of those aspects in order to solve most of the potential problems which might occur because of this real void in legislation.

⁸ Carmen Moldovan, '*Succinte consideratii referitoare la privilegiul confidentialitatii surselor de informare ale ziaristilor in reglementarea legala a unor state si in jurisprudenta CEDO*' [2012] Revista Dreptul n. 3/2012 181-194 [Romanian].

3. Who is a “journalist” according to the national legislation? Is it in your view a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media actors? Is the protection of journalists’ sources extended to anyone else?

3.1. Definition and Interpretation

There is no legal definition given to the term “journalist”, but the Journalists Code of Conduct adopted by the Media Organizations Convention in 2009 provides one.

According to this Code, a journalist is:

‘A person that handles the collecting, photographing, recording, writing, editing or publishing information regarding local events, national, international, of public interest, with the purpose of publicly spreading this information, earning his living in a considerable proportion from this activity.’⁹

Since there is no legal definition given to the term “journalist”, when interpreting the law we shall refer to the common meaning of the term, a person specialized in journalistic activities (according to the explanatory dictionary of the Romanian language). With this interpretation, the definition of a journalist is flexible enough to include several categories of activities that shall be given protection by the law.

3.2. The Protection of Other Media Actors

The legal framework offers protection not only to journalists but to other media actors as well. Articles 7 and 8 of Law n. 504/2002 (the Broadcasting Law) provide the norms that offer this legal protection.

According to the 2nd paragraph of Article 7, any journalist or media developer is free from disclosing data that can lead to the identification of the source of the information obtained in relation to his professional activity.

For the purpose of this law, a program shall be considered a group of moving images, with or without sound, that constitutes a whole which can be identifiable through its title, content, form or author, within a grid or a catalogue composed by a media supplier, having the form and the content of television services or having a comparable form and content to these.

This protection extends to other people that, through their professional relations with journalists, gain knowledge capable of identifying a source through collecting, editing or publishing this information.

⁹ Carmen Maria Andronache, ‘Codul Deontologic al Jurnalistului, Elaborat de conventia Organizatiilor Media’ (The Journalists Code of Conduct adopted by the Media Organizations Convention, 7 July 2010) <<http://www.paginademedia.ro/2010/05/codul-deontologic-al-jurnalistului-elaborat-de-conventia-organizatiilor-de-media/>> accessed 28 April 2016 [Romanian].

Article 8 grants further protection provided by the public authorities for journalists in case they are under a pressure or threat that can restrain or prevent them from freely exercising their profession. The same protection is also granted to the headquarters of radio transmitters.

Furthermore, it is stated that this protection of the headquarters cannot become a pretext to restrain or prevent the free exercise of the profession.

According to article 7 of the Law of author rights (Law n. 8 from 1996), the protection given by author rights can be extended to works such as journalistic articles, dramatic operas, photographic, cinematographic and other audio-visual pieces of work.

Under the same law, protection is granted not only to the author, the creator of the piece of work. The director is also an author, and if the producer includes an express clause in the contract between him and the director, he can also be considered an author under this law.

This law, under article 113, also gives protection to the radio and television organisms for the programs that they develop and distribute.

3.3. Access to Public Information

Law n. 544/2001 provides a special section dedicated to the access of mass media to public information.

Access to public information for mass media actors is guaranteed by this law which is also binding public authorities to give accreditation to journalists and mass media actors without any discrimination within two days of request.

The law also binds the public authorities to inform all mass media actors of the press conferences they will hold and other public actions, as well as allow all accredited journalists the access to these activities.

In return, mass media actors and journalists are not obliged to publish information given by the public authorities during these events.

3.4. Scope of the Protection and Conclusions

The protection of journalists and other media actors aims to balance the freedom of expression of the journalists and other actors, the public's right to information and other public interests such as national security, public safety and other individual rights. It is an important issue, especially in the current national climate and international context, in which these rights are bound to find themselves in conflict more than ever. It is the legislator's duty to assure that the necessary balance is maintained, adjusting the mechanism to each national situation and needs.

4. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

4.1. Protection of Journalists Against Being Forced to Disclose Their Sources

The protection of journalistic sources represents one of the basic conditions for press freedom's existence in a democratic society. Freedom of press implies unrestricted flow of information from journalists to citizens and, just as important, from citizens to journalists. Thus there is a double exchange based on the need to provide information on matters of public interest.

There have also been many national and international instruments adopted by states for better protection of journalistic sources. In Romania, Article 30 of the Constitution states that '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'. Principles regarding freedom of expression have also been stated in the Civil Code: Article 70 - 'any person has the right to freedom of expression'.

Although no case has been brought to the Constitutional Court regarding the protection of journalistic sources based on Article 30 of the Constitution (thus, there is no jurisprudence), the European Court of Human Rights has held in *Goodwin v. United Kingdom*, a case from 1996, that 'Protection of journalistic sources is one of the basic conditions for press freedom' and

'If journalists are forced to reveal their sources the role of the press as public watchdog could be seriously undermined because of the chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest'

Thus, it is possible to use the same arguments in defending the need of protecting journalistic sources based on the Romanian Constitution, of which Article 30, line 1 has the same content as Article 10 line 1 from the Human Rights Act.

There is also the Broadcasting Law n. 504/2002, of which article 7 line 1 states explicitly that 'The confidential nature of the information sources used in conceiving or issuing news, shows or other elements of program services is warranted by this Law'. But, of course, there are exceptions comprised in the Law where journalistic sources may be disclosed, just as the European Court of Human Rights has stated in its decisions:

'The disclosure of an information source may be ordered by law courts insofar it is necessary in order to protect national safety or public order and insofar such disclosure is necessary to solve a case judged at a law court when:

- a) alternative measures of similar effect, to the disclosure do not exist or have been exhausted;
- b) the legitimate interest for disclosure exceeds the legitimate interest for non-disclosure.'¹⁰

¹⁰ *Nordisk Film & TV A/S v. Denmark* [2005] European Court of Human Rights [English].

A journalist may be forced to disclose his sources only through the judiciary system, the judge being the one who can order him to do so. The journalist can be cited as a witness in an ongoing trial and can be asked to divulge his sources by the prosecutor, otherwise he can be charged with false testimony (again, by the prosecutor), an offence. This case concerning the journalist specifically will be brought in front of the judge, who will give a solution considering Article 7 of the Broadcasting Law and the European Court's of Human Rights Jurisprudence.

If the judge orders the disclosure, any information can be revealed in what is called the Council Room, which means that only the judges, the prosecutors and anyone working on the case will hear the information, as well as the persons involved in the case (defendants, witnesses, interpreters, experts, but only if necessary for them to hear the disclosed information). There are in the Romanian Criminal Code some provisions which forbid passing on not only of disclosed information done by a journalist, but any sensible information connected to the case whatsoever. The penalty is prison, but it can also be a fine if the person who passes on the information is not a magistrate or a public servant (police officer, for example).

A journalist may challenge a judge's decision by appeal, according to the Criminal Procedure Code (Article 408 from the Criminal Procedure Code: sentences may be challenged by appeal, unless the law says otherwise; there's no impediment written anywhere else). The journalist also has the right to not self-incriminate, a right provided by Article 118 from the Criminal Procedure Code, which states *expressis verbis* that the witness's declaration cannot be used against him. Also, Article 83 from the same code states that the defendant can refuse to give any declarations during the trial, without suffering any consequences, which is also meant to prevent self-incrimination.

The right to be heard is enshrined in the Criminal Procedure Code as a principle in Article 10. Self-regulatory mechanisms have no application whatsoever in the above proceedings. The self-regulatory mechanisms are rules to which parties abide by signing a contract.

4.2. Self-regulatory Mechanisms

For the protection of journalistic sources against the disclosure by the journalists themselves to be assured, a Deontological Code has been created, which acts as a self-regulatory mechanism, implemented by the specialized bodies of each signing party to the Code. The Code was adopted within the *Convenția Organizațiilor de Media din România* (Convention of Media Organizations from Romania) on 24 October 2009. Those specialized bodies function as ethics commission under different names, or they are the boards of the different professional associations which can, based on their statute, be able to provide the sanction for breaking the provision. The sanctions range from a warning notice to small percentages of the journalist's wage taken as fines, even dissolution of the labor contract.

If a journalist wants to disclose his sources, from a legal standpoint there are no sanctions for his actions. But there is a provision (Article 2.3.1.) in the Deontological Code which states that 'The journalist has the obligation not to disclose his sources when they ask for their anonymity to be kept, or those sources for which their disclosure may put their life, their physical integrity or their job in jeopardy', thus, journalists can be sanctioned by the ethics board based on the

Deontological Code, so, they may have to ask the ethics board if they are allowed to disclose their sources.

Considering all of the above, it can be stated that there are minimum safeguards of journalistic sources in Romanian Law and they can be invoked in a Court of Law to provide a decent protection of the journalistic sources.

During the last year a trend has been noticed for citing national security for the purpose of issuing interception mandates by the highest Romanian court. This may actually be an infringement on the right to not disclose journalistic sources, as the possibility of forcing a journalist to reveal his source is bypassed through this method.¹¹ In the first 9 months of 2015, 224 mandates per month have been issued, and all of them have been accomplished through RIS (Romanian Information Service). This type of mandate offers lawful access not only to the person's phone, but also to every other phone which contains the phone number of the person the mandate is addressed to.

5. In the respective national legislation are the limits of non-disclosure of the information in line with the principles of the Recommendation No R (2000) 7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

5.1. National Legislation and the principle of the Recommendation No R (2000) 7

The principles of the Recommendation No R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information¹² are brought under the regulation in different national legislations, such as Law number 8/1996 published in the Official Gazette of Romania¹³ n. 60/26 March 1996 regarding copyrights and other rights connected in Article 91, Law n. 504/2002 published in the Official Gazette of Romania n. 534/22 July 2002 regarding the audio and video materials published to the public audience in Article 7, and Law n. 19/2003 published in the Official Gazette of Romania n. 34/22

¹¹ George Tarata, Alex Puiu, 'Cifra oficiala: ora si mandatul' (The Official Figure: the Hour and the Mandate, 11 October 2015) <[http://www.luju.ro/institutii/servicii-secrete/cifra-oficiala-ora-si-mandatul-in-primele-9-luni-din-2015-inalta-curte-a-emis-2-020-de-mandate-de-interceptare-pe-siguranta-nationala-adica-224-pe-luna-judecatorii-iccj-semneaza-cate-10-mandate-in-fiecare-zi-lucratoare-media-este-identica-cu-cea-din-2014->](http://www.luju.ro/institutii/servicii-secrete/cifra-oficiala-ora-si-mandatul-in-primele-9-luni-din-2015-inalta-curte-a-emis-2-020-de-mandate-de-interceptare-pe-siguranta-nationala-adica-224-pe-luna-judecatorii-iccj-semneaza-cate-10-mandate-in-fiecare-zi-lucratoare-media-este-identica-cu-cea-din-2014-) accessed 28 February 2016 [Romanian].

¹² - Adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministries' Deputies.

¹³ - Translated from *Monitorul Oficial R.A.* (The Gazette). The Gazette provides information to the population regarding promulgated bills, presidential decrees, governmental ordinances and other major legal acts.

January 2003 regarding the establishment and functioning of the National News Agency – ROMPRES.¹⁴

The limits of non-disclosure of the information are stated in the Recommendation No R (2000) 7 (*Adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministers' Deputies*) in Principle 3 "Limits of the right of non-disclosure" of the presented document.

In the Romanian legislation the principle is highlighted in Article 7, paragraph 6 of Law n. 504/2002 stating:

"The disclosure of a source of information may be ruled by the courts only if this measure is necessary for the defence of the national security or the public order, but also in those cases in which this disclosure is highly necessary for solving an on-going trial in case that:

a) There are no reasonable alternative measures of disclosure with similar effect or they have been exhausted; or

b) The legitimate interest of disclosure outweighs the legitimate interest of non-disclosure.'

Having in mind the paragraph mentioned above, the principles of the Recommendation No R (2000) 7 are in line with the Romanian legislation, because the elements of the limitation of this right are strictly mentioned and taken into consideration. The legislator is nominating "a competent authority of the member state" represented by the national courts. They have the role to determine if the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure or if the disclosure is highly necessary for a vital and serious cause. The judges have some limitation in ordering the disclosure, the one stated in paragraphs 6.a) and 6.b) of the Article 7 of Law n. 504/2002 that are in accordance with the one stated by paragraph b) of the Recommendation No R (2000) 7.

5.2. The Applied Procedures and Exceptional Circumstances

The disclosure of the sources of information is limited within the national legislation of Romania. The cases in which the disclosure of sources are to be sentenced by the courts, has to be done only if the disclosure is necessary in protecting the national security or for the public order, and for the judge/s to reach a decision in an on-going case in which the disclosure is highly necessary for solving the case. This hypothesis regulates only two situations, referred to when there are no other alternative sources in the disclosure with similar effect, or they have been exhausted and the situation in which the legitimate interest in the disclosure outweighs the legitimate interest of non-disclosure.¹⁵

The confidentiality of the sources of information of the expert personnel is assured by the regulation of Law n. 19/2003 regarding the establishment and functionality of the National Agency of Press – AGERPRES. The disclosure of sources can only be the subject of the judges' decisions and the action for exposing the sources must be initiated based on solid grounds, such

¹⁴ - Firstly named AGERPRES (in 1889), followed by the name ROMPRES established in 1990 and returning to the previous name in July 2008 according to the amendment of the Law n. 19/2003 in 2008.

¹⁵Law n. 504 (Broadcasting Law) 2002 [Legea audiovizualului].

as the public interest.¹⁶ Thus, the procedure is stated in two articles, as below:

Article 10 of Law n. 19/2003 regarding the establishment and functioning of the National News Agency - AGERPRES - "The confidentiality of the sources of information for the specialized personnel is assured by the presented Law. The disclosure of their sources, motivated by a public interest, may be ordered only by a final decision reached by the national courts."

Article 91 of Law n. 8/1996 published in the Official Gazette of Romania n. 60/26 March 1996 regarding copyrights and other connected rights - "(1) The editor or the producer, at the author's request, is forced to keep the secret of the sources of information used for the work created and not to publish documents referring to that.

(2) The disclosure of the secret is permitted only by the approval of the person that gave the information or by a final and irrevocable sentence reach by the national courts."¹⁷

5.3. Alternative Measures. ECHR Jurisprudence. Important ECHR Cases Concerning Romania

The jurisprudence of the national courts did not register any case in which their main action was to prove their overpower of forcing the journalists to disclose their sources of information. Thus, Romania doesn't have any jurisprudence in this regard.

The European Court of Human Rights highlighted, more than once, that Article 10 of the Convention is protecting not only the substance and the content of the information and ideas that the journalists are providing, but also the means that they are using for transmitting them. The jurisprudence of the Court offers an underestimated protection especially for the confidentiality of the journalists' sources. Thus, in the case *Goodwin v. The United Kingdom*, the Court states that the protection of the journalists' sources is one of the fundamental rocks of the freedom of press and that the absence of this kind of protection might discourage the journalists' sources from providing the necessary information in order to serve the public interests. Therefore, the press may be incapable of playing its' essential role as "the watchdog" and the capacity of the role of journalists in the society may be decreased. A binding disclosure may not be in accordance with Article 10 of the Convention besides the case that involves a superior public interest.

There are many cases brought to the European Court of Human Rights that show that the journalists were forced to disclose their sources, such as *Telegraaf Media Nederland Landelijke Media B.V. and others v. the Low Countries*, *Nagla v. Latvia*, *Sanoma Uitgevers B.V. v. the Low Countries*, *Financial Times Ltd and others v. the United Kingdom*, *Voskuil v. the Low Countries*, *Nordisk Film & TV A/S v. Denmark*, *Goodwin v. the UK*. There are also cases in which the inquisition at the journalist's domicile or at the work place of journalists were brought by the judges as a method of

¹⁶Law n. 19 (regarding the establishment and functioning of the National News Agency AGERPRES) 2003 [privind organizarea si functionarea Agentiei Nationale de Presa AGERPRES].

¹⁷Translated from *Monitorul Oficial R.A.* (The Gazette) in Romanian.

serving the public interest; these were discovered by the Court as a violation of Article 10 of the Convention, such as *Ivashchenko v. Russia*, *Ressiot and others v. France*, *Martin and others v. Belgium*, etc. In all of these cases, the general idea that is approaching all of them is the abuse of power that the government uses, in general, for different purposes. The two most significant cases for Romania in the jurisprudence of the Court connected to Article 10 of the Convention in terms of disclosing the press sources are a part of a more complex case. In both of the cases, *Stângu and Scutelnicu v. Romania* and *Cumpănă and Mazăre v. Romania*, the Court is uncertain of the plaintiff's argument according to which they did not present evidence to support their statements for protecting their sources. Consequently, the Court states that the plaintiffs' obligation to ensure a solid factual base of the statement does not involve, under any circumstances, the obligation of disclosing the name of the people that contributed to the information needed for the creation of the article. Moreover, in *Cumpănă and Mazăre v. Romania*, the elements that were brought to the judges' attention did not conclude during the entire penal procedure against the claimant that the report of the Court of Accounts (which was the main document that the claimants founded their claim) represented a confidential document which may have caused a real conviction and that it might have called upon a sanction to both the claimants, or their sources.¹⁸

In this regard, the Court states that the claimant shall not affirm that the national courts applied a wrongful sentence, because they gave nothing to the national courts in order to decide if the cause that they were pleading was or was not over the limits of the admissible critics.

In the *Stângu and Scutelnicu v. Romania* case, the claimants declared that, under the statement of professional secrecy, they found it impossible to enclose to the dossier the elements that might have proven the relevance and the truthfulness of their article, but the Court states that the obligation of the claimant of presenting a factual and solid base for their disputable statements does not imply the obligation of disclosing the name of their sources under any circumstances, as in the former case stated above.

¹⁸ *Cumpăna and Mazăre v. Romania* [2004] European Court of Human Rights, para 27 [English].

6. In the Recommendation No R (2000) 7 the Following Principles Should Be Respected When the Necessity of Disclosure Is Stated: Absence of Reasonable Alternative Measures, Outweighing Legitimate Interest (Protection of Human Life, Prevention of Major Crime, Defence of a Person Accused or Convicted of Having Committed a Major Crime). Under which Criteria Can the Interest in the Disclosure Outweigh the Interest in the Non-disclosure?

6.1. Introduction

The Romanian Broadcasting Law n. 504/2002 states that the confidentiality of journalistic sources used in conceiving or issuing news broadcasts and other elements of program services is guaranteed by law. Therefore, any journalist or program is free not to disclose information that could identify the source of information obtained directly connected with his professional activity. The confidentiality of journalistic sources obliges the journalist in return to 'assume responsibility for the accuracy of the information provided'.¹⁹

The aforementioned National provision states that:

'The disclosure of an information source may be ordered by the court only if necessary to protect national security or public order, and to the extent that such disclosure is necessary to resolve the case before the court when either there is no alternative measures have been exhausted or disclosure of similar effect or the legitimate interest of disclosure exceeds the legitimate interest of non-disclosure.'²⁰

Although the Romanian legislator has transposed the aforementioned condition of a necessary outweigh of legitimate interest of disclosure over the legitimate interest of non-disclosure, it has not enlisted the criteria the Recommendation No R (2000) 7 offers for the appreciation of whether 'the disclosure of information identifying a source should be deemed necessary' or not, specifically:

- an overriding requirement of the need for disclosure is proved,
- the circumstances are of a sufficiently vital and serious nature,
- the necessity of the disclosure is identified as responding to a pressing social need, and
- member states enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.'²¹

¹⁹ Law n. 504 (Broadcasting Law) 2002, article 7 para 4 [Legea Audiovizualului].

²⁰ Law n. 504 (Broadcasting Law) 2002, Article 7 para 6 [Legea Audiovizualului].

²¹ Recommendation No R (2000) 7, Principle 3 b.

Therefore, as the Romanian legislation does not expressly mention any criteria in appreciating the necessity of the disclosure, in case of litigation, the Court is enabled to appreciate whether the interest of disclosure exceeds the interest of non-disclosure or not. Of course, although having a certain margin of appreciation, judges must not subject the right of the journalist to non-disclosure to any other restrictions than those mentioned in Article 10, paragraph 2 of the ECHR. The criteria behind this margin of appreciation can be found in Article 53 of the Romanian Constitution that states the following:

“The exercise of certain rights or freedoms may only be restricted by law, and only if necessary, as the case may be, for the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe. Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom.”²²

6.2. Romanian Provisions Regarding the Interest on Disclosure

Analyzing the aforementioned provision, one can easily reach the conclusion that the condition of necessity of the disclosure can only be analyzed in close relation with the condition of proportionality of the disclosure. In the Decision of the Constitutional Court n. 279/2015²³, the Court states that in the analysis of the proportionality of a certain measure, the purpose sought by the lawmaker must be taken into consideration and whether this purpose is legitimate or not. The just equilibrium between the public and private interest has to be reached, and the Court is the only entity enabled to appreciate this equilibrium. Furthermore, the Romanian Constitutional Court Decision n. 461/2014²⁴ states that the retention and storage of personal data have to be expressly permitted by the law and, additionally, the entity which disposes the measure has to provide sufficient guarantees concerning the access to and utilization of the data. What is more, the measure has to respect the exigencies of non-discrimination and not affect the mere existence of the right or freedom in question.

Regarding the necessary and adequate character, the Romanian Constitutional Court has repeatedly stated that a measure has to be adapted to its legitimate purpose and it has to fulfill its requirements and be necessary in a democratic society. Moreover, the measure of restriction of one's liberties has to be exceptional, in other words, there must be no other available measures for the purpose to be attained.

²² Personal translation of Article 53 from *Constitutia Romaniei* (The Constitution of Romania).

²³ Decision n. 279 (Regarding the Exception of Unconstitutionality of Article 52 para 1b of Law n. 53/2003 - Labor Code) 2015 [Referitoare la excepția de neconstituționalitate a dispozițiilor art.52 alin.(1) lit.b) din Legea nr.53/2003 – Codul muncii].

²⁴ Decision n. 461 (Admitting the Objection of Unconstitutionality of the Law Amending the Government Emergency Ordinance n. 111/2011 on Electronic Communications) 2015 [asupra admiterii obiecției de neconstituționalitate a dispozițiilor Legii pentru modificarea și completarea Ordonanței de urgență a Guvernului nr. 111/2011 privind comunicațiile electronice].

Furthermore, not only the public interest can override the interest for non-disclosure, but also a legitimate private interest, as it is defined by the Law n. 554/2004 as the possibility to claim a conduct, in consideration of the realization of a subjective right of freedom. In the *Goodwin v. the United Kingdom* case, there was a disproportion between the disclosure of the source and the value of the private interest that was affected. Applying the *per a contrario* principle, one may come to the conclusion that had the interest of the society been of a significant value, there would have been the possibility for the Court to maintain the decision of the national Court that constrained the journalist to disclose his source.

6.3. Conclusions

To sum it up, as there are no expressly mentioned criteria in the Romanian legislation for weighing the opposite interests of disclosure and non-disclosure, the judge has to appreciate the prevailing interest relying on jurisprudential sources in order to interpret the concept of necessity, analyzed in close relation with that of proportionality. However, there are authors that give examples of cases when the interest of disclosure prevails:²⁵

- when the source in question is a fugitive or on the lookout for executing a penalty;
- when the source willingly determines the journalist to commit an infraction, for example, the disclosure of a state secret;
- when the protection of the source would be the equivalent of committing the infractions of Failure to report (Article 266 of the Romanian Criminal Code)²⁶, The omission to notify the judicial bodies (Article 267 of the Romanian Criminal Code)²⁷, Aiding and abetting a perpetrator (Article 269 of the Romanian Criminal Code)²⁸.

²⁵ 'Protectia surselor de informatii si principiile acesteia' (The Protection of Journalistic Sources and its' Principles) <<http://www.rasfoiesc.com/business/marketing/comunicare/Protectia-surselor-de-informat55.php>> accessed 4 May 2016 [Romanian]

²⁶ ART. 266 (Failure to report), Romanian Criminal Code

(1) The act of the individual who, becoming aware of the commission of an offense against human life or which resulted in the death of an individual, as provided by criminal law, does not notify the authorities immediately, shall be punishable by no less than 6 months and no more than 2 years of imprisonment or by a fine.

(2) Failure to report shall not be punishable when committed by a family member.

(3) A person who, before the commencement of criminal action against an individual for the commission of the offense that was not reported, notifies the relevant authorities concerning such offense or who, even after commencement of the criminal action, has facilitated the criminal action against the perpetrator or the other persons involved in the commission of the offense, shall not be punishable.

²⁷ ART. 267 (Omission to notify the judicial bodies) *ibid*

(1) The act of a public servant who, becoming aware of the commission of an offense criminalized by law in connection with the service where they work, omits to immediately notify the criminal investigation body, shall be punishable by no less than 3 months and no more than 3 years of imprisonment or by a fine.

(2) If the act is committed with basic intent, the penalty shall consist of no less than 3 months and no more than 1 years of imprisonment or a fine.

²⁸ ART. 269 (Aiding and abetting a perpetrator) *ibid*

7. In the light of the case law of the European Court of Human Rights how do national courts apply the respective laws with regard to the right to protect sources? In particular, how do they balance the different interests at stake?

7.1. Introduction. National Legislation. Article 10 of the European Convention on Human Rights

Romania ratified the European Convention on Human Rights on 20 June 1994. Since this moment, the European Court of Human Rights has played an important role in the protection of human rights. Also, through its convictions, the European Court has had a great influence on the matter of decriminalisation of the insult and the defamation from the previous Criminal Code.

In Romania, the most important law that protects the freedom of expression is the Constitution. Besides this, there is the Civil Code, where the freedom of expression is mentioned in a few articles, and also other related laws such as Law n. 544/2001 regarding the free access to public interest information and Law n. 504/2002 (the Broadcasting Law).

The right to freedom of expression is one of the rights protected by the European Convention on Human Rights in Article 10. It is not only important in its own right, but it also plays a central part in the protection of other rights under the Convention.²⁹

This involves a lot of interdependent elements such as: the freedom to hold opinions, the freedom to impart and receive information, the freedom of the press and so on. They are equally protected and they should be limited only in exceptional circumstances. The interference in the freedom of expression is allowed only when it goes against other rights that are protected in the Convention. In this case, the Court strikes a balance in order to establish the pre-eminence of one right over the other.³⁰ There are three requirements for the legitimate interference with the exercise of freedom of expression: the interference is prescribed by the law, the interference aims to protect one or more interests or values of great importance and the interference is necessary in a democratic society.

(1) The act of aiding and abetting a perpetrator, for the purposes of preventing or hindering the investigation in a criminal case, criminal liability, serving a sentence or a custodial sentence shall be punishable by no less than 1 and no more than 5 years of imprisonment or by a fine.

(2) The penalty for the individual who has aided and abetted the perpetrator may not exceed the penalty provided by the law for the offense committed by the perpetrator.

3) Aiding and abetting committed by a family member shall not be punishable.

²⁹ Monica Macovei, 'A guide to the implementation of Article 10 of the European Convention on Human Rights' <<http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-02%282004%29.pdf/>> accessed 2 April 2016.

³⁰ *ibid.*

To balance the interests at stake, the Court has its own classification in which the affirmations are divided in two: judgements of value and factual information. While the opinions are viewpoints or personal assessments of an event or situation and are not susceptible of being proven true or false, the underlying facts on which the opinion is based might be capable of being proven true or false.³¹ These are important criteria on which the Court bases its decisions on whether there is a violation of the freedom of expression or not.

7.2. Case Law of the European Court of Human Rights Regarding Romania's Convictions on Freedom of Expression

During the time, Romania did not have a lot of convictions regarding the protection of journalists and the freedom of expression, but there were some of great importance in our legislation such as: *Cumpănă and Mazăre v. Romania*, published in the Official Gazette of Romania n. 501, 14 June 2005; *Morar v. Romania*, published in the Official Gazette of Romania n. 141, 14 February 2016 and *Dalban v. Romania*, published in the Official Gazette of Romania n. 277, 20 June 2000. *Dalban v. Romania* will be presented in the next paragraph, being the case that emphasises the protection of journalists the most.

7.2.1. Case Law *Dalban v. Romania*

Case law *Dalban v. Romania* is one of the most important in our national legislation because it led to the decriminalisation of the insult and the defamation from the previous Criminal Code.

In this case law, Ionel Dalban, a journalist who ran a local weekly magazine called *Cronica Romașcană*, published in 1992 and in 1993 some investigations regarding frauds committed by the chief executive of a State-owned agricultural company, FASTROM of Roman (previously known as the Roman *LAS* or State farm). He was sentenced to suspended prison, had to pay damages and he was also banned from practising his profession for an indefinite period. Considering the fact that Ionel Dalban died, his wife, Elena Dalban, notified the European Court of Human Rights, claiming that her husband's right to freedom of expression was violated. The Court unanimously decided that there was indeed a violation of Article 10 of the Convention and that the State is to pay the applicant's widow a non-pecuniary damage. The Court based its conviction on the following:

'One factor of particular importance for the Court's determination of the present case is therefore the essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is, nevertheless, to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. In addition, the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation. In cases such as the present one, the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its

³¹ *ibid.*

rightful role of “public watchdog” in imparting information of serious public. It would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth’.³²

7.3. Relevant National Jurisprudence and Conclusions

Romanian jurisprudence also has some interesting cases regarding the freedom of expression. One of them was the case of a Senate candidate who complained about the defaming affirmations made during a TV show. The Romanian Court considered that the information regarding his candidature was a topic of general interest and therefore his request was dismissed. The Court motivated its decision based on Article 10 of the European Convention on Human Rights and its jurisprudence.

In another case law, the Romanian Court decided in favour of the plaintiff, a police officer who complained about some personal details, including a letter regarding her marriage that was published in a newspaper. The Court considered that publishing the article and the letter was not a matter of general interest and therefore the freedom of expression should be limited. The newspaper’s owners had to pay non-pecuniary damages, but the Court made sure they were proportional with the injury so that the journalists were not discouraged to publish certain details about public figures in the future. When analysing the freedom of expression, one must take into consideration that the Convention also protects another right in Article 8: a right to respect for one’s private and family life, his home and his correspondence. In a democratic society, such as the one we live in, all the rights from the Convention must be equally protected and one must know how to mark the limits between the two.

To sum up, all these convictions Romania has faced throughout the last decades have something in common: they all had a major impact on our national legislation because they led to the decriminalisation of the insult and the defamation in 2006, which was a very controversial topic. This can only be good for the journalists, as they cannot be held responsible for every affirmation they make or for every personal detail they publish. Before this, it was easier for the people to bring criminal charges for minor offences against journalists who were simply doing their job. The decriminalisation of the insult and the defamation comes as a greater protection to the journalists’ rights. It can be said that the protection the journalists are benefiting from now is wider and more secure and therefore the freedom of expression can only be limited in exceptional circumstances. In 2007, the Romanian Constitutional Court decided that the law that decriminalised the insult and the defamation was not constitutional. It was considered that people are free to express themselves but they must not use this freedom to act in bad faith and violate the rights of others. Over the time, there have been a lot of disputes whether to apply the law or the Constitutional Court decision. All of these ended with the actual Criminal Code, where the insult and the defamation are no longer incriminated. There are still a lot of people who do not agree with this decision, considering that the freedom of expression is compatible

³² *Dalban v. Romania* [1999] European Court of Human Rights, The Official Gazette of Romania n. 277 [2000] [English].

with the incrimination of the insult and the defamation, but the legislator balanced the interests at stake and decided that they need to stay repealed.

8. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

8.1. History and Current Legal Provisions

The current Criminal Procedure Code provides more rigorous legal norms, defining the concept of technical surveillance and qualifying it.

Technical surveillance includes electronic surveillance and it may be granted by the Judge of Rights and Liberties or the prosecutor, provided several conditions described in Article 139 of the Criminal Procedure Code are fulfilled:

Firstly, there must be **a reasonable suspicion** that a person is preparing or has already committed one of the crimes that are listed under the second paragraph of the same article. These crimes include crimes against national safety regulated by the Criminal Code and other National Laws, trafficking, drug trafficking, arm trafficking, terrorism acts, money laundering, counterfeiting, blackmail, rape, deprivation of liberty, tax evasion, corruption, crimes against the financial interest of the European Union, and other crimes for which the law regulates a 5 year jail sentence or more.

This reasonable suspicion was considered a subjective matter, it cannot be quantified, it differs from one person to another and, as a result, it was criticized and considered inadequate for procedural norms that are uninterpretable through their essence.

Secondly, given the particularities of the case, the **importance of the information** or the evidence that shall be obtained or the gravity of the crime, the measure **has to be proportional** to the limitation of the fundamental rights. This condition does not create difficulties in interpretation.

Lastly, **the evidence should not be able to be obtained in any other way** or their obtaining should imply great difficulties that would harm the inquiry or there should be a danger for the safety of the people or of some valuable goods. This reference to valuable goods, without any criteria indicated in the norms was deemed able of leading to a differentiated jurisprudence.

This new Criminal Procedure Code entered to force in 2014, bringing out of force the previous one.

Our previous Criminal Procedure Code has been the cause of several convictions for Romania at the European Court of Human Rights.

The previous Criminal Procedure Code has brought several convictions against Romania for not meeting the required criteria, especially the foreseeability one and the existence of clear legislative norms.

In cases *Raducu v. Romania*³³, *Calmanovici v. Romania*³⁴ and *Dumitru Popescu v. Romania*³⁵, the Court has stated repeatedly that the legal provisions present in the old Criminal Procedure Code, prior to the modifications brought by Law n. 281/2003, are incompatible with the minimum degree of protection that Article 8 of the European Human Rights Convention aims at.

The Court acknowledges that Law n. 281/2003 has brought many changes in the method of regulation, bringing several guarantees regarding the interception, transcription, archiving and destruction of data gathered from personal communications.

But, even after these changes in legislation, Romania has been convicted by the European Court of Human Rights for lacking adequate guarantees in the field of private life with regards to technical surveillance.³⁶

With regards to the technical surveillance and especially cell phones tapping, the Court has constantly concluded that an *a priori* control or an *a posteriori* control by a judge or another independent authority of the authorization issued by the prosecutor is lacking in the previous Criminal and Criminal Procedure Code.

The new Criminal Procedure Code aimed at eliminating the flaws of the old one, by making the legislation more accessible, more foreseeable and more predictable.

Considering the fact that the law is considerably new, there is little or no case law regarding the predictability, accessibility, foreseeability and clarity of the norms.

8.2. Special Legislation

Special legislation that includes the Law regarding the Romanian Information Services, a state organized service specialized in the field of Romania's national safety information and a part of the national defence system, working under direct supervision of the Supreme Defence Council,

³³ *Raducu v. Romania* [2009] European Court of Human Rights [English].

³⁴ *Calmanovici v. Romania* [2008] European Court of Human Rights [English].

³⁵ *Dumitru Popescu v. Romania* [2007] European Court of Human Rights [English].

³⁶ *Ulariu v. Romania* [2013] European Court of Human Rights [English].

n. 14/1992 and the Law regarding Romanian National Security n. 51/1991 allow the usage of technical surveillance under certain conditions and procedures regulated within these laws.

Article 10 of Law n. 14/1992 allows the Romanian Information Service to take the necessary actions specific for the gathering of the necessary information in case that there is a national security threat. These actions can be restrictive for some of the fundamental rights that a person has.

Prior to the entering into force of Law n. 255/2013, there was no method of control of these activities, no approval of these warrants by any judges, an aspect that has led to the conviction of the Romanian state in many cases.

For example, even after these legal changes, the European Court of Human Rights has stated:

‘The possibility to notify the commissions of defence and public order of the two chambers of the Parliament cannot compensate for the lack of any a priori or a posteriori control of the surveillance by an independent and impartial authority. As it is regulated now, the legislative power’s control seems more theoretical and lacking any practical effects for individuals. Furthermore, the law does not provide any sanctions or measures that the parliamentary commissions can take in case that they find any breaches of the law in the actions taken by the authorities that authorized the interceptions.’ (Case Dumitru Popescu v. Romania, 27 April 2007³⁷)

Article 3 of Law n. 51/1991 contains an exhaustive enumeration of what constitutes a threat to the Romanian national safety. Article 13 of the same law prescribes the course of action that Romanian authorities can take in order to obtain the required information. This includes physical surveillance, obtaining data generated or processed by electronic communications public providers and any technical surveillance needed.

In the same case, *Dumitru Popescu v. Romania*, the Court has established that technical surveillance can still be authorized by means of this law that has not been taken out of force yet, thus reinforcing the conclusion that this law does not contain clear legislative norms and enough guarantees against arbitrary.

8.3. Doctrinary Analysis

According to both jurisprudence and doctrine, in order for a limitation to be in accordance with the Convention, it must fulfill several conditions.

Firstly, it has to be regulated by a national law, this in turn implying two other criteria: the law must be both accessible and predictable. The accessibility condition is fulfilled by the Romanian national law, as many authors conclude, but the predictability condition may pose several issues.

³⁷ *Dumitru Popescu v. Romania* [2007] European Court of Human Rights [English].

According to Corneliu Birsan, a renowned Romanian author, the predictability of the law implies that it is written with sufficient precision to allow the citizen to adjust his social conduct and to foresee within reasonable conditions the consequences of a certain conduct.³⁸

He also states that even though an absolute predictability of the law is practically impossible, due to the necessity of the law to adapt to social circumstances and changes, this level is to be desired by the legislator in his endeavors.

A second condition that the national law must meet is the pursuing of a legitimate aim through its restrictions. Even though the list of crimes for which the electronic surveillance can be granted has grown with the new Code, considering the nature of these crimes, this condition will usually be fulfilled by the measure, considering the social interest it will most likely fulfill.

Another criteria is that the necessity of the limitation has to be a democratic solution. This being one of the most volatile conditions, it is likely that it will cause some difficulties in the future application of the law. This condition is also one that caused many conviction of the Romanian state for the previous Criminal Code.

The last criteria is the proportionality of the measure with its aim. This condition assures the minimization of the dissuasive effect the measure has on journalists and other media actors as well as allows the state to take the necessary actions. This condition has led to the conviction of Romania in *Cumpana and Mazare v. Romania*³⁹ for the fact that the two journalists accused of publishing a defamatory article were sentenced to jail as well as had their license revoked, never being permitted to profess in the journalistic domain forth - these sanctions were considered by the Court as being excessive.

With regards to the new Criminal Procedure Code, despite the fact that there are no recent convictions against Romania on the basis of illegal technical surveillance, many authors have already analyzed the content of the provisions with regard to the standards imposed by European legislation and jurisprudence. The new code may have resolved most of the irregularities sanctioned in the past by the European Court of Human Rights, but some aspects need a greater clarification and implementation.

According to Gheorghită Mateuț:

“The simple possibility that the discussions between an attorney and his client can be intercepted constitutes a violation of the right of private life and the right to a secret correspondence, but also the right to a defence, as a main component of the right to a fair trial. We believe that Article 139 (4) from the Criminal Procedure Code does not provide sufficient warrantees, as it does not eliminate the risk of prejudice suffered by the party that has had his discussion with his attorney intercepted, discussions that may contain

³⁸ Corneliu Birsan, *Convenția Europeană a Drepturilor Omului. Comentariu pe Articole* (2nd edn, CH Beck 2006) 674 [Romanian].

³⁹ *Cumpana and Mazare v. Romania* [2004] European Court of Human Rights [English].

information regarding the object of the criminal procedures, being able to lead the judiciary organs to the obtaining of new evidence by other probatory means.⁴⁰

Apart from these concerns regarding the predictability of the law, another issue was raised regarding the competence of the Romanian Information Service to emit technical surveillance warrants.

Such an extension in the material competence of the Romanian Information Service in the exclusive attributions of the courts and in the act of justice in general, exceeds the lines of a democratic society, representing an infringement of the democratic values consecrated by the European Court of Human Rights.⁴¹

9. Can Journalists Rely on Encryption and Anonymity Online to Protect Themselves and Their Sources Against Surveillance?

9.1. Introduction

The Romanian National Law makes no reference towards the illegality of data encryption. Therefore, in normal circumstances, journalists may protect themselves or their sources using both data encryption and online anonymity. However, in the case of reasonable suspicion in relation to the preparation or commission of certain offenses defined by the Romanian law, the issue of the equilibrium between the public and private interest can be put up to discussion, as mentioned below.

9.2. Journalists' Protection Against Surveillance

Firstly, as far as electronic surveillance is concerned, the Romanian National law does not offer journalists special protection in virtue of their profession. Therefore, the relevant general laws apply to the same extent to journalists as well as all other persons.

As there is no specific regulation in the Romanian legislation, the general principles of law apply. Hence, Article 8 of the ECHR is applicable.

In the *Keegan v. Ireland* decision⁴², the Court states that the essential object of Article 8 (art. 8) is to protect the individual against arbitrary action by the public authorities. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of

⁴⁰ Gheorghita Mateut, *'Garantarea secretului profesional al avocatului in lumina noului Cod de procedura penala'* in *'Avocatura in Romania – 150 de ani in linia intai a luptei pentru Drept'* (Hamangiu 2015) [Romanian].

⁴¹ Doru Ioan Cristescu, Victor Catalin Enescu, *'Puncte de vedere privind administrarea si expertizarea probelor multimedia'* (Points of View Regarding the Administration and the Expertise of Multimedia Evidence, 4 March 2014) <<http://www.juridice.ro/312158/puncte-de-vedere-privind-administrarea-si-expertizarea-probelor-multimedia.html/>> accessed 28 April 2016.

⁴² *Keegan v. Ireland* [1994] European Court of Human Rights [English].

the community as a whole; [...] the State enjoys a certain margin of appreciation [in appreciating this balance]. The principle is reiterated in the subsequent case law of the ECHR (e.g.: *Kroon and others vs. Netherlands*⁴³).

Therefore, although both data encryption and Internet anonymity are both legal in the Romanian judiciary system, the public interest of identifying suspects and outlining the circumstances of criminal actions prevails over the journalist's private interest. In such cases, it is the state's prerogative to analyze the proportionality and necessity of disposing the measure of electronic surveillance. Moreover, Article 142 of the Romanian Criminal Procedure Code states that data resulted from electronic surveillance measures may be used also in other criminal case if they contain eloquent and useful data or information regarding the preparation or commission of another crime of those set forth.

More importantly, according to Article 154 of the Romanian Criminal Procedure Code, the prosecutor supervising or conducting the criminal investigation may order immediate preservation of computer data, including of data referring to information traffic, that were stored by means of a computer system and that is in the possession or under the control of a provider of public electronic communication networks or of a provider of electronic communication services intended for the public, in the event that there is a danger that such data may be lost or altered. If the aforementioned preserved computer data is classified, regardless of the fact that there may not be any connection with the object of the criminal investigation in question, the information resulted from the preservation must be kept confidential.⁴⁴ However, the prosecution body has the right to access and analyze the classified information.⁴⁵ *A minori ad major*, even if a piece of information is encrypted, regardless of its source, the prosecution body can access it, analyze it and use it as evidence in criminal trial.

9.3. Conclusions

To sum up, it is legal for journalists to use data encryption and anonymity online, but these measures of precaution will not be effective when conducted upon data that are investigated in a criminal trial.

⁴³ *Kroon and others v. Netherlands* [1994] European Court of Human Rights [English].

⁴⁴ Nicolae Volonciu, Andreea Simona Uzlaeu, 'Noul Cod de Procedura Penala Comentat' (Bucuresti, Hamangiu 2014) [Romanian].

⁴⁵ Dec. n. 140 (for judges' and Supreme Court assistant magistrates' access to classified information) 2014 [Hotararea CSM pentru aprobarea Regulamentului privind accesul judecatorilor, procurorilor si magistratilor asistenti ai ICCJ la informatii clasificate]

10.Are whistle blowers explicitly protected under law protecting journalistic sources? Is there another practice protecting whistle blowers? Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

10.1. Introduction

The risk of corruption is significantly increasing in environments where the reporting of any kind of information or activity that is illegal, unethical is not supported or protected. Employees from public or private sectors are the first that have access to information related to their workplace and practices, but unfortunately, due to this fact, they may be the subject of intimidation, harassment or even violence by their fellow colleagues or superiors. Whistleblower protection is therefore important to encourage the reporting of misconduct, fraud and corruption and can also be an effective tool.

10.2. Protection at International Level

First of all, whistleblower protection has been recognized by all major international instruments concerning corruption, among which we can mention: The 1998 OECD Recommendation on Improving Ethical Conduct in the Public Service including the Principles for Managing Ethics in the Public Service and the 2003 OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service, The 2009 Recommendation of the OECD Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. Furthermore, the Council of Europe has developed a legal instrument on protecting individuals: Recommendation [CM/Rec\(2014\)7](#) on the protection of whistleblowers.

10.3. Protection at National Level

As far as Romania is concerned, there is a specific law on whistleblowing protection since 2004: Law n. 571/2004. Romania was the first country in the continental legislative system to have a comprehensive whistleblower protection act. Regarding this fact, we have to mention here that this law covers only the personnel from the public sector. The initiative in adopting the legislation to protect whistleblowers appeared as a result of an advocacy campaign as part of a larger project meant to improve integrity in the public sector. According to the Romanian Whistleblower's Law, a *whistleblower* is

‘the person making a notice in good faith concerning any fact involving a violation of law, of professional deontology or of principles of a good administration, of efficiency, effectiveness, economic efficiency and transparency and which is employed in one of the public authorities and institutions within the central public administration, local public administration, in the apparatus of the Parliament, the work apparatus of the Presidential Administration, the work apparatus of the Government, autonomous administrative authorities, cultural public institutions, education, health and social assistance fields, national companies, national and local interest public corporations, as well as to national state capital companies’

Although in theory Law n. 571/2004 covers a plethora of disclosure activities, in practice the implementation suffers, as public servants have no knowledge of it most of the time, and public

institutions prove to be reluctant in applying its provisions.⁴⁶ There is also a mentality issue: whistleblowers are seen as violating the principle of conformity and treated as outcasts, traitors.

We have to mention that, regarding the private sector, private companies can adopt their own rules through internal regulations. In other words, whistleblowers from the private sector are protected in a lesser degree, but they may still be able to enter the Witness Protection Program, falling under the provisions of Law n. 682/2002. Thus, their personal information is protected, including their identity.

In Article 7 of Law n. 571/2004 it is stated that the whistleblower's identity must be protected if the person making a disclosure does so against his or her hierarchical superior.

In conclusion, from the legal point of view, whistle blowers are protected by laws and the judicial system, but they nevertheless fear the public opprobrium and even harassment. This may come from a lack of understanding the law and poor awareness of their rights.

11. Conclusion

Answering the first question of the report meant delivering a scientific document that included a relevant introduction for the whole research. Taking this into consideration, the report can be divided into the introductory part which includes a short resume of the evolution in time of the subject, then going on to international influences and national facts from past until present. The theoretical part includes an analysis of all national legislation that provides protection of the right of the journalists not to disclose their source of information.

Romanian legislation does not provide a clear disposition which would state the prohibition of disclosing journalists sources due to the fact that Constitutional Court stated the fact that Law of Press 3/1974 is currently repealed. Taking into consideration the fact that this was the only national instrument which stated this prohibition, in order to "recreate" this prohibition in the national order courts it is necessary to use international law before a new law on the matter is adopted.

A journalist is a person that handles the collecting, photographing, recording, writing, editing or publishing information regarding local events, national, international, of public interest, with the purpose of publicly spreading this information, earning his living in a considerable proportion from this activity. This definition is quite open to interpretation, its content being not restricted.

The protection that is given to journalists is also provided for the headquarters of radio transmitters and other entities.

⁴⁶ *Report on whistleblowing in Romania*, Transparency International Romania.

It can be stated that there are minimum safeguards of journalistic sources in Romanian Law and they can be invoked in a Court of Law to provide a decent protection of the journalistic sources, starting with European legal safeguards and going all the way to the Deontological Code adopted by the media organizations.

The principles of the 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 are brought under the regulation in different national legislation. The limits of the right of non-disclosure are well developed and in line with the principle number 3 of the Recommendation, where the competent authority to give judgment on whether the disclosure of the sources of information is the only solution in a particular case or not, is in the hands of the national courts.

As there are no expressly mentioned criteria in the Romanian legislation for weighing the opposite interests of disclosure and non-disclosure, the judge has to appreciate the prevailing interest relying on jurisprudential sources in order to interpret the concept of necessity, analyzed in close relation with that of proportionality

The answer for question 7 was based on the jurisprudence of the European Court of Human Rights and how our national legislation has changed during the years. More cases were mentioned, but only the most important one was analysed: Dalban v. Romania. The conclusion to it was that there has been a violation of Article 10 of the European Convention on Human Rights. This case law played an important role and was the source of great changes in our national legislation.

Also, a brief presentation of Article 10 of the European Convention on Human Rights was made. In the end, some relevant national jurisprudence and some conclusions about the protection of journalists were displayed.

The criteria for using electronic surveillance are reasonable suspicion that the persona is preparing or has already committed one of several crimes, the importance of the information or the evidence that shall be obtained or the gravity of the crime and the impossibility to obtain the information in any other ways or the obtaining should prove extremely difficult. The previous Criminal Procedura Code has brought many convictions against Romania at the European Court of Human Rights, but the new Criminal Procedure Code has brought many improvements.

There is no caseload for this new legislation, but specialists conclude the new provisions are a great improvement.

As for whether or not journalists can rely on encryption and anonymity online to protect themselves and their sources against surveillance is concerned, it is legal for journalists to use data encryption and anonymity online, but these measures of precaution will not be effective when conducted upon data that are investigated in a criminal trial

From the legal point of view whistle blowers are protected by laws and the judicial system, but they nevertheless fear the public opprobrium and even harassment. This may come from a lack of understanding the law and poor awareness of their rights.

12. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

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- Law n. 504 (The Broadcasting Law, Regarding the Audio and Video Materials Published to the Public Audience) 2002 [Legea Audiovizualului].
- Law n. 19 (Regarding the Establishment and Functioning of the National News Agency AGERPRES) 2003 [privind organizarea si functionarea Agentiei Nationale de Presa AGERPRES].
- Law n. 571 (Regarding the Protection of the Personnel Belonging to Public Authorities, Public Institutes and Other Entities Who Report Breaches of the Law) 2004 [privind protectia personalului din autoritățile publice, instituțiile publice și din alte unități care semnalează încălcări ale legii].
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12.2. Case Law

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13. Table of Provisions

Provisions in native language	Corresponding translation
<p>Art. 11 Constitutia Romaniei</p> <p>(1) Statul român se obligă să îndeplinească întocmai și cu bună-credință obligațiile ce-i revin din tratatele la care este parte.</p> <p>(2) Tratatelor ratificate de Parlament, potrivit legii, fac parte din dreptul intern.</p> <p>(3) În cazul în care un tratat la care România urmează să devină parte cuprinde dispoziții contrare Constituției, ratificarea lui poate avea loc numai după revizuirea Constituției.</p>	<p>Art. 11 of the Constitution of Romania</p> <p>(1) The Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to.</p> <p>(2) Treaties ratified by Parliament, according to the law, are part of national law.</p> <p>(3) If a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution.</p>
<p>Art. 30 Constitutia Romaniei</p> <p>(1) Libertatea de exprimare a gândurilor, a opiniilor sau a credințelor și libertatea creațiilor de orice fel, prin viu grai, prin scris, prin imagini, prin sunete sau prin alte mijloace de comunicare în public, sunt inviolabile.</p> <p>(2) Cenzura de orice fel este interzisă.</p> <p>(3) Libertatea presei implică și libertatea de a înființa publicații.</p> <p>(4) Nici o publicație nu poate fi suprimată.</p> <p>(5) Legea poate impune mijloacelor de comunicare în masă obligația de a face publică sursa finanțării.</p> <p>(6) Libertatea de exprimare nu poate prejudicia demnitatea, onoarea, viața particulară a persoanei și nici dreptul la propria imagine.</p> <p>(7) Sunt interzise de lege defăimarea țării și a națiunii, îndemnul la război de agresiune, la ură națională, rasială, de clasă sau religioasă, incitarea la discriminare, la separatism teritorial sau la violență publică, precum și manifestările obscene, contrare bunelor moravuri.</p>	<p>Art. 30 of the Constitution of Romania</p> <p>(1) 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.</p> <p>(2) Any censorship shall be prohibited.</p> <p>(3) Freedom of the press also involves the free setting up of publications.</p> <p>(4) No publication shall be suppressed.</p> <p>(5) The law may impose upon the mass media the obligation to make public their financing source.</p> <p>(6) Freedom of expression shall not be prejudicial to the dignity, honour, privacy of a person, and to the right to one's own image.</p> <p>(7) 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.</p> <p>(8) 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,</p>

<p>(8) Răspunderea civilă pentru informația sau pentru creația adusă la cunoștință publică revine editorului sau realizatorului, autorului, organizatorului manifestării artistice, proprietarului mijlocului de multiplicare, al postului de radio sau de televiziune, în condițiile legii. Delictele de presă se stabilesc prin lege.</p>	<p>under the terms laid down by law. Indictable offences of the press shall be established by law.</p>
<p>Art. 31 Constituția României (1) Dreptul persoanei de a avea acces la orice informație de interes public nu poate fi îngrădit. (2) Autoritățile publice, potrivit competențelor ce le revin, sunt obligate să asigure informarea corectă a cetățenilor asupra treburilor publice și asupra problemelor de interes personal. (3) Dreptul la informație nu trebuie să prejudicieze măsurile de protecție a tinerilor sau securitatea națională. (4) Mijloacele de informare în masă, publice și private, sunt obligate să asigure informarea corectă a opiniei publice. (5) Serviciile publice de radio și de televiziune sunt autonome. Ele trebuie să garanteze grupurilor sociale și politice importante exercitarea dreptului la antenă. Organizarea acestor servicii și controlul parlamentar asupra activității lor se reglementează prin lege organică.</p>	<p>Art. 31 of the Constitution of Romania (1) A person's right of access to any information of public interest shall not be restricted. (2) The public authorities, according to their competence, shall be bound to provide correct information to the citizens in public affairs and matters of personal interest. (3) The right to information shall not be prejudicial to the measures of protection of young people or national security. (4) Public and private media shall be bound to provide correct information to the public opinion. (5) Public radio and television services shall be autonomous. They must guarantee any important social and political group the exercise of the right to broadcasting time. The organization of these services and the parliamentary control over their activity shall be regulated by an organic law.</p>
<p>Art. 53 Constituția României (1) Exercițiul unor drepturi sau al unor libertăți poate fi restrâns numai prin lege și numai dacă se impune, după caz, pentru: apărarea securității naționale, a ordinii, a sănătății ori a moralei publice, a drepturilor și a libertăților cetățenilor; desfășurarea instrucției penale; prevenirea consecințelor unei calamități naturale, ale unui dezastru ori ale unui sinistru deosebit de grav. (2) Restrângerea poate fi dispusă numai dacă</p>	<p>Art. 53 of the Constitution of Romania The exercise of certain rights or freedoms can only be restricted by law, and only if necessary, as the case may be, for the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe. Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation that has caused</p>

<p>este necesară într-o societate democratică. Măsura trebuie să fie proporțională cu situația care a determinat-o, să fie aplicată în mod nediscriminatoriu și fără a aduce atingere existenței dreptului sau a libertății.</p>	<p>it and it shall be applied without discrimination, and without infringing on the existence of such right or freedom.</p>
<p>Art. 63, Legea nr. 3/1974 Organele de presa nu sînt obligate sa dezvaluie celor vizati sursele de informație pe baza cărora au elaborat materialele difuzate, sursele nedezvaluite constituind secret profesional.</p>	<p>Art. 63 of the Law n. 3/1974 The media bodies may not be compelled to divulge to those who are targeted the sources of information upon which they created the broadcasted materials, the sources being part of professional secrecy.</p>
<p>Art. 7, Legea nr. 8/1996 Constituie obiect al dreptului de autor operele originale de creație intelectuală în domeniul literar, artistic sau științific, oricare ar fi modalitatea de creație, modul sau forma de exprimare și independent de valoarea și destinația lor, cum sunt: a) scrierile literare și publicistice, conferințele, predicile, pledoariile, prelegerile și orice alte opere scrise sau orale, precum și programele pentru calculator; b) operele științifice, scrise sau orale, cum ar fi: comunicările, studiile, cursurile universitare, manualele școlare, proiectele și documentațiile științifice; c) compozițiile muzicale cu sau fără text; d) operele dramatice, dramatico-muzicale, operele coregrafice și pantomimele; e) operele cinematografice, precum și orice alte opere audiovizuale; f) operele fotografice, precum și orice alte opere exprimate printr-un procedeu analog fotografiei; g) operele de artă grafică sau plastică, cum ar fi: operele de sculptură, pictură, gravură, litografie, arta monumentală, scenografie, tapiserie, ceramică, plastica sticlei și a metalului, desene, design, precum și alte opere de artă aplicată produselor destinate unei utilizări practice; h) operele de arhitectură, inclusiv planșele,</p>	<p>Art. 7 of the Law n. 8/1996 The subject matter of copyright shall be original works of intellectual creation in the literary, artistic, or scientific field, regardless of their manner of creation, specific form or mode of expression and independently of their merit and purpose, such as: (a) literary and journalistic writings, lectures, sermons, pleadings, addresses and any other written or oral works, and also computer programs; (b) scientific works, written or oral, such as presentations, studies, university textbooks, school textbooks and scientific projects and documentation; (c) musical compositions with or without words; (d) dramatic and dramatico-musical works, choreographic and mimed works; (e) cinematographic works and any other audiovisual works; (f) photographic works and any other works expressed by a process analogous to photography; (g) works of three-dimensional art such as: works of sculpture, painting, drawing, engraving, lithography, monumental art, stage design, tapestry, ceramics, glass and metal shaping, and also works of art applied to products intended for practical use; (h) works of architecture, including sketches, scale models and the graphic work that constitutes an architectural project;</p>

<p>machetele și lucrările grafice ce formează proiectele de arhitectură; i) lucrările plastice, hărțile și desenele din domeniul topografiei, geografiei și științei în general.</p>	<p>(i) three-dimensional works, maps and drawings in the field of topography, geography and science in general.</p>
<p>Art. 91, Legea nr. 8/1996 (1) Editorul sau producătorul, la cererea autorului, este obligat să păstreze secretul surselor de informații folosite în opere și să nu publice documentele referitoare la acestea. (2) Dezvăluirea secretului este permisă cu consimțământul persoanei care l-a încredințat sau în baza unei hotărâri judecătorești, definitive și irevocabile.</p>	<p>Art. 91 of the Law n. 8/1996 (1) At the author's request, the publisher or producer shall be obliged to preserve the secrecy of the information sources used in the works and to abstain from publishing documents referring thereto. (2) The lifting of the secrecy shall be permitted with the consent of the person who has requested it or on the basis of a final and irrevocable judgment.</p>
<p>Art. 113, Legea nr. 8/1996 Organismele de radiodifuziune și de televiziune au dreptul patrimonial exclusiv de a autoriza sau de a interzice, cu obligația pentru cel autorizat de a menționa numele organismelor, următoarele: a) fixarea propriilor emisiuni și servicii de programe de radiodifuziune sau de televiziune; b) reproducerea prin orice mijloc și sub orice formă a propriilor emisiuni și servicii de programe de radiodifuziune sau de televiziune fixate pe orice fel de suport, indiferent dacă au fost transmise prin fir sau fără fir, inclusiv prin cablu sau satelit; c) distribuirea propriilor emisiuni și servicii de programe de radiodifuziune sau de televiziune fixate pe orice fel de suport; d) importul, în vederea comercializării pe piața internă, a propriilor emisiuni și servicii de programe de radiodifuziune sau de televiziune fixate pe orice fel de suport; e) retransmiterea sau reemiterea propriilor emisiuni și servicii de programe de radiodifuziune sau de televiziune prin mijloace fără fir, prin fir, prin cablu, prin satelit sau prin orice alt procedeu similar,</p>	<p>Art. 113 of the Law n. 8/1996 Radio and television broadcasting organizations shall have the exclusive economic right to authorize or to prohibit the following, subject to the authorized person's obligation to mention the name of the organizations: (a) the fixing of their own broadcasts and services of radio or television programs; (b) reproduction, in whole or in part, direct or indirect, temporary or permanent, by any means and under any form, of their own broadcasts and services of radio or television programs fixed on any kind of physical medium, regardless whether transmitted by wire or wireless, including by cable or satellite; (c) the distribution of their own broadcasts and services of radio or television programs fixed on any kind of physical medium; (d) the import for trading on domestic market of their own broadcasts and services of radio or television programs fixed on any kind of physical medium; (e) the retransmission or reemission of their own broadcasts and services of radio or television programs by wireless means, by wire, by cable, by satellite or by any other</p>

<p>precum și prin orice alt mod de comunicare către public, inclusiv retransmiterea pe Internet;</p> <p>f) comunicarea publică a propriilor emisiuni și servicii de programe de radiodifuziune sau de televiziune în locuri accesibile publicului, cu plata intrării;</p> <p>g) Închirierea propriilor emisiuni și servicii de programe de radiodifuziune sau de televiziune, fixate pe orice tip de suport;</p> <p>h) Împrumutul propriilor emisiuni și servicii de programe de radiodifuziune sau de televiziune fixate pe orice fel de suport;</p> <p>i) punerea la dispoziția publicului a propriilor emisiuni și servicii de programe de radiodifuziune sau de televiziune fixate pe orice fel de suport, indiferent dacă au fost emise prin fir sau fără fir, inclusiv prin cablu sau satelit, astfel încât să poată fi accesate în orice loc și în orice moment ales, în mod individual, de către public.</p>	<p>similar proceeding, as well as by any other mode of communication to the public, including retransmission through Internet;</p> <p>(f) the communication to the public of their own broadcasts and services of radio or television programs in places accessible to the public, against payment of an admission charge;</p> <p>(g) the rental of their own broadcasts and services of radio or television programs, fixed on any kind of physical medium;</p> <p>(h) the lending of their own broadcasts and services of radio or television programs, fixed on any kind of physical medium;</p> <p>(i) the making available to the public of their own broadcasts and services of radio or television programs, fixed on any kind of physical medium, regardless whether emitted by wire or wireless, including by cable or satellite, so that members of the public may access them from a place and at a time individually chosen by them.</p>
<p>Art. 3, Legea nr. 51/1991 Constituie amenințări la adresa securității naționale a României următoarele:</p> <p>a) planurile și acțiunile care vizează suprimarea sau știrbirea suveranității, unității, independenței sau indivizibilității statului român;</p> <p>b) acțiunile care au ca scop, direct sau indirect, provocarea de război contra țării sau de război civil, înlesnirea ocupației militare străine, aservirea față de o putere străină ori ajutorarea unei puteri sau organizații străine de a săvârși oricare din aceste fapte;</p> <p>c) trădarea prin ajutorarea inamicului;</p> <p>d) acțiunile armate sau orice alte acțiuni violente care urmăresc slăbirea puterii de stat;</p> <p>e) spionajul, transmiterea secretelor de stat unei puteri sau organizații străine ori</p>	<p>Art. 3 of the Law n. 51/2001 The following are considered threats to Romania's national security:</p> <p>a) the projects and actions aiming at the suppression or at the prejudice of the sovereignty, unity, independence or indivizibility of the Romanian state;</p> <p>b) the actions having as purpose, directly or indirectly, the provocation of a war against the country, or of a civil war, facilitating foreign military occupation, subjugation to a foreign power, or aiding a foreign power or organization to commit any of these deeds;</p> <p>c) treason by helping the enemy;</p> <p>d) the military or any other violent actions aiming at the weakening of the state power;</p> <p>e) espionage, transference of state secrets to a foreign power or organization, or to their agents, illegal procurement and holding of state secret documents or data with a view to transferring them to a foreign power or</p>

agenților acestora, procurarea ori deținerea ilegală de documente sau date secrete de stat, în vederea transmiterii lor unei puteri sau organizații străine ori agenților acestora sau în orice alt scop neautorizat de lege, precum și divulgarea secretelor de stat sau neglijența în păstrarea acestora;

f) subminarea, sabotajul sau orice alte acțiuni care au ca scop înlăturarea prin forță a instituțiilor democratice ale statului ori care aduc atingere gravă drepturilor și libertăților fundamentale ale cetățenilor români sau pot aduce atingere capacității de apărare ori altor asemenea interese ale țării, precum și actele de distrugere, degradare ori aducere în stare de neîntrebuințare a structurilor necesare bunei desfășurări a vieții social-economice sau apărării naționale;

g) acțiunile prin care se atentează la viața, integritatea fizică sau sănătatea persoanelor care îndeplinesc funcții importante în stat ori a reprezentanților altor state sau ai organizațiilor internaționale, a căror protecție trebuie să fie asigurată pe timpul șederii în România, potrivit legii, tratatelor și convențiilor încheiate, precum și practicii internaționale;

h) inițierea, organizarea, săvârșirea sau sprijinirea în orice mod a acțiunilor totalitariste sau extremiste de sorginte comunistă, fascistă, legionară sau de orice altă natură, rasiste, antisemite, revizioniste, separatiste care pot pune în pericol sub orice formă unitatea și integritatea teritorială a României, precum și incitarea la fapte ce pot periclita ordinea statului de drept;

i) actele teroriste, precum și inițierea sau

organization, or to their agents, or with any other end, unauthorized by law, as well as disclosure of state secrets, or negligence in their preserving;

f) undermining, sabotage or any other actions that have as purpose the removal by force of the democratic institutions of the state or that gravely harm the fundamental rights and freedoms of Romanian citizens, or may damage the defence capacity, or other similar interests of the country, as well as the acts of destruction, degradation or bringing in an unusable state the structures necessary to the good development of social and economic life, or to the national defence;

g) the actions by which an attempt is made on the life, physical integrity or the health of the persons holding important positions in the state, or of the representatives of other states, or of international organizations, whose protection must be ensured during their sojourn in Romania, in accordance with the law, the treaties and agreements concluded, as well as with the international practice;

h) the initiation, organization, perpetration, or the supporting in any way of the totalitarian or extremist actions of a communist, fascist, iron guardist, or of any other origin, of the racial, anti-Semitic, revisionist, separatist actions that can endanger in any way the unity and territorial integrity of Romania, as well as the instigation to deeds that can put in danger the order of the state governed by the rule of law;

i) the terrorist acts, as well as the initiation or the supporting in any way of any activities whose purpose is the perpetration of such deeds;

j) the attempts committed by any means upon a community;

k) the stealing of armament, ammunition, explosive or radioactive, toxic or biological materials from the units authorized to hold them, smuggling with these materials, the

<p>sprijinirea în orice mod a oricăror activități al căror scop îl constituie săvârșirea de asemenea fapte;</p> <p>j) atentatele contra unei colectivități, săvârșite prin orice mijloace;</p> <p>k) sustragerea de armament, muniție, materii explozive sau radioactive, toxice sau biologice din unitățile autorizate să le dețină, contrabanda cu acestea, producerea, deținerea, înstrăinarea, transportul sau folosirea lor în alte condiții decât cele prevăzute de lege, precum și portul de armament sau muniție, fără drept, dacă prin acestea se pune în pericol securitatea națională;</p> <p>l) inițierea sau constituirea de organizații sau grupări ori aderarea sau sprijinirea sub orice formă a acestora, în scopul desfășurării vreunora din activitățile enumerate la lit. a)-k), precum și desfășurarea în secret de asemenea activități de către organizații sau grupări constituite potrivit legii.</p> <p>m) orice acțiuni sau inacțiuni care lezează interesele economice strategice ale României, cele care au ca efect periclitarea, gestionarea ilegală, degradarea ori distrugerea resurselor naturale, fondurilor forestier, cinegetic și piscicol, apelor și altor asemenea resurse, precum și monopolizarea ori blocarea accesului la acestea, cu consecințe la nivel național sau regional.</p>	<p>manufacturing, holding, alienation, transport or their utilization in other conditions than those provided by the law, as well as the illegal bearing of armament and ammunition, if by these deeds national security is exposed to danger;</p> <p>l) the initiation or constitution of organizations or groups, adhering to them, or their supporting in any way, with a view to carrying out one of the activities mentioned under the paragraphs a) to k), as well as the carrying out in secrecy of such activities by organizations or groups constituted according to the law.</p> <p>m) any action or inaction which injure the strategic economic interests of Romania, the ones that have as an effect the endangering, illegal management, the damage or destruction of the natural resources, the forrest, hunting and fishing funds, the waters and other such resources, as well as monopolizing or blocking the access to them, which may lead to consequences at national or international level.</p>
<p>Art. 13, Legea nr. 51/1991</p> <p>În situațiile prevăzute la art. 3 organele cu atribuții în domeniul securității naționale pot, în condițiile legii privind organizarea și funcționarea acestora:</p> <p>a) să solicite și să obțină obiecte, înscrisuri sau relații oficiale de la autorități sau instituții</p>	<p>Art. 13 of the Law n. 51/2001</p> <p>In the cases stipulated under Article 3, the authorities with competence in national security can, in justified cases regarding their organisation and functioning:</p> <p>a) request and obtain objects, documents or official relations from the public authorities or public institution, or they can request them from a legal entity or a natural person;</p>

<p>publice, respectiv să solicite de la persoane juridice de drept privat ori de la persoane fizice;</p> <p>b) să consulte specialiști ori experți;</p> <p>c) să primească sesizări sau note de relații;</p> <p>d) să fixeze unele momente operative prin fotografiere, filmare sau prin alte mijloace tehnice ori să efectueze constatări personale cu privire la activități publice desfășurate în locuri publice, dacă această activitate este efectuată ocazional;</p> <p>e) să solicite obținerea datelor generate sau prelucrate de către furnizorii de rețele publice de comunicații electronice ori furnizorii de servicii de comunicații electronice destinate publicului, altele decât conținutul acestora, și reținute de către aceștia potrivit legii;</p> <p>f) să efectueze activități specifice culegerii de informații care presupun restrângerea exercițiului unor drepturi sau libertăți fundamentale ale omului desfășurate cu respectarea prevederilor legale.</p>	<p>b) consult specialists or experts;</p> <p>c) receive notices;</p> <p>d) fix some operative moments by photographing, filming or by any other technical means, or to make individual observations regarding public activities carried out in public places, if that activity is carried out on an occasional basis;</p> <p>e) request obtaining the data generated or processed by the providers of public electronic communication network or by the may require obtaining data generated or processed by providers of public electronic communications networks or providers of the communication services for the public, others than their content, and retained by them under the law;</p> <p>f) may undertake specific activities that involve collecting information that require the restriction of some fundamental human rights and freedoms conducted under the law.</p>
<p>Art. 7, Legea nr. 504/2002</p> <p>(1) Caracterul confidențial al surselor de informare utilizate în conceperea sau elaborarea de știri, de emisiuni sau de alte elemente ale serviciilor de programe este garantat de prezenta lege.</p> <p>(2) Orice jurnalist sau realizator de programe este liber să nu dezvăluie date de natura să identifice sursa informațiilor obținute în legătura directă cu activitatea sa profesională.</p> <p>(3) Se considera date de natura sa identifice o sursa următoarele:</p> <p>a) numele și datele personale, precum și vocea sau imaginea unei surse;</p> <p>b) circumstanțele concrete ale obținerii informațiilor de către jurnalist;</p> <p>c) partea nepublicată a informației furnizate de sursa jurnalistului;</p> <p>d) datele cu caracter personal ale jurnalistului sau radiodifuzorului, legate de activitatea</p>	<p>Art. 7 of the Law n. 504/2002</p> <p>(1) Confidentiality of the sources of information used in the design or development of news, shows or other elements of program services is guaranteed by law.</p> <p>(2) Any journalist (...) is free not to disclose information that could identify the source of information obtained directly linked to his professional activity.</p> <p>(3) It is considered information that could identify a source the following:</p> <p>a) name and personal data as well as voice or image of a source;</p> <p>b) factual circumstances of acquiring information by journalist;</p> <p>c) the unpublished information provided by the journalist's source;</p> <p>d) personal data of the journalist or radio speaker related work to obtain information disseminated.</p>

<p>pentru obținerea informațiilor difuzate.</p> <p>(4) Confidențialitatea surselor de informare obliga, în schimb, la asumarea răspunderii pentru corectitudinea informațiilor furnizate.</p> <p>(5) Persoanele care, prin efectul relațiilor lor profesionale cu jurnaliștii, iau cunoștința de informații de natura să identifice o sursă prin colectarea, tratarea editorială sau publicarea acestor informații, beneficiază de aceeași protecție ca jurnaliștii.</p> <p>(6) Dezvăluirea unei surse de informare poate fi dispusă de instanțele judecătorești numai dacă aceasta este necesară pentru apărarea siguranței naționale sau a ordinii publice, precum și în măsura în care aceasta dezvăluire este necesară pentru soluționarea cauzei aflate în fața instanței judecătorești, atunci când:</p> <p>a) nu exista sau au fost epuizate măsuri alternative la divulgare cu efect similar;</p> <p>b) interesul legitim al divulgării depășește interesul legitim al nedivulgării.</p>	<p>(4) The confidentiality of information sources obliges in return, responsibility for the accuracy of the information provided.</p> <p>(5) Persons who, through their professional relations with journalists, acquire knowledge of information that could identify a source by gathering, editorial treating or publishing such information will benefit of the same protection as journalists.</p> <p>(6) Disclosure of information sources can only be ordered by courts if this is necessary for the protection of national security or public order, and to the extent that such disclosure is necessary for solving the case facing the court when:</p> <p>a) there does not exist or have been exhausted the alternatives to disclosure of similar effect;</p> <p>b) the legitimate interest of disclosure exceeds the legitimate interest of non-disclosure.</p>
<p>Art. 8, Legea nr. 504/2002</p> <p>(1) Autoritățile publice abilitate asigura, la cerere:</p> <p>a) protecția jurnaliștilor în cazul în care aceștia sunt supuși unor presiuni sau amenințări de natura să împiedice ori să restrângă în mod efectiv libera exercitare a profesiei lor;</p> <p>b) protecția sediilor și a localurilor radiodifuzorilor, în cazul în care acestea sunt supuse unor amenințări de natura să împiedice sau să afecteze libera desfășurare a activității lor.</p> <p>(2) Protecția jurnaliștilor și a sediilor sau a localurilor radiodifuzorilor, în condițiile alin. (1), nu trebuie să devină pretext pentru a</p>	<p>Art. 8 of the Law n. 504/2002</p> <p>(1) Authorized public authorities shall ensure upon request:</p> <p>a) journalists' protection in case they are subject to pressures or threats that could effectively impede or restrict the free exertion of their profession;</p> <p>b) the protection of the head quarters and offices of the radio-broadcasters in case they are subject to threats that could impede or affect the free development of their activity.</p> <p>(2) The protection of journalists and of headquarters or offices of radio-broadcasters in the terms of paragraph (1) may not become a pretext to prevent or restrict the free exertion of their profession or activity.</p>

<p>Împiedica sau a restrânge libera exercitare a profesiei ori a activității acestora.</p>	
<p>Art. 91. Legea nr. 504/2002 (1) Constituie contravenție nerespectarea de către furnizorii sau distribuitorii de servicii a dispozițiilor prezentei legi prevăzute la art. 22 alin. (1), art. 24 alin. (1) și (2), art. 26¹ alin. (1), art. 31 alin. (1), (3), (4) și (5), art. 39¹ și art. 48, precum și ale deciziilor având caracter normativ emise de Consiliu. (2) În cazurile prevăzute la alin. (1) Consiliul va emite o somație conținând condiții și termene precise de intrare în legalitate. (3) În cazul în care furnizorul sau distribuitorul de servicii nu intră în legalitate în termenul și în condițiile stabilite prin somație ori încalcă din nou aceste prevederi, se aplică o amendă contravențională de la 5.000 lei la 100.000 lei.</p>	<p>Art. 91 of the Law n. 504/2002 1) The infringement by radio-broadcasters or service distributors of the provisions of this Law, mentioned in art. 22 paragraph (1), art.24 paragraphs (1) and (2), art.26¹ paragraph (1), art. 31 paragraphs (1), (3), (4) and (5), art. 39¹ și art. 48 and of the decisions representing regulation norms issued by the Council, shall be considered offences. 2) In cases stipulated in paragraph (1), the Council shall issue a writ including the conditions and terms for abiding by the law. 3) If the radio-broadcaster or the service distributor does not abide by the law within the terms and under the conditions established in the summons or if he infringes again these provisions, a civil penalty from 5,000 lei to 100,000 lei shall be applied.</p>
<p>Art. 10, Legea nr. 19/2003 Caracterul confidențial al surselor de informare a personalului de specialitate este garantat prin prezenta lege. Dezvăluirea acestor surse, motivată prin existența unui interes public, poate fi făcută numai în baza unei hotărâri judecătorești.</p>	<p>Art. 10 of the Law n. 19/2003 The confidential nature of the information sources of specialized personnel is guaranteed through the present law. Disclosure of those sources, motivated by public interest, can be made only based on a judicial decision.</p>
<p>Art. 7, Legea nr. 571/2004 (1) În fața comisiei de disciplină sau a altor organe similare, avertizorii beneficiază de protecție după cum urmează: a) avertizorii în interes public beneficiază de prezumția de bună-credință, în condițiile art. 4 lit. h), până la proba contrară; b) la cererea avertizorului cercetat disciplinar ca urmare a unui act de avertizare, comisiile de disciplină sau alte organisme similare din cadrul autorităților publice, instituțiilor</p>	<p>Art. 7 of the Law n. 571/2004 (1) Before the disciplinary committee or other similar bodies, whistleblowers benefit from protection as follows: a) public interest whistleblowers benefit from the presumption of goodfaith, under the conditions of art. 4 subsection h), until proven otherwise; b) upon the request of the whistleblower under disciplinary investigation following a whistleblowing act, disciplinary committees or other similar bodies within the public authorities, public institutions or other</p>

<p>publice sau al altor unități prevăzute la art. 2 au obligația de a invita presa și un reprezentant al sindicatului sau al asociației profesionale. Anunțul se face prin comunicat pe pagina de Internet a autorității publice, instituției publice sau a unității bugetare, cu cel puțin 3 zile lucrătoare înainte de ședința, sub sancțiunea nulității raportului și a sancțiunii disciplinare aplicate.</p> <p>(2) În situația în care cel reclamat prin avertizarea în interes public este șef ierarhic, direct sau indirect, ori are atribuții de control, inspecție și evaluare a avertizorului, comisia de disciplină sau alt organism similar va asigura protecția avertizorului, ascunzându-i identitatea.</p>	<p>establishments stipulated by art. 2, shall invite the press and a representative of the trade union or of the professional association. The announcement shall be made in the form of a release on the webpage of the public authority, public institution or budgetary establishment, at least 3 working days before the date of the meeting, otherwise the report and the disciplinary sanction applied can be declared null.</p> <p>(2) In case the person incriminated by the public interest whistleblowing is the direct or indirect superior, has control or inspection and evaluation responsibilities over the whistleblower, the disciplinary committee or other similar body shall ensure the protection of the whistleblower by hiding his/her identity.</p>
<p>Art. 226 Cod Penal Violarea vieții private</p> <p>(1) Atingerea adusă vieții private, fără drept, prin fotografierea, captarea sau înregistrarea de imagini, ascultarea cu mijloace tehnice sau înregistrarea audio a unei persoane aflate într-o locuință sau încăpere ori dependența fiind de aceasta sau a unei convorbiri private se pedepsește cu închisoare de la o lună la 6 luni sau cu amendă.</p> <p>(2) Divulgarea, difuzarea, prezentarea sau transmiterea, fără drept, a sunetelor, convorbirilor ori a imaginilor prevăzute în alin. (1), către o altă persoană sau către public, se pedepsește cu închisoare de la 3 luni la 2 ani sau cu amendă.</p> <p>(3) Acțiunea penală se pune în mișcare la plângerea prealabilă a persoanei vătămate.</p> <p>(4) Nu constituie infracțiune fapta săvârșită: a) de către cel care a participat la întâlnirea</p>	<p>Art. 226 of the Criminal Code Violation of privacy</p> <p>(1) The unlawful violation of privacy, by photographing, capturing or recording images, by listening using technical means or by recording audio of an individual, in a house or room or outbuilding related to them or to a private conversation shall be punishable by no less than 1 month and no more than 6 months of imprisonment or by a fine.</p> <p>(2) The unlawful disclosure, dissemination, presentation or transmission of sounds, conversations or images set out in par. (1) to another person or to the general public shall be punishable by no less than 3 months and no more than 2 years of imprisonment or by a fine.</p> <p>(3) Criminal action shall be initiated based on a prior complaint filed by the victim.</p> <p>(4) The following do not constitute offenses: a) the act committed by the individual who attended the meeting with the victim during which the sounds and conversations were recorded and photos were taken, if there is a legitimate interest; b) if the victim has acted with the explicit</p>

<p>cu persoana vătămată în cadrul căreia au fost surprinse sunetele, convorbirile sau imaginile, dacă justifică un interes legitim;</p> <p>b) dacă persoana vătămată a acționat explicit cu intenția de a fi văzută ori auzită de făptuitor;</p> <p>c) dacă făptuitorul surprinde săvârșirea unei infracțiuni sau contribuie la dovedirea săvârșirii unei infracțiuni;</p> <p>d) dacă surprinde fapte de interes public, care au semnificație pentru viața comunității și a căror divulgare prezintă avantaje publice mai mari decât prejudiciul produs persoanei vătămate.</p> <p>(5) Plasarea, fără drept, de mijloace tehnice de înregistrare audio sau video, în scopul săvârșirii faptelor prevăzute în alin. (1) și alin. (2), se pedepsește cu închisoarea de la unu la 5 ani.</p>	<p>intention to be seen or heard by the perpetrator;</p> <p>c) if the perpetrator has records of the commission of an offense or helps prove that an offense was committed;</p> <p>d) if public-interest acts are recorded, which are meaningful to the life of the community and whose disclosure has public advantages that outweigh the damage to the victim.</p> <p>(5) Unlawfully installing technical means for audio or video recording, in order to commit the acts set out in par. (1) and par. (2), shall be punishable by no less than 1 and no more than 5 years of imprisonment.</p>
<p>Art. 267 Cod Penal Omisiunea sesizării</p> <p>(1) Funcționarul public care, luând cunoștință de săvârșirea unei fapte prevăzute de legea penală în legătură cu serviciul în cadrul căruia își îndeplinește sarcinile, omite sesizarea de îndată a organelor de urmărire penală se pedepsește cu închisoare de la 3 luni la 3 ani sau cu amendă.</p> <p>(2) Când fapta este săvârșită din culpă, pedeapsa este închisoarea de la 3 luni la un an sau amendă.</p>	<p>Art. 267 of the Criminal Code Omission to notify the judicial bodies</p> <p>(1) The act of a public servant who, becoming aware of the commission of an offense criminalized by law in connection with the service where they work, omits to immediately notify the criminal investigation body, shall be punishable by no less than 3 months and no more than 3 years of imprisonment or by a fine.</p> <p>(2) If the act is committed with basic intent, the penalty shall consist of no less than 3 months and no more than 1 years of imprisonment or a fine.</p>
<p>Art. 269 Cod Penal Favorizarea făptuitorului</p> <p>(1) Ajutorul dat făptuitorului în scopul împiedicării sau îngreunării cercetărilor într-o cauză penală, tragerii la răspundere penală,</p>	<p>Art. 269 of the Criminal Code Aiding and abetting a perpetrator</p> <p>(1) The act of aiding and abetting a perpetrator, for the purposes of preventing or hindering the investigation in a criminal case, criminal liability, serving a sentence or a</p>

<p>executării unei pedepse sau măsuri privative de libertate se pedepsește cu închisoare de la unu la 5 ani sau cu amendă.</p> <p>(2) Pedepsa aplicată favorizatorului nu poate fi mai mare decât pedeapsa prevăzută de lege pentru fapta săvârșită de autor.</p> <p>(3) Favorizarea săvârșită de un membru de familie nu se pedepsește.</p>	<p>custodial sentence shall be punishable by no less than 1 and no more than 5 years of imprisonment or by a fine.</p> <p>(2) The penalty for the individual who has aided and abetted the perpetrator may not exceed the penalty provided by the law for the offense committed by the perpetrator.</p> <p>3) Aiding and abetting committed by a family member shall not be punishable.</p>
<p>Art. 10 Codul de Procedura Penală Dreptul la apărare</p> <p>(1) Părțile și subiecții procesuali principali au dreptul de a se apăra ei înșiși sau de a fi asistați de avocat.</p> <p>(2) Părțile, subiecții procesuali principali și avocatul au dreptul să beneficieze de timpul și înlesnirile necesare pregătirii apărării.</p> <p>(3) Suspectul are dreptul de a fi informat de îndată și înainte de a fi ascultat despre fapta pentru care se efectuează urmărirea penală și încadrarea juridică a acesteia. Inculpatul are dreptul de a fi informat de îndată despre fapta pentru care s-a pus în mișcare acțiunea penală împotriva lui și încadrarea juridică a acesteia.</p> <p>(4) Înainte de a fi ascultați, suspectului și inculpatului trebuie să li se pună în vedere că au dreptul de a nu face nicio declarație.</p> <p>(5) Organele judiciare au obligația de a asigura exercitarea deplină și efectivă a dreptului la apărare de către părți și subiecții procesuali principali în tot cursul procesului penal.</p> <p>(6) Dreptul la apărare trebuie exercitat cu bună-credință, potrivit scopului pentru care a fost recunoscut de lege.</p>	<p>Art. 10 of the Criminal Procedure Code Right to defense</p> <p>(1) The parties and main subjects in the proceedings have the right to defend themselves or be assisted by a counsel.</p> <p>(2) The parties, main subjects on the proceedings and the counsel have the right to be given the time and facilitations needed for preparing a defense.</p> <p>(3) The suspect has the right to be informed immediately, and before being interviewed, of the offense the criminal investigation is looking into and the charge for that offense. The defendant has the right to be informed immediately of the offense the prosecution against them has started for, and the charges for that offense.</p> <p>(4) Before being interviewed the suspect and defendant must be informed that they have the right to make no statements whatsoever.</p> <p>(5) The judicial bodies are under an obligation to ensure full and effective exercise by the parties and main subjects in the proceedings of their right to defense throughout the criminal proceedings.</p> <p>(6) The right to defense shall be exercised in good faith, according to the goal for which the law recognizes it.</p>
<p>Art. 83 Codul de Procedura Penală Drepturile inculpatului</p>	<p>Art. 83 of the Criminal Procedure Code Rights of defendants</p>

<p>În cursul procesului penal, inculpatul are următoarele drepturi:</p> <p>a) dreptul de a nu da nicio declarație pe parcursul procesului penal, atrăgându-i-se atenția că dacă refuză să dea declarații nu va suferi nicio consecință defavorabilă, iar dacă va da declarații acestea vor putea fi folosite ca mijloace de probă împotriva sa;</p> <p>a¹) dreptul de a fi informat cu privire la fapta pentru care este cercetat și încadrarea juridică a acesteia;</p> <p>b) dreptul de a consulta dosarul, în condițiile legii;</p> <p>c) dreptul de a avea un avocat ales, iar dacă nu își desemnează unul, în cazurile de asistență obligatorie, dreptul de a i se desemna un avocat din oficiu;</p> <p>d) dreptul de a propune administrarea de probe în condițiile prevăzute de lege, de a ridica excepții și de a pune concluzii;</p> <p>e) dreptul de a formula orice alte cereri ce țin de soluționarea laturii penale și civile a cauzei;</p> <p>f) dreptul de a beneficia în mod gratuit de un interpret atunci când nu înțelege, nu se exprimă bine sau nu poate comunica în limba română;</p> <p>g) dreptul de a apela la un mediator, în cazurile permise de lege;</p> <p>g¹) dreptul de a fi informat cu privire la drepturile sale;</p> <p>h) alte drepturi prevăzute de lege.</p>	<p>During the course of criminal proceedings, a defendant has the following rights:</p> <p>a) not to give any statements during criminal proceedings, and their attention shall be drawn to the fact that their refusal to make any statements shall not cause them to suffer any unfavorable consequences, and that any statement they do make may be used as evidence against them;</p> <p>a¹) to be informed of the act for which they are under investigation and the charges against them;</p> <p>b) to consult the case file, under the law;</p> <p>c) to have a retained counsel and, if they cannot afford one, in cases of mandatory legal assistance the right to have a court-appointed counsel;</p> <p>d) to propose production of evidence under the terms set by law, to raise objections and to argue in court;</p> <p>e) to file any other applications related to the settlement of the criminal and civil part of the case;</p> <p>f) to an interpreter free of charge, when they cannot understand, cannot express themselves properly or cannot communicate in the Romanian language;</p> <p>g) to use a mediator, in cases permitted by law;</p> <p>g¹) to be informed of their rights;</p> <p>h) other rights set by law.</p>
<p>Art. 118 Codul de Procedura Penala Dreptul martorului de a nu se acuza Declarația de martor dată de o persoană care, în aceeași cauză, anterior declarației a avut sau, ulterior, a dobândit calitatea de suspect</p>	<p>Art. 118 of the Criminal Procedure Code Right of witnesses to avoid self-incrimination A witness statement given by a person who had the capacity as suspect or defendant before such testimony or subsequently acquired the capacity of suspect or defendant in the same case, may not be used against</p>

<p>ori inculpat nu poate fi folosită împotriva sa. Organele judiciare au obligația să menționeze, cu ocazia consemnării declarației, calitatea procesuală anterioară.</p>	<p>them. At the moment when they record the statement, judicial bodies are under an obligation to mention their previous capacity.</p>
<p>Art. 139 Codul de Procedura Penală Supravegherea tehnică (1) Supravegherea tehnică se dispune de judecătorul de drepturi și libertăți atunci când sunt îndeplinite cumulativ următoarele condiții: a) există o suspiciune rezonabilă cu privire la pregătirea sau săvârșirea unei infracțiuni dintre cele prevăzute la alin. (2); b) măsura să fie proporțională cu restrângerea drepturilor și libertăților fundamentale, date fiind particularitățile cauzei, importanța informațiilor ori a probelor ce urmează a fi obținute sau gravitatea infracțiunii; c) probele nu ar putea fi obținute în alt mod sau obținerea lor ar presupune dificultăți deosebite ce ar prejudicia ancheta ori există un pericol pentru siguranța persoanelor sau a unor bunuri de valoare. (2) Supravegherea tehnică se poate dispune în cazul infracțiunilor contra securității naționale prevăzute de Codul penal și de legi speciale, precum și în cazul infracțiunilor de trafic de droguri, de trafic de arme, de trafic de persoane, acte de terorism, de spălare a banilor, de falsificare de monede ori alte valori, de falsificare de instrumente de plată electronică, contra patrimoniului, de șantaj, de viol, de lipsire de libertate, de evaziune fiscală, în cazul infracțiunilor de corupție și al infracțiunilor asimilate infracțiunilor de corupție, infracțiunilor împotriva intereselor financiare ale Uniunii Europene, al infracțiunilor care se săvârșesc prin sisteme</p>	<p>Art. 139 of the Criminal Procedure Code Electronic surveillance (1) Electronic surveillance is ordered by the Judge for Rights and Liberties when the following requirements are cumulatively met: a) there is a reasonable suspicion in relation to the preparation or commission of one of the offenses listed under par. (2); b) such measure is proportional to the restriction of fundamental rights and freedoms, considering the particularities of the case, the importance of information or evidence that are to be obtained or the seriousness of the offense; c) evidence could not be obtained in any other way or its obtaining implies special difficulties that would harm the investigation, or there is a threat for the safety of persons or of valuable goods. (2) Electronic surveillance may be ordered in case of offenses against national security stipulated by the Criminal Code and by special laws, as well as in case of drug trafficking, weapons trafficking, trafficking in human beings, acts of terrorism, money laundering, counterfeiting of currency or securities, counterfeiting electronic payment instruments, offenses against property, blackmail, rape, deprivation of freedom, tax evasion, corruption offenses and offenses assimilated to corruption, offenses against the European Union's financial interests, offenses committed by means of computer systems or electronic communication devices, or in case of other offenses in respect of which the law sets forth a penalty of no less than 5 years of imprisonment. (3) The recordings set forth by this chapter, done by the parties or by other persons, represent evidence when they concern their own conversations or communications with</p>

<p>informatică sau mijloace de comunicații electronice ori în cazul altor infracțiuni pentru care legea prevede pedeapsa închisorii de 5 ani sau mai mare.</p> <p>(3) Înregistrările prevăzute în prezentul capitol, efectuate de părți sau de alte persoane, constituie mijloace de probă când privesc propriile convorbiri sau comunicări pe care le-au purtat cu terții. Orice alte înregistrări pot constitui mijloace de probă dacă nu sunt interzise de lege.</p> <p>(4) Raportul dintre avocat și persoana pe care o asistă sau o reprezintă nu poate forma obiectul supravegherii tehnice decât dacă există date că avocatul săvârșește ori pregătește săvârșirea unei infracțiuni dintre cele prevăzute la alin. (2). Dacă pe parcursul sau după executarea măsurii rezultă că activitățile de supraveghere tehnică au vizat și raporturile dintre avocat și suspectul ori inculpatul pe care acesta îl apără, probele obținute nu pot fi folosite în cadrul niciunui proces penal, urmând a fi distruse, de îndată, de către procuror. Judecătorul care a dispus măsura este informat, de îndată, de către procuror. Atunci când apreciază necesar, judecătorul dispune informarea avocatului.</p>	<p>third parties. Any other recordings may constitute evidence unless prohibited by law.</p> <p>(4) The relationship between a counsel and a person assisted or represented by them may be subject to electronic surveillance only when there is information that the counsel perpetrates or prepares the commission of any of the offenses listed under par.(2). If during or after the performance of such measure it results that the activities of electronic surveillance also targeted the relations between the counsel and the suspect or defendant defended by the former, the evidence obtained this way may not be used in a criminal proceeding, and shall be destroyed forthwith by the prosecutor. The judge having ordered such measure shall be informed forthwith by the prosecutor. When deemed necessary, the judge may order the information of the counsel.</p>
<p>Art. 142 Codul de Procedura Penală</p> <p>Punerea în executare a mandatului de supraveghere tehnică</p> <p>(1) Procurorul pune în executare supravegherea tehnică ori poate dispune ca aceasta să fie efectuată de organul de cercetare penală sau de lucrători specializați din cadrul poliției.</p> <p>(2) Furnizorii de rețele publice de</p>	<p>Art. 142 of the Criminal Procedure Code</p> <p>Enforcement of electronic surveillance warrants</p> <p>(1) The prosecutor shall enforce an electronic surveillance measure or may order that this be enforced by criminal investigation bodies or by specialized employees of the law enforcement bodies.</p> <p>(2) Providers of public electronic communication networks or providers of electronic communication services intended</p>

comunicații electronice sau furnizorii de servicii de comunicații electronice destinate publicului sau de orice tip de comunicare ori de servicii financiare sunt obligați să colaboreze cu procurorul, organele de cercetare penală sau lucrătorii specializați din cadrul poliției, în limitele competențelor acestora, pentru punerea în executare a mandatului de supraveghere tehnică.

(3) Persoanele care sunt chemate să dea concurs tehnic la executarea măsurilor de supraveghere au obligația să păstreze secretul operațiunii efectuate, sub sancțiunea legii penale.

(4) Procurorul are obligația de a înceta imediat supravegherea tehnică înainte de expirarea duratei mandatului dacă nu mai există temeiurile care au justificat măsura, informând de îndată despre aceasta judecătorul care a emis mandatul.

(5) Datele rezultate din măsurile de supraveghere tehnică pot fi folosite și în altă cauză penală dacă din cuprinsul acestora rezultă date sau informații concludente și utile privitoare la pregătirea ori săvârșirea unei alte infracțiuni dintre cele prevăzute la art. 139 alin. (2).

(6) Datele rezultate din măsurile de supraveghere care nu privesc fapta ce formează obiectul cercetării sau care nu contribuie la identificarea ori localizarea persoanelor, dacă nu sunt folosite în alte cauze penale potrivit alin. (5), se arhivează la sediul parchetului, în locuri speciale, cu asigurarea confidențialității. Din oficiu sau la solicitarea părților, judecătorul ori completul investit poate solicita datele sigilate dacă există noi probe din care rezultă că totuși o parte dintre acestea privesc fapta ce

for the public or of communication or financial services are under an obligation to cooperate with the criminal investigation bodies, the authorities listed under par. (1), within the limits of their authority, for the enforcement of electronic surveillance warrants.

(3) Persons who are called to provide technical support for the enforcement of surveillance measures are under an obligation to keep secrecy in respect of the performed operation, under penalties set by the criminal law.

(4) The prosecutor is under an obligation to cease electronic surveillance forthwith before expiry of the warrant term if the reasons justifying such measure no longer exist, by immediately informing the judge having issued the warrant.

(5) Data resulted from electronic surveillance measures may be used also in other criminal case if they contain eloquent and useful data or information regarding the preparation or commission of another crime of those set forth by Art. 139 par. (2).

(6) Data resulted from surveillance measures that do not concern the act subject to investigation or that do not contribute to the identification or locating of persons, if such are not used in other criminal cases as per par. (5), shall be archived at the premises of the prosecutors' office, in special places, by ensuring their confidentiality. Ex officio or upon request by the parties, the vested judge or judicial panel may request the sealed data if there is new evidence from which it results that part of these concern an act subject to investigation. One year after the final settlement of a case, these are destroyed by the prosecutor, who shall prepare a report in this sense.

<p>formează obiectul cercetării. După un an de la soluționarea definitivă a cauzei, acestea sunt distruse de către procuror, care întocmește un proces-verbal în acest sens.</p>	
<p>Art. 154 Codul de Procedura Penală Conservarea datelor informatice (1) Dacă există o suspiciune rezonabilă cu privire la pregătirea sau săvârșirea unei infracțiuni, în scopul străngerii de probe ori identificării făptuitorului, suspectului sau a inculpatului, procurorul care supraveghează sau efectuează urmărirea penală poate dispune conservarea imediată a anumitor date informatice, inclusiv a datelor referitoare la traficul informațional, care au fost stocate prin intermediul unui sistem informatic și care se află în posesia sau sub controlul unui furnizor de rețele publice de comunicații electronice ori unui furnizor de servicii de comunicații electronice destinate publicului, în cazul în care există pericolul pierderii sau modificării acestora. (2) Conservarea se dispune de procuror, din oficiu sau la cererea organului de cercetare penală, pe o durată de maximum 60 de zile, prin ordonanță care trebuie să cuprindă, în afara mențiunilor prevăzute la art. 286 alin. (2): furnizorii de rețele publice de comunicații electronice ori furnizorii de servicii de comunicații electronice destinate publicului în posesia cărora se află datele informatice ori care le au sub control, numele făptuitorului, suspectului sau inculpatului, dacă este cunoscut, descrierea datelor ce trebuie conservate, motivarea îndeplinirii condițiilor prevăzute la alin. (1), durata pentru care a fost emisă, menționarea obligației persoanei sau furnizorilor de rețele publice de comunicații electronice ori furnizorilor de servicii de comunicații</p>	<p>Art. 154 of the Criminal Procedure Code Preservation of computer data (1) If there is a reasonable suspicion in relation to the preparation or commission of an offense, for the purpose of collecting evidence or of identifying a perpetrator, suspect or defendant, the prosecutor supervising or conducting the criminal investigation may order immediate preservation of computer data, including of data referring to information traffic, that were stored by means of a computer system and that is in the possession or under the control of a provider of public electronic communication networks or of a provider of electronic communication services intended for the public, in the event that there is a danger that such data may be lost or altered. (2) Such preservation is ordered by the prosecutor, ex officio or upon request by criminal investigation bodies, for a term of maximum 60 days, through an order that has to contain, in addition to the mentions set by Art. 286 par. (2), the following: the providers of public electronic communication networks or the providers of electronic communication services intended for the public in whose possession or under whose control such computer data is, the name of the perpetrator, suspect or defendant, if known, a description of the data that have to be preserved, a justification for the fulfillment of the requirements set by par. (1), the time interval for which this was issued, the obligation of the person or of providers of public electronic communication networks or of providers of electronic communication services intended for the public to immediately preserve the indicated computer data and to maintain their integrity, under confidentiality terms.</p>

electronice destinate publicului de a conserva imediat datele informatice indicate și de a le menține integritatea, în condiții de confidențialitate.

(3) Măsura conservării poate fi prelungită, pentru motive temeinic justificate, de procuror, o singură dată, pe o durată de maximum 30 de zile.

(4) Ordonanța procurorului se transmite, de îndată, oricărui furnizor de rețele publice de comunicații electronice ori furnizor de servicii de comunicații electronice destinate publicului în posesia căruia se află datele prevăzute la alin. (1) ori care le are sub control, acesta fiind obligat să le conserve imediat, în condiții de confidențialitate.

(5) În cazul în care datele referitoare la traficul informațional se află în posesia mai multor furnizori de rețele publice de comunicații electronice ori furnizori de servicii de comunicații electronice destinate publicului, furnizorul în posesia sau sub controlul căruia se află datele informatice are obligația de a pune, de îndată, la dispoziția organului de urmărire penală informațiile necesare identificării celorlalți furnizori, în vederea cunoașterii tuturor elementelor din lanțul de comunicare folosit.

(6) În termenul prevăzut la alin. (2) și (3), procurorul care supraveghează sau efectuează urmărirea penală poate, cu autorizarea prealabilă a judecătorului de drepturi și libertăți, să solicite unui furnizor de rețele publice de comunicații electronice ori unui furnizor de servicii de comunicații electronice destinate publicului transmiterea datelor conservate potrivit legii ori poate dispune ridicarea acestei măsuri. Dispozițiile art. 170 alin. (2¹)-(2⁵), alin. (4) și (5) și ale art.

(3) The measure of preservation can be extended by the prosecutor, only once, for well-grounded reasons, for a term of maximum 30 days.

(4) A prosecutorial order is transmitted forthwith to any provider of public electronic communication networks or provider of electronic communication services intended for the public holding the data specified under par. (1) or having control on such data, and the latter are under an obligation to preserve it immediately, under confidentiality terms.

(5) If data referring to information traffic is held by several providers of public electronic communication networks or providers of electronic communication services intended for the public, a provider holding or controlling the computer data is under an obligation to provide the criminal investigation bodies forthwith with the information necessary for the identification of other providers, in order to enable them to learn of all elements of the used communication chain.

(6) Within the term set under par. (2) and (3), the prosecutor supervising or conducting the criminal investigation, based on a prior authorization from the Judge for Rights and Liberties, may request a provider of public electronic communication networks or a provider of electronic communication services intended for the public to transmit the data preserved under the law or may order cancellation of such measure. The stipulations of Art. 170 par. (2¹)-(2⁵), par. (4) and (5) and of Art. 171 shall apply accordingly.

(7) The Judge for Rights and Liberties shall rule on requests transmitted by criminal investigation bodies regarding the transmission of data within 48 hours, through a reasoned court resolution, in chambers.

(8) Before completion of the criminal investigation, the prosecutor is under an

<p>171 se aplică în mod corespunzător.</p> <p>(7) Judecătorul de drepturi și libertăți se pronunță în termen de 48 de ore cu privire la solicitarea organelor de urmărire penală de transmitere a datelor, prin încheiere motivată, în camera de consiliu.</p> <p>(8) Până la terminarea urmăririi penale, procurorul este obligat să încunoștințeze, în scris, persoanele față de care se efectuează urmărirea penală și ale căror date au fost conservate.</p>	<p>obligation to inform in writing the persons against whom the criminal investigation is conducted and whose data were preserved.</p>
<p>Art. 408 Codul de Procedura Penală</p> <p>Hotărârile supuse apelului</p> <p>(1) Sentințele pot fi atacate cu apel, dacă legea nu prevede altfel.</p> <p>(2) Încheierile pot fi atacate cu apel numai odată cu sentința, cu excepția cazurilor când, potrivit legii, pot fi atacate separat cu apel.</p> <p>(3) Apelul declarat împotriva sentinței se socotește făcut și împotriva încheierilor.</p>	<p>Art. 408 of the Criminal Procedure Code</p> <p>Court rulings subject to appeal</p> <p>(1) Sentences may be challenged by an appeal, unless the law stipulates otherwise.</p> <p>(2) Court resolutions may be challenged by an appeal only jointly with the sentence, except for the situations when, according to the law, they may be challenged by appeal separately.</p> <p>(3) The appeal filed against the sentence shall be deemed as filed against the court resolutions as well.</p>
<p>Art. 2.3.1 Codul Deontologic</p> <p>Jurnalistul are obligația de a păstra confidențialitatea acelor surse care solicită să își păstreze anonimatul sau a acelor surse a căror dezvăluire le poate pune în pericol viața, integritatea fizică și psihică sau locul de muncă.</p>	<p>Art. 2.3.1 of the Deontological Code</p> <p>The journalist has the obligation not to disclose his sources when they ask for their anonymity to be kept, or those sources for which their disclosure may put their life, their physical integrity or their job in jeopardy.</p>
<p>Art. 15 of the the Unified Code of Ethics</p> <p>15.1. Jurnalistul are obligația de a păstra confidențialitatea surselor în cazul în care acestea solicită acest lucru, dar și în cazul în care dezvăluirea identității surselor le poate pune în pericol viața, integritatea fizică și psihică sau locul de muncă.</p> <p>15.2. Protecția secretului profesional și a</p>	<p>Art. 15 of the the Unified Code of Ethics</p> <p>15.1 A journalist has the responsibility to maintain the confidentiality of those sources that demand it, or of those sources whose life, physical or mental integrity or workplace could be in jeopardy if their identity were revealed.</p> <p>15.2 The protection of the professional secrets and of confidentiality is a right, as well as an obligation.</p>

<p>confidențialității surselor este în egală măsură un drept și o obligație al jurnalistului.</p>	
<p>Art. 70 Noul Cod Civil Dreptul la libera exprimare (1) Orice persoană are dreptul la libera exprimare. (2) Exercițarea acestui drept nu poate fi restrânsă decât în cazurile și limitele prevăzute la art. 75.</p>	<p>Art. 70 of the the New Civil Code Freedom of speech (1) Every person has the right to freedom of speech. (2) The exercise of this right cannot be restricted, with the exceptions of cases and limits stated in art. 75.</p>
<p>Art. 75 Noul Cod Civil Limite (1) Nu constituie o încălcare a drepturilor prevăzute în această secțiune atingerile care sunt permise de lege sau de convențiile și pactele internaționale privitoare la drepturile omului la care România este parte. (2) Exercițarea drepturilor și libertăților constituționale cu bună-credință și cu respectarea pactelor și convențiilor internaționale la care România este parte nu constituie o încălcare a drepturilor prevăzute în prezenta secțiune.</p>	<p>Art. 75 of the the New Civil Code Limits (1) It does not constitute a breach of the rights provided in this section prejudices that are permitted by law or international conventions and covenants on human rights to which Romania is a party. (2) Exercise of constitutional rights and freedoms in good faith and in compliance with the covenants and conventions to which Romania is part does not constitute a violation of the rights provided for in this section.</p>

ELSA RUSSIA

Contributors

National Coordinator

Alfiya Sailaubayeva

National Academic Coordinator

Ekaterina Baliuk

National Researchers

Lusine Arutiunian

Elena Buiantueva

Vera Ivanova

Ilya Kletkin

Anastasia Pronina

Ksenia Soloveva

Alexandra Tsareva

National Linguistic Editors

Artem Ryzhov

National Technical Editors

Artem Ryzhov

National Academic Supervisor

Ksenia Shestakova

1. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

1.1. International obligations of the Russian Federation as an essential part of its national legal system

Human rights are applied in the Russian Federation directly. According to Article 15(4) of the Constitution [**“Constitution”**] the universally recognised norms of international law and international treaties of the Russian Federation are component part of its national legal system. In the event when rules established by law contradict to international treaty, the latter shall be applied.¹ Further, according to the Article 17 of the Russian Constitution the recognition and guarantees shall be provided for the rights and freedoms of man and citizen according to the universally recognised principles and norms of international law and according to the present Constitution. Relevant international law rules will include:

- Universal declaration of human rights, reflecting to large extent customary rules Articles 12 and 19 [reference is needed],
- International Covenant on Civil and Political Rights [**“ICCPR”**], in particular Articles 17 and 19 on private correspondence and on the freedom of expression correspondingly.²
- European Convention on Human Rights [**“ECHR”**].³ Interpreting the ECHR in 1994, the 4th European Ministerial Conference on Mass Media Policy adopted resolution N 2 which confirmed the need to keep journalistic source of information in secret.⁴ Moreover, the Council of Europe in its Recommendation N 7 followed the similar logic.⁵ Although these international obligations are not effectively implemented into the national legislation they foreordain further development of legislation of the Russian Federation. The implementation of the ECHR in Russia will be fully reviewed in the Q. 7 of this report.

¹ Constitution of the Russian Federation (adopted by nation-wide voting 12.12.1993) (as amended by Laws of the Russian Federation about Amendments to Constitution of the Russian Federation 30.12.2008 N 6-FKZ, 30.12.2008 N 7-FKZ, 05.02.2014 N 2-FKZ, 21.07.2014 N 11-FKZ, ConsultantPlus, [**“Constitution”**], Art.15(4)

² International Covenant on Civil and Political Rights, 16.12.1966, 999 UNTS 171 [**“ICCPR”**], Art.17, 19

³ European Convention for the Protection of Human Rights and Fundamental Freedoms, 04.11.1950, ETS 5; 213 UNTS 221 [**“ECHR”**], Art.10

⁴ Resolution N 2, 4th European Ministerial Conference on Mass Media Policy, Principles 3, 7.

⁵ 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, 08.03.2000, Council of Europe

1.2. Protection of the right of the journalists not to disclose their source of information at national level

The Russian Federation has the federative structure of the legislative system. There is a hierarchy of the laws. On the top of the hierarchy is the Constitution of the Russian Federation (the question about its balance with the international treaties of Russia is reviews in Q.1.1, 7.1) followed by federal laws and the laws of the Russian Federation (issued before the adoption of the Constitution) Laws of the entities of the Russian Federation are at the next hierarchical level. The latter has not been adopted with regard to the protection of journalistic sources.

The basic law which protects the rights of the journalists is the Law on Mass Media which was the subject to the Ruling of the Supreme Court of the Russian Federation On the practice of courts' application of the law On Mass Media⁶. It stipulates no definition of the source of information, it is also not explicitly provided in the court practice, but one can deduce from the text of Article 41 of the Law on Mass Media⁷ and from the Ruling mentioned above, that the *source of information* is a person who possesses information or evidence of the relevant facts. It is further developed in the other federal laws and the Code of the Professional Ethics which establishes specific rules in this regards.

1.2.1. Federal level

The protection is first of all grounded on the Article 23(2) of the Constitutions, establishing that each person has a right to privacy of correspondence, of telephone conversations, postal, telegraph and other messages where limitations of this right shall be allowed only by court decision.⁸ Further, Article 29(4) of the Constitution explicitly underlines right to freely look for, receive, transmit, produce and distribute information by any legal way.⁹ The Law On Mass Media develops constitutional provisions in its Article 41 emphasizing right of the journalists to keep their source of information in secret as following:

- Publisher is prohibited to disclose in its publications information that was given to it by a person under the condition of keeping it secret;
- Publisher shall keep the source of information in confidence and shall not indicate the person who has provided such information with notice of non-disclosure of his/her

⁶ Ruling of the Plenum of the Supreme Court of the Russian Federation 2010 (ed. 09.02.2012) on the practice of courts' application of the Law On Mass Media N 16, ConsultantPlus [“**Ruling N 16**”]

⁷ Law of the Russian Federation On Mass Media 1991 (ed. 05.04.2016) N 2124-1, ConsultantPlus, [“**Law On Mass Media**”], Art.41

⁸ Constitution, Art.23(2)

⁹ *Ibid*, Art.29(4)

name, except for the case when such request is issued by a court in connection to the case under consideration.¹⁰

Drafting this Article, the legislator most likely intended to protect informers from possible danger that direct mentioning of their name in the media might bring. The same obligation is provided in Article 49 of the Law On Mass Media that establishes requirement not to impart such type of information to other people without the consent of its owner.¹¹

Even in the criminal cases the confidentiality of the source of information will be preserved: according to Article 144(2) of the Code of Criminal Procedure of the Russian Federation, a publisher is entitled not to disclose the source of information to a prosecutor or detective verifying the reliability of the report of a crime in case when it was communicated to him or her under the condition of anonymity.¹²

However, the Law On Mass Media provides an exception to these rules. Its Article 41 emphasizes that the source of information could be disclosed if this information was requested by the court to decide the legal case.¹³ The Supreme Court in its recommendation on the interpretation of the Law On Mass Media acknowledges the fact that personal data of the person, who provided the edition with information under condition to stay anonymous constitute secret protected by the law.¹⁴ Despite the lack of the respective judicial practice, there is a possibility for a state to protect the source of information by establishing criminal proceedings to be held in *in camera*¹⁵ so not to endanger the informer's identity.

Further there are different types of information that are under the protection of the Russian Federation such as state, commercial, bank secrets, confidential personal data, *etc.* which is prohibited to be disclosed as well. This conclusion proves the responsibility for minor criminal offences namely for the disclosure of these types of information established by a separate federal law – the Code of Administrative Offences of the Russian Federation – in Article 13.14¹⁶. To the best knowledge of the drafters of the present report, this Article has never been applied to the disclosure of the journalistic sources but there is enough potential for this article to be applied in case a journalist would have an access to such information while performing his or her professional duties leading to its disclosure. The disclosure of different types of information will be fully reviewed in Q.10.2.

¹⁰ Law On Mass Media, Art.41

¹¹ Law On Mass Media, Art.49

¹² Code of Criminal Procedure of the Russian Federation 2001 (ed. 30.03.2016) N 174-FZ, ConsultantPlus [“**Code of Criminal Procedure**”], Art. 144(2)

¹³ Law on Mass Media, Art.41

¹⁴ Ruling of the Plenum of the Supreme Court of the Russian Federation 2010 (ed. 09.02.2012) On the practice of courts' application of the law On Mass Media N 16, ConsultantPlus [“**Ruling N 16**”]

¹⁵ Code of Criminal Procedure, Art. 241(2)(1)

¹⁶ Code of Administrative Offences of the Russian Federation 2001 (ed. 26.04.2016) N 195-FZ, ConsultantPlus [“**Code of Administrative Offences**”], Art.13.14(1)

1.2.2. Code of Professional Ethics

The right of journalists to keep their source of information in secret is also enshrined in the code of professional conduct, namely in the Code of Professional Ethics of Russian Journalist. It reiterates that no-one can force the journalist to disclose its source including legal entities and law-enforcement agencies.¹⁷ The right to the anonymity might be overcome only in exceptional cases when there is a suspicion that the source of information consciously misrepresented the actual facts or when the disclosure of the source of information might be the only way to avoid the serious and imminent loss for individuals.

This Code of Professional Ethics is an act of a non-governmental non-political public organization named the Union of Journalists and the breach of the rules contained in this Code does not entail any legal responsibility for a journalist. However, he or she might be sanctioned by the organization or expelled from it¹⁸.

Therefore, despite the Russian laws provide numerous means of protection of the journalists' right not to disclose their source of information, the legal framework is not explicit in both wording and practical application.

2. Is there in domestic law a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

2.1. Prohibition to disclose journalistic sources

Under Article 51 of the Constitution no-one shall be obliged to give incriminating evidence against husband or wife and close relatives the range of whom is determined by the federal law. The federal law may envisage other cases of absolution from the obligation to testify.¹⁹

This "other case" might be found under Article 49 of the Law On Mass Media that obliges journalists to preserve the confidential character of information and (or) its source.²⁰ Thus, journalists can refuse to testify before the court about the content of the confidential information and its sources. According to the Russian Supreme Court personal data of an individual who has communicated information on condition that his name would be kept secret

¹⁷ Code of Ethics of Russian Journalist, Union of Journalists of the Russian Federation 1994 [**"Code of Ethics"**], para. 9

¹⁸ The Statute of the Union of Journalist, Art. 4 (12) Available at: http://www.ruj.ru/_about/charter_russian_public_organization_quot_russian_union_of_journalists_39.php

¹⁹ Constitution, Art.51

²⁰ Law On Mass Media, Art.49

constitutes the secret specifically protected by law.²¹ Most likely the Supreme Court meant the Law on Mass Media.

The only exception to the general confidentiality rule provided in Article 41 of the Law On Mass Media when the court has requested this information with regard to the particular proceedings. The court can exercise this power only when all other means of proving are exhausted and the public interest in disclosure of the source of information definitely outweighs the public interest in keeping it secret.²² At the same time the court order to disclose the information could be appealed by the parties to the proceedings.

At first glance, the Criminal Procedure Code contradicts to the Law on Mass Media as it in Article 56 does not specifically mention journalists while listing those who are explicitly exempted from the duty to testify in court. As it was explained in the answer to Q.1 there is a distinction made between the Laws and the Federal Laws. According to the article 55 of the Russian Constitution human rights may only be limited by federal laws, and not the laws. Consequently, also according to Article 51 of the Constitution as described above no one shall be obliged to give incriminating evidence, husband or wife and close relatives the range of whom is determined by the federal law. The federal law may envisage other cases of absolution from the obligation to testify. Notably, Article 56 of the Code of Criminal Procedure mentions specific categories of persons who cannot be interrogated (lawyers, priests, etc.),²³ but journalists are outside the scope of this privilege. Article 55 of the Constitution establishes that the rights may be only limited by a federal law. Being literally interpreted Article 55 of the Constitution concludes that while the Law On Mass Media is not the federal law it cannot establish any exceptions from the duty to testify before the court. Therefore, the Law On Mass Media and Article 51 are not in the contradiction and journalists are not exempted from the duty to testify before the courts unless journalists performs their rights under Article 51 not to give incriminating evidence.

2.2. Sanction imposed for disclosure of journalistic sources

Although the Russian legislation does not have any direct provisions regarding responsibility of journalists for disclosure of their sources, there is the guidance in Article 56 of the Law On Mass Media which states that violation of this law entails responsibility in accordance with the Russian law.²⁴ Thus, the LRG refers to the legislation which provides administrative, civil, criminal and disciplinary liability for journalists who had committed offences in question.

²¹ Ruling N 16

²² Ruling N 16

²³ Code of Criminal Procedure, Art.56(3)

²⁴ Law On Mass Media, Art.56

2.2.1. Administrative responsibility

In accordance with the Constitution administrative legislation is jointly developed by the Russian Federation and its territorial subjects. However, there are no examples of the entities of the Russian Federation laying down the administrative legislation concerning liability for breach of journalists' secrecy. Thus, one refers to the federal legislation and specifically Article 13.14 of the Code of Administrative Offences which provides liability for the disclosure of information of limited access.²⁵ This norm stipulates the special character of both the subject and the information. The subject of this offence is a person, including journalists, who has access to information due to professional or official activity. The information that fall under this provision is defined as the disclosed information of limited access established by law in case the disclosure of such information is not criminally punishable. The analysis of sparse cases shows that a person is brought to responsibility for this very offence if only he simultaneously breaks other legal provisions related to the disclosure of information of limited access. For example, in one case a journalist was punished for the disclosure of source in the form of publishing materials from closed plenary session of the legislative (representative) body of the territorial subject of the Russian Federation.²⁶ It is worth noting that law prohibits publication of such information but the disclosure of the source itself is not punishable.

2.2.2. Criminal responsibility

Criminal Code clearly states responsibility for the unlawful access and (or) dissemination of information about a person's private life.²⁷ Still it is difficult to establish relation between journalists' secrecy and the information about someone's private life (in the terminology of the Criminal Code, this information is the same as personal data). So it might be concluded that personal data of a journalistic source is protected by Criminal Code and the journalist disclosed personal data of his or her journalistic source whose will was to remain anonymous shall be criminally responsible.

2.2.3. Civil liability

Violation of journalists' secrecy can cause both moral and material damages to the source of information which was revealed in mass media as well as to the editorial board, in particular

²⁵ Code of Administrative Offences, Art.13.14(1)

²⁶ Resolution of the regional court of the Kaliningrad 12.08.2014 on a case N4-Ar-378/2014

²⁷ Criminal Code of the Russian Federation 1996 (ed. 29.06.2009) N 63-FZ, ConsultantPlus ["**Criminal Code**"], Art.137

when a journalist is hired by the editorial board and acts on behalf of it. Since civil liability is meant for compensation for violated rights, it constitutes the best option to recover damages.²⁸

2.2.4. Disciplinary responsibility

If a journalist is employed he or she could be disciplinary punished for the disclosure of his or her sources in accordance with Chapter 30 of Labour Code of the Russian Federation.²⁹ However, there are reasonable doubts whether this mean is effective, for instance, if the editorial board forced a journalist to disclose his or her sources. Moreover, a journalist cannot be brought to disciplinary responsibility on the initiative of a third party. The decision whether to punish an employee depends on the will of the employer, and an injured party has no ability to influence this process.

In conclusion, violation of professional secrecy entails civil or disciplinary responsibility. Administrative or criminal liability is only possible if a certain act is provided by the Code of Administrative Offences or the Criminal Code.

3. Who is “journalist” according to the national legislation? Is it in your view a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media actors? Is the protection of journalists’ sources extended to anyone else?

3.1. Broad definition of “journalist” in legislation of the Russian Federation

Under Article 2 of the Law On Mass Media journalist is a person who:

- edits, creates, collects or prepares messages and materials;
- carries out mentioned activities for the editorial of registered media;
- is associated with the editorial board of registered media by labour or other contractual relations or is engaged in such activities for the editorial on its authorization.³⁰

²⁸ Civil Code of the Russian Federation 1994 N 51-FZ, ConsultantPlus [“**Civil Code**”], Chapter 59

²⁹ Labour Code of the Russian Federation 2001 (ed. 30.12.2015) N 197-FZ, ConsultantPlus [“**Labour Code**”], Chapter 30

³⁰ Law On Mass Media, Art.2

In addition, according to the Law On Mass Media, professional accreditation or membership in journalistic organization is unnecessary for obtaining the status of the journalist, which is in compliance with European standards.³¹

At first glance, this definition is rather broad since the journalist is defined by indicating their possible activities and the relations with the editorial board. Thus, editors fall under the specified definition of a journalist, while in accordance with Recommendation no R (2000) 7 editors are not related to journalists³².

However, even with this rather broad definition, there are situations that negatively affect the protection of journalistic sources.

For instance, based on the definition of a journalist provided in Russian legislation, journalist is obliged to work exclusively for editorial board of registered media. However, Article 12 of the Law On Mass Media establishes the list of cases when the registration of a media is not required.³³ Taking into account literal interpretation of the term «journalist», if a person works for unregistered media, he or she will not be considered journalist and will not have journalist's rights and obligations, including rights in the sphere of protection of journalistic sources. Moreover, according to the definition of a journalist given in Recommendation no R (2000) 7, journalist works via any media; registration requirements are not mentioned. Therefore, in our opinion, the term «journalist» in the Russian legislation should be interpreted broadly, i.e. persons who carry out their activities via unregistered media when the registration of a media is not required should be classified as journalists too. Otherwise, rights of persons working for an unregistered media may be significantly limited.

Excluding this provision, the definition of journalist provided in the Law On Mass Media is sufficient for the purposes of the protection of journalistic sources.

3.2. Protection of “bloggers” as other media actors

Among other media actors involved in dealing with information, the present report focuses on bloggers and individuals keeping their own websites, etc.³⁴

³¹ Explanatory Memorandum to 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 §13

³² According to the Appendix to 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 the journalist provides only the collection and dissemination of information. In this regard, in §13 of the explanatory Memorandum of the same document it is mentioned that the protection of journalistic sources, in addition to journalists, should be extended to editors.

³³ Law On Mass Media, Art.12

³⁴ In particular, such persons are mentioned in §14 of recommendations of the Report of the Committee on Culture, Science and Education of the Parliamentary Assembly (2010) on the protection of journalistic' sources

In 2014, Russian legislation on legal status of bloggers appeared.³⁵ In accordance with Article 10.2 of Federal Law On information, information technologies and about information protection a blogger is the owner of a website and (or) site pages on the Internet that contain publicly available information which is accessed during the day by more than three thousand users of the Internet.³⁶ Consequently, even those who have a publicly available page on a social network and over three thousand subscribers should be considered bloggers.

Under Article 10.2 of the above-mentioned Federal Law bloggers are obliged:

- not to allow the website or website page on the Internet to be used for the purpose of committing the acts punishable under a criminal law, disclosing the information classified as state or another specifically law-protected secret;
- not to allow the dissemination of information about the private life of a citizen in breach of the civil legislation;
- to observe the provisions of the legislation of the Russian Federation that regulate the procedure for disseminating mass information;
- to observe the rights and lawful interests of citizens and organisations, for instance the honour, dignity and business reputation of citizens as well as the business reputation of organisations.³⁷

Even more importantly, under this Article the bloggers have certain rights such as:

- to freely search, receive, transmit and disseminate information by any method in accordance with the legislation of the Russian Federation;
- to set out on his their website or website page on the Internet his their personal judgements and assessment with an indication of his name or pseudonym;
- to place or allow the placement on his their website or website page on the Internet texts and/or other materials of other users of the Internet, unless the placement of such texts and/or other materials contravenes the legislation of the Russian Federation.³⁸

However, unlike journalists, bloggers do not enjoy the right to protect their sources of information. The Committee on Culture, Science and Education of the Parliamentary Assembly confirms in its Report (2010) that a variety of states do not extend journalists' professional

³⁵ Federal Law On amendments to the Federal law On information, information technologies and about information protection" and certain legislative acts of the Russian Federation on streamlining the exchange of information via information and telecommunication networks" 2014 (ed. 21.07.2014) N 97-FZ, ConsultantPlus

³⁶ Federal Law On information, information technologies and on information protection 2006 (ed. 13.07.2015) N 149-FZ, ConsultantPlus, Art.10.2

³⁷ *Ibid*

³⁸ *Ibid*

privilege to other media actors like individuals with their own website or web blog. Therefore, non-journalists cannot benefit from the right of journalists not to reveal their sources.³⁹

3.3. Is the protection of journalists' sources extended to anyone else?

According to Article 52 of the Law On Mass Media other persons who have the status of a journalist are:

- staff of the editorial board which is engaged in editing, creation, collection or preparation of messages and materials for newspapers with large circulation and other media whose products are disseminated exclusively within one enterprise (association), organization, institutions (corporate media) and;
- authors who are not related to the editorial board by labour or other contractual relations but are recognised by it as its freelance authors or correspondents when performing editorial's assignments.⁴⁰

As for the first category, the present report acknowledges that Article 12 of the Law On Mass Media provides that in some cases registration of the media is not required.⁴¹ Since there are no grounds for the exemption from registration for a corporate media, it is subject to registration in the general procedure. In this regard, persons who are engaged in editing, creation, collection or preparation of messages and materials, and are full-time employees of the editorial board of registered media fall within the definition of journalists. Therefore, they have professional status of journalist even without specific reference to Article 52 of the Law On Mass Media.

Accordingly, provisions of Article 52 are relevant only in cases when a corporate media is not subject to registration (for example, if the periodical print publication has a circulation of less than one thousand copies).⁴² Thus, under literal interpretation of the above mentioned term "journalist" the editorial staff of the corporate media will not be considered journalists and will not have the rights and duties of a journalist. Article 52 of the Law On Mass Media, in its turn, improves this situation. However, the implementation of the broad interpretation of the term "journalist" makes provisions of Article 52 of the Law On Mass Media unnecessary.

As for the second category, it is unclear how the authors or correspondents may execute the instructions of editorial board without having any labour or other contractual relations.⁴³ Thus,

³⁹ Recommendations of the Report of the Committee on Culture, Science and Education of the Parliamentary Assembly (2010) on the protection of journalistic' sources, §14

⁴⁰ Law On Mass Media, Art.52

⁴¹ *Ibid*, Art.12

⁴² Law On Mass Media, Art.12

⁴³ D. Bakhareva, *Legal regulation of work of freelance correspondents of the print media*, Labour Law, 2008, N 6, 69-72. Available at: <http://www.center-bereg.ru/h1455.html>

the freelance authors or correspondents are journalists by implication of the Law On Mass Media.

Moreover, protection of journalistic sources also covers the editorial board. As previously stated, Article 41 of the Law On Mass Media prohibits editorial board from revealing the source of information that was provided on condition that the source will be confidential. Otherwise, the editorial board shall bear responsibility. Only the court can request this information as necessary to decide a particular case. Accordingly, the protection of journalistic sources covers the editorial. Importantly, national legislation does not extend the protection of journalistic sources to employees of editorial board other than journalists. It is worth mentioning that above considered list of cases when the protection of journalistic sources covers persons other than journalists is exhaustive. Other situations in Russian legislation are not envisaged.

4. What are the legal safeguards for the protection of journalistic sources?

4.1. Legal Guarantees

4.1.1. Constitutional guarantees

First of all, basic legal safeguards for the protection of journalistic sources are derived from the Constitution. They are provided in the table below:

Relevant Article	Description
Article 46	Everyone is guaranteed judicial protection of their rights and freedoms coupled with the right to appeal decisions of state and local authorities, public associations and officials. On top of that, if national remedies are exhausted, everyone can apply to the international human rights bodies according to international treaties of the Russian Federation.
Article 23 (2)	Right to privacy of correspondence, telephone conversations, postal, telegraph and other messages. Although it is not an absolute right, limitations may be imposed only by a court decision.

<p>Article 29</p>	<p>Protection of the freedom of expression together with prohibition of the incitement to social, racial, national or religious hatred. No one may be forced to express his views and convictions or to reject them. Censorship shall be banned.</p>
<p>Article 19</p>	<p>All people shall be equal before the law and court. The State shall guarantee the equality of rights and freedoms of man and citizen, regardless of sex, race, nationality, language, origin, property and official status, place of residence, religion, convictions, membership of public associations, and also of other circumstances.</p>
<p>Article 22</p>	<p>Everyone shall have the right to freedom and personal immunity. Arrest, detention and remanding in custody shall be allowed only by court decision. Without the court's decision a person may not be detained for a term more than 48 hours.</p>
<p>Article 45</p>	<p>The Russian Federation ensures the protection of the rights and freedoms by all means not prohibited by law.</p>
<p>Articles 48-53</p>	<p>Guarantees for journalists in a kind of legal proceedings such as right to legal aid, principles of assumption of innocence, <i>non bis in idem</i>, right not to testify against himself, rights protection against abuses of power, right to claim for the compensation of damages in case of such abuses.</p>

4.1.2. Guarantees provided by the Criminal Code

Apart from the Constitution, legal safeguards are further reflected in the Criminal Code. According to Article 144 of the Criminal Code,⁴⁴ obstruction of the lawful professional activity

⁴⁴ Criminal Code, Art.144(1)

of journalists by compelling them to give out information or to refuse to give it out is punishable. The term *obstruction* is mentioned in Article 58 of the Law On Mass Media which defines the infringement of the freedom of mass media as the obstruction of the lawful activities of the founders, editors, publishers, distributors of mass media products and journalists in any form by citizens, government officials and organizations, public associations, including forcing the journalist to disseminate or refuse to disseminate information.⁴⁵

Moreover, the right to a fair trial is also a guarantee for a fair punishment. A request to disclose information must be made in a form of an interlocutory judgment. Interlocutory judgments are aimed at getting procedural information and use a mechanism request - response. In the Russian Federation a right to be heard is given to all defendants in criminal cases, no matter journalists or not, which is prescribed by Article 47 of the Code of Criminal procedure. Oral requests are not valid. Hence, as an interlocutory judgment it can be appealed⁴⁶. The procedure of appeal is similar for all judgments and prescribed by Chapter 45.1 of the Code of Criminal procedure.

4.2. How are the laws implemented?

Despite the lack of case law on the subject, the crucial point is how a victim could file a complaint to a judicial or a quasi-judicial body about unauthorised disclosure of confidential information by either a journalist or an editorial board.

As a general rule, a person either goes directly to the court or to the federal executive body authorised to supervise the implementation of federal legislation on mass media (Federal Service for Supervision in the Sphere of Telecom, Information Technologies and Mass Communications, also known as Roskomnadzor). Moreover, a complaint could be filed to a Prosecutor's Office which is in charge of supervision over the execution of laws by certain subjects and ensuring supremacy of both the Constitution and the federal legislation with the primary aim to protect human rights and freedoms as well as the interests of the Russian Federation, its territorial subjects and municipal units.

In the present report, a special attention is given to the procedure for filing a complaint to the above-named bodies, which is provided in a table below:

⁴⁵ Law On Mass Media, Art.58

⁴⁶ Mass Media Defense Centre, *The right of a journalist not to disclose the source of information*, at: http://www.mmdc.ru/consulting/common/pravo_zhurnalista_ne_raskryvat_svoj_istochnik_informacii

	Judicial body (court)	Roskomnadzor/Prosecutor's Office
Period for consideration of a complaint	2 months according to Civil Procedural Code	30 days according to the Federal Law On the order of consideration of citizens' appeals ⁴⁷
Competence/final decision	Judicial decision which is binding upon parties to the dispute	Initiates legal proceedings
Possibility to appeal the decision	To a higher court within a month according to Article 321 of Civil Procedural Code	To a court within 3 years since the violation of rights according to Articles 196 and 200 of Civil Procedural Code

4.3. How are the legal safeguards combined with self-regulatory mechanisms?

Currently, mostly the state regulation ensures the freedom of speech in the Russian Federation. However, self-regulatory mechanisms being extra measure support this regulation. One of these mechanisms is the Code of Ethics that contains the principles of the professional ethics. This Code is binding on majority of journalists who are the members of the Union of Journalists of the Russian Federation because its observance is a precondition for the membership in this Union.⁴⁸ At the same time, the highly qualified scholars express concerns that journalists' ethical standards are not very effective in practice.⁴⁹

⁴⁷ Federal Law On the order of consideration of citizens' appeals 2006 (ed. 03.11.2015) N 59-FZ, ConsultantPlus

⁴⁸ Code of Ethics

⁴⁹ Abov E. *On the issue of professional standards in the Russian press*. Available at: <http://www.presscouncil.ru/index.php/teoriya-i-praktika/knigi-i-stati/305-o-probleme-professionalnykh-standartov-v-rossijskoj-presse>

Notably, acts of self-regulation charge journalist with a duty to keep secret the name of the person who provided information in confidence. This obligation not only arises from the Code of Ethics, but was also embodied in the draft of the Standard on Media Ethics of 2015. It should be mentioned that the provisions of Principle 4 of the Standard appear to the authors of this report to be a matter of concern. It is stated there that the professional association or the professional organization which the journalist is associated with shall determine the level of protection of the confidential source of information which is acceptable to these association or organization, whereas aforementioned entities are not subject to the prohibition against the disclosure of information. This document was drafted by the Public Collegium for Press Complaints (Russian NGO which deals with the complaints against the press) and considered as the set of fundamental professional principles, norms and rules of conduct for journalists and the editorial board. It is also meant to help solve disputes, both ethical and concerning human rights.⁵⁰

In this regard, it is interesting to take a closer look at the Public Collegium for Press Complaints as a self-regulating and a civil society organization which unites not only the members of the media community but also the members of the media audience. Since its founding in May 2005, the Collegium settled more than 100 media disputes.⁵¹ It won international recognition and became a member of the European Alliance of Independent Press Councils (AIPCE).⁵² The importance of the decisions of the organization was also noted in the Ruling of the Plenum of the Supreme Court of the Russian Federation which stated that in case of an information dispute, it is possible for the party to go to the Public Collegium for Press Complaints.⁵³ Thus, despite the fact that there are some difficulties in creation of a national self-regulation mechanism in the sphere of mass media, it should be noted that certain steps have been made. There is an opinion that the high standards of the journalistic work cannot be achieved in a night, and the importance of legal regulation decreases with the increase of the role of ethical and moral norms.

5. In the respective national legislation are the limits of non-disclosure of the information in line with the principles of the Recommendation No R (2000)7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their

⁵⁰ Draft of mediaethical standard of Public Collegium responsible for press complaints 2015. Available at: <http://presscouncil.ru/index.php/teoriya-i-praktika/dokumenty/4756-mediaeticheskij-standart-2015>

⁵¹ See generally, Register of decisions of the Collegium. Available at: <http://www.presscouncil.ru/index.php/praktika/rassmotrennye-zhaloby>

⁵² Report of the Grand Jury of the Russian Union of Journalists and the Public Collegium of the Press Complaints. Available at: <http://ruj.ru/x/the-report-of-the-secretary-of-the-russian-union-of-journalists-mikhail-fedotov-on-the-work-of-the-j.php>

⁵³ Ruling N 16

respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

5.1. Limits of the national legislation in relation to non-disclosure of journalistic information

According to Article 15(4) of the Constitution international treaties are an integral part of the Russian legal system. Moreover, special federal law covers the ratification of the ECHR.⁵⁴ In Russian legislation limits of non-disclosure of journalistic information as limitation on the right to freedom of expression should totally comply with the demands of Article 10(2) of the ECHR. In particular limitation should be prescribed by law and be 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.

Limits to the journalists' right not to disclose the source of information are also designated in Principle 3 of Recommendation No R (2000) 7:

a. The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10, paragraph 2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of Article 10, paragraph 2 of the Convention outweighs the public interest in not disclosing information identifying a source, competent authorities of member States shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law of the European Court of Human Rights, and may only order a disclosure if, subject to paragraph b, there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature

b. The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:

i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and

ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:

- an overriding requirement of the need for disclosure is proved,
- the circumstances are of a sufficiently vital and serious nature,
- the necessity of the disclosure is identified as responding to a pressing social need, and

⁵⁴Federal Law On ratification of the European Convention of Human Rights and Fundamental Freedoms and its Protocols 1998 N 54-FZ, ConsultantPlus

- member States enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.

The analysis of Russian legislation leads to the conclusion that it largely meets the demands of the Recommendation No R (2000) 7. First of all, the limitations are explicitly stated in Article 41 of the Law On Mass Media upon which the editorial board is obliged to keep the source of information secret, except for cases when the corresponding request was made by the court in connection with a case that is under the proceedings in this court.⁵⁵ The Supreme Court of the Russian Federation interprets the provisions of this article and claims that at any stage of the proceedings the court is entitled to request the editorial staff to provide information about the source if other means of proving have been exhausted and the public interest in disclosing the source clearly outweighs the public interest in keeping it secret.⁵⁶

However, Russian legislation does not require the person concerned to prove that there is the need for the disclosure of the source of information or that the corresponding public interest is clearly of top priority.

5.2. National legislation establishes judicial procedure for the disclosure of the journalistic source of information

The court may exercise the power in question at any stage and in any type of proceedings (civil, criminal, administrative and constitutional). The Law On Mass Media states that the request for the disclosure of information is made in a form of a reasoned interlocutory judgment, which can be appealed by the interested parties.⁵⁷ Journalists are not bound by oral requests of the investigator, the prosecutor, or even the judge.

Moreover, it is crucial for the disclosure of information that two criteria must be satisfied cumulatively:

- all other means of establishing essential circumstances of the case must be exhausted;
- the public interest in disclosure of confidential information must clearly outweigh the public interest in maintaining its secrecy.⁵⁸

5.2.1. Exhaustion of other possibilities to establish essential circumstances of a case

Recommendation No R (2000) 7 and the above mentioned Ruling of the Supreme Court of the Russian Federation provide that the source of journalistic information may be disclosed only by

⁵⁵ Law On Mass Media, Art.41

⁵⁶ Ruling N 16

⁵⁷ Law On Mass Media, Art.41

⁵⁸ *Ibid.*

decision of a court and only if all the other possibilities to establish essential circumstances of a case are exhausted. This requirement is important for proper protection of the journalistic secrecy. The Code of Professional Ethics of Journalists provides that the right to anonymity may be limited only in exceptional cases when there is a suspicion that the source has deliberately distorted the truth as well as mentioning the name of the source is the only way to avoid serious and imminent harm to people.

5.2.2. Public *vs* Private interests in disclosure

National legislation protects both vital public and individual interests regarding the disclosure of information. However, it is hard to strike a balance between two.

In case of investigation of a crime, combating terrorism, *etc.* public interest clearly outweighs the necessity to keep information secret. Therefore, the disclosure of confidential information is legitimate. Examples of public interest are found in Article 2 of the Federal Law On Operational Search Activity such as discovery, prevention, suppression and detection of crimes as well as discovery and identification persons who are preparing, committing or have committed crimes, searches for persons who are hiding from the inquest and the investigation bodies and from the court and who are avoiding the criminal punishment, and also searches for missing persons, obtaining information about events or actions that threaten the state, military, economic or ecological security of the Russian Federation.⁵⁹

As to individual interests, courts do not usually consider them prevailing over public interests, because there is no explicitly defined criteria how find a balance between these interests

5.3. National legislation provides alternative measures against the disclosure of the journalistic sources

Principle 3 (b) (i) of the Recommendation No. R (2000) 7 emphasizes that “the disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that ... reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure”. The Explanatory Memorandum to Recommendation No. R (2000) 7 lists specific alternative measures, namely:

- internal/police investigations;
- the reinforcing of restrictions on access to certain secret information;
- dissemination of contrasting information as a countermeasure;

⁵⁹ Federal Law On Operational Search Activity 1995 (ed. 29.06.1995) N 144-FZ, ConsultantPlus [“**Federal Law On Operational Search Activity**”], Art.2

- investigation of other persons who are connected with the journalists (employees, colleagues, contracting partners or business partners of the person requesting the disclosure).

Therefore, as it is stated in the Clause 34 of the Explanatory Memorandum to Recommendation No. R (2000) 7, the persons or public authorities seeking a disclosure should primarily search for and apply proportionate alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the protection of the right of journalists not to disclose their source. The existence of reasonable alternative measures for the protection of a legitimate interest excludes the necessity of disclosing the source by the journalist and the parties seeking the disclosure have to exhaust these alternatives at first.⁶⁰

The respective national legislation is in a full compliance with the above-mentioned requirements. The Supreme Court confirms that disclosure of the confidential information is an extraordinary measure, which is taken only by court decision and only if all alternative measures which adequately protect public rights and interests have been exhausted. Code of Criminal Procedure provides in Article 144(2) that the editorial board is not obliged to disclose the source of information on request of the prosecutor or state investigators since the information on request is subject to a specific condition that it be kept confidential.⁶¹ Therefore, Russian legislation adequately protects both journalistic rights and the interests of the state.

6. In the Recommendation No R (2000) 7 the following principles should be respected when the necessity of disclosure is stated: absence of reasonable alternative measures, outweighing legitimate interest (protection of human life, prevention of major crime, defense of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the disclosure outweigh the interest in the non-disclosure?

6.1. Outweighing legitimate interest

The balance of such constitutional interests as freedom of expression (protection of journalistic sources) and public interest in the disclosure of information might be found at the stage of receiving information about crime. Article 144 of the Code of Criminal Procedure prohibits disclosure of journalistic information if its source decided to remain confidential.⁶²

⁶⁰ Explanatory Memorandum to 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

⁶¹ Code of Criminal Procedure, Art.144(2)

⁶² Code of Criminal Procedure, Art.144

However, according to Article 41 of the Law On Mass Media the right of the journalist to maintain confidentiality of the source of his/her information is not an absolute one. This Article provides the only possible exception, namely when a court requests this information as necessary to decide a particular case what was mentioned in Q. 1, 2.⁶³

Disclosure of the information of journalists' professional secrecy is possible when any case is considered. It may vary from crime of violence to economic crimes or terrorist crimes, there is no special norm, regarding this. The aim is to protect any public relations being under violation. Article 2(1) of the Criminal Code mentions, the aim of this act is to protect all the rights and freedoms of any human and citizen, property, public order and public security, environment and also protection of peace and security of mankind, as well as the prevention of crimes⁶⁴ This is the underlying interest for all the crimes in the Criminal Code. These aims have lots in common with the list of the public interests in the Recommendation such as protection of human rights, prevention of crimes, *etc.*

Moreover, the Supreme Court of the Russian Federation established almost a similar list of situations that constitute outweighing public interest in disclosure the journalistic source. They include necessity to identify and reveal a threat to democracy and civil society, public security, environment and information concerning how governmental official and other public figures abuse their powers.⁶⁵

6.2. Absence of other alternative measures

Further, in its Ruling the Supreme Court pointed out that a court can demand the disclosure of the source of the information “if only there is no other possibility to establish the circumstances which are of high importance to proper consideration and decision of the case.”⁶⁶ Therefore, the Supreme Court implemented principles 3, 4 and 5 of the Recommendation No R (2000) 7.

7. In the light of the case law of the European Court of Human Rights how do national courts apply the respective laws with regard to the right to protect sources? In particular, how do they balance the different interests at stake?

7.1. Decisions of the European Court of Human Rights with respect to the Russian Federation as an integral part of its legal system

⁶³ Law On Mass Media, Art.41

⁶⁴ Criminal Code, Art.2 (1)

⁶⁵ Ruling N 16

⁶⁶ Ruling N 16

7.1.1. General rules

As it was referred to in Q. 1 human rights are applied in the Russian Federation directly. According to Article 15(4) of the Constitution the universally recognised norms of international law and international treaties of the Russian Federation are component part of its national legal system. In the event when rules established by law contradict to international treaty, the latter shall be applied.⁶⁷ Further, according to the Article 17 of the Russian Constitution the recognition and guarantees shall be provided for the rights and freedoms of man and citizen according to the universally recognised principles and norms of international law and according to the present Constitution. Relevant international law rules are also could be found under the European Convention on Human Rights.⁶⁸

The Plenum of the Supreme Court of the Russian Federation adopted the Ruling on the implementation of ECHR where it stated that legal decisions of ECtHR are *considered* while implementing the Russian laws.⁶⁹ Particularly the content of the rights and freedoms established by the Russian laws shall be defined with the consideration of the content of the similar rights and freedoms established by ECHR and its Protocols.

The conditions under which any restrictions of the human rights and freedoms may be established are defined in accordance with Article 55 (3) of the Constitution mentioned before in Q. 2.1, ECHR and its Protocols. Such restrictions shall (a) pursue a legitimate aim; (b) be necessary, adequate and proportionate.⁷⁰

Notably, Article 19 of the ECHR establishes the ECtHR with the primary aim to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto. Moreover, Article 46(1) of the ECHR emphasizes that decisions of the Court on behalf of the Russian Federation are accepted as final and binding for all authorities including national courts.⁷¹

However, according to the Ruling of the Constitutional Court of the Russian Federation on 14 July 2015⁷² and Article 46(1) of the Vienna Convention on the Law of Treaties “a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental

⁶⁷ Constitution, Art.15(4)

⁶⁸ ECHR, Art.10

⁶⁹ The Ruling of the Plenum of the Supreme Court of the Russian Federation 27.06.2015 on the implementation of ECHR by the courts of general jurisdiction N 21 [**“Ruling N 21”**]

⁷⁰ *Ibid.* Art. 5

⁷¹ ECHR, Art.46(1)

⁷² Ruling N 21

importance”.⁷³ In the Russian Federation the rules of fundamental importance are contained in the Part 1 and Part 2 of the Constitution. In accordance with Articles 15(1)(4), 79 and 125 (6) of the Constitution the international treaties of the Russian Federation shall comply with the Constitutional provision and shall not be implemented in case the provisions thereof contravene the Constitutional ruled of fundamental importance. Moreover, if an international treaty at the time of its accession complied with the Constitution and subsequently was specified through the interpretation coming in conflict with the Constitutional provisions relating to the human rights and freedoms and to the fundamental principles of the Constitutional order of the Russian Federation the latter shall apply. This does not itself entail the termination of the treaty at question but entails incapacity to satisfy the obligation invoked in a particular case which was interpreted as prescribed above.⁷⁴

7.1.2. International court practice

As to the practical example, the case against the Russian Federation in the ECtHR is one of *Ivashchenko v. Russia*. Applicant, a photojournalist, travelled to Abkhazia in August 2009 where he took several photographs concerning, as he described, “the life of this unrecognised Republic”. On 27 August 2009 on his return to the Russian Federation he was required to pass through the Adler customs checkpoint, where he showed his Russian passport and press card. For unspecified reasons his belongings including a laptop and several electronic storage devices were inspected. A customs officer read the information contained on the storage devices and the laptop and examined the digital photographs stored on them. The copied data included the applicant’s personal correspondence, the passwords for his e-mail, Skype and Facebook accounts and private drawings, as well as photographs previously used in newspaper publications concerning extremist activities, the Ezid ethnic group and the Azov gambling zone. Applicant decided to appeal the actions of the customs authorities. Among other issues, applicant claimed violation of Article 10 of the ECHR because he was not provided necessary procedural safeguards to protect him from unjustified interference or to protect journalistic sources. Although the case is still pending it gives a perfect example of abuse of journalistic rights by state authorities.

7.2. Applicability of the laws with regard to the right to protect journalistic sources. Balance of different interests at stake

The crucial question here is one of a balance between the freedom of expression and legitimate aims pursued by state authorities in their restrictive measures

⁷³ The Vienna Convention on the Law of Treaties signed at Vienna 23 May 1969. Art. 46(1). Available at: <http://www.oas.org/legal/english/docs/Vienna%20Convention%20Treaties.htm>

⁷⁴ Ruling N 21

Starting with the freedom of expression reflected in Article 10 of the European Convention of Human Rights, the ECtHR in a countless number of cases emphasized that this freedom constitutes a cornerstone of the democratic society being therefore a basic human right.⁷⁵ The Court further pointed out that such broad scope of protection is explained by the necessity of pluralism and the breadth of views to develop democratic society. When the press is involved the balance even more focuses on the protection of freedom of expression, since the press is a valuable organ, “a watchdog of a democratic society” working within the prescribed legal scope to maintain democratic interests.⁷⁶

As to the practice of the national courts, it revolves mostly around the distribution of the wrongful information and information, discrediting honor, dignity or business reputation.

Thus, taking into account interpretation of the ECtHR the district court recognised that as long as respondent did not indicate the source of information about the exact salary of officials which was provided to the press anonymously, it did not result in the abuse of the freedom of press. The court delivered this conclusion because the protection of the journalistic sources constitutes the cornerstone of the freedom of press in the absence of which the function of the press as “watchdog in the democratic society” would be gravely undermined. The only possible exception to reveal such sources as the court pointed out was to protect more valuable interests at stake. However, in that case the protection of dignity and business reputation did not justify any deviation from the freedom of speech.⁷⁷ In another case the district court followed the similar logic and upheld the supremacy of the freedom of expression.⁷⁸

In conclusion the national courts as well as the Supreme Court pay attention to the recognised right of the journalists to protect their sources against arbitrary disclosure. Following their rulings, the freedom of expression as a foundation of democratic governance prevails over other circumstances. However, finding a balance is still very vague in the absence of legally defined criteria.

8. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalist’s sources of information? Are the national law provisions accessible, precise, foreseeable and include clear

⁷⁵ *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) §49

⁷⁶ See generally, *De Haes and Gijssels v. Belgium* App no 19983/92 (ECtHR, 24 February 1997)

⁷⁷ *Alechina T.S. and Department of pre-school education of town Sarov's Nizhny Novgorod region administration v OOO "Editorial office of newspaper Sarov"*, Decision of the Savor court of Nizhny Novgorod region November (29.08.2011). Available at: <http://sudact.ru/regular/doc/vQwF3MorXpWw/>

⁷⁸ The Ruling of The Sverdlovsky region court N 33-3395/2012 (27.03.2012). Available at: <http://sudrf.ru>

legislative norms in the context of surveillance and anti-terrorism provisions?

8.1. General observation of the legislation of the Russian Federation concerning using electronic surveillance and combating of terrorism

The freedom of mass media according to the Russian laws cannot be subject to abuses. In particular, Article 4 of the Law On Mass Media prohibits the use of mass media in order to commit a crime, disclose information, and popularise terrorist ideas, corresponding manuals and information or to justify terrorist activities.⁷⁹

Such measures as interceptions of communications, surveillance actions and search or seizure actions may be applied in case there is a suspicion that the rights to the freedom of mass media have been abused. These measures should be authorised by a court warrant. The Russian legislative framework does not explicitly address criteria for using electronic surveillance and anti-terrorism laws. However, the Federal Law On Counteracting Terrorism defines the list of terrorist activities the prevention of which by the before mentioned means demands the court. These activities include:

- organization, planning, preparation, financing and realization of a terrorist act;
- incitement to a terrorist act;
- organization of illegal armed gangs, criminal communities or groups for committing a terrorist act, as well as participation in this type of community;
- recruitment, armament, trainings and usage of terrorists;
- informational or another aiding in planning, preparation or realization of terrorist act;
- propaganda of terrorist ideas, relevant manuals and information calling upon to commit a terrorist act or to justify this type of activity.⁸⁰

The Federal Law On Counteracting Terrorism in its Article 11 states that during operation of combating terrorism measures such as passport control of individuals, and, importantly – the control of telephone conversations and other communications may be applied.⁸¹

The Federal Law On the Operational Search Activity also addresses the interception of communications. It consists of, *inter alia*, the interception of postal, telegraphic, telephone and other forms of communication and the collection of data from technical channels of communication. They are carried out by technical means by the Federal Security Service and the

⁷⁹ Law On Mass Media, Art.4

⁸⁰ Federal Law On Counteracting Terrorism 2006 (ed. 31.12.2014) N 35-FZ, ConsultantPlus, Art.3(2)

⁸¹ *Ibid*, Art.11(3)(4)

agencies of the Ministry of the Internal Affairs of the Russian Federation, in accordance with decisions and agreements signed between the agencies involved.⁸² The Law stipulates that audio and video recording, photography, filming and other technical means may be used during operational-search activities, provided that they are not harmful to the life or health of those involved or to the environment.

Measures as control over the use of mails, phone-tapping and control of technical communication links could be used on the following conditions:

- 1) initiation of criminal proceeding;
- 2) occurrence of special information on:
 - criminal signs
 - activities that can threaten the state, military, economical, informational and environmental security of Russian Federation
 - persons avoiding justice
 - missing persons
- 3) instructions of certain state authority;
- 4) inquiry of international law-enforcement agencies.

Importantly, these measures should be sanctioned by a decision of judge based on objective facts. In exceptional circumstances other public authorities could authorise undertaking the measures envisaged by the Law even without a warrant, but it is necessary to inform the court about the measures during 24 hours. Within 48 hours since the beginning of the operational-search activities certain authority is required to obtain a judicial decision on the conduct of such operational-search activities or on its termination.⁸³ The similar provision is contained in Article 86 of the Code of Criminal Procedure where only a judicial decision authorises the interception of the audio.⁸⁴ A court may grant authorization to intercept the communications of a suspect, an accused or other persons if there are reasons to believe that information relevant to the criminal case may be discussed.⁸⁵

According to the above mentioned provisions a judge has the right to render the operational-search activities undertaken in the absence of the judicial warrant inadmissible in case he or she consider it contradicts the Russian laws. Article 75 of the Code of Criminal Procedure contains the criteria of the admissibility of evidence. The evidence obtained with the breach of the Code of Criminal Procedure rules shall be rendered inadmissible.⁸⁶ And as it is stated in Article 6 of the Code of the Criminal Procedure the protection of the human rights is one of its core principles.⁸⁷

⁸² Federal Law On Operational Search Activity, Art.6(4)

⁸³ *Ibid.*, Art. 8

⁸⁴ Code of Criminal Procedure, Art.86

⁸⁵ *Ibid.*, Art.186(1)

⁸⁶ *Ibid.*, Art.75

⁸⁷ *Ibid.*, Art.6

Consequently, the evidence obtained in the violation of the human rights could not be considered by a court as admissible. Further according to the Constitution no laws denying or belittling human and civil rights and liberties may be issued in the Russian Federation what also indirectly demonstrates that the evidence violating human rights is illegal. In cases of indirect seizure and interception of communications violation of human rights is also an obstacle to regard particular evidence as admissible. What is more, the Code of Criminal Procedure is silent on the issue that authorities are under the obligation to bring the seized information before a judge.

Moreover, the Federal Law On Communications imposes an obligation on communications service providers to furnish to the law-enforcement agencies information about subscribers and services received by them and any other information they require in order to achieve their aims and objectives in cases specified in federal laws.⁸⁸ Most likely by federal laws legislator meant Article 7 of the Federal Law On Operational Search Activity which states the grounds for operational-search activities.⁸⁹

The body responsible for monitoring the media (electronic and mass media), information technologies and telecommunications is Roskomnadzor. In any case, this body cannot request information which is not published in mass media. Accordingly Roskomnadzor does not have access to the source of information and cannot demand its disclosure⁹⁰

It is evident that the respective legislation merely provides general regulation without any specific rules concerning journalists. It could be explained by the fact that journalistic professional secrecy has no specific limits and is included in other spheres of regulation.

8.2. Legislation of the Russian Federation contains accessible although unclear and unprecise norms in the context of surveillance and anti-terrorism provisions.

The ECtHR established specific requirements for the law to justify interception of communications. Thus, the criterion of foreseeability implies that the national law must be sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures.⁹¹

The extensive research revealed that the respective national legislation is not absolutely clear in its regulation of journalists' conduct in the context of surveillance and terrorism spheres. It also flows from the fact that these legislative norms could be interpreted in different ways in the absence of strict regulation.

⁸⁸ Federal Law On Communications 2003 (ed. 13.07.2015) N 126-FZ, Art.64(1)

⁸⁹ Federal Law On Operational Search Activity, Art.7

⁹⁰ Decree of the Government of the Russian Federation 2009 (ed. 25.12.2015) On the Federal Service for Surveillance on the communications, information technologies and mass media N 228 ["**Decree N 228**"] "

⁹¹ *Malone v The United Kingdom* App no 8691/79 (ECtHR, 2 August 1984), 67; *Leander v Sweden* App no 9248/81 (ECtHR, 26 March 1987), 51; *Huwig v France* App no 11105/84 (ECtHR, 24 April 1990), 29

The ECtHR confirmed this conclusion in cases of *Roman Zakharov v. Russia* and *Bykov v. Russia*. Firstly, in *Roman Zakharov v. Russia* the ECtHR unanimously found serious and systematic faults with the Russian legislative framework regulating the surveillance of mobile communications. The parties did not dispute that interceptions of mobile telephone communications have a basis in the domestic law (Code of Criminal Procedure and the Federal Law On the Operational Search Activity). The ECtHR upheld that these laws were accessible since they were published in an official ministerial magazine, combined with the fact that it can be accessed by the general public through an internet legal database.⁹² However, the Court concluded that Russian law does not provide with sufficient clarity the circumstances in which public authorities are empowered to resort to secret surveillance measures. The authorization procedures are not capable of ensuring that secret surveillance measures are ordered only when “necessary in a democratic society”. The supervision of interceptions, as it is currently organised, does not comply with the requirements of independence, powers and competence. The effectiveness of the remedies is undermined by the absence of notification at any point of interceptions, or adequate access to documents relating to interceptions.⁹³

Secondly, in *Bykov v. Russia* applicant claimed that the covert operation had involved an unlawful intrusion into his home and that the interception and recording of his conversation had interfered with his private life. The ECtHR held that there had been a violation of Article 8 of the European Convention on account of the use of a surveillance technique which was not accompanied by adequate safeguards against abuses and the legal discretion enjoyed by the police authorities had been too broad.⁹⁴

Thus, Russian legislation on surveillance and anti-terrorism measures is accessible, but still rather unclear and unprecise.

9. Can journalists rely on encryption and anonymity online to protect themselves and their sources against surveillance?

9.1. General knowledge

In the modern world governments and external arbitrarily obtain access to the journalists' information thereby they limit the freedom of expression of journalists and violate the principle of confidentiality.⁹⁵ Therefore, journalists are forced to rely on encryption and anonymity online to protect their sources. Since this issue is a subject to the attention of the international

⁹² *Roman Zakharov v. Russia* App no 47143/06 (ECtHR, 4 December 2015), §242

⁹³ *Ibid*, §302

⁹⁴ *Bykov v. Russia* App no 4378/02 (ECtHR, 10 March 2009), §§80, 82, 83

community as a whole the present report focuses on United Nations documents on a question of surveillance provided in the table below and the Russian legal framework despite its limitation.

	Report of the Special Rapporteur to the Human Rights Council on the States' surveillance of communications (2013)⁹⁶	Report of the Special Rapporteur to the Human Rights Council on the use of encryption and anonymity (2015)⁹⁷
Theses	<p>Privacy and freedom of expression are mutually dependent.</p> <p>Infringements on online journalism, which constitute intimidation and censorship such as:</p> <ul style="list-style-type: none"> ▪ illegal hacking into online journalists and bloggers accounts; ▪ monitoring of their online activities; ▪ arbitrary arrests and detention; ▪ the blocking of websites that contain information that 	<p>Encryption and anonymity constitutes necessary tools for exercising the right to freedom of opinion and expression in the digital age. Any restrictions must be provided by law and be necessary and proportionate to achieve legitimate aim.</p>

⁹⁶ Report of the Special Rapporteur to the Human Rights Council on the implications of States' surveillance of communications on the exercise of the human rights to privacy and to freedom of opinion and expression 2013. Available at: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx>

⁹⁷ Report of the Special Rapporteur to the Human Rights Council on the use of encryption and anonymity to exercise the rights to freedom of opinion and expression in the digital age 2015. Available at: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/Annual.aspx>

	criticize authorities.	
Recommendations	Safeguards must be articulated in law (nature, scope, duration of, grounds for restrictive measures, bodies which authorize them, remedy provided).	National laws should recognise using encryption technology and other anonymity tools.
Obligations	Surveillance over communications should not be used until exhaustion of less invasive techniques. Any illegal surveillance should be criminalised.	

These documents show *opinio juris* of UN members which states that confidentiality of sources should be protected against illegal surveillance. The Constitution also establishes the grounds to protect the confidentiality in Article 23 which guarantees privacy of correspondence, telephone conversations, postal, telegraph and other communications.⁹⁸ Further, the encryption and anonymity online are the supplementary legal sources of protection journalists against the illegal surveillance.

9.1.1. Encryption

According to Article 2(a) of the Decree of the Government of the Russian Federation On Licensing of Certain Activities Associated With Encryption (Cryptographic) Means N 313 *encryption* is a method of encoding messages or information in such a way that only authorised parties can read it by access to data (a text message or a file), using the decryption key.⁹⁹ The Federal Law On Licensing Certain Types of Activity N 99-FZ which covers general licensing procedures for many activities states that the license is needed to develop encryption for information systems and telecommunications systems, disseminate encryption material, work on encryption, and provide encryption services. At the same time, the usage of the cryptography to

⁹⁸ Constitution, Art. 23

⁹⁹ The Decree states that the Federal Security Service of the Russian Federation (FSB) is the licensing authority. The FSB licenses are issued by the FSB Center for Licensing, Certification, and Protection of State Secrets. The Decree of the Government of the Russian Federation from 16.04.2012 On Licensing of Certain Activities Associated With Encryption (Cryptographic) Means N 313 [“**Decree N 313**”], ConsultantPlus.

satisfy the needs for personal use as a natural person and of the legal entity or individual entrepreneur is not prohibited in the absence of a license¹⁰⁰.

9.1.2. Anonymisers

In the Russian Federation tools that help to use anonymity online are called anonymisers. They can imitate access to a web-page from foreign IP addresses, which allows users to bypass blocking services on particular prohibited web-pages.

In February 2015 there were calls demanding pre-trial block of anonymisers and their equivalences like Tor. The Roskomnadzor confirmed that anonymisers should be prohibited because they allow getting access to the prohibited information and even worse, to conduct the cyber attacks.¹⁰¹ On the other hand, the Head of the Roskomnadzor Alexander Zharov emphasises that need to “self made” anonymizers exists which should be under special services control or at least certified by state bodies.¹⁰² Despite the fact that national legislation does not prohibit the use of anonymous sites and anonymisers, Roskomnadzor has taken steps in order to block them.¹⁰³

9.2. The right to surveillance vs. the protection of privacy

For most journalists e-mail and social network messages are the primary means for communication with their sources of information. In case the source of information prefers to use his or her right to anonymity it is highly important for journalists to ensure the confidentiality. At the same time journalists in Russia share their concern about the privacy in the country.¹⁰⁴ The number of cases when Russian authorities request the access to users' information located in the social networks service on the opinion of the drafters of this research is rather high. From 1 July 2014 to 31 December 2015 Russian authorities requested 233 times from Twitter to disclose users' information. There is no evidence whether the reasons of the requests to disclose the information were provided to the operators or not. However, Twitter did

¹⁰⁰ Federal Law On Licensing Certain Types of Activity N 99-FZ from 04.05.2011, ConsultantPlus.

¹⁰¹A. Golichina, *Roskomnadzor confirmed that anonymizers in runet should be prohibited*, Vedomosti (05.02.2015). Available at: <http://www.vedomosti.ru/technology/articles/2015/02/05/roskomnadzor-podderzhal-ideyu-zapreta-anonimajzerov-v-runete>

¹⁰² *Roskomnadzor: encryption algorithms of anonymizers should be controlled by state special forces*, Gazeta.ru (29.12.2015). Available at: http://www.gazeta.ru/tech/news/2015/12/29/n_8073197.shtml

¹⁰³ Following the judgment of Arapskiy court of the Krasnodar region site “RosKomSvoboda” was blocked because on this site advised how to bypass the interlock and visit the blocked sites. However, afterwards this site was unblocked. Available at: <https://digital.report/oon-priznala-anonimnost-v-internete-sostavnoy-chastyu-pravcheloveka/>

¹⁰⁴ Gainutdinov D., Chikov P. Russia under supervision. Report of the International non-governmental Human Rights Protection Group Agora. Available at: https://meduza.io/static/0001/Surveillance_Report_Agora.pdf

not disclose the data.¹⁰⁵ Similarly, in the beginning of 2015 Google responded only 5% of the 207 such requests.¹⁰⁶ The “Telegram” also refused to restrict access to the messenger when the Deputy of the Russian State Duma Alexander Ageev contacted the head of the Federal Security Service with this purpose.¹⁰⁷ The evidence whether the government abuses its right to surveillance or any external enrooted surveillance spyware in the gadgets of the users may be found due to the new programme *Detekt* developed with the partnership of Amnesty International.¹⁰⁸ Though the access to the programme has not been limited by the Russian Government the question if an evidence which was obtained using such programme will be admissible in court is still open and not legally regulated.

In conclusion, the Russian laws do not prohibit the usage of encryption programs and anonymisers although the legal regulation thereof is very scarce. At the same time there is not enough trust of the journalistic society that the government can provide the privacy of the information in reality. Consequently, journalists keep using technical tools to protect their sources by reliance of encryption and anonymity online.

10. Are whistle-blowers explicitly protected under law protecting journalistic sources? Is there another practice protecting whistle-blowers? Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

Analysis of the legal framework of the Russian Federation has shown that whistle-blowers are neither explicitly protected under law protecting journalistic sources nor given other special protection. However, they are subjects to general protection under the distinguished instruments.¹⁰⁹

¹⁰⁵ Russia – Information requests, Transparency Report. Available at: <https://transparency.twitter.com/country/ru>

¹⁰⁶ Report concerning availability of services and data, Google (June – July 2015). Available at: <https://www.google.com/transparencyreport/userdatarequests/countries/>

¹⁰⁷ *Deputy suggest FSS to control Telegram*, Vedomosti newspaper N 3961 (17.11.2015). Available at: <https://www.vedomosti.ru/technology/articles/2015/11/17/617122-fsb-kontrolirovat-telegram>

¹⁰⁸ *The new program would help activists to find out whether the government has surveilled over them*, Amnesty International (24.11.2014). Available at: <https://amnesty.org.ru/node/3100/>

¹⁰⁹ The Constitution; the Criminal Code, the Code of Criminal Procedure; the Government Decree of the Russian Federation “On security measures for participants of the criminal judicial proceedings” 27.10.2006 N 630; Ruling of the Constitutional Court of the Russian Federation “On the rights of victims of criminal cases to get acquainted with files” 11.06.2006; the Government Decree of the Russian Federation “On determining the level of harm made to human health” 17.08.2007 N 522; the Government Decree of the Russian Federation “On the Rules of payments to victims, witnesses and other participants of criminal judicial proceedings as a state protection” 11.11.2006 N 664; the Government Decree of the Russian Federation On protection of information for protecting victims, witnesses and other participants of the criminal judicial proceedings 03.03.2007 N 134

10.1. Different protection granted by disclosure in different areas

10.1.1. Anti-Corruption regulation

In 2006 the Russian Federation ratified United Nations Convention against Corruption and relevant Council of Europe's instruments among which are the Criminal Law Convention on Corruption.¹¹⁰ Unfortunately, national legislation including protection of whistle-blowers lacks conformity with the above mentioned international agreements yet.

In September 2008 the National Anti-Corruption Council approved a package of anti-corruption bills, which had been submitted by President Medvedev to the State Duma. The draft legislation was approved in its first week of reading and introduced a norm for the mandatory reporting of cases on corruption, graft, abuse of power or abuse of resources by public officials.

On 11 December 2008 at a meeting of the State Duma working group on anti-corruption, it was decided to remove a model for whistleblowing from the text of the anti-corruption legislation prepared for the second reading. The resulting legislation, the Federal Law On Combatting Corruption does not include an explicit reference to whistle-blowers, however under its Article 9(4) public officials, in accordance with the laws of the Russian Federation, who report corrupt offences committed by other public officials are protected.¹¹¹

Further, following the G20 2010 summit Anti-Corruption Action Plan, Russian Federation decided to introduce whistle-blowing protection legislation. A national plan to counteract corruption was approved by the decree of the President and ensures that the aforementioned legislation will be in effect until the 1 of April 2013.

Unfortunately, these efforts are not effective to grant necessary protection to whistle-blowers. Yet, there is no specific legal protection for whistle-blowers besides the general rules that appear in the Federal Law On Combatting Corruption.

10.1.1.1. ANTI-CORRUPTION IN THE PUBLIC SECTOR

In the public sector, persons may use phone hotlines and e-mail addresses to file a complaint against public officials. However, under its anti-corruption mandate, the General Prosecutor's Office collects such information regardless of the position a person willing to report corruption holds. For example, in September 2007, the Office of Prosecutor General in Sverdlovsk opened

¹¹⁰United Nations Convention against Corruption Signature and Ratification Status as of 1 December 2015, United Nations Office on Drugs and Crime. Available at: <http://www.unodc.org/tandem/tfservlet/UNODC/infocentre/press/press-releases/2015/15-09-01-UN-Convention-against-Corruption-Signature-and-Ratification-Status-as-of-1-December-2015>; Chart of signatures and ratifications of Treaty 173 (Criminal Law Convention on Corruption) Status as of 14/03/2016. Available at: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173/signatures?p_auth=v9h9mt4n;

¹¹¹ Federal Law On Combatting Corruption 2008 (ed. 15.02.2016) N 273-FZ, ConsultantPlus, Art.9(4)

a hotline through which citizens could report on corrupted officials. Some experts claimed that this was an attempt to collect “kompromat” on local bureaucrats on the eve of the December 2007 parliamentary election and obtain an instrument of control over regional authorities. It is very likely that this initiative will be replicated in other regions.

In practice, the internal reporting mechanism for public sector corruption does not have a professional, full-time staff and does not receive regular funding.

10.1.1.2. ANTI-CORRUPTION IN THE PRIVATE SECTOR

Private sector employees who report cases of corruption, graft, abuse of power, or abuse of resources are not protected from recrimination.

Currently, a number of Russian companies have begun to undertake measures which minimise risks for being accused by whistle-blowers. They strengthen corporate governance by creating clearer separation of board and management competencies and responsibilities. The companies also introduce International Financial Reporting Standards (IFRS) and create greater transparency of accounts, disclosure of shareholders and nominate independent directors to the board. At the management level, they introduce ethical codes, internal audit procedures and diverse ways for employees to raise concerns about non-compliance. For example, Tyumen Oil Company has appointed an “anti-corruption manager” who is responsible for making ethical business.

10.1.2. Witness Protection

Whistle-blowers are granted general protection under the Federal Law On governmental protection of victims, witnesses and other participants of criminal judicial proceedings.¹¹² However as Transparency International clarified in its report a whistle-blowers are not a witness in the traditional sense, as described in the Code of Criminal Procedure.¹¹³ Thus, rules of criminal procedure those apply to witness protection of suspects and accused, do not protect corporate whistle-blowers.¹¹⁴

10.1.3. Civil Defamation Law

10.1.3.1. GENERAL RULES

¹¹² Federal Law On governmental protection of victims, witnesses and other participants of criminal judicial proceedings 2004 (ed. 08.03.2015) N 119-FZ, ConsultantPlus

¹¹³ Alternative to Silence: Whistle-blower Protection in 10 European Countries, Transparency International (15 November 2009)

¹¹⁴ D. Gololobov, *Businessmen v. Investigators: Who is responsible for the Poor Russian Investment Climate?*, Russian Law Journal Vol. II (2014) Issue 2, 136

Claims for civil defamation are founded on Articles 150-152 and 1099-1101 of the Civil Code.¹¹⁵ Article 150 of the Civil Code establishes interests which are legally protected, such as dignity of person and privacy. Only reputation (honor, good name, and business reputation) are afforded detailed codification. Article 152(1) of the Civil Code establishes the necessary elements of a successful civil defamation claim in Russian Federation, namely:

- dissemination of a communication concerning the plaintiff;
- communication should be defamatory;
- communication should be false. As interpreted by the Russian Supreme Court, falsity is presumed, with the burden of proof resting on the defendant to prove otherwise.

10.1.3.2. REMEDIES

In civil defamation cases the available remedies are: compensation for non-material harm (moral damages) the amount of which is left for the court to determine, retraction, right of reply if the defendant is a mass media organization, and monetary compensation.¹¹⁶

10.1.3.3. INTERCONNECTION BETWEEN THE CIVIL CODE, THE CRIMINAL CODE AND THE LAW ON MASS MEDIA

Lawsuits which are based on civil defamation claims rarely include other related claims, namely invasion of privacy. However, since this claim is not outlined in the Civil Code, Russian courts look to the Criminal Code when considering this claim.

Article 137 of the Criminal Code describes an invasion of privacy as “The illegal gathering or dissemination of information about the personal life of a person without that person’s permission which information constitutes a personal or family confidence, or the dissemination of such information...by means of the mass media, if such actions are undertaken for reasons of financial gain or personal benefit and cause harm to the rights and legal interests of citizens.”¹¹⁷

Moreover, the Law On Mass Media contains rules on the civil defamation. In particular, under Article 46 someone who was identified in a defamatory statement has a right of reply even if that statement is factually correct.¹¹⁸ Furthermore, the Law states that in lawsuits of or against the journalists and other media there is a possibility to obtain monetary compensation for moral damages.

¹¹⁵ Civil Code, Art.150-152, 1099-1101

¹¹⁶ *Ibid*, Art.152

¹¹⁷ *Ibid*, Art.137

¹¹⁸ Law On Mass Media, Art.46

In 2005, the Supreme Court of the Russian Federation issued a Resolution¹¹⁹ that the civil defamation law began to embrace the plurality principle by accepting multiple sources of law for consideration. Prior to that time, the Supreme Court did not deviate from the autonomy principle with respect to civil defamation and ordinary courts did not recognise external norms as applicable to such cases either.

In addition to accepting the plurality principle, the Ruling N 3 is also significant in its specific mandate to ordinary courts to internalise the ECtHR's interpretations of Article 10 of the ECHR. Prior to 2005, one of the most criticized aspects of Russia's civil defamation law was its approach to the fact/opinion distinction, namely the treatment by Russian courts of all "communication" as subject to Article 152 of the Civil Code.

The Ruling N 3 marked a change in approach to this issue. Significantly, the Supreme Court took the position that going forward Russian courts must distinguish between allegations of fact from statements of opinion, with opinion being excluded entirely from the scope of Article 152.

However, one caveat to this broad exclusion should be noted. Although statements of opinion are no longer subject to Article 152 defamation claims, the Supreme Court left open the possibility for an opinion to be the basis for a claim resting on insult. Also important to the statements of Ruling N 3 concerning the fact/opinion issue is the proclamation, set forth for the first time, that defamation plaintiffs must bear the burden of proof with respect to showing that the communication at issue is defamatory.

Further, the Ruling N 3 provides in terms of distinguishing defamation claims from claims of invasion of privacy, a distinction often lacking in the practice of the courts.

Finally, the Ruling N 3 establishes criteria for ordinary courts to consider in their determination of monetary awards for moral harm. *Firstly*, the amount should be "proportionate" to the harm itself. *Secondly*, the amount must not "encroach on the freedom of mass information". Although these criteria are vague, they show that the Supreme Court of the Russian Federation take into account that unduly high damages might overburden the mass media.

10.2. Disclosure of different types of information

10.2.1. Commercial secrets

As a general rule, disclosure of information which constitutes a commercial secrecy leads to liability. However, in accordance with Article 5 of the Federal Law On commercial secrets the

¹¹⁹ The Ruling of the Plenum of the Supreme Court of the Russian Federation 2005 N 3, ConsultantPlus ["**Ruling N 3**"]

following information does not constitute commercial secrets disclosure of which would not form a basis for liability:¹²⁰

- about violations of the legislation of the Russian Federation and the facts of accountability for these violations;
- about environmental pollution, condition of fire safety, sanitary-epidemiological and radiation situation, food safety and other factors that may have a negative impact on the safe functioning of industrial objects, safety of citizens as well as safety of the population as a whole;
- about employer's debt on salary payments and other social payments.¹²¹

10.2.2. State secrets

Article 4 of the Law On Mass Media prohibits everyone from using mass media for the disclosure of information comprising *state secret*. According to the Mass Media Defense Centre¹²², this interpretation allows Russian mass media to engage in socially responsible journalism without oppression, excessive requirements or surplus of bureaucracy.¹²³

When information being a state secret become known to journalist he or she is not held criminally responsible for its publishing until the journalist does not have access to such information while performing his or her official or professional duties but the person who provided this information or had access to it is brought to criminal responsibility for disclosure of a state secret.¹²⁴ In this regard, the most striking example is the *criminal case* initiated by the department of the Federal Security Service in Perm region in 2003. In October 2002, the journalists of the newspaper *The Star* Konstantin Sterledev and Konstantin Bakharev published an article about drug traffickers which, according to the facts of the case, revealed the identity of an agent of the Security Service. Furthermore, senior police officer captain Sergei Dudkin was charged with the disclosure of the confidential information. Under the court's warrant the editorial office was searched, the journalists' phone conversations were recorded to find out what exactly captain Dudkin told the journalists about the activities of the drug traffickers.¹²⁵

¹²⁰ D.I. Cherkaev, *Informing and signaling: good or bad for Russian companies?*, Available at: <http://www.ao-journal.ru/> № 3 (22) 2006

¹²¹ Federal Law On Commercial Secrets 2004 (ed. 12.03.2014) N 98-FZ, ConsultantPlus, Art.5

¹²² Russian non-governmental organization aimed at the protection of the rights of journalists and editorial boards of mass media, contribution to the protection of the right to freedom of expression registered in 1996 in Voronezh, Russia, Available at: http://www.mmdc.ru/about_center/activity/

¹²³ New opportunities for the freedom of Mass Media in Russia, Mass Media law and practice, 07.05.10, Roscomnadzor Management, Federal Service for Supervision of Communications, Information Technology and Mass Media in Voronezh region, Available at: <http://36.rkn.gov.ru/p3773/p7760/?print=1>

¹²⁴ Criminal Code, Art.283

¹²⁵ Ruling of the Supreme Court of the Russian Federation 27.10.2003 Case N 44-O03-113C Available at: <http://www.vsrfr.ru>

Thus, journalists are not criminally responsible for the disclosure of the state secret but in a case when the court requests the disclosure of the journalistic source who disclosed the information contained the state secret as it was mentioned in Q. 2.1 a journalist shall behave accordingly. Article 7 of the Law On State Secrets provides the list of information which does not constitute state secret:

- information about condition of the environment, health, sanitation, demography, education, culture, agriculture and crime;
- information about violations of the rights and freedoms of man and citizen;
- information about facts of state organs and its officials' violations of law.¹²⁶

11. Conclusion

The analysis of the Russian laws has shown that journalists in Russia are enjoyed full protection in accordance with the Constitution of the Russian Federation, Law on Mass Media, Code of Administrative Offences, Criminal Code, Code of Criminal Procedure and other non-legislative instruments. This protection is also a core of international obligations of the Russian Federation under the ICCPR, ECHR and other international conventions.

Under these instruments the journalists' rights to freedom of expression and privacy of their messages constitute basis for the protection. Even more importantly, to perform these rights and freedoms journalists could keep their source of information confidential except when the court has requested this information with regard to the particular proceedings. The court can exercise this power only after exhaustion of all other available means to prove a fact and if the public interest in disclosure definitely outweighs the interest in keeping it secret. Although the Russian courts regard freedom of speech as a cornerstone of democratic society absence of clearly defined criteria makes it difficult to found a balance between different interests at stake.

In addition, the LRG faced a challenge to find out whether journalists' protection extends to anyone else. In the Russian Federation this protection also covers editorial board and recognised by it freelance authors or correspondents if they perform editorial's assignments. Unfortunately, the protection of journalistic sources does not extend to bloggers as other media actors.

When freedom of mass media is abused Russian courts shall authorise the electronic surveillance and apply the anti-terrorism laws. In the absence of explicit regulation the Federal Law On Counteracting Terrorism and the Federal Law On Operational Search Activity indirectly address conditions to apply these measures. Although being accessible these Laws contain unclear and

¹²⁶ The Law of the Russian Federation On State Secrets 1993 (ed. 08.03.2015) N 5485-1, ConsultantPlus, Art.7

unprecise norms that were confirmed by the ECtHR in *Roman Zakharov v. Russia* and *Bykov v. Russia*.

Moreover, the LRG sought to find out whether the journalists could rely on encryption and anonymity online. Despite the fact that Russian legislation does not prohibit the use of anonymous sites and anonymisers, state bodies have taken steps in order to block them. However, still the government could not effectively protect journalistic privacy which undermines the mere trust in the high echelons of power. Therefore, encryption and anonymity tools are considered to be the only way of journalists to defend their sources.

Further, whistle-blowers are neither explicitly protected under law protecting journalistic sources nor given other special protection. However, they are subjects to general protection which depends on disclosure of different types of information in different areas.

Having analyzed the respective national legislation, the LRG has come to the general conclusion that regulation of the rights of journalists is vague in its terms and not well structured. This could also be explained by the very limited court practice where unwillingness of journalists to be involved in a trial is their adaptation to the existing real situations.

12. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

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13. Table of Provisions

Provisions in your native language	Corresponding translation
<p>Конституция Российской Федерации, часть 4 статьи 15</p> <p>Общепризнанные принципы и нормы международного права и международные договоры Российской Федерации являются составной частью ее правовой системы. Если международным договором Российской Федерации установлены иные правила, чем предусмотренные законом, то применяются правила международного договора.</p>	<p>Constitution of the Russian Federation, Article 15 (4)</p> <p>The universally-recognised norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation establishes other rules than those envisaged by law, the rules of the international agreement shall be applied.</p>
<p>Конституция Российской Федерации, часть 2 статьи 23</p> <p>Каждый имеет право на тайну переписки, телефонных переговоров, почтовых, телеграфных и иных сообщений. Ограничение этого права допускается только на основании судебного решения.</p>	<p>Constitution of the Russian Federation, Article 23 (2)</p> <p>Everyone shall have the right to privacy of correspondence, of telephone conversations, postal, telegraph and other messages. Limitations of this right shall be allowed only by court decision.</p>
<p>Конституция Российской Федерации, часть 4 статьи 29</p>	<p>Constitution of the Russian Federation, Article 29 (4)</p>

<p>Каждый имеет право свободно искать, получать, передавать, производить и распространять информацию любым законным способом. Перечень сведений, составляющих государственную тайну, определяется федеральным законом.</p>	<p>Everyone shall have the right to freely look for, receive, transmit, produce and distribute information by any legal means. The list of data comprising state secrets shall be determined by a federal law.</p>
<p>Закон Российской Федерации «О средствах массовой информации», статья 2</p> <p>Под журналистом понимается лицо, занимающееся редактированием, созданием, сбором или подготовкой сообщений и материалов для редакции зарегистрированного средства массовой информации, связанное с ней трудовыми или иными договорными отношениями либо занимающееся такой деятельностью по ее уполномочию...</p>	<p>Law of the Russian Federation on Mass Media, Article 2</p> <p>The journalist shall be understood to mean a person who edits, creates, collects or prepares messages and materials for the editor's office of a mass medium and is connected with it with labor and other contractual relations or engaged in such activity, being authorised by it...</p>
<p>Закон Российской Федерации «О средствах массовой информации», статья 4</p> <p>Не допускается использование средств массовой информации в целях совершения уголовно наказуемых деяний, для разглашения сведений, составляющих государственную или иную специально охраняемую законом тайну, для распространения материалов, содержащих публичные призывы к осуществлению террористической</p>	<p>Law of the Russian Federation on Mass Media, Article 4</p> <p>No provision shall be made for the use of mass media for purposes of committing criminally indictable deeds, divulging information making up a state secret or any other law-protective secret, calling for the seizure of power, violently changing the constitutional system and the state integrity, fanning national, class, social and religious intolerance or strife, propagating war and also for the spreading of</p>

<p>деятельности или публично оправдывающих терроризм, других экстремистских материалов, а также материалов, пропагандирующих порнографию, культ насилия и жестокости, и материалов, содержащих нецензурную брань.</p> <p>Запрещается использование в радио-, теле-, видео-, кинопрограммах, документальных и художественных фильмах, а также в информационных компьютерных файлах и программах обработки информационных текстов, относящихся к специальным средствам массовой информации, скрытых вставок и иных технических приемов и способов распространения информации, воздействующих на подсознание людей и (или) оказывающих вредное влияние на их здоровье...</p>	<p>broadcasts propagandizing pornography or the cult of violence and cruelty.</p> <p>It shall be prohibited to use – in the television, video and cinema programmes or in documentary and feature films, and also in information computer files and in the programmes of the processing of information texts belonging to special mass information media - concealed in - sets influencing the subconscious of human beings and/or affecting their health.</p>
<p>Закон Российской Федерации «О средствах массовой информации», статья 12</p> <p>Не требуется регистрация:</p> <p>средств массовой информации, учреждаемых органами государственной власти и органами местного самоуправления исключительно для издания их официальных сообщений и материалов, нормативных и иных актов;</p> <p>периодических печатных изданий тиражом менее одной тысячи</p>	<p>Law of the Russian Federation on Mass Media, Article 12</p> <p>No registration is required for the following mass media:</p> <p>the mass information media founded by the organs of legislative, executive and judicial power to publish nothing but their official communications and materials, normative and other acts;</p> <p>periodicals with a total print of not less than one thousand copies;</p>

<p>экземпляров;</p> <p>радио- и телепрограмм, распространяемых по кабельным сетям, ограниченным помещением и территорией одного государственного учреждения, одной образовательной организации или одного промышленного предприятия либо имеющим не более десяти абонентов;</p> <p>аудио- и видеопрограмм, распространяемых в записи тиражом не более десяти экземпляров.</p>	<p>radio and television programmes disseminated through cable networks, limited by the premises and area of one governmental institution, educational establishment industrial enterprise or organization that has not more than ten subscribers;</p> <p>audio and video-programmes spread in recording with a total printing of not more than ten copies.</p>
<p>Закон Российской Федерации «О средствах массовой информации», части 1 и 2 статьи 41</p> <p>Редакция не вправе разглашать в распространяемых сообщениях и материалах сведения, предоставленные гражданином с условием сохранения их в тайне.</p> <p>Редакция обязана сохранять в тайне источник информации и не вправе называть лицо, предоставившее сведения с условием неразглашения его имени, за исключением случая, когда соответствующее требование поступило от суда в связи с находящимся в его производстве делом.</p>	<p>Law of the Russian Federation on Mass Media, Article 41 (1,2)</p> <p>The editorial office shall not have the right to divulge in distributed reports and materials the information submitted by a private citizen with the proviso of keeping this information secret.</p> <p>The editorial office shall be obliged to keep the source of information secret and shall not have the right to name the person who has submitted information with the proviso of non-divulgence of his name, except for the case when the corresponding demand came from a court of law in connection with case it disposes of.</p>
<p>Закон Российской Федерации «О средствах массовой информации», статья 46</p>	<p>Law of the Russian Federation on Mass Media, Article 46</p>

<p>Гражданин или организация, в отношении которых в средстве массовой информации распространены сведения, не соответствующие действительности либо ущемляющие права и законные интересы гражданина, имеют право на ответ (комментарий, реплику) в том же средстве массовой информации.</p> <p>В отношении ответа и отказа в таковом применяются правила статей 43 - 45 настоящего Закона.</p> <p>Ответ на ответ помещается не ранее чем в следующем выпуске средства массовой информации. Данное правило не распространяется на редакционные комментарии.</p>	<p>A private citizen or organization, in respect of whom a mass medium has spread information that runs counter to the reality or impinges on the rights and lawful interests of the citizen, shall have the right to give the answer (commentary or retort) in the same mass medium.</p> <p>The rules, contained in Articles 43-45 of the present Law shall be applicable to the answer or refusal to this reply.</p> <p>The answer to the reply shall be featured at least in the next issue of a mass medium. This rule shall not extend to editorial commentaries.</p>
<p>Закон Российской Федерации «О средствах массовой информации», статья 49</p> <p>Журналист обязан:</p> <ol style="list-style-type: none"> 1) соблюдать устав редакции, с которой он состоит в трудовых отношениях; 2) проверять достоверность сообщаемой им информации; 3) удовлетворять просьбы лиц, предоставивших информацию, об указании на ее источник, а также об авторизации цитируемого высказывания, 	<p>Law of the Russian Federation on Mass Media, Article 49</p> <p>The journalist shall be obliged:</p> <ol style="list-style-type: none"> 1) to observe the statutes of the editorial office with which he maintains labor relations; 2) to verify the authenticity of the information he supplies; 3) to satisfy the requests of the persons who submitted information concerning the indication of its source, and also the authorization of a cited pronouncement, if

<p>если оно оглашается впервые;</p> <p>4) сохранять конфиденциальность информации и (или) ее источника;</p> <p>5) получать согласие (за исключением случаев, когда это необходимо для защиты общественных интересов) на распространение в средстве массовой информации сведений о личной жизни гражданина от самого гражданина или его законных представителей;</p> <p>6) при получении информации от граждан и должностных лиц ставить их в известность о проведении аудио- и видеозаписи, кино - и фотосъемки;</p> <p>7) ставить в известность главного редактора о возможных исках и предъявлении иных предусмотренных законом требований в связи с распространением подготовленного им сообщения или материала;</p> <p>8) отказаться от данного ему главным редактором или редакцией задания, если оно либо его выполнение связано с нарушением закона;</p> <p>9) предъявлять при осуществлении профессиональной деятельности по первому требованию редакционное удостоверение или иной документ, удостоверяющий личность и полномочия журналиста;</p> <p>Журналист несет также иные обязанности, установленные законодательством Российской Федерации о средствах массовой информации.</p>	<p>it is made public for the first time;</p> <p>4) to preserve the confidential character of information and (or) its source;</p> <p>5) to receive the consent of a private citizen or his lawful representatives (except for the cases when it is necessary to protect public interests) to the spread in a mass medium of information about his personal life;</p> <p>6) to inform private citizens and officials about audio- and video-recording, photography and cine-photography upon the receipt data from these persons and officials;</p> <p>7) to inform the editor-in-chief about possible suits and the presentation of other claims envisaged by law in connection with the spread of the communication or material prepared by him;</p> <p>8) to decline the assignment given to him by the editor-in-chief or his editorial office, if its fulfillment involves the infringement of law;</p> <p>9) to produce as soon as required the identity card issued by his editorial office or any other document that certifies his identity and rights, when he carries on professional activities.</p> <p>The journalist shall also bear other duties established by the legislation of the Russian Federation on mass media.</p> <p>In his professional activities the journalist shall be obliged to respect the rights, lawful interests, the honor and dignity of</p>
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<p>При осуществлении профессиональной деятельности журналист обязан уважать права, законные интересы, честь и достоинство граждан и организаций.</p> <p>Государство гарантирует журналисту в связи с осуществлением им профессиональной деятельности защиту его чести, достоинства, здоровья, жизни и имущества как лицу, выполняющему общественный долг.</p>	<p>private citizens and organizations.</p> <p>The State shall guarantee for the journalist, who carries on his professional activities, the protection of his honor, dignity, health, life and property as a person discharging his civil duty.</p>
<p>Закон Российской Федерации «О средствах массовой информации», статья 52</p> <p>Профессиональный статус журналиста, установленный настоящим Законом, распространяется:</p> <p>на штатных сотрудников редакций, занимающихся редактированием, созданием, сбором или подготовкой сообщений и материалов для многотиражных газет и других средств массовой информации, продукция которых распространяется исключительно в пределах одного предприятия (объединения), организации, учреждения;</p> <p>на авторов, не связанных с редакцией средства массовой информации трудовыми или иными договорными отношениями, но признаваемых ею своими внештатными авторами или корреспондентами, при выполнении ими поручений редакции.</p>	<p>Law of the Russian Federation on Mass Media, Article 52</p> <p>The professional status of journalists established by the present Law shall extend to:</p> <p>staff workers of the editorial offices engaged in editing, writing, collecting or preparing communications and materials for newspapers with a large circulation and other mass media whose products are disseminated exclusively within one enterprise (association), organization or institution;</p> <p>authors who are not connected with the editorial office or section of a mass medium by labor or other contractual relations but are recognized by it as its free-lance authors or non-staff correspondents when they fulfill the editorial office's assignments.</p>

<p>Закон Российской Федерации «О средствах массовой информации», статья 56</p> <p>Учредители, редакции, издатели, распространители, государственные органы, организации, учреждения, предприятия и общественные объединения, должностные лица, журналисты, авторы распространенных сообщений и материалов несут ответственность за нарушения законодательства Российской Федерации о средствах массовой информации...</p>	<p>Law of the Russian Federation on Mass Media, Article 56</p> <p>The founders, editorial offices and sections, distributors, state agencies, organizations, institutions, enterprises and public associations, officials, journalists, and the authors of disseminated reports and materials shall bear responsibility for breaching the legislation of the Russian Federation on mass media...</p>
<p>Закон Российской Федерации «О средствах массовой информации», статья 58</p> <p>Ущемление свободы массовой информации, то есть воспрепятствование в какой бы то ни было форме со стороны граждан, должностных лиц государственных органов и организаций, общественных объединений законной деятельности учредителей, редакций, издателей и распространителей продукции средства массовой информации, а также журналистов, в том числе посредством:</p> <p>осуществления цензуры;</p> <p>вмешательства в деятельность и нарушения профессиональной</p>	<p>Law of the Russian Federation on Mass Media, Article 58</p> <p>The infringement of the freedom of mass communication, that is, the prevention by individuals, officials of state organs and organizations, and public associations of the lawful activity of the founders, editorial offices, publishers and distributors of mass media products, and also by journalists by means of:</p> <p>editorial office;</p> <p>interference in the activity and breach of the professional independence of the editorial office;</p> <p>illegal termination or suspension of the</p>

<p>самостоятельности редакции;</p> <p>незаконного прекращения либо приостановления деятельности средства массовой информации;</p> <p>нарушения права редакции на запрос и получение информации;</p> <p>незаконного изъятия, а равно уничтожения тиража или его части;</p> <p>принуждения журналиста к распространению или отказу от распространения информации;</p> <p>установления ограничений на контакты с журналистом и передачу ему информации, за исключением сведений, составляющих государственную, коммерческую или иную специально охраняемую законом тайну;</p> <p>нарушения прав журналиста, установленных настоящим Законом, – влечет уголовную, административную, дисциплинарную или иную ответственность в соответствии с законодательством Российской Федерации.</p> <p>Обнаружение органов, организаций, учреждений или должностей, в задачи либо функции которых входит осуществление цензуры массовой информации, – влечет немедленное прекращение их финансирования и ликвидацию в порядке, предусмотренном законодательством Российской Федерации.</p>	<p>functioning of a mass medium;</p> <p>breach of the right of the editorial office in reply to the inquiry and receipt of information;</p> <p>illegal seizure and also destruction of the print or part thereof;</p> <p>compulsion of journalists to spread information or to refuse to spread it;</p> <p>establishment of limitations on the contracts with journalists and transfer of information to them, except for the data comprising a state, commercial or any other specially law-protected secret;</p> <p>breach of the rights of journalists established by the present Law;</p> <p>shall entail criminal, administrative, disciplinary or any other responsibility in accordance with the legislation of the Russian Federation.</p> <p>The identification of organs, organizations, institutions or officials whose functions cover censorship of mass communication shall entail the immediate termination of their financing and their liquidation in the order prescribed by the legislation of the Russian Federation.</p>
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<p>Гражданский кодекс Российской Федерации, статья 150</p>	<p>Civil Code of the Russian Federation, Article 150</p>
<p>1. Жизнь и здоровье, достоинство личности, личная неприкосновенность, честь и доброе имя, деловая репутация, неприкосновенность частной жизни, неприкосновенность жилища, личная и семейная тайна, свобода передвижения, свобода выбора места пребывания и жительства, имя гражданина, авторство, иные нематериальные блага, принадлежащие гражданину от рождения или в силу закона, неотчуждаемы и непередаваемы иным способом.</p> <p>2. Нематериальные блага защищаются в соответствии с настоящим Кодексом и другими законами в случаях и в порядке, ими предусмотренных, а также в тех случаях и пределах, в каких использование способов защиты гражданских прав (статья 12) вытекает из существа нарушенного нематериального блага или личного неимущественного права и характера последствий этого нарушения...</p>	<p>1. The life and health, the personal dignity and personal immunity, the honour and good name, the business reputation, the immunity of private life, the personal and family secret, the right of a free movement, of the choice of the place of stay and residence, the right to the name,</p> <p>the copyright and the other personal non-property rights and non-material values, possessed by the citizen since his birth or by force of the law, shall be inalienable and untransferable in any other way. In the cases and in conformity with the procedure, stipulated by the law, the personal non-property rights and the other non-material values, possessed by the deceased person, may be exercised and protected by other persons, including the heirs of their legal owner.</p> <p>2. The non-material values shall be protected in conformity with the present Code and with the other laws in the cases and in the order, stipulated by these, and also in those cases and within that scope, in which the use of the ways of protecting the civil rights (Article 12) follow from the substance of the violated non-material right and from the nature of the consequences of this violation.</p>

<p style="text-align: center;">Гражданский кодекс Российской Федерации, статья 151</p> <p>Если гражданину причинен моральный вред (физические или нравственные страдания) действиями, нарушающими его личные неимущественные права либо посягающими на принадлежащие гражданину нематериальные блага, а также в других случаях, предусмотренных законом, суд может возложить на нарушителя обязанность денежной компенсации указанного вреда.</p> <p>При определении размеров компенсации морального вреда суд принимает во внимание степень вины нарушителя и иные заслуживающие внимания обстоятельства. Суд должен также учитывать степень физических и нравственных страданий, связанных с индивидуальными особенностями гражданина, которому причинен вред.</p>	<p style="text-align: center;">Civil Code of the Russian Federation, Article 151</p> <p>If the citizen has been inflicted a moral damage (the physical or moral sufferings) by the actions, violating his personal non-property rights or infringing upon the other non-material values in his possession, and also in the other law-stipulated cases, the court may impose upon the culprit the duty to pay out the monetary compensation for the said damage. When determining the size of compensation for the moral damage, the court shall take into consideration the extent of the culprit's guilt and the other circumstances, worthy of attention. The court shall also take into account the depth of the physical and moral sufferings, connected with the individual features of the person, to whom the damage has been done.</p>
<p style="text-align: center;">Гражданский кодекс Российской Федерации, статья 152</p> <p>1. Гражданин вправе требовать по суду опровержения порочащих его честь, достоинство или деловую репутацию сведений, если распространивший такие сведения не докажет, что они соответствуют действительности.</p> <p>По требованию заинтересованных лиц</p>	<p style="text-align: center;">Civil Code of the Russian Federation, Article 152</p> <p>1. The citizen shall have the right to claim through the court that the information, discrediting his honour, dignity or business reputation be refuted, unless the person who has spread such information proves its correspondence to reality. By the demand of the interested persons, the citizen's honour and dignity shall also be</p>

<p>допускается защита чести и достоинства гражданина и после его смерти.</p> <p>2. Если сведения, порочащие честь, достоинство или деловую репутацию гражданина, распространены в средствах массовой информации, они должны быть опровергнуты в тех же средствах массовой информации.</p> <p>Если указанные сведения содержатся в документе, исходящем от организации, такой документ подлежит замене или отзыву.</p> <p>Порядок опровержения в иных случаях устанавливается судом.</p> <p>3. Гражданин, в отношении которого средствами массовой информации опубликованы сведения, ущемляющие его права или охраняемые законом интересы, имеет право на опубликование своего ответа в тех же средствах массовой информации.</p> <p>4. Если решение суда не выполнено, суд вправе наложить на нарушителя штраф, взыскиваемый в размере и в порядке, предусмотренных процессуальным законодательством, в доход Российской Федерации. Уплата штрафа не освобождает нарушителя от обязанности выполнить предусмотренное решением суда действие.</p> <p>5. Гражданин, в отношении которого распространены сведения, порочащие его честь, достоинство или деловую репутацию, вправе наряду с опровержением таких сведений требовать возмещения убытков и морального вреда, причиненных их</p>	<p>liable to protection after his death.</p> <p>2. If the information, discrediting the honour, dignity or business reputation of the citizen, has been spread by the mass media, it shall be refuted by the same mass media. If the said information is contained in the document, issued by an organization, the given document shall be liable to an exchange or recall. In the other cases, the procedure for the refutation shall be ruled by the court.</p> <p>3. The citizen, with respect to whom the mass media have published the information, infringing upon his rights or his law-protected interests, shall have the right to publish his answer in the same mass media.</p> <p>4. If the ruling of the court has not been executed, the court shall have the right to impose upon the culprit a fine, to be exacted in the amount and in the order, stipulated by the procedural legislation, into the revenue of the Russian Federation. The payment of the fine shall not exempt the culprit from the duty to perform the action, ruled by the court decision.</p> <p>5. The citizen, with respect to whom the information, discrediting his honour, dignity or business reputation has been spread, shall have the right, in addition to the refutation of the given information, also to claim the compensation of the losses and of the moral damage, caused by its spread.</p> <p>6. If the person, who has spread the information, discrediting the honour, dignity or business reputation of the citizen, cannot be identified, the citizen</p>
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<p>распространением.</p> <p>6. Если установить лицо, распространившее сведения, порочащие честь, достоинство или деловую репутацию гражданина, невозможно, лицо, в отношении которого такие сведения распространены, вправе обратиться в суд с заявлением о признании распространенных сведений не соответствующими действительности.</p> <p>7. Правила настоящей статьи о защите деловой репутации гражданина соответственно применяются к защите деловой репутации юридического лица.</p>	<p>shall have the right to turn to the court with the demand that it recognize the spread information as not corresponding to reality.</p> <p>7. The rules of the present Article on the protection of the business reputation of the citizen shall be applied, correspondingly, to the protection of the business reputation of the legal entity.</p>
<p>Гражданский кодекс Российской Федерации, статья 1099</p> <p>1. Основания и размер компенсации гражданину морального вреда определяются правилами, предусмотренными настоящей главой и статьей 151 настоящего Кодекса.</p> <p>2. Моральный вред, причиненный действиями (бездействием), нарушающими имущественные права гражданина, подлежит компенсации в случаях, предусмотренных законом.</p> <p>3. Компенсация морального вреда осуществляется независимо от подлежащего возмещению имущественного вреда.</p>	<p>Civil Code of the Russian Federation, Article 1099</p> <p>1. The grounds and the amount of compensation for the moral damage done to an individual shall be determined by the rules, provided for by this Chapter and Article 151 of this Code.</p> <p>2. The moral damage inflicted by actions (inaction) that infringe the property rights of an individual shall be subject to compensation in cases, provided for by the law.</p> <p>3. The moral damage shall be compensated regardless of the property damage subject to compensation.</p>

<p align="center">Гражданский кодекс Российской Федерации, статья 1100</p> <p>Компенсация морального вреда осуществляется независимо от вины причинителя вреда в случаях, когда:</p> <p>вред причинен жизни или здоровью гражданина источником повышенной опасности;</p> <p>вред причинен гражданину в результате его незаконного осуждения, незаконного привлечения к уголовной ответственности, незаконного применения в качестве меры пресечения заключения под стражу или подписки о невыезде, незаконного наложения административного взыскания в виде ареста или исправительных работ;</p> <p>вред причинен распространением сведений, порочащих честь, достоинство и деловую репутацию;</p> <p>в иных случаях, предусмотренных законом.</p>	<p align="center">Civil Code of the Russian Federation, Article 1100</p> <p>The moral damage shall be compensated regardless of the guilt of the inflictor of damage</p> <p>in cases where:</p> <p>injury has been inflicted the life or health of an individual by a source of special danger;</p> <p>damage has been done to an individual as a result of his illegal conviction, the illegal institution of proceedings against him, the illegal application of remand in custody as a measure of suppression or of a written understanding not to leave his place of residence, the illegal imposition of the administrative penalty in the form of arrest or corrective labour;</p> <p>damage has been inflicted by the spread of information denigrating the honour, dignity and business standing;</p> <p>in other cases provided for by the law.</p>
<p align="center">Гражданский кодекс Российской Федерации, статья 1101</p> <p>1. Компенсация морального вреда осуществляется в денежной форме.</p>	<p align="center">Civil Code of the Russian Federation, Article 1101</p> <p>1. The moral damage shall be compensated in monetary form.</p>

<p>2. Размер компенсации морального вреда определяется судом в зависимости от характера причиненных потерпевшему физических и нравственных страданий, а также степени вины причинителя вреда в случаях, когда вина является основанием возмещения вреда. При определении размера компенсации вреда должны учитываться требования разумности и справедливости.</p> <p>Характер физических и нравственных страданий оценивается судом с учетом фактических обстоятельств, при которых был причинен моральный вред, и индивидуальных особенностей потерпевшего.</p>	<p>2. The amount of the compensation for the moral damage shall be determined by a court of law depending on the nature of physical and moral suffering caused to the victim, and also on the degree of guilt of the inflictor of damage in cases when guilt is a ground for the redress of injury. In estimating the amount of the compensation it is necessary to take into account the requirements of reasonable and justice.</p> <p>The nature of physical and moral suffering shall be assessed by the court with due account of the actual circumstances under which the moral damage was inflicted and of the victim's individual features.</p>
<p>Уголовный кодекс Российской Федерации, часть 1 статьи 137</p> <p>Незаконное собирание или распространение сведений о частной жизни лица, составляющих его личную или семейную тайну, без его согласия либо распространение этих сведений в публичном выступлении, публично демонстрирующемся произведении или средствах массовой информации...</p>	<p>Criminal Code of the Russian Federation, Article 137(1)</p> <p>Illegal collection or spreading of information about the private life of a person which constitutes his personal or family secrets, without his consent, or the distribution of this information in a public speech, in a publicly performed work, or in the mass media...</p>
<p>Уголовный кодекс Российской Федерации, часть 1 статьи 144</p> <p>Воспрепятствование законной профессиональной деятельности</p>	<p>Criminal Code of the Russian Federation, Article 144(1)</p> <p>Obstruction of the lawful professional activity of journalists by compelling them</p>

<p>журналистов путем принуждения их к распространению либо к отказу от распространения информации...</p>	<p>to give out information or to refuse to give out it...</p>
<p>Уголовный кодекс Российской Федерации, часть 1 статьи 238</p> <p>Разглашение сведений, составляющих государственную тайну, лицом, которому она была доверена или стала известна по службе, работе, учебе или в иных случаях, предусмотренных законодательством Российской Федерации, если эти сведения стали достоянием других лиц....</p>	<p>Criminal Code of the Russian Federation, Article 283(1)</p> <p>Disclosure of information comprising a state secret, by a person to whom it has been entrusted or to whom it has become known through his office or work, if this information has become the property of other persons...</p>
<p>Уголовный процессуальный кодекс Российской Федерации, статья 6</p> <p>1. Уголовное судопроизводство имеет своим назначением:</p> <p>1) защиту прав и законных интересов лиц и организаций, потерпевших от преступлений;</p> <p>2) защиту личности от незаконного и необоснованного обвинения, осуждения, ограничения ее прав и свобод.</p> <p>2. Уголовное преследование и назначение виновным справедливого наказания в той же мере отвечают назначению уголовного судопроизводства, что и отказ от</p>	<p>Code of Criminal Procedure of the Russian Federation, Article 6</p> <p>1. The criminal court proceedings are aimed at:</p> <p>1) protecting the rights and the lawful interests of the persons and organizations, who (which) have suffered from the crimes;</p> <p>2) protecting the person from unlawful and ungrounded accusations and conviction, and from the restriction of his rights and freedoms.</p> <p>2. The criminal prosecution and the administration of the just punishment to the guilty persons shall correspond to the</p>

<p>уголовного преследования невиновных, освобождение их от наказания, реабилитация каждого, кто необоснованно подвергся уголовному преследованию.</p>	<p>purpose of the criminal court proceedings in the same measure as the refusal from the criminal prosecution of the non-guilty ones, their relief from the punishment and the rehabilitation of everyone, who has been groundlessly subjected to criminal prosecution.</p>
<p>Уголовный процессуальный кодекс Российской Федерации, часть 3 статьи 56</p> <p>1) судья, присяжный заседатель – об обстоятельствах уголовного дела, которые стали им известны в связи с участием в производстве по данному уголовному делу;</p> <p>2) адвокат, защитник подозреваемого, обвиняемого – об обстоятельствах, ставших ему известными в связи с обращением к нему за юридической помощью или в связи с ее оказанием;</p> <p>3) адвокат – об обстоятельствах, которые стали ему известны в связи с оказанием юридической помощи;</p> <p>4) священнослужитель – об обстоятельствах, ставших ему известными из исповеди;</p> <p>5) член Совета Федерации, депутат Государственной Думы без их согласия – об обстоятельствах, которые стали им известны в связи с осуществлением ими своих полномочий.</p>	<p>Code of Criminal Procedure of the Russian Federation, Article 56(3)</p> <p>Not subject to an interrogation as witnesses shall be:</p> <p>1) a judge and the juror – about circumstances of the case, which have become known to them in connection with their participation in the procedure on the given criminal case;</p> <p>2) a lawyer, the counsel for the defence of the suspect and of the accused – about the circumstances, which have become known to him in connection with applying to him/her for legal aid or in connection with rendering it;</p> <p>3) a lawyer – about the circumstances, which have become known to him in connection with rendering legal advice;</p> <p>4) a priest – about the circumstances, which he has learned from the confession;</p> <p>5) a member of the Federation Council, a Deputy of the State Duma without their consent – about the circumstances, which have become known to them in connection with their discharge of their</p>

	powers.
<p>Уголовный процессуальный кодекс Российской Федерации, статья 75</p> <p>1. Доказательства, полученные с нарушением требований настоящего Кодекса, являются недопустимыми. Недопустимые доказательства не имеют юридической силы и не могут быть положены в основу обвинения, а также использоваться для доказывания любого из обстоятельств, предусмотренных статьей 73 настоящего Кодекса.</p> <p>2. К недопустимым доказательствам относятся:</p> <p>1) показания подозреваемого, обвиняемого, данные в ходе досудебного производства по уголовному делу в отсутствие защитника, включая случаи отказа от защитника, и не подтвержденные подозреваемым, обвиняемым в суде;</p> <p>2) показания потерпевшего, свидетеля, основанные на догадке, предположении, слухе, а также показания свидетеля, который не может указать источник своей осведомленности;</p> <p>3) иные доказательства, полученные с нарушением требований настоящего Кодекса.</p>	<p>Code of Criminal Procedure of the Russian Federation, Article 75</p> <p>1. The proof, obtained with a violation of the demands of the present Code, shall be qualified as inadmissible. Inadmissible proof are deprived of legal force and cannot serve as a basis for the accusation or be used for proving any one of the circumstances, listed in Article 73 of the present Code.</p> <p>2. Referred as inadmissible proof shall be:</p> <p>1) evidence given by the suspect and by the accused in the course of the pretrial proceedings on the criminal case in the absence of the counsel for the defence, including the cases of the refusal from counsel for the defence, and not confirmed by the suspect and by the accused in the court;</p> <p>2) the evidence of the victim and of the witness, based on a surmise, a supposition or hearsay, as well as the testimony of the witness, who cannot indicate the source of his knowledge;</p> <p>3) the other proof, obtained with a violation of the demands of the present Code.</p>
Уголовный процессуальный кодекс	Code of Criminal Procedure of the

<p style="text-align: center;">Российской Федерации, часть 2 статьи 144</p> <p>По сообщению о преступлении, распространенному в средствах массовой информации, проверку проводит по поручению прокурора орган дознания, а также по поручению руководителя следственного органа следователь. Редакция, главный редактор соответствующего средства массовой информации обязаны передать по требованию прокурора, следователя или органа дознания имеющиеся в распоряжении соответствующего средства массовой информации документы и материалы, подтверждающие сообщение о преступлении, а также данные о лице, предоставившем указанную информацию, за исключением случаев, когда это лицо поставило условие о сохранении в тайне источника информации.</p>	<p style="text-align: center;">Russian Federation, Article 144(2)</p> <p>The communication about a crime in the mass media shall be checked up on the public prosecutor's orders by the body of inquiry or by the investigator. The editorial board and the editor in chief of the corresponding mass medium shall be obliged to hand over, on the demand of the public prosecutor, of the investigator or of the body of inquiry, the documents and materials, confirming the communication on the crime, which are at the disposal of the given mass medium, as well as the data on the person who has supplied the said information, with the exception of the cases when this person has given an assurance that the source of information shall be kept secret.</p>
<p style="text-align: center;">Уголовный процессуальный кодекс Российской Федерации, часть 1 статьи 186</p> <p>При наличии достаточных оснований полагать, что телефонные и иные переговоры подозреваемого, обвиняемого и других лиц могут содержать сведения, имеющие значение для уголовного дела, их контроль и запись допускаются при производстве по уголовным делам о преступлениях средней тяжести, тяжких и особо тяжких</p>	<p style="text-align: center;">Code of Criminal Procedure of the Russian Federation, Article 186(1)</p> <p>If there are sufficient grounds to suppose that telephone and other discussions of the suspect, of the accused or other persons may contain information of importance for the criminal case, their monitoring and recording shall be seen as admissible in the proceedings on the criminal cases on grave and especially grave crimes, on the grounds of a court decision to be adopted in accordance with</p>

<p>преступлениях на основании судебного решения, принимаемого в порядке, установленном <u>статьей 165</u> настоящего Кодекса.</p>	<p>the procedure, laid down by Article 165 of the present Code.</p>
<p>Уголовный процессуальный кодекс Российской Федерации, пункт 1 части 2 статьи 241</p> <p>Закрытое судебное разбирательство допускается на основании определения или постановления суда в случаях, когда разбирательство уголовного дела в суде может привести к разглашению государственной или иной охраняемой федеральным законом тайны.</p>	<p>Code of Criminal Procedure of the Russian Federation, Article 241(2)(1)</p> <p>Conducting the judicial proceedings in camera shall be admissible on the ground of a court ruling or resolution if the judicial proceedings on a criminal case in court may lead to an indulgence of the state or of the other kind of a secret protected by the federal law.</p>
<p>Кодекс Российской Федерации об административных правонарушениях, часть 1 статьи 13.14</p> <p>Разглашение информации, доступ к которой ограничен федеральным законом (за исключением случаев, если разглашение такой информации влечет уголовную ответственность), лицом, получившим доступ к такой информации в связи с исполнением служебных или профессиональных обязанностей...</p>	<p>Code of Administrative Offences of the Russian Federation, Article 13.14(1)</p> <p>Disclosing information, to which access is limited by federal law (safe for the cases when disclosure of such information is criminally punishable), by a person who has access to such information in connection with the performance of official or professional duties...</p>

Федеральный закон «Об информации, информационных технологиях и о защите информации», статья 10.2

1. Владелец сайта и (или) страницы сайта в сети "Интернет", на которых размещается общедоступная информация и доступ к которым в течение суток составляет более трех тысяч пользователей сети "Интернет" (далее - блогер), при размещении и использовании указанной информации, в том числе при размещении указанной информации на данном сайте или странице сайта иными пользователями сети "Интернет", обязан обеспечивать соблюдение законодательства Российской Федерации, в частности:

1) не допускать использование сайта или страницы сайта в сети "Интернет" в целях совершения уголовно наказуемых деяний, для разглашения сведений, составляющих государственную или иную специально охраняемую законом тайну, для распространения материалов, содержащих публичные призывы к осуществлению террористической деятельности или публично оправдывающих терроризм, других экстремистских материалов, а также материалов, пропагандирующих порнографию, культ насилия и жестокости, и материалов, содержащих нецензурную брань;

2) проверять достоверность размещаемой общедоступной информации до ее размещения и незамедлительно удалять размещенную

Federal Law On information, information technologies and on information protection, Article 10.2

1. The owner of a website and/or a website page on the Internet on which generally accessible information is placed and to which access exceeds 3,000 users of the Internet per day (hereinafter referred to as "blogger") when said information is placed and used, for instance when said information is placed on the given website or website page by other users of the Internet shall ensure the observance of the legislation of the Russian Federation, for instance:

1) shall not allow the website or website page on the Internet to be used for the purpose of committing the acts punishable under a criminal law, disclosing the information classified as state or another specifically law-protected secret, disseminating the materials containing public appeals for carrying out terrorist activities or publicly justifying terrorism, other extremist materials and also the materials propagating pornography, the cult of violence and cruelty and the materials containing obscene language;

2) shall verify the reliability of placed generally accessible information before it is placed and shall immediately delete unreliable information that has been placed;

3) shall not allow the dissemination of information about the private life of a

<p>недостовверную информацию;</p> <p>3) не допускать распространение информации о частной жизни гражданина с нарушением гражданского законодательства;</p> <p>4) соблюдать запреты и ограничения, предусмотренные законодательством Российской Федерации о референдуме и законодательством Российской Федерации о выборах;</p> <p>5) соблюдать требования законодательства Российской Федерации, регулирующие порядок распространения массовой информации;</p> <p>6) соблюдать права и законные интересы граждан и организаций, в том числе честь, достоинство и деловую репутацию граждан, деловую репутацию организаций.</p> <p>2. При размещении информации на сайте или странице сайта в сети "Интернет" не допускается:</p> <p>1) использование сайта или страницы сайта в сети "Интернет" в целях сокрытия или фальсификации общественно значимых сведений, распространения заведомо недостоверной информации под видом достоверных сообщений;</p> <p>2) распространение информации с целью опорочить гражданина или отдельные категории граждан по признакам пола, возраста, расовой или национальной принадлежности, языка, отношения к религии, профессии, места</p>	<p>citizen in breach of the civil legislation;</p> <p>4) shall observe the bans and restrictions envisaged by the legislation of the Russian Federation the referendum and the legislation of the Russian Federation on elections;</p> <p>5) shall observe the provisions of the legislation of the Russian Federation that regulate the procedure for disseminating mass information;</p> <p>6) shall observe the rights and lawful interests of citizens and organisations, for instance the honour, dignity and business reputation of citizens as well as the business reputation of organisations.</p> <p>2. The following is hereby prohibited when information is placed on a website or website page on the Internet:</p> <p>1) the use of the website or website page on the Internet for the purpose of concealing or falsifying information of public significance, disseminating knowingly unreliable information under the disguise of reliable messages;</p> <p>2) the dissemination of information for the purpose of discrediting a citizen or some categories of citizens on the basis of sex, age, race or ethnicity, language, religion, trade, place of residence and work and also in connection with their political convictions.</p> <p>3. The blogger is entitled to:</p> <p>1) freely search, receive, transmit and disseminate information by any method in accordance with the legislation of the</p>
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<p>жительства и работы, а также в связи с их политическими убеждениями.</p> <p>3. Блогер имеет право:</p> <p>1) свободно искать, получать, передавать и распространять информацию любым способом в соответствии с законодательством Российской Федерации;</p> <p>2) излагать на своих сайте или странице сайта в сети "Интернет" свои личные суждения и оценки с указанием своего имени или псевдонима;</p> <p>3) размещать или допускать размещение на своих сайте или странице сайта в сети "Интернет" текстов и (или) иных материалов других пользователей сети "Интернет", если размещение таких текстов и (или) иных материалов не противоречит законодательству Российской Федерации;</p> <p>4) распространять на возмездной основе рекламу в соответствии с гражданским законодательством, Федеральным законом от 13 марта 2006 года N 38-ФЗ "О рекламе" на своих сайте или странице сайта в сети "Интернет".</p> <p>4. Злоупотребление правом на распространение общедоступной информации, выразившееся в нарушении требований частей 1, 2 и 3 настоящей статьи, влечет за собой уголовную, административную или иную ответственность в соответствии с законодательством Российской Федерации.</p> <p>5. Блогер обязан разместить на своих</p>	<p>Russian Federation;</p> <p>2) set out on his website or website page on the Internet his personal judgements and assessment with an indication of his name or pseudonym;</p> <p>3) place or allow the placement on his website or website page on the Internet texts and/or other materials of other users of the Internet, unless the placement of such texts and/or other materials contravenes the legislation of the Russian Federation;</p> <p>4) disseminate advertisements on an onerous basis in keeping with the civil legislation, Federal Law No. 38-FZ of March 13, 2006 on Advertisement on his website or website page on the Internet.</p> <p>4. An abuse of the right of disseminating generally accessible information that has manifested itself as breach of the provisions of Parts 1, 2 and 3 of the present article shall entail criminal, administrative or another liability in accordance with the legislation of the Russian Federation.</p> <p>5. On his website or website page on the Internet the blogger shall place his name and initials and an e-mail address for sending legal-significance messages to him.</p> <p>6. On his website or website page on the Internet the blogger shall place immediately after receiving a court's decision that has become final and contains demand for its being published on the website or website page.</p> <p>7. The owners of websites on the Internet</p>
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<p>сайте или странице сайта в сети "Интернет" свои фамилию и инициалы, электронный адрес для направления ему юридически значимых сообщений.</p> <p>6. Блогер обязан разместить на своем сайте или странице сайта в сети "Интернет" незамедлительно при получении решения суда, вступившее в законную силу и содержащее требование о его опубликовании на данном сайте или странице сайта.</p> <p>7. Владельцы сайтов в сети "Интернет", которые зарегистрированы в соответствии с Законом Российской Федерации от 27 декабря 1991 года N 2124-1 "О средствах массовой информации" в качестве сетевых изданий, не являются блогерами.</p> <p>8. Федеральный орган исполнительной власти, осуществляющий функции по контролю и надзору в сфере средств массовой информации, массовых коммуникаций, информационных технологий и связи, ведет реестр сайтов и (или) страниц сайтов в сети "Интернет", на которых размещается общедоступная информация и доступ к которой в течение суток составляет более трех тысяч пользователей сети "Интернет". В целях обеспечения формирования реестра сайтов и (или) страниц сайтов в сети "Интернет" федеральный орган исполнительной власти, осуществляющий функции по контролю и надзору в сфере средств массовой информации, массовых коммуникаций, информационных технологий и связи:</p> <p>1) организует мониторинг сайтов и</p>	<p>who have registered as network editions in accordance with Law of the Russian Federation No. 2124-I of December 27, 1991 on Mass Media are not bloggers.</p> <p>8. The federal executive governmental body carrying out the functions of control and supervision in the field of mass media, mass communications, information technologies and telecom shall keep a register of the websites and/or website pages on the Internet on which generally accessible information is placed and to which access exceeds 3,000 users of the Internet per day. For the purpose of ensuring the formation of the register of websites and/or website pages on the Internet the federal executive governmental body carrying out the functions of control and supervision in the field of mass media, mass communications, information technologies and telecom:</p> <p>1) shall organise the monitoring of websites and website pages on the Internet;</p> <p>2) shall endorse a methodology for assessing the number of users of a website or website page on the Internet per day;</p> <p>3) has the right of requesting from organisers of dissemination of information on the Internet, bloggers and other persons the information required for keeping such register. Within 10 days after receiving a request from the federal executive governmental body carrying out the functions of control and supervision in the field of mass media, mass communications, information technologies and telecom said persons shall provide the</p>
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<p>страниц сайтов в сети "Интернет";</p> <p>2) утверждает методику определения количества пользователей сайта или страницы сайта в сети "Интернет" в сутки;</p> <p>3) вправе запрашивать у организаторов распространения информации в сети "Интернет", блогеров и иных лиц информацию, необходимую для ведения такого реестра. Указанные лица обязаны предоставлять запрашиваемую информацию не позднее чем в течение десяти дней со дня получения запроса федерального органа исполнительной власти, осуществляющего функции по контролю и надзору в сфере средств массовой информации, массовых коммуникаций, информационных технологий и связи.</p> <p>9. В случае обнаружения в информационно-телекоммуникационных сетях, в том числе в сети "Интернет", сайтов или страниц сайтов, на которых размещается общедоступная информация и доступ к которым в течение суток составляет более трех тысяч пользователей сети "Интернет", включая рассмотрение соответствующих обращений граждан или организаций, федеральный орган исполнительной власти, осуществляющий функции по контролю и надзору в сфере средств массовой информации, массовых коммуникаций, информационных технологий и связи:</p> <p>1) включает указанные сайт или страницу сайта в сети "Интернет" в реестр сайтов и (или) страниц сайтов в сети "Интернет", на которых</p>	<p>information so requested.</p> <p>9. In the event of detection in information-telecommunication networks, for instance on the Internet, of a website or website page which contain generally accessible information and to which access exceeds 3,000 users of the Internet per day, including the consideration of relevant applications of citizens or organisations, the federal executive governmental body carrying out the functions of control and supervision in the field of mass media, mass communications, information technologies and telecom:</p> <p>1) shall include said website or website page on the Internet in the register of the websites and/or website pages on the Internet on which generally accessible information is placed and to which access exceeds 3,000 users of the Internet per day;</p> <p>2) shall identify the hosting provider or the other person which ensures the placement of the website or website page on the Internet;</p> <p>3) shall send to the hosting provider or the person mentioned in Item 2 of the present part a notice in electronic form in Russian and English concerning the need for provision of details allowing to identify the blogger;</p> <p>4) shall record the date and time of dispatch of the notice to the hosting provider or the person mentioned in Item 2 of the present part in the relevant information system.</p> <p>10. Within three working days after</p>
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<p>размещается общедоступная информация и доступ к которым в течение суток составляет более трех тысяч пользователей сети "Интернет";</p> <p>2) определяет провайдера хостинга или иное обеспечивающее размещение сайта или страницы сайта в сети "Интернет" лицо;</p> <p>3) направляет провайдеру хостинга или указанному в пункте 2 настоящей части лицу уведомление в электронном виде на русском и английском языках о необходимости предоставления данных, позволяющих идентифицировать блогера;</p> <p>4) фиксирует дату и время направления уведомления провайдеру хостинга или указанному в пункте 2 настоящей части лицу в соответствующей информационной системе.</p> <p>10. В течение трех рабочих дней с момента получения уведомления, указанного в пункте 3 части 9 настоящей статьи, провайдер хостинга или указанное в пункте 2 части 9 настоящей статьи лицо обязаны предоставить данные, позволяющие идентифицировать блогера.</p> <p>11. После получения данных, указанных в пункте 3 части 9 настоящей статьи, федеральный орган исполнительной власти, осуществляющий функции по контролю и надзору в сфере средств массовой информации, массовых коммуникаций, информационных технологий и связи, направляет блогеру уведомление о включении его сайта или страницы сайта в реестр сайтов и (или) страниц сайтов в сети "Интернет", на</p>	<p>receiving the notice mentioned in Item 3 of Part 9 of the present article the hosting provider or the person mentioned in Item 2 of Part 9 of the present article shall provide the information allowing to identify the blogger.</p> <p>11. Having received the information specified in Item 3 of Part 9 of the present article, the federal executive governmental body carrying out the functions of control and supervision in the field of mass media, mass communications, information technologies and telecom shall send a notice to the blogger informing that his website or website page has been included in the register of the websites and/or website pages on the Internet on which generally accessible information is placed and to which access exceeds 3,000 users of the Internet per day, with reference to the provisions of the legislation of the Russian Federation applicable to said website or website page on the Internet.</p> <p>12. If during three months access to the website or website page on the Internet is below 3,000 users of the Internet per day that website or that website page on the Internet shall be removed on the blogger's application from the register of the websites and/or website pages on the Internet on which generally accessible information is placed and to which access exceeds 3,000 users of the Internet per day, with a notice to this effect being sent to the blogger. The given website or website page on the Internet may be removed from that register when no application is filed by the blogger if access to the given website or website page on the Internet during six months is below 3,000 users of the Internet per day.</p>
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<p>которых размещается общедоступная информация и доступ к которым в течение суток составляет более трех тысяч пользователей сети "Интернет", с указанием требований законодательства Российской Федерации, применимых к данным сайту или странице сайта в сети "Интернет".</p> <p>12. В случае, если доступ к сайту или странице сайта в сети "Интернет" на протяжении трех месяцев составляет в течение суток менее трех тысяч пользователей сети "Интернет", данный сайт или данная страница сайта в сети "Интернет" по заявлению блогера исключается из реестра сайтов и (или) страниц сайтов в сети "Интернет", на которых размещается общедоступная информация и доступ к которым в течение суток составляет более трех тысяч пользователей сети "Интернет", о чем блогеру направляется соответствующее уведомление. Данные сайт или страница сайта в сети "Интернет" могут быть исключены из этого реестра при отсутствии заявления блогера, если доступ к данным сайту или странице сайта в сети "Интернет" на протяжении шести месяцев составляет в течение суток менее трех тысяч пользователей сети "Интернет".</p>	
<p>Федеральный закон об оперативно-розыскной деятельности, статья 2</p> <p>Задачами оперативно-розыскной деятельности являются:</p> <p>выявление, предупреждение, пресечение</p>	<p>Federal Law On Operational Search Activity, Article 2</p> <p>The tasks of an operational-search activity shall be:</p> <p>to discover, prevent, suppress and reveal</p>

<p>и раскрытие преступлений, а также выявление и установление лиц, их подготавливающих, совершающих или совершивших;</p> <p>осуществление розыска лиц, скрывающихся от органов дознания, следствия и суда, уклоняющихся от уголовного наказания, а также розыска без вести пропавших;</p> <p>добывание информации о событиях или действиях (бездействии), создающих угрозу государственной, военной, экономической, информационной или экологической безопасности Российской Федерации...</p>	<p>crimes, and to discover and identify the persons, who are preparing and committing or who have perpetrated them;</p> <p>to conduct searches for persons who are hiding from the inquest and the investigation bodies and from the court and who are avoiding the criminal punishment, and also searches for missing persons;</p> <p>to collect information on events or actions, creating a threat to the military, economic or ecological security of the Russian Federation.</p>
<p>Федеральный закон об оперативно-розыскной деятельности, часть 4 статьи 6</p> <p>Оперативно-розыскные мероприятия, связанные с контролем почтовых отправлений, телеграфных и иных сообщений, прослушиванием телефонных переговоров с подключением к станционной аппаратуре предприятий, учреждений и организаций независимо от форм собственности, физических и юридических лиц, предоставляющих услуги и средства связи, со снятием информации с технических каналов связи, проводятся с использованием оперативно-технических сил и средств</p>	<p>Federal Law On Operational Search Activity, Article 6(4)</p> <p>The operational-search measures, involved in controlling the mail, the telegraph and other kind of communications, the bugging of telephone conversations with the linking up to the station apparatuses of the enterprises, institutions and organizations, regardless of their forms of ownership, as well as of the natural and the legal persons, who render services and provide the means of communication, with taking the information off the technical communications channels, shall be carried out using the operational-technical forces and the means of the bodies of the federal security service, the</p>

<p>органов федеральной службы безопасности, органов внутренних дел и органов по контролю за оборотом наркотических средств и психотропных веществ в порядке, определяемом межведомственными нормативными актами или соглашениями между органами, осуществляющими оперативно-розыскную деятельность.</p>	<p>bodies of internal affairs and, of the bodies for control over the traffic of narcotics and psychotropic substances in conformity with the procedure, defined by the inter-departmental normative acts or by the agreements, signed between the bodies, engaged in the operational-search activity.</p>
<p>Федеральный закон об оперативно-розыскной деятельности, статья 7</p> <p>Основаниями для проведения оперативно-розыскных мероприятий являются:</p> <ol style="list-style-type: none"> 1. Наличие возбужденного уголовного дела. 2. Ставшие известными органам, осуществляющим оперативно-розыскную деятельность, сведения о: <ol style="list-style-type: none"> 1) признаках подготавливаемого, совершаемого или совершенного противоправного деяния, а также о лицах, его подготавливающих, совершающих или совершивших, если нет достаточных данных для решения вопроса о возбуждении уголовного дела; 2) событиях или действиях (бездействии), создающих угрозу государственной, военной, экономической, информационной или экологической безопасности Российской Федерации; 	<p>Federal Law On Operational Search Activity, Article 7</p> <p>The grounds for launching operational-search measures shall be:</p> <ol style="list-style-type: none"> 1. The existence of an instituted criminal case. 2. The information, which has become known to the bodies, engaged in the operational-search activity: <ol style="list-style-type: none"> 1) on the signs, showing that an unlawful act is being prepared or committed, or has been perpetrated, as well as on the persons, who are preparing or committing it or have perpetrated it, if the information is insufficient to resolve the question of instituting a criminal case; 2) on events or the actions, creating a threat to the state, military, economic or ecological security of the Russian Federation; 3) on persons, hiding from the bodies of inquest and of investigation and from the court, or on those avoiding the criminal

<p>3) лицах, скрывающихся от органов дознания, следствия и суда или уклоняющихся от уголовного наказания;</p> <p>4) лицах, без вести пропавших, и об обнаружении неопознанных трупов.</p> <p>3. Поручения следователя, руководителя следственного органа, дознавателя, органа дознания или определения суда по уголовным делам и материалам проверки сообщений о преступлении, находящимся в их производстве.</p> <p>4. Запросы других органов, осуществляющих оперативно-розыскную деятельность, по основаниям, указанным в настоящей статье.</p> <p>5. Постановление о применении мер безопасности в отношении защищаемых лиц, осуществляемых уполномоченными на то государственными органами в порядке, предусмотренном законодательством Российской Федерации.</p> <p>6. Запросы международных правоохранительных организаций и правоохранительных органов иностранных государств в соответствии с международными договорами Российской Федерации.</p>	<p>punishment;</p> <p>4) on missing persons and on finding the unidentified corpses.</p> <p>3. The orders from the investigator or from the inquest body, the instructions from the prosecutor or the ruling of the court on the criminal cases in the process of examination.</p> <p>4. The inquiries of the other bodies performing operational-search activities, on the grounds indicated in the present Article.</p> <p>5. A decision on applying the measures, aimed at ensuring the security of protected persons, implemented by the specially authorized state bodies, in conformity with the procedure, envisaged by the legislation of the Russian Federation.</p> <p>6. The inquiries of the international law-protection organizations and of the law protection bodies of foreign states in conformity with the international treaties of the Russian Federation...</p>
<p>Федеральный закон «О противодействии терроризму», часть 2 статьи 3</p>	<p>Federal Law On Counteracting Terrorism, Article 3(2)</p> <p>Terrorist activity shall mean activity</p>

<p>Террористическая деятельность – деятельность, включающая в себя:</p> <p>а) организацию, планирование, подготовку, финансирование и реализацию террористического акта;</p> <p>б) подстрекательство к террористическому акту;</p> <p>в) организацию незаконного вооруженного формирования, преступного сообщества (преступной организации), организованной группы для реализации террористического акта, а равно участие в такой структуре;</p> <p>г) вербовку, вооружение, обучение и использование террористов;</p> <p>д) информационное или иное пособничество в планировании, подготовке или реализации террористического акта;</p> <p>е) пропаганду идей терроризма, распространение материалов или информации, призывающих к осуществлению террористической деятельности либо обосновывающих или оправдывающих необходимость осуществления такой деятельности...</p>	<p>including the following:</p> <p>a) arranging, planning, preparing, financing and implementing an act of terrorism;</p> <p>b) instigation of an act of terrorism;</p> <p>c) establishment of an unlawful armed unit, criminal association (criminal organisation) or an organised group for the implementation of an act of terrorism, as well as participation in such a structure;</p> <p>d) recruiting, arming, training and using terrorists;</p> <p>e) informational or other assistance to planning, preparing or implementing an act of terrorism;</p> <p>f) popularisation of terrorist ideas, dissemination of materials or information urging terrorist activities, substantiating or justifying the necessity of the exercise of such activity...</p>
<p>Федеральный закон «О противодействии терроризму», пункт 4 части 3 статьи 11</p> <p>На территории (объектах), в пределах которой (на которых) введен правовой</p>	<p>Federal Law On Counteracting Terrorism, Article 11(3)(4)</p> <p>It shall be allowable to take the following measures and to establish the following temporary restrictions in the procedure</p>

<p>режим контртеррористической операции, в порядке, предусмотренном законодательством Российской Федерации, на период проведения контртеррористической операции допускается применение следующих мер и временных ограничений:</p> <p>... ведение контроля телефонных переговоров и иной информации, передаваемой по каналам телекоммуникационных систем, а также осуществление поиска на каналах электрической связи и в почтовых отправлениях в целях выявления информации об обстоятельствах совершения террористического акта, о лицах, его подготовивших и совершивших, и в целях предупреждения совершения других террористических актов...</p>	<p>provided for by the legislation of the Russian Federation, on the territory (objects) where the legal regime of an antiterrorist operation is established, for the time period of conducting it:</p> <p><...> exercising control over telephone communications and over other information transmitted over telecommunication channels, as well as searching in electric communication channels and in postal mailing for the purpose of detecting information concerning the circumstances of committing an act of terrorism and the persons who have prepared and committed it, as well as for the purpose of preventing other terrorist acts...</p>
<p>Федеральный закон о противодействии коррупции, часть 4 статьи 9</p> <p>Государственный или муниципальный служащий, уведомивший представителя нанимателя (работодателя), органы прокуратуры или другие государственные органы о фактах обращения в целях склонения его к совершению коррупционного правонарушения, о фактах совершения другими государственными или муниципальными служащими коррупционных правонарушений, непредставления сведений либо</p>	<p>Federal Law On Combatting Corruption, Article 9(4)</p> <p>A government or municipal employee who has notified the representative of the hirer (the employer), Public Prosecutor's Office or other state bodies of the facts of approaching him/her for the purpose of inciting to corruption offences, the facts of corruption offences by other government or municipal employees, their non-provision of information or provision of deliberately inadequate or incomplete information on their incomes, property and property obligations, is under the protection of the State in accordance with</p>

<p>представления заведомо недостоверных или неполных сведений о доходах, об имуществе и обязательствах имущественного характера, находится под защитой государства в соответствии с законодательством Российской Федерации.</p>	<p>the legislation of the Russian Federation.</p>
<p>Федеральный закон «О связи», часть 1 статьи 64</p> <p>Операторы связи обязаны предоставлять уполномоченным государственным органам, осуществляющим оперативно-розыскную деятельность или обеспечение безопасности Российской Федерации, информацию о пользователях услугами связи и об оказанных им услугах связи, а также иную информацию, необходимую для выполнения возложенных на эти органы задач, в случаях, установленных федеральными законами.</p>	<p>Federal Law On Communications, Article 64(1)</p> <p>Telecom operators are obliged to provide the authorized state bodies engaged in the operational-search activity or security of the Russian Federation with information about the users of telecom and of rendered services as well as other information necessary for fulfillment of the tasks of the above mentioned bodies, in cases established by federal laws.</p>
<p>Федеральный закон о коммерческой тайне, статья 5</p> <p>Режим коммерческой тайны не может быть установлен лицами, осуществляющими предпринимательскую деятельность, в отношении следующих сведений:</p> <p>1) содержащихся в учредительных документах юридического лица, документах, подтверждающих факт</p>	<p>Federal Law On Commercial Secrets, Article 5</p> <p>The regime of commercial secrecy may not be instituted by persons conducting entrepreneurial activity in respect of the following data:</p> <p>1) available in constituent documents of legal entities, documents confirming the making of entries on legal entities and individual entrepreneurs in the relevant</p>

<p>внесения записей о юридических лицах и об индивидуальных предпринимателях в соответствующие государственные реестры;</p> <p>2) содержащихся в документах, дающих право на осуществление предпринимательской деятельности;</p> <p>3) о составе имущества государственного или муниципального унитарного предприятия, государственного учреждения и об использовании ими средств соответствующих бюджетов;</p> <p>4) о загрязнении окружающей среды, состоянии противопожарной безопасности, санитарно-эпидемиологической и радиационной обстановке, безопасности пищевых продуктов и других факторах, оказывающих негативное воздействие на обеспечение безопасного функционирования производственных объектов, безопасности каждого гражданина и безопасности населения в целом;</p> <p>5) о численности, о составе работников, о системе оплаты труда, об условиях труда, в том числе об охране труда, о показателях производственного травматизма и профессиональной заболеваемости, и о наличии свободных рабочих мест;</p> <p>6) о задолженности работодателей по выплате заработной платы и по иным социальным выплатам;</p> <p>7) о нарушениях законодательства Российской Федерации и фактах привлечения к ответственности за</p>	<p>state registers;</p> <p>2) available in documents giving the right to conduct entrepreneurial activity;</p> <p>3) regarding the composition of property of state-run or municipal unitary enterprises, and government agencies and on utilisation by them of funds of corresponding budgets;</p> <p>4) regarding pollution of the environment, the condition of fire safety, sanitary-epidemiological and radiation situation, safety of food products and other factors adversely affecting the safe functioning of production facilities, security of each citizen and security of the population as a whole;</p> <p>5) on the numbers, make-up of employees, system of labour remuneration, terms and conditions of labour, including labour safety measures, on the indices of on-the-job injuries and occupational diseases, on availability of vacancies;</p> <p>6) on debts of employers in paying wages and salaries and on other social payments;</p> <p>7) on violations of the legislation of the Russian Federation and facts of instituting proceedings for</p> <p>commission of such offences;</p> <p>8) on the terms of contests or auctions for privatisation of projects of state or municipal property;</p> <p>9) on the amount and structure of incomes of non-profit organisations, on the</p>
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<p>совершение этих нарушений;</p> <p>8) об условиях конкурсов или аукционов по приватизации объектов государственной или муниципальной собственности;</p> <p>9) о размерах и структуре доходов некоммерческих организаций, о размерах и составе их имущества, об их расходах, о численности и об оплате труда их работников, об использовании безвозмездного труда граждан в деятельности некоммерческой организации;</p> <p>10) о перечне лиц, имеющих право действовать без доверенности от имени юридического лица;</p> <p>11) обязательность раскрытия которых или недопустимость ограничения доступа к которым установлена иными федеральными законами.</p>	<p>amount and make-up of their property, on their incomes, on the numeric strength and remuneration of work of their employees, on the use of uncompensated labour of citizens in the activity of non-profit organisations;</p> <p>10) on a list of persons entitled to act without a power of attorney on behalf of a legal entity;</p> <p>11) obligation to disclose data which, or impermissibility of restricting access to data which is prescribed under other federal laws.</p>
<p>Закон Российской Федерации «О государственной тайне», статья 7</p> <p>Не подлежат отнесению к государственной тайне и засекречиванию сведения:</p> <p>о чрезвычайных происшествиях и катастрофах, угрожающих безопасности и здоровью граждан, и их последствиях, а также о стихийных бедствиях, их официальных прогнозах и последствиях;</p>	<p>The Law of the Russian Federation On State Secrets, Article 7</p> <p>The following information shall not be classified as state secret:</p> <p>on emergencies and catastrophes that threaten the safety and health of citizens, their consequences, as well as natural disasters, their official forecasts and consequences;</p> <p>on the state of the environment, public health, sanitation, demography, education,</p>

<p>о состоянии экологии, здравоохранения, санитарии, демографии, образования, культуры, сельского хозяйства, а также о состоянии преступности;</p> <p>о привилегиях, компенсациях и социальных гарантиях, предоставляемых государством гражданам, должностным лицам, предприятиям, учреждениям и организациям;</p> <p>о фактах нарушения прав и свобод человека и гражданина;</p> <p>о размерах золотого запаса и государственных валютных резервах Российской Федерации;</p> <p>о состоянии здоровья высших должностных лиц Российской Федерации;</p> <p>о фактах нарушения законности органами государственной власти и их должностными лицами...</p>	<p>culture, agriculture, as well as on the state of crime;</p> <p>on privileges, compensations and social guarantees provided by the state to citizens, officials, enterprises, institutions and organizations;</p> <p>on violations of the rights and freedoms of man and citizen;</p> <p>about the size of gold reserves and foreign exchange reserves of the state of the Russian Federation;</p> <p>about the health of senior officials of the Russian Federation;</p> <p>on violations of the rule of law by public authorities and their officials ...</p>
<p>Кодекс профессиональной этики журналиста, абзац 9</p> <p>Журналист сохраняет профессиональную тайну в отношении источника информации, полученной конфиденциальным путем. Никто не может принудить его к открытию этого источника. Право на анонимность может быть нарушено лишь в исключительных случаях, когда имеется подозрение, что источник сознательно исказил истину, а также когда</p>	<p>Code of Professional Ethics of Russian Journalist, paragraph 9</p> <p>A journalist respects professional secrets in relation to the source of information which is acquired in a confidential way. No one can force him to reveal this source. The right to anonymity may be broken only in exceptional cases when there is a suspicion that the source has consciously distorted truth, and also when the reference to the name of the source is the only way to avoid serious and inevitable</p>

<p>упоминание имени источника представляет собой единственный способ избежать тяжкого и неминуемого ущерба для людей.</p> <p>Журналист обязан уважать просьбу интервьюируемых им лиц не разглашать официально их высказывания.</p>	<p>damage to people.</p> <p>A journalist is obliged to respect the request of persons interviewed by him not to officially reveal their statements.</p>
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ELSA SPAIN

CONTRIBUTORS

NATIONAL COORDINATOR

PROF. DRA. BEATRIZ COLLANTES SÁNCHEZ

NATIONAL ACADEMIC COORDINATOR

PROF. DRA. MARÍA ELISA ALONSO

NATIONAL RESEARCHERS

MARÍA DEL CARMEN ESPEJEL CARRION

SARAH BONO

IRENE FERNÁNDEZ-MAYORALAS GONZÁLEZ

MIGUEL CHERÓN

OLAYA ÁLVAREZ FERNÁNDEZ

NATIONAL LINGUISTIC EDITORS

PROF. IGNACIO MUÑOZ BIELSA

NATIONAL ACADEMIC SUPERVISOR

PROF. DRA. BEATRIZ COLLANTES SÁNCHEZ

1. Introduction

From a Spanish perspective, the national legislation does not provide explicit protection of the right of the journalists not to disclose their source of information, as the protection is not regulated in the law clearly and precisely.

The Spanish Constitution (*Constitución Española*), in effect since December 29 1978, is the supreme norm of the Spanish legal system; to which subjects are the public authorities and Spanish citizens. It protects the right to communicate or to receive freely truthful information by any media.

Legislation on this matter comes mainly from the Spanish Civil and Criminal Codes, but there's not a specific legislation regulating on this matter, and it provokes a lot of uncertainty in the profession. The principal source of information for professionals is to be found in the deontological codes of the journalistic profession, the International legislation (UNESCO, Council of Europe, UN...) and the national case-law.

This research will show the lack of an implicit protection of journalists' sources in the Spanish legislation and of a proper definition of the limits of the non-disclosure of the information.

2. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

In the Spanish Constitution there's an explicit protection of the right of the journalists not to disclose their source of information. Firstly, the Article 20.1 d) of the Spanish Constitution says that: 'they are recognised and protected rights: To communicate or to receive freely truthful information by any media. The law shall regulate the right of conscience clause and professional secrecy in the exercise of these freedoms'.

The constitutional precept requires truthfulness of the information. It is interpreted as a need of subjective truth in which the reporter has performed with diligence, has contrasted the information adequately to the characteristics of the information and the available resources.

There are several case laws of the Spanish Constitutional Court (*Tribunal Constitucional Español*). A clear example of this is the case law 240/1992, December 21 1992 in which Ms María José Porteiro García, Mr. Juan Luis Cebrián Echarri and Promotora de Informaciones S.A. appealed amparo against the case-law of the First Chamber of the Spanish Supreme Court, December 11 1989. The Spanish newspaper, El País, published an article about Mr. Andrés Carril, a priest from Hío, in August 17 1984. However, the case-law established that there was no infringement of the Article 20.1 d) of the Spanish Constitution, the right to communicate freely information.

Even though, the Article 20.1 d) of the Spanish Constitution refers to the freedom of information, it does not express clearly the professional rights of the journalists and their obligations. As a result, Spain has an implicit right not to disclosure its sources of information.

Nonetheless, the Spanish Criminal Code prohibits explicitly the rights not to disclose the sources of information. Besides, the Article 200.2 of the Spanish Criminal Code which protects those that are affected by general interests or a group of people, as it is not necessarily required a report to arraign the actions described in Article 198.

Secondly, the professional secrecy of the media professionals has not been regulated yet. Therefore, there are concerns about the scope. There is only the right of rectification, regulated in the Organic Law 2/1984, March 26 1984.¹ The right of rectification is mainly for those who suffer from the exercise of information freedom. This right is for both natural and legal entities who consider that the information provided is inaccurate and its divulgation can cause a detriment. The right can be exercised by the aggrieved person, representatives and in the case of deceased, representatives of them. Moreover, the rectification should be limited to the facts of the information that would be rectified.

The Constitutional case law 168/1986 (Sentence 168/1986)² related to Ediciones Tiempo S.A. appealed “amparo” due to an article published in the number 122 about Mercorsa, a commercial entity. This article referred to Mr Luis García, the ex-president of Mercorsa, who sent a rectification statement to the Director of Ediciones Tiempo. The Spanish Constitutional Court rejected the rectification as it stated that the correction right will apply for those who suffer from the exercise of the freedom of information and for the purpose of avoiding or preventing certain information who can affect the honour or any other rights and the facts are not appropriate.

According to the Spanish Constitutional Court in the case law 35/1983³, 6/1988⁴ and 51/2007,⁵ the right of rectification is a legal right; subjective and instrumental, it's exhausted by the rectification of the information published. The rectification should comply with the facts and the director should publish the information with the same relevance as the one that had within three days of the date of reception, except if the publication or diffusion has another term, which would be done in the following number. If the period of time is not complying with or diffusing, the case would be conducted by the judge.

Thirdly, the Spanish Federation of Journalist Associations (*Federación de Asociaciones de la Prensa de España*, FAPE),⁶ established on May 19 1922 in Santander, it is the first professional organization

¹ Spain. Organic Law 2/1984, Right of Rectification, March 26 1984, Official State Gazette Num 74. <http://www.boe.es/buscar/doc.php?id=BOE-A-1984-7248>

² Spain. Spanish Constitutional Court. Case Law, December 22 1986, Number 17. <http://ocw.usal.es/ciencias-sociales-1/derecho-a-la-informacion/contenidos/SENTENCIAS/1er%20BLOQUE/PDF/STC%20168-1986,%20de%2022%20de%20diciembre.pdf>

³ Spain. Spanish Constitutional Court. Case Law, May 11 1983, Number 120. <http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=16789>

⁴ SPAIN. SPANISH CONSTITUTIONAL COURT. CASE LAW 6/1988, JANUARY 21 1988. <HTTP://HJ.TRIBUNALCONSTITUCIONALES/HJ/EN/RESOLUCION/SHOW/947>

⁵ SPAIN. SPANISH CONSTITUTIONAL COURT. CASE LAW 51/2007, MARCH 12 2007. <http://hj.tribunalconstitucional.es/HJ/en/Resolucion/Show/6018>

⁶ Spain. Spanish Federation of Journalist Associations. <http://fape.es>

of Spanish journalists, formed by 49 associations federated and 16 related. The Law 91/1977 of Professional Associations regulated the Spanish Federation of Journalist Associations as a trade union organization. This federation is governed and approved by the General Assembly of Seville in 2008. Furthermore, the General Assembly of the FAPE established the Spanish Deontological Code (*Código Deontológico Español*)⁷ for the Journalistic Profession in November 27 1993 as an essential ethic principle for the journalists in the exercise of their profession. One remarkable article of the Spanish Deontological Code is the Article 10 of the Spanish professional code of ethics defining the professional secrecy as:

“The professional secrecy is a right of the journalist, and it is a responsibility that ensures the confidentiality of the information sources. Therefore, the journalist will ensure the right of information sources to remain anonymous, if it was requested. However, the professional duty could surrender exceptional in case that there is reliable evidence that the source has been distorted the information or by revealing the source is the only option to avoid a serious and imminent damage”.

In November 27 1993, after being approved the Spanish Deontological Code, the Complaints and Ethics Commission was created and in total took place four Assemblies until now: Assembly of San Sebastián 1997, Assembly of Lanzarote 2001, Assembly of Almería 2004 and Assembly of Burgos 2006. Moreover, the Foundation of Arbitration, Complaints and Deontology of the Journalism (*Comisión de Arbitraje, Quejas y Deontología del Periodismo*) was created in 2011 with the aim of ensuring the freedom of information and citizens right to receive truthful information and ethical opinions, while safeguarding fundamental rights.

It's also important to note that in Spain there are free press associations: the Free Press Association in Madrid (*Asociación Madrileña de Prensa Gratuita: AMPG*), the Free Press Association in Catalonia (*Associació Catalana de la Premsa Gratuïta: ACPG*) and the Spanish Free Press Association (*Asociación Española de la Prensa Gratuïta: AEPG*). The Spanish Free Press Association⁸ was established on February 2011 and it represents all the publications and publishers of the Free Press defined as “Publications and Free Distribution”. The publications and the journalists that work in the Spanish Free Press Association are bound by professional secrecy, complying with the sources of information and confidences. Furthermore, they will not disclose the names of the informants except in case of a judicial authorization. It's also relevant to point out that the publications are obliged to amend incorrect or inaccurate information as soon as possible. Besides, it confers the right of objection, rectification or response for everyone that request it.

⁷ Spain. Deontological Code for the Journalistic Profession.
http://ethicnet.uta.fi/spain/deontological_code_for_the_journalistic_profession

⁸ Spain. Spanish Free Press Association. <http://www.infoperiodistas.info/empresa/40804/Asociacion-Espanola-de-la-Prensa-Gratuïta-AEPG>

From a European perspective, due to the ineffectiveness of most professional codes of ethics, the Council of Europe, as a European institution responsible of safeguarding the basic human rights, approved in 1993 the Ethics of Journalism,⁹ which is the reference ethic framework of the journalism in Europe. The European Ethics of Journalism is formed as a set of self-regulatory bodies and mechanisms that enables publishers, media users, associations, experts and judges to issue resolutions in harmony with the ethical precepts of journalism. The European Ethics of Journalism in its Article 14 states that we must enlarge and clarify the essence of the professional secrecy and conscience clause.

Article 10 of the European Convention of Human Rights protects the right of freedom of expression.¹⁰ However, the professional secrecy and the protection of the journalist's sources are not explicitly mention.

From an International perspective, UNESCO's Declaration¹¹ in 1983 stated inter alia the freedom of information, expression and opinion. These freedoms are acknowledged as an essential part of the fundamental freedoms and human rights. Principle IV of UNESCO's Declaration refers to the journalist's professional integrity: the journalist has the right to abstain from working against his / her convictions and from disclosing sources of information.

The limits of the journalists are also regulated. Article 20.4 of the Spanish Constitution that states: 'These freedoms have the limit in the respect of the rights recognized in this Title, in the precepts of the law and, especially, in the right of honour, privacy, self-image and the protection of the youth and children'.

Furthermore, the Article 18.1 of the Spanish Constitution ensures the right of honour, privacy and self-image. These rights are also regulated in the Organic Law 1/1982, May 5 1982¹² and are civilly protected to confront every kind of illegitimate interference.

It is extremely important to consider that the rights of honour, privacy and self-image are recognised as basic rights and as a ground for the public order and social peace. Therefore, they are inalienable, undeniable and indefeasible. If there is a collision between the right to freedom of expression and information and the right of honour, privacy and self-image, the last ones will predominate

⁹ Europe. European Professional Code of Ethics. Council of Europe, Ethics of journalism. <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16414&lang=en>

¹⁰ Europe. European Convention of Human Rights, ECHR as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13. http://www.echr.coe.int/Documents/Convention_ENG.pdf

¹¹ International. International Principles of Professional Ethics in Journalism. http://ethicnet.uta.fi/international/international_principles_of_professional_ethics_in_journalism

¹² Spain. Organic Law 1/1982, May 5 1982, Official State Gazette, Number 115., <http://www.boe.es/buscar/doc.php?id=BOE-A-1982-11196>

3. Is there, in domestic law, a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

In Spain there are three different types of responsibility:

- Disciplinary responsibility
- Civil responsibility
- Criminal responsibility

1. - Disciplinary responsibility: Spanish Deontological Code

The Spanish Deontological Code in its Article 10 regulates the professional secrecy as: A right of a journalist, but it is also an obligation, which guarantees the confidentiality of the sources of information. Therefore, a journalist shall guarantee the right of the sources of information to remain anonymous, if such has been requested. However, this professional obligation shall exceptionally not be applied if it has been proved that the source has deliberately falsified information or if revealing the source is the only way to avoid serious and instant damage to people.

The Complaints and Ethics Commission has evolved as a self- regulatory body for journalism in Spain. This Commission processes and resolves files opened with reference to the infringement of the Spanish Deontological Code that guarantees the independence of journalism and provides an extrajudicial possibility to denounce the negligent professional journalist behaviour.

According to Article 9 of the Complaints and Ethics Commission, the only person who can submit a complaint is the one that is directly affected by the unethical behaviour of the journalist. The person directly affected has two months to submit the complaint. Exceptionally, complaints filed by third parties are admitted in cases of social alarm or scandal.

The Resolution 2013/79 (Resolution 2013/ 79)¹³ in which the Arbitration, Complaints and Ethics Commission of Journalism considered that the director of Onda Cero Radio, Mr Juan Carlos Enrique Forcada, from Balearic islands pushed the journalist, Ms Lorena Sanz Sáez, director of the programme 'Mallorca en la Onda' to disclosure her source of information about the news of an imminent restructuring of the Balearic Government. The Commission determined that Mr Juan Carlos Enrique Forcada infringed Article 10 of the Spanish Deontological Code.

¹³ Spain. Complaints and Deontological Commission. <http://www.comisiondequejas.com/>

2. - Civil Responsibility: Organic Law 1/1982, May 5 1982, right of civil protection, personal and family privacy and image¹⁴.

When the divulgation of data or facts may affect fundamental rights, implying an illegitimate intromission in such fundamental rights as established in the Article 7 of the Organic Law 1/1982, May 5, right of civil protection, personal and family privacy and image, in which, the compensation could be asked for all damages incurred because of this illegitimate intromission.

According to Article 7 of the Organic Law 1/1982, May 5, right of civil protection, personal and family privacy and image, they are considered illegitimate intromissions in the protection of the second article of this law:

- First. The location in any place of listening, filming or optical devices or other media to record or reproduce the private life of people.
- Second. The use of listening or optical devices, or any other media in order to discover the private life of people, their opinions or their private correspondence, which are neither to be known by the people using these media, nor to be recorded, registered or reproduced in any way.
- Third. The divulgation of facts of the private life of a person or family which may affect the reputation and good name as a consequence of the revelation or publication of the content of letters, memories or any other personal private writings.
- Fourth: The revelation of private information of a person or family, obtained in the course of the fulfilling of professional or official activities.
- Fifth. The caption, reproduction or publication of the image of a person (photographs, films or any other media) in places or moments of the life, private or not, except as described of in Article 8.2.
- Sixth. The use of the name, voice or image of a person for advertising or commercial purposes, or of similar nature.
- Seventh. The divulgation of expressions or facts about a person, who by these means could be defamed and become undeserving for other people.

Besides, it is important Article 8. of this law as it states that 'the right to the own image will not prevent the exceptions of the paragraphs a) and b) and it will not be applicable when the functions of the authorities or people will need anonymity'.

3. - Criminal Responsibility: Spanish Criminal Code (*Código penal español*)¹⁵

¹⁴ Spain. Organic Law 1/1982, May 5 1982, right of civil protection, personal and family privacy and image. http://noticias.juridicas.com/base_datos/Admin/lo1-1982.html

¹⁵ Spain. Criminal Code. Organic Act 10/1995. Official State Gazette, November 24 1995, number 281. http://www.legislationline.org/download/action/download/id/5160/file/Spain_Criminal_Code_Codigo_Penal.pdf

The prohibition to divulgate the sources of a journalist is regulated by the Spanish Criminal Code in its Articles 197, 199, 200 and 201.

Article 197.2 states that:

“The same penalties will 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 telematics files or media, or in any other kind of file or public or private record. The same penalties will 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”.

The case-law 234/1999 of the Supreme Court of Justice (Sentence 234/1999 of the Spanish Supreme Court, Criminal Chamber n. 2)¹⁶ February 18 1999 where a journalist published a report stating that in Salto del negro prison were working two chefs with AIDS. The Supreme Court of Justice condemned the journalist for the crime to disclosure confidential information with a sentence of one year of imprisonment, penalty of twelve months and special disqualification for the exercise of his profession. According to Article 199 of Criminal Code:

1. Whoever discloses secrets of others that he obtains knowledge whereof through his trade or labour relations, shall be punished with a sentence of imprisonment from one to three years and a fine from six to twelve months.
2. Professionals who, in breach of their obligation of secrecy or reserve, reveal secrets of another person shall be punished with a sentence of imprisonment of one to four years, a fine of twelve to twenty- four months and special barring from that profession for a term from two to six years.

Due to Article 200 of the Criminal Code ‘the terms set forth this Chapter shall be applicable to whoever, discloses, reveals or communicates reserved data of legal persons without the consent of their representatives, except for what is set forth in other provisions of this Code’.

In regard to Article 201 of the Criminal Code, ‘it requires to make a complaint by the victim or the legal representative. When the former is a minor, incapacitated or handicapped person, it may also be reported by the Public Prosecutor’.

This article also explains the forgiveness of the victim or his legal representative, which extinguishes the penal action.

From a European perspective, the European Convention of Human Rights in Article 10 regulates the freedom of expression. In this Article, it is provided that everyone has the right of

¹⁶ Spain. Spanish Supreme Court of Justice. Case Law 234/1999, Criminal Chamber n. 2, February 18 1999. <http://supremo.vlex.es/vid/descubrimiento-revelacion-secretos-fa-17716989>

freedom of expression. The exercise of this right which entails obligations and responsibilities might be susceptible to penalties, conditions, limitations and formalities and is stipulated by law and must seek one of the purposes recognised as legitimate in a democratic society: national security, territorial security, socio-economic wellbeing, defence of public order and prevention of the criminal offences, health care or morals or the protection of the rights and freedoms of others, prevention of disclosure information obtained confidentially.

In the *Castells* judgment, in April 1992,¹⁷ the Court stated that there has been an infringement of Article 10 of the European Convention of Human Rights. A member of the Spanish Parliament who was a Basque militant, had been convicted for offending the Government when publishing an article accusing the Government of helping or permitting attacks on Basques by armed groups. The Court made the following statement observations:

“Freedom of the press affords the public one of the best means of discovering and forming an opinion on the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate, which is at the very core of the concept of a democratic society”

4. Who is a “Journalist” According to the National Legislation? Is it, in Your View, a Restricted Definition for the Purpose of the Protection of Journalistic Sources? What is the Scope of Protection of Other Media Actors? I the Protection of Journalists’s Sources Extended to Anyone Else?

The Press and Print Law (*Ley de prensa e imprenta*) 14/1966 March 18, in article 33 states the Journalist’s Statute (*Estatuto del periodista profesional*), approved by the Decree 744/1967,¹⁸ April 13, which ratifies the consolidated text of the Statute of the Journalistic Profession (*Estatuto de la profesión periodística*), for the definition and development of such profession.

The legal definition of “journalist” is essentially established by the articles of the Statute of the Journalistic Profession, based on the constitutional Article 20 of the Spanish Constitution of December 29 1978:

- Art. 1

For all legal purposes, a journalist is someone who is registered in the Official Register of Journalists (*Registro oficial de periodistas*).

¹⁷ Europe. Freedom of Expression. Case- law concerning Article 10 of the European Convention of Human Rights. Council of Europe, 1998-2006. [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18\(2007\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18(2007).pdf)

¹⁸ This Decree has an informative value and not a normative value. Since now there is only a draft law on the Statute of Professional Journalist displayed by the parliamentary group of *Izquierda Verde- Izquierda Unida-Iniciativa per Catalunya Verds* on April 23 2004 and declared admissible on November 23 2004, as stated in the question n° 1.

The journalists in possession of a Degree in Journalism will be only registered in the Official Register of Journalists. The degree will only be obtained once approved the studies in any of the legally recognised schools of journalism and after passing an exam at the official school of journalism or those established for the remaining as a requirement for its achievement.

- Art. 4

A journalist has the right to obtain the press card that identifies him/her as such, if he/she meets the requirements of Article 1 and, in general, all the requirements of the Press and Print legislation, and this for the doing the tasks of journalistic information (written, oral, or graphic), whether printed, radiated, televised or filmed, in both broadcast media as a body or public entities.

This definition of “journalist” given by the Spanish regulation (Article 4 of the Statute of the Journalistic Profession) is in accordance with the definition issued by the UNESCO in 1983:

“Every person, of any nationality, who has a permanent job paid as director, reporter, photographer, ‘cameraman’ or technical press, radio, television or filmed news service, that exercise their profession in accordance with the ethical standards required by the profession. The activity is: to seek, to receive, to impart information, opinions, ideas, studies or remarks in daily or periodical publications, news agencies, radio services, television or cinema”.

The Statute of the Journalistic Profession also involves an annex which provides general principles of the profession. Among them, there’s a reference to the protection of the sources: “The journalist has a duty to keep professional secrecy, except in cases of forced cooperation with justice, at the service of the common good”.

This legal definition of “journalist” found in the in the Statute of the Journalistic Profession regulates the access to the journalistic profession and, in my opinion, a limits the protection of the journalists sources, because those without the necessary qualification (registration in the Official Register of Journalists and “academic degree requirements”) can’t be considered as “journalists”. As a result of this, certain rights which tend to protect sources of information are rejected, i.e. the right to professional secrecy.

Nevertheless, the attribution of these specific rights to the professional journalists does not implies a restriction on the right of any citizen to freely exercise his/her freedom of expression, opinion or information. Likewise, with the arrival of the Digital Era, citizens participate the more and more informing and communicating as a public service. Consequently, “citizen journalists”, “bloggers”, “tweeters”, etc. appeared. However, these citizens in the exercise of their right of information and opinion in a professional manner, due to the absence of legal regulation, currently do not enjoy the same rights as the professionals journalists, which involves that their sources are not protected in the same manner as they do not have the right to professional secrecy as a mechanism of protection of sources.

5. What Are the Legal Safeguards for the Protection of Journalistic Sources? How Are the Laws Implemented? How Are the Legal Safeguards Combined With Self-Regulatory Mechanisms?

The legal safeguards for the protection of journalistic sources are regulated in the annex of the Statute of the Journalistic Profession, amended by the Decree 744/1967, April 13. The most important are the professional secrecy and the conscience clause. Such rights are recognised in the Spanish Constitution of 1978, in its Article 20, paragraph 1.d) by which acquired a value and protection of constitutional level.

The right to professional secrecy is probably the most concrete and visible protection of the journalistic sources. It is an instrument of the journalist to obtain information and, therefore, the Spanish legislation has protected it in the paragraph 5 of the annex of the Statute of the journalistic profession. It establishes the non-disclosure of the identity of people who have provided information. In October 1974, the Council of Europe defined the right of professional secrecy as "the right of the journalist" to refuse to reveal the identity of the author of the information to his/her company, third parties and the public or judicial authorities. On March 8 2000, appeared the recommendation R (2000) 7 of the Committee of Ministers of the Council of Europe, informing the Member States of 'the explicit and clear protection of the right of journalists not to disclose information identifying a source'.

Unlike the right of conscience clause, it has not been subject to any national legislation. This obligation of non-disclosure, extended to any document or medium which communication could allow the identification of the sources. It is one of the aspects of freedom of press and freedom of expression. Moreover, is a duty of the journalist, as the beneficiary of the professional secrecy is not the journalist, but the source of information, who is also part of the audience. The revelation of sources constitutes a criminal offence, regulated in the Article 199.2 of the Spanish Criminal Code. The obligation to maintain the anonymity of the sources is to be respected before the media company and the public authorities, including the judiciary and the journalists, and he/she will not be punished for it. This protection of sources is extended not only to the journalist, but also to any other journalist or editorial manager who could indirectly know the identity of the confidential source.

However, there's an exception to this duty of confidentiality, according to the Statute: 'except in cases of forced cooperation with justice, at the service of the common good'. The journalists are required to disclose the identity of their sources if it can avoid a crime against life, physical integrity, health, freedom or sexual freedom of people. In the case of failure to do so, the person will be punished under the article 450 of the Criminal Code.

In its judgment of March 27 1996, in *Goodwin v. the United Kingdom*, the European Court of Human Rights recognised:

"The right of journalists to protect their sources even before the judge" and that the 'freedom of press to protect journalists against the sanctions when they cannot disclose their sources of information, because this is their freedom of expression and this protection constitutes a capital public interest'. Moreover, if there is only a preponderant 'imperative public interest' requirement could be justified to the journalist to reveal the sources".

Which underlines the conformity of the Spanish legislation to the conception of EU law in such

an aspect.

Moreover, the conscience clause comes regulated by the Organic Law 2/1997, of June 19. In the explanatory memorandum, this law contains the protection of the independence of journalists, who participates in the protection of sources, declaring:

“The information may not be subject to commercial considerations, nor can professional information be conceived as a kind of open mercenary to all kinds of news and information that are published on the side-lines of the constitutional mandate of veracity and pluralism”.

This clause aims to safeguard the moral integrity and the right of opinion of the journalist, allowing him/her to terminate his/her employment contract with a communications company, in the event of a significant change in the ideological orientation of the publications. This clause, which represents a protective right, allows the professional journalist to protect his/her honour and reputation. It is important to state that the demand may not cause any detriment to the journalist during the procedure, not may be subject to transfer or modify the working conditions. That is explained by the fact that the communication is not a neutral activity but it takes part in leading public opinion, providing values and interests.

The abovementioned legal safeguards are regulated by self-regulatory mechanisms.¹⁹ There's a lot of self-regulatory mechanisms and they aim to complete the legal regulations. There are conventions and codes of conduct elaborated by different agents in the world of communication that has a more regulatory burden and are legally binding, but there are other self-regulatory mechanisms whose value is purely declarative and indicative: recommendations, declarations, and manifestos.

Codes of ethics are the main means of self-regulation and can be defined as a set of professional ethical principles and values that should guide professionals in the exercise of their profession, in this case the journalistic profession. They emanate from different actors (national and supranational, institutions as well as practitioners of such profession).

Spain has been one of the last European countries to develop a code of ethics for the journalistic profession. This situation is due to the Franco's dictatorship, whose regime exercised an extensive repression on the media and there was no self-regulation.

Currently, Spain has a code of ethics of the Spanish Federation of Journalist Associations (*Federación de Asociaciones de Periodistas de España: FAPE*) approved by its extraordinary Assembly on November 28 1993 in Seville. It is the main source of media self-regulation for its content and approval. In order to ensure the respect of the provisions of this code of ethics, it was created an internal control body, led by FAPE: Foundation of Arbitration, Complaints and Deontology of the Journalism (*Comisión de arbitraje, quejas y deontología del periodismo*). This code of

¹⁹ Please note that it doesn't exist an explicit national legislation which regulates all aspects of the profession of journalist. Although case law has begun to score limits the right to professional secrecy (see ECtHR March 27 1996, *Goodwin v. the United Kingdom*)

FAPE, as well as the self-control body, examine the ethical practice of the profession. Codes of ethics are not known for being binding sources because of the parallel development of the legal regulation.

However, it must be said that the first article of the FAPE's Code of ethics of the journalistic profession (*Código deontológico del periodista*) notes that the acceptance of the principles of professionalism and ethics contained in this code is "a necessary condition for its incorporation into the professional register of journalists and associations of the Federated Press". Since then, under the Article 16 of the Statute of the journalistic profession, approved by Decree, all journalists has the obligation to become members of the Spanish Federation of Journalist Associations, through the Press Association they belong to. Such legal provision provides indirectly binding to the precepts of FAPE's code of ethics.

In the same way, it is necessary to take into account part of the precepts that are recognised by this code and are inspired by the principles regulated in the annex of the Statute, which confers a legal value.

For example, Article 10 of the FAPE's code of ethics²⁰ agrees with the Article 5 of the annex of the Statute²¹. Other self-regulatory mechanisms merely declarative and indicative:

- The International principles of professional ethics of journalism or the UNESCO Declaration were approved in 1983
- The resolution about the European ethical code of the journalistic profession was adopted unanimously in Strasbourg on July 1 1993.

6. In the Respective National Legislation Are the Limits of Non-Disclosure of the Information in Line With the Principles of the Recommendation N° R (2000) 7? What Are the Procedures Applied? Is the Disclosure Limited to Exceptional Circumstances, Taking Into Consideration Vital Public or Individual Interests at Stake? Do the Authorities First Search for and Apply Alternative Measures, Which Adequately Protect Their Respective Rights and Interests and at the Same Time Are Less Intrusive With Regard to the Right of Journalists Not to Disclose Information?

²⁰ Article 10 of the FAPE's code of ethic: "The obligation of professional secrecy is the right of the journalist, as well as a duty that guarantees the confidentiality of the sources of information. Therefore the journalist will guarantee the right of their sources of information remain anonymous, if it has been applied. However, such professional duty may assign exceptionally assuming that truthfully record source has distorted consciously when revealing the source is the only way to prevent a serious and imminent harm to people."

²¹ Article 5 of the annex of the Statute of the Journalistic Profession: "The journalist has a duty to maintain professional secrecy, except in cases of forced cooperation with justice, to serve the common good."

As we have seen so far, the national legislation in Spain regarding the protection of journalistic sources is limited for several reasons: this legislation was developed lately and, in addition, it is dispersed due to the lack of a specific rule regulating this protection in the way the Recommendation demands.

The only provision found in the Spanish Constitution is to be found in Article 20.1.d), which establishes the right to professional secret and the necessity of a specific legislation for it. This Article shows that the will of the legislator is to express the importance of this fundamental right and the imperative necessity of its development. However, this constitutional requirement has not been accomplished because there is no a specific legislation in Spain regulating the right of the journalists to not disclose their sources and, as a consequence, its limits are far from being clear.

This kind of loophole can cause legal insecurity. The lack of a specific rule regarding the limits of non-disclosure of the information can be harmful for professionals because they do not know accurately what the limits of their rights are and in what cases or situations they have the legal duty of revelation of their sources. Even if the principles established by the Recommendation No R (2000) 7 of the Council of Europe constitute a wake-up call to the Spanish legislators for preparing a legal corpus regulating this right, it seems that since 2000 no progress has been made in this arena.

The law courts have to make reference to the regulations of the Criminal Code, which are too indeterminate to protect a fundamental right because its provisions don't provide a specific protection for journalists. In Title X of this Code is to be found the development of "felonies against privacy, the right to personal dignity and the inviolability of the dwelling", thus some provisions exist and law courts can take them into account: for example, Article 199 (that punishes "whoever discloses secrets of others that he obtains knowledge where of through his trade or labour relations") or Article 200 that applies the terms of the Chapter to "whoever discloses, reveals or communicates reserved data of legal persons without the consent of their representatives".

Another example from the Criminal Code is Article 20.7, which establishes that "any person who acts in carrying out of a duty or in the lawful exercise of a right" shall not be criminally accountable. This regulation helps the law courts to protect the right of journalists to protect their sources because it's their duty, but it seems quite clear that all these articles are not sufficient to protect journalists in Spain, and even more if we take into account the high level of protection that pretends to provide the Recommendation No R (2000) 7 of the Council of Europe.

If it is difficult for law courts to find regulations that might be useful to protect a journalist for non-disclosing his/her sources, it is even harder to delimit this right and define clearly the limits

by the jurisprudence.²² Therefore, judges acknowledge this lack in the legislation in the case of conflicts implying the right of non-disclosure of the sources and its limits. It is certain that when the accusation demands to disclose a source, you need more than the Article contained in the Constitution, because there is no definition or delimitation of the content of this right and, as we have seen up to now, there is no development of it in a specific rule.

This being so, jurisprudence in Spain has confirmed the large margin of uncertainty existing, in order to find the limits of the right, and especially given the substantial number of existing references due to the effort carried out strongly by the European Court of Human Rights to determinate and define the limits of the right of the journalists not to disclose their sources. Thus, the law courts seek legal support in the European jurisprudence to confront this kind of conflicts.²³

Nevertheless, even if there is not a specific legislation accomplishing the constitutional mandate of regulation of the right of journalists, it does not mean that the legislator has not tried to work on it. It is important to emphasise that 19 bills have been proposed on the matter of protection of journalism since the Spanish Constitution came into effect and none of them has been approved.²⁴

In order to answer the question, we are going to analyse the last bill proposed on this subject matter, called Right of information and the duties and rights of reporters (*Proposición de ley de derecho a la información y de deberes y derechos de los informadores*).²⁵ This proposed bill constitutes a good example of application of the Recommendation (2000)7, because we find the definition of the rights very clearly and also it is regulated their limitations.

Therefore, Article 15 of this proposed bill establishes the disclosure of confidential sources and the duty of revealing them in some given situations:

“The journalists and editorial responsible that do not fulfil the professional secret will be punished as perpetrators of the crime included at article 199.2 of the Penal Code.

The journalist has to disclosure the source identity when it can be avoided the commission of a crime against life, integrity, health, freedom or sexual freedom of people. In this case, not disclosing the source will be punished by article 450 of the Criminal Code”.

We can see that the disclosure of the sources is a duty when it is extremely necessary in order to avoid a crime. In addition, there is a specific list of crimes related to the safety of the individuals and their integrity. In all these situations, the journalists find the legitimation and the duty to reveal their sources, and they will be more protected by law.

²² Moretón Torquedo, A., *El secreto profesional de los periodistas. De deber ético a derecho fundamental*, Madrid: Estudios Constitucionales, 2012, p. 223.

²³ Spain. *AJ Instrucción nº 2 de Vitoria*, September 27, 2010, Case “Tellería”.

²⁴ Moretón Torquedo, op.cit., 2012, p. 220

²⁵ Spain. Proposed Bill 122/000070 Right of information and the duties and rights of reporters

Article 15 of this proposed bill corresponds fully to the content of the Statute for journalist that, as we have seen, is not a binding norm. However, is the only reference in our legal system of the rights of journalists and the exceptional circumstances under which they must disclose the source's identity. The list of exceptional circumstances, that is, avoid a crime against life, integrity or freedom of people, constitute a model to grant legal security to journalists. Nevertheless the majority of legal experts in Spain has highlighted that is very insufficient to protect the journalists because of its inaccuracies and lack of clarity in its provisions.

As we have seen before, at the Statute it is possible to find provisions concerning the necessity of disclosure due to a "service of the common good" and "forced cooperation with justice". To analyse this provision it is important to focus on the binding norms of our legal system. However, in our Criminal Code there is no reference to journalists in the Chapter VII, dedicated to the obstruction of justice. Concerning the jurisprudence it is possible to find an example of the Provincial Court of Madrid (*Audiencia Provincial de Madrid*).²⁶ In this case of illegal surveillance, the journalist refuses to reveal the identity of his source and, in consequence, the Court establishes that the information obtained by this journalist hasn't any probative value at all. Thus, we can see that as the Court does not oblige the journalist to reveal his/her source, so the right of non-disclosure is implicitly recognised, despite the legal loophole. The judge seems to bear in mind the doctrine and the Statute not binding to consider that in this case the journalist is not forced to cooperate with the justice, because it is a situation which does not concern any exceptional circumstances included at the list of Article 15. The only consequence was the inadmissibility of the evidence obtained without the determination of the source identity.

In reference to the punishment, Article 450 of the Spanish Criminal Code is to be applied. This Article is included in the Chapter of "omission of the duties to prevent felonies or to promote their persecution" and establishes that:

"Whoever is able, by his immediate intervention and without risk to himself or another, and does not prevent a felony being committed that affects the life, integrity or health, freedom or sexual freedom of persons, shall be punished with a sentence of imprisonment of six months to two years and if the offence is against life, and that of a fine from six to twenty-four months in the other cases, except if the offence not prevented is subject to an equal or lower punishment, in which case a lower degree punishment than that for the actual felony shall be imposed."

When there is an omission of this kind, the Article makes the difference between a crime that "affects" the life and the integrity of individuals and a crime that is "against" life. In this last case the punishment is higher because of its gravity. In fact, this Article is usually applied by the law courts in this kind of conflicts.²⁷

We can consider that this proposed bill fulfil the conditions of the Recommendation, especially the principle 3, which requires that the legitimate interest must take into account the circumstances, which have to be vital and serious (the protection of life in our case).

²⁶ Provincial Court of Madrid, December 29 2008, Case 1077/2008

²⁷ Moretón Toquero, op.cit. 2012, p. 230.

However, we have to bear in mind that we are talking about the last proposed bill about our subject and that it was not approved. Indeed, this bill was proposed in 2008 and since then, no other proposals were presented. So, as it is not to be approved soon, we will have to wait to find a legislation providing protection to journalists and defining the right of non-disclosure of its sources and its limits in Spain.

7. In the Recommendation N° R (2000) 7 the Following Principles Should Be Respected When the Necessity of Disclosure Is Stated: Absence of Reasonable Alternative Measures, Outweighing Legitimate Interest (Protection of Human Life, Prevention of Major Crime, Defence of a Person Accused or Convicted of Having Committed a Major Crime). Under Which Criteria Can the Interest In the Disclosure Outweigh the Interest In the Non-Disclosure?

The answer to this question is to be found in other legislations because, as we have already explained, it doesn't exist a specific regulation on this subject. The lack of legislation is a big obstacle to determinate which criteria can legitimate the disclosure of the sources and confirm if the principles of the Recommendation are taken into account or not in our legal system. Nevertheless, most of the Spanish case-law on the matter understands that article 199 and following of the Spanish Criminal Code indirectly warrant this protection.

Precisely, this disparity of points of view emphasizes is the reason why we insist since the beginning of this research on the idea that: a concrete and specific legal regulation on the subject is urgent.

With that said, we are going to focus our study on two recent norms that affect directly the protection of the right of non-disclosure of the journalist's sources. It is possible to question through this analysis if the measures that we are going to see, which were included by recent reforms, are reasonable, proportionate and legitimate in order to allow the authorities to ask for the disclosure of sources.

In the first place, we are going to take into account the provisions of the Organic Law of Protection of Citizen Security (*Ley orgánica de protección de la seguridad ciudadana*). This recent legislation that came into effect in 2015, is very criticised because its provisions could constitute a threat to civil liberties. The reason of this controversy resides in the regulation of the criteria defining the situations where the interest of the disclosure can outweigh the interest of the non-disclosure, so it is a delicate issue.

An example of a contestation of a provision is the one about the freedom of expression and the press. In Article 36 there is an enumeration of serious offences where we can find that the "unauthorised use of images or personal data (...) that could endanger the personal or family safety of [public security officers] or that put at risk the success of an operation" is considered a "serious offence" and therefore punishable by a fine of between €601 and €30,000. In this

provision the protection of “personal or family safety” of security officers can be used as a criteria to force the journalist to reveal his/her sources.²⁸

But not only is the freedom of expression affected by this law. Article 30.3 says that:

“It will be considered as organizer or promoter of the meetings in public places or protests, the natural persons or legal entities that have subscribed the required communication”.

We can see that the journalist can be responsible of a protest only by publishing information of it. In addition, the ambiguity of these provisions can contribute to a certain arbitrariness in its interpretation, because under this Law a person just spreading a protest can be considered as responsible. We will have to wait to see the nuanced definition of the limits and the examination of the legitimate interest of this restriction of the journalist’s right by the Constitutional Court: it is important to determinate if this provisions in the Public Security Law are vague and disproportionate, even if this could take years.²⁹

Another norm that it is important to take into account is the reform of the Law on Criminal Procedure (*Ley de enjuiciamiento criminal*) that includes some provisions in relation to our topic. This reform carried out in 2015 has also attracted controversy, especially for Article 520.1 of the Criminal Procedure Code, which establishes that:

“Pre-trial detention and imprisonment shall be carried out in the manner least harmful to the person, reputation and property of the detainee or prisoner”.

The article also established the necessity of ensuring the constitutional rights of honour, privacy and right to image of the detainee. Once again we find the constitutional protection of the rights of honour and privacy to delimitate the journalist’s right: actually this is a provision that we find in the Spanish Constitution, Article 20.4, where it determinates that the freedom of expression has this rights as a limit.

However, the Spanish Free Press Association (*Asociación Española de Prensa Gratuita*: AEPG) and other journalistic groups have complaint about the legal insecurity of these provisions for the journalists: they give the example of a journalist taking a photography of a detainee or a security officer, which now constitutes a criminal offence, and that it can affect directly to the right of non-disclosure of the sources, because it can be considered a situation to add to the list of the cases in which the journalist must reveal his/her sources.

It is important to add that the press sector and the defenders of the right of freedom of expression brought pressure on the Spanish Government to rethink some provisions, especially Article 520.1. It was a success because the final version of the bill states that those measures are to be adopted only in order to protect the constitutional rights of honour, privacy and image of

²⁸ International Press Institute. Report on the June 2015 High-Level International Press Freedom Mission to Spain. P. 13. http://ipi.freemedia.at/fileadmin/user_upload/Spain-Press-Freedom-Time-of-Change-ENG.pdf

²⁹ International Press Institute. Report on the June 2015 High-Level International Press Freedom Mission to Spain. P. 14. http://ipi.freemedia.at/fileadmin/user_upload/Spain-Press-Freedom-Time-of-Change-ENG.pdf

the detainees “with respect to the fundamental right of freedom of expression”.³⁰ It is very significant the reference to the freedom expression, because it is another constitutional and fundamental right that cannot be forgotten and it also needs a special legal protection. This can contribute to help law courts to protect it and examine the balance between the right of honour and the right of freedom of expression.

Through this provisions we find a new criteria other than the protection of human life, the prevention of major crime or the defence of a person accused or convicted of having committed a major crime. As we have seen, the constitutional rights of honour, privacy and right to image of the detainee appears on several provisions of these last reforms to legitimate alternative measures that offer an enlargement of situations in which journalists have to reveal their sources. In several occasions the Supreme Court established the limits of the right of honour and the illegitimate intromission and the freedom of expression. Usually, the latter prevail over the right of honour, because of the special protection of the journalists:³¹ the published information should constitute a serious offense and affect directly to the reputation of the individual for considering that it is necessary to delimitate the right of journalists.

As these provisions are quiet recent, we will have to see what are the limits posed by the law courts and above all if it is applied the principle 4 of the Recommendation inviting to consider that it does “not require for that purpose the disclosure of information identifying a source by the journalist”.

It is important to take into account that these two rules came into effect in the last legislative term, so it could be interesting to analyse how the limits to the right of non-disclosure have been developed during this period, but there is a lack of interest regarding the protection to the journalistic sources: it seems there is no political willingness to approve a bill concerning the protection of non-disclosure of the journalist’s sources.

Thus, we can consider that an offense of the right of honour included in this rules is not a crime in line with the recommendation to force the journalist to disclosure its sources. In our legal system, especially at the Criminal Code, there is no a specific and concrete provision concerning the duty of journalists to protect their source, as it exists in the deontological code (but it’s a non-binding norm). At this code we find the provisions that we have commented before under which the journalist can be forced to disclosure the source identity only in the situations where a crime can be avoided. Thus, crimes included at this provision fulfil de requirements of the Recommendation: the protection of Human Life (all the crimes against life, integrity, health, freedom or sexual freedom of people) and the Prevention of Major Crime.

³⁰ International Press Institute. Report on the June 2015 High-Level International Press Freedom Mission to Spain. P. 18. http://ipi.freemedia.at/fileadmin/user_upload/Spain-Press-Freedom-Time-of-Change-ENG.pdf

³¹ Supreme Court (Tribunal Supremo), March 25 2013. Case Law 2013\3928.

8. In The Light Of The Case Law Of The European Court Of Human Rights, How Do National Courts Apply The Respective Laws With Regard To The Right To Protect Sources? In Particular, How Do They Balance The Different Interests At Stake?

The lack of regulation about the professional secret of the journalists observed in the European countries has been solved for the most part by the European Court of Human Rights (ECtHR). The professional secret does not appear directly in the European Convention of Human Rights (ECHR) of 1950, but it can be deduced reading the Article 10. It protects the freedom of expression and, in relation with the confidentiality, it only mentions that this freedom carries duties:

“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”.*³²

As the professional secret is not regulated, the task of the ECtHR consists of, on one hand, clarifying the existence of this secret and, on the other hand, establishing its requirements and limitations.

Ultimately, the professional secret of the journalists in the area of the Council of Europe is a real right, that can be inferred by what is said in Article 10 of the ECHR, and is recognised by the jurisprudence of the ECtHR as not absolute (it is subject to restrictions).

We are going to see, first of all, the acknowledgement of this professional secret (I) and, secondly, the limitation of this right (II).

1. The professional secret: a right not present in the European Convention of Human Rights

a) The Sentence of *Goodwin v. United Kingdom* (1993)

This case acknowledged the professional secret right.

³² Article 10 of the ECHR of 1950

Mr. Goodwin received information on the telephone about the financial situation of a company. He promised not to disclose his source as it could lead the company into bankruptcy. The newspaper was sued and the Judge of the 'High Court of Justice' demanded the divulgence of the source's identity. Mr. Goodwin lodged an appeal against the judge's decision and the Appeals Tribunal disallowed the claim. The House of Lords considered that the High Court of Justice and the Appeals Tribunal had reason to establish the need of spreading the sources in the interests of justice.

The Sentence of the ECtHR *Goodwin v. United Kingdom* of March 27 1996 supposed a milestone in the protection of journalistic sources: not only because of his express recognition on the matter, but because it is no longer considered as a duty of ethical efficiency but a right protected by the ECHR.

In his claim before the ECtHR, Mr. Goodwin (a British journalist) alleged that the judicial order broke his freedom of expression, as it is recognised in the Article 10 of the Convention: he was required to reveal the identity of his source of information.

In his Sentence, the Court recalls that the 'freedom of expression constitutes one of the essential foundations of a democratic society'³³ and that the safeguards afforded to the press are of particular importance. The protection of the sources of information is 'one of the basic conditions for press freedom'. The Court expressed that:

"[...] without such protection, source may be deterred from assisting the press in informing the public on matters for public interest [...] Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest".

The conclusion was that the judicial decision asking the defendant to reveal his source and as well the fine for refusing to obey, infringed the right to freedom of expression, as it is written in Article 10.

This sentence established the foundations of the juridical construction of the professional secret of the journalists.

b) The Sentence *Fressoz and Roire v. France* (1999)

This is a sentence about the professional secret of the journalists against other professional

³³ From the Sentence *Handyside v. the United Kingdom* (sentence of ECtHR of September 7 1976), the European Court of Human Rights (ECtHR) has established that 'freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for each individual's self-fulfilment'. Since then, every time the ECtHR has applied the Article 10 of the ECHR, the reference to the freedom of expression like a foundation of the democracy has been constant (as Teresa Freixes Sanjuán establishes it in *El Tribunal Europeo de Derechos Humanos y las Libertades de la Comunicación*).

secrets.

In the Goodwin case, the Court established that the protection of the journalist allowed the guardianship of those who had infringed her duty of secret. And this sentence *Fressoz and Roire v. France* of January 21 1999 (JUR 1999/3) confirms it.

In this case, a journal leaked out the fiscal information of a person of public interest, after receiving copies of the original liquidations from an anonymous sender. The problem in this case lies in the fact that the source was a civil servant bound to keep the confidentiality of citizens' fiscal information.

The Court recognised that the conduct of the informers who publish documents with fiscal information provided by civil servants doesn't constitute *per se* an illegitimate exercise of the right to the information. This clarified the Sentence of *Goodwin v. UK* and the questions that Patrick Fontbressin³⁴ was raising about the possibility of publishing illicitly-obtained information (separating the journalist' conduct of the informant's conduct).

c) The Sentence *Roemen and Schmit v. Luxembourg* (2003)

In this case, the Court took a stance about the measures of judicial investigation: the registration of a journalist's workplace after being accused of violation of professional and fiscal secret, theft and concealment in relation with the publication of a journalistic article.

With this Sentence, the Court decided that the registrations could only be authorized in case of existing serious indications of the commission of a crime (which was not given in this case).

d) *Cumpănă and Mazârê v. Rumania* (2004)

In this case, two journalists accused of insult and slander received a prison sentence after publishing the offensive expressions. The journalists alleged before the ECtHR that they were not providing the evidences demanded by the National Court because they didn't want to cause any harm to their sources. As the Court noted

*"While the role of the press certainly entails a duty to alert the public where it is informed about presumed misappropriation on the part of local elected representatives and public officials, the fact of directly accusing specific individuals by mentioning their names and positions placed the applicants under an obligation to provide a sufficient factual basis for their assertions".*³⁵

But

³⁴ Fontbressin, P., 'Les arrêts du 17 décembre 2004 de la Cour européenne des Droits de l'Homme (Grande Chambre): Vers un principe de dignité de l'information?', in *Revue Trimestrielle des Droits de l'Homme*, n° 62, 2005.

³⁵ Sentence ECtHR *Cumpănă and Mazârê v. Rumania* of December 17 2004 §101

*“The Court points out that the applicants’ duty to provide a sound factual basis for the allegations in question in no way entailed an obligation to disclose the names of anyone who had supplied the information they used in producing their report. Furthermore, it does not appear from the evidence before the Court that during the criminal proceedings as a whole, or even on the date on which the second applicant appeared before the Court of First Instance (see paragraph 27 above), the Audit Court report on which the applicants’ article was clearly based was a confidential document whose disclosure could have led to sanctions for them or for their sources”.*³⁶

The Court established the violation of the Article 10 of the Convention, given the disproportion of the sanction, because it could dissuade the journalists from fulfilling their duty as alert of the public opinion.

In this cases, we see that the right of professional secret appeared very slowly. But as we said previously, is not an absolute right. It has some limits.

1. The limits at this professional secret

Which are the limits of this protection that we can distinguish from the jurisprudence of the ECtHR?

The general rule is the protection of the freedom of information and the journalist sources. This protection is not absolute, but the limitation takes place only in the suppositions of a ‘pressing social need’ or public interest.

We can recall the Sentences of the ECtHR³⁷ when he establishes that the exercise of freedom of expression carries with it duties and responsibilities, and the safeguard afforded by Article 10 to journalists is subject to the *proviso* that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.

The reference to the ethical character of his/her action and to the good faith of the journalist can be determinant at the moment of valuing if the limitation of his/her professional secret has been so intense as to affirm the violation of Article 10.

In any case, the limitations of the professional secret are interpreted in a restrictive and proportional way. Any limitation of the professional secret has to be realised in a pondered way and with the due guarantees (judicial previous intervention)³⁸.

The sentence *Handyside v. United Kingdom* (September 7 1976) established the analysis (a ‘test’) of this limitation, if it was just or not in the light of the paragraph 2, Article 10 of the ECHR (*vid supra*).

³⁶ *Ibidem* §106

³⁷ Sentence ECtHR *Cumpână and Mazârê v. Rumania; Fressoz and Roire v. France*; and *Stoll v. Switzerland* (2006).

³⁸ Sentence *Sanoma II v. Netherlands* of September 14 2010.

In this sentence, the ECtHR established the necessary requirements in order to validate the limitation:

- (i) The limitation is necessary to be foreseen in the law;
- (ii) Has to be justified by a legitimate purpose (in agreement to the Article 10.2);
- (iii) Has to be necessary in a democratic society for the protection of the moral;
- (iv) Has to be proportional to the legitimate purpose pursued.

In this context, the ECtHR established the theory of 'margin of appraisal' (sentence of ECtHR July 23 1969).

On the other hand, it must be said that these limits are not compulsory. On the contrary, each State decides to impose limits or not, since Article 10 of the Convention says that the limitations must be established by law.

2. In the Spanish national context

In the Spanish system, the Spanish Constitution recognizes and protects in the Article 20.1 the freedom of expression and the right to freely communicate or receive truthful information:

- "1. The following rights are recognized and protected:*
- a. The right to freely express and spread thoughts, ideas and opinions through words, in writing or by any other means of reproduction.*
 - 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 truthful information by any means of dissemination whatsoever. The law shall regulate the right to the clause of conscience and professional secrecy in the exercise of these freedoms".*

But that is not all, as our Constitution indicates the need of a law to develop this right of professional secret. We may wonder if this law exists.

Nowadays, we haven't a legislative text about the protection of the journalist sources. We have only a Deontological Code approved by the Ordinary Assembly of the Federation of FAPE in Seville, November 27 1993. This Code defines the professional secret in its Article 10:

"The right to keep professional secrecy is a right of a journalist, but it is also an obligation which guarantees the confidentiality of the sources of information.

Therefore, a journalist shall guarantee the right of the sources of information to remain anonymous, if such has been requested. However, this professional obligation shall exceptionally not be applied if it has been proved that the source has deliberately falsified information or if revealing the source is the only way to avoid serious and instant damage to people".

FAPE is the principal organization of professionals of journalism in Spain and its Commission wants to be a reference in the autoregulation of the journalistic profession. It works on its own

initiative or at the request of any citizen, and it exercises its function independently. The main purpose of FAPE is to know and solve the journalistic questions of ethics matters in conformity with its own regulation.

This is all the existing protection of the journalist source in the Spanish system, where the Constitution is not respected because the Spanish Parliament has not legislated on this matter yet (in opposition to the Article 20 of the Spanish Constitution).

Consequently, the Spanish regulation for the protection of the journalist sources and the professional secret is poor and it is not endorsed by the legislative power, as there's a lack of specific legislation about the secret of journalistic sources.

I am going to do a brief revision to the most relevant doctrines of the Constitutional Court:

- (I) Sentence 15/1993: it notes the importance of not revealing the sources, as well as the material of work used during the process and, in this case, even the identity of the person that it publishes in the section of correspondence columns (*Cartas al director* in Spanish).
- (II) Sentence 123/1993 and 173/90: we see that the right of the professional secret is exercised on any public entity that requires the revelation of his sources and this does not carry the responsibility that derive from the non-cooperating with the Public Administrations. Therefore, it does not free the journalist of proving that he has acted with ethics, diligence and professional veracity.
- (III) Sentence 21/2000: this sentence talks on the conflict that exists between the professional secret and the public interest in the pursuit of the criminal activity. In this regard the High Court has declared itself on the need to weight the right to the freedom of information and the general interest of the justice to revealing this professional secret.

In conclusion, the absence of Spanish jurisprudence is due to the lack of a specific legislation about the professional secret. The Criminal Code doesn't not regulate textually the protection of the sources, as we can see in the Sentences of the Constitutional Court. But at the same time this right is developed in the national and European jurisprudence.

9. What Are The Criteria For Using Electronic Surveillance And Anti-Terrorism Laws, Which May Include Measures Such As Interceptions Of Communications, Surveillance Actions And Search Or Seizure Actions In Order To Identify Journalists' Sources Of Information? Are The National Law Provisions Accessible, Precise, Foreseeable And Include Clear Legislative Norms In The Context Of Surveillance And Anti-Terrorism Provisions?

As we'll see, the question of the telephonic interventions in the Spanish legal order (I) gave place to numerous case-law of the Constitutional Court and the Supreme Court (II) because of the insufficient regulation of the interception of communications.

1. Juridical Spanish regime in accordance with the telephonic interventions.

In this part, we're going to talk about the juridical regime in general (A). In the second part, we'll focus on the communications between lawyer and client (B) that has specific rules in accordance with the terrorism.

A. The general legal order

The general legal order refers to the ensemble of applicable legal texts in the Spanish territory: the national, international rules.

The treaties are a part of our legal order in accordance with Article 10 of the Spanish Constitution (and in according with the Article 96).

Concerning the **international laws**, we must mention Article 12 of the Universal Declaration of Human rights: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'.

On the other hand, the United Nations signed the International Covenant on Civil and Political Rights (New-York, December 16 1966). We are interested in the Article 17.1 and 2:

*"1. - No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. - Everyone has the right to the protection of the law against such interference or attacks".*

Regarding **European laws**, we must mention the ECHR and the Fundamental Freedoms: Article 8.1 and 2 deal with the 'Right to respect for private and family life'.

Finally, in the **Spanish laws**, the Article 18.3 of the current Spanish Constitution says: 'Secrecy of communications is guaranteed, particularly of postal, telegraphic and telephonic communications, except in the event of a court order to the contrary'.

With regard to the prohibition of the telephone tapping in our legislation, we must mention the organic law 7/1984 because it added to the Penal Code the crime of clandestine telephone tapping in its Title X, Chapter 1 'On discovery and revelation of secrets'.

The Spanish Criminal Procedure Code (SCPC) regulating the telephonic interventions until the Organic Law 4/1988 in the Article 579, paragraphs 2, 3 and 4.

Nevertheless, following the doctrinal majority opinion: the regulation of Article 579 of the SCPC is insufficient. This situation was pointed essentially by the ECHR in its Sentence of February 18 2003, *Meadow Bugallo v. Spain*. It declares that this Article does not conform to the requirements relative to the legal request of the interference, infringing the Article 8 of the CEDH.

Article 579 of the SCPC caused a legal vacuum in the matter of telephonic interventions. Such insufficiencies concern basically the duration of the execution of the measure, the conditions of

establishment of the procedure of transcription of the intercepted conversations, the precautions to the observing, to report intact and complete the realised recordings, to the purposes of the eventual control for the judge and the defence. The Spanish law does not contain any regulation on this subject.

This vacuum was solved by the case-law of the Spanish Supreme Court (fundamentally for Judicial Decree of June 18 1992 and the Sentence of June 25 1993, according to Jose Paul Sancha Díez).

The first one established the speciality of the criminal activity and the exceptionality of the measure.

The second one established the previous existence of a procedure of penal investigation and the area of application.

In addition to the contributions done by these two important sentences, the jurisprudence has continued developing this regulation. The Sentence of the Supreme Court of March 12 2004 established the necessary conditions to the application of this legislative norm (developed in the second part of this answer).

B. The communications between lawyer and his client

This question it's regulated in Article 51.2 of the Organic law 1/1979, of September 26, General Penitentiary Act (*Ley General Penitenciaria*: LOGP).

The Prisons Regulations consider the intervention in Article 48.3: 'The intervention of communications between prisoners and their lawyers is very restrictive, and it's only allowed in case of terrorism or in suppositions in which the lawyer could be involved'.

The two cumulative requirements for the intervention of such communications demanded by the Organic Law of the LOGP are (Sentence of the Spain's Constitutional Court 183/1994, of June 20):

- (i) Judicial authorization
 - (ii) Cases of terrorism
2. The Jurisprudential contributions

According to Jose Paul Sancha Díez's analysis, the principles for the judicial intervention of the telephonic communications are enumerated in the Sentence of the Spain's Supreme Court of March 12 2004:

Principle of Jurisdictional exclusivity: only the judicial authority can restrict the right to the secret of the communications. This means that the fundamental Right of the secret of the communication only can be limited by a juridical act.

Principle of exclusively evidential purpose: this evidence only can serve to establish the existence of the crime and find the people personally accountable (Sentence of Supreme Court of September 12 1994).

Principle of exceptional measure: only it will be possible its use in the absence of another way of investigating the crime (The Judicial Degree of the Supreme Court of June 18th 1992).

Principle of proportionality: only in case of serious crime. Nevertheless, Article 579.2 SCPC does not have a list of “serious crimes” (Sentence of the Supreme Court of May 20 1994). The problem is that there’s not a definition of “serious crimes” and this fact has developed two theories:

- a. López Barja³⁹ thinks that we can apply this measure, only for crimes punished with a penalty of imprisonment of more than 9 years.
- b. On the other hand, López Fragoso⁴⁰ thinks these measures should apply to any type of crimes.

The Spanish Supreme Court combines both theories: the sentence of June 14 1993 thinks that the measure finds her justification on very serious crimes, but it can be authorised for minor offences with social transcendence.

Principle of temporary legitimization: Article 579.3 SPCP authorizes this intervention during a period of three months, which is extendable (Sentence of the Supreme Court May 9 1994). There’s a problem with this principle because the Article 579.3 doesn’t talk about the limitations of this extension.

Specialty of the criminal fact: the interceptions of communications are incompatibly with a general investigation of criminal acts (Sentence of Supreme Court of May 20 1994).

Such measures will be applied only on the telephones of the persons investigated (Supreme Court, June 25 1993). The consequence of this Sentence is the imposition of the name of the person in the judicial act that establishes the interceptions of communications, in order to identify accurately the person.

Existence of indications of the commission of a crime and not only suspicions (Sentence of Supreme Court of April 18 1994).

Previous existence of a procedure of penal investigation. In consequence, we can’t apply this measure in prevention or on preliminary investigations (Sentence of Supreme Court of June 15

³⁹ Jacobo López Barja, *Las escuchas telefónicas y la prueba ilegalmente obtenida*, AKAL, Madrid, 1989.

⁴⁰ Tomás Vicente López-Fragoso Álvarez ‘Los descubrimientos casuales en las intervenciones telefónicas como medidas coercitivas en el proceso penal’, *Derechos y libertades: Revista del Instituto Bartolomé de las Casas*, ISSN 1133-0937, n° 1, N° 2, 1993-1994, p. 81-90.

1993 and March 25 1994).

Principle of sufficient reasons in the sentence in order to establish these measures. We can't forget that this measure goes in opposition to our Fundamental Rights, that's why it has to be very rigorously justified (Sentence of Supreme Court of May 20, 1994 and September 12 1994). Principle of judicial control in the development and cessation of the measure (Supreme Court of April 18th 1994).

If, after all this, the right of the secret of the communications is infringed, it should be applied Article 11.1 of the Judiciary Act (LOPJ) disposing that the evidences obtained against the Rights or the fundamental freedom will not be taken into consideration (Sentence 85/1994 of the Spain's Constitutional Court).

As we have seen how, the Spanish regulation of the electronic surveillance is really poor and insufficient. As a consequence, the jurisprudence fills this legislative insufficiency.

The investigation of the telephonic communications shows deficiencies that have not been object of the necessary legal reform in spite of the case-law. It is to the legislator to solve this deficiency and not to the case-law or the doctrine.

In conclusion, the national law it is not precise, foreseeable and it doesn't include clear legislative norms.

It is necessary to reform the procedural regulation, as the Sentence of the Supreme Court 184/2003 of October 3 declared it. As long as the Spanish Criminal Procedure Code will not be reformed, the case-law (national and European) will still be used.

10. Can Journalists Rely on Encryption and Anonymity Online to Protect Themselves and their Sources against Surveillance?

The right to the secrecy of communications encompasses every content of communication, either private or not. It constitutes a fundamental right of any individual or legal person, which must be respected by all others, either public or private entities or individuals.

At International level, Article 8(2) of the European Convention on Human Rights establishes the limitation of the right to respect private and family life whereas a court order is provided. Furthermore, it requires a legal provision and the concurrence of necessity by reason of national security, public safety of economic wellbeing of the country interests, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others. The Budapest Convention on Cybercrime determines in Article 18 the national sovereignty with the legislative measures on: 1) the request for computer data of any person in its territory; 2) the request for data to a service provider relating to the services offered in the territory of the country. This Convention empowers State parties to pass a decryption legislation, and at the same time provides encryption as, in principle, a right.

In compliance to European Union law,⁴¹ Spanish legal framework considers encryption as a dual use technology. Furthermore, European Union has created a regulatory framework which rules electronic communications,⁴² thus entirely applicable to Spain.

The framework provided by Spanish constitution in relation to the protection against surveillance is contained in various articles, among which the main regulation is contained in Article 18.

First of all, Article 18(3) guarantees the secrecy of communications, and more concretely regarding postal, telegraphic and telephonic communications, then setting it as an independent right apart from the right to privacy. In accordance to Constitutional Court case-law,⁴³ secrecy of communications not only constitutes a guarantee of individual freedom, but also a collective instrument of cultural, scientific and technological development. Furthermore, this protection covers either intrusion from private as well as public entities or individuals, independently from the content of the information, and regardless of the way in which the interception is carried out. In addition, secrecy of communications is undermined not only with the interception, but also with the unlawful awareness of the information transmitted, and are protected both, the information which constitutes the content of the information and the interlocutor's identity.

Summarizing, this article provides the prohibition of interference and intervention of communication, with the sole exception of a court order, and in compliance with the guarantees laid down.

Later on, Article 18(4) of the Spanish Constitution provides the restriction of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights. This provision constitutes a citizen's faculty, who might oppose to the use of personal data for different purposes from which substantiated its collecting. This article sets up a different right from the right to privacy, although closely linked. It guarantees the full control on the personal data, its use as well as its final destination.

On the other hand, Article 20 sets up the right of free information in its fourth paragraph, and freedom of expression in its first paragraph. Under this Article, Spanish Constitutional Court issued a judgment⁴⁴ on the July 3 2006 in which explicitly recognises the journalist's right not to reveal his/her sources of information and to professional secrecy in accordance to this

⁴¹ R (EC) n° 428/2009 of the Council, of 5 May 2009.

⁴² Dir. 2002/21/EC of the Commission and of the Council, of 7 March 2002.

Dir. 2002/19/EC of the Parliament and the Council, of 7 March 2002.

Dir. 2002/20/EC of the Parliament and the Council, of 7 March 2002.

Dir. 2002/22/EC of the Parliament and the Council, of 7 March 2002.

Dir. 2002/58/EC of the Parliament and the Council, of 12 July 2002.

⁴³ Spanish Constitutional Court. Case 132/2002, of 20 May 2002.

⁴⁴ Spanish Constitutional Court. Case 216/2006.

provision. This case-law is in accordance to ECHR⁴⁵, which has emphasised that the right of journalist's not to reveal their sources is an intrinsic part of the right to information.

These three articles, as contained within the First Section of Chapter II of Title I of the Constitution, can only be ruled through Organic Act as established in Article 81, and bind all public entities in accordance to Article 53(1).

In relation to the limitations to the secrecy of communications rights, as established in the aforementioned constitutional provision 18(3), Article 55 provides for two restrictions applicable to the journalistic sphere. The first paragraph thereby establishes that secrecy of communications may be suspended in case of state of emergency or siege. The second paragraph foresees the possibility of suspension, which shall be determined with an organic act, for specific persons in connection with investigations of the activities of armed bands or terrorist groups. This suspension must be established along with the necessary participation of the courts and proper parliamentary control, and be determined on an individual basis.

Regarding Spanish development legislation, the Organic Act on Telecommunications (*Ley orgánica de telecomunicaciones*) provides in its Chapter III the regulation for personal data protection, and public rights and obligations concerning networks and electronic communications. In its Article 39 is established the obligation to guarantee the secret of communications for those operators on public communication networks or who provide electronic communication services. This right can be restricted firstly, in accordance to EU Directive on personal data and privacy protection,⁴⁶ to safeguard national security, public security, defence, or an important economic or financial interest, among others. Furthermore, at national level, Article 579 of the Criminal Procedural Code, in virtue of which can be issued an interception of communications judicial warrant. The other exception prescribed is in relation to the Organic Act 2/2002 on previous judicial control of the National Intelligence Centre, in which the only article has established the need of previous judicial warrant to the adoption of measures affecting secrecy of communications.

Later on, Article 43 provides that every content transmitted via communication networks, can be protected through encryption, adding further on that every public entity can request the encryption method used.

Royal Decree 424/2005 on the conditions for the provision of electronic communication services, develops the Act on Telecommunications, including in Article 63 the legal regime to be applied. Article 65(1) provides that operators must eliminate or anonymise all those personal data of their clients and subscribers in the moment these data are not useful anymore for the purposes of communication.

⁴⁵ Sentence case of *Nagla v. Latvia*, 16 July 2013

⁴⁶ R (EC) n° 45/2001 of the Parliament and the Council, of 18 December 2000.

Subsidiary, Organic Act on Personal Data Protection (*Ley orgánica de protección de datos*) shall be applied, which enables the adoption of high-level security measures, as encryption. In case the journalist is intending to publish sensitive personal data, such as those related to ideology, union membership, or religion as provided in Article 16(2) of Spanish Constitution, the content of the information along with its sensitive nature, public interest and the person's role in public life must be weighed. Once the evaluation has been done, a journalist can be constricted to use encryption to protect that data. Its regulation provides in Article 101(2) that the distribution of supports containing personal data, shall be after their encryption.

The Spanish Agency for Data Protection (*Agencia Española de protección de datos*) was created on 1993 as the public entity in charge of assuring the enforcement of the Organic Act on Data Protection.

In relation to the Criminal regulation, Article 197 of Spanish Criminal Code punishes the communications' interception crime, when it is perpetrated by individuals, while Article 200 rules the same in relation to legal entities. Article 536 penalises those public workers who commit the injury.

Regarding the right of journalists to rest to anonymity in their publications, there is not concrete provision which covers that scenario. Therefore, an extension of the professional secrecy right might be alleged on that regard, as the right to anonymity covers journalist's sources regardless of who is the source.

10. Are Whistle-Blowers Explicitly Protected under Law Protecting Journalistic Sources? Is there Another Practice Protecting Whistle-Blowers? Is the Legislation Prohibiting Authorities and Companies from Identifying Whistle-Blowers?

A journalist's position is among various interests: on the one side the interest of the sources in hiding the identity; the interest of the journalist in offering unique information conserving the source at the same time; and the public opinion's interest in being informed. Professional secrecy is the main instrument directed to protect this short of interests, understood as the right to protect informative sources, and not including others such as off the record, pseudonyms, or undetermined sources. As well established at the EU Anti-Corruption report,⁴⁷ Spain does not have specific legislation protecting whistle-blowers or effective protection mechanisms.

Given the lack of a legislative framework which rules whistle-blowers protection at national level, the closer definition is found at Council's of Europe level,⁴⁸ where is defined as 'individuals who report or disclose information on threats or harm to the public interest'.

⁴⁷ COM (2014) 38 final, Annex 9.

⁴⁸ Recommendation CM/Rec(2014) 7

At international level, the Council of Europe has issued Resolution 1003 on Ethics of Journalism that points out the need to unify and develop a national regulation on professional secrecy in relation to confidential sources. This instrument links professional secrecy under two approaches: the right of citizens to be informed, and the journalist's freedom of expression. Constitutional Court⁴⁹ has reiterated that, not only media have the dissemination of information role, but citizens have also the right to receive it. Spanish Constitutional Court has occasionally been in accordance with this interpretation, while in other judgments has understood that the right to be informed is not an individual right, but part of the broader right to communicate information.

Moreover, Recommendation No R (2000) 7, affirms that professional secrecy of the journalist covers the following elements: name and personal data, concrete circumstances in the collection of the information, the information which remains unpublished, as well as the journalist's personal data.

Legal regimen on the journalist's professional secrecy must be regarded under two approaches: within the framework of business information protections when journalistic sources are considered as the media; or within the personal sphere of the journalist, in case the sources are individual connections. Professional secrecy covers the source's identity, and operates in case of truthful information.

The Spanish Constitution recognises, in Article 20(1) (d), the right to freely communicate or receive truthful information by any means or dissemination whatsoever. Later on, it reserves to the law the regulation of professional secrecy in the exercise of these freedoms. In accordance to the case-law of the Constitutional Court, journalists should own a preferential right in receiving the information. The Court points out in further judgments that Article 20 guarantees professional secrecy not only as a right linked to the information right, but also in relation to the right to receive quality information, as a public interest ownership of the citizen.

At national level, there is not any specific Act which rules professional secrecy or whistleblowers protection, not have being constitutional regulation developed yet. This lack of regulation has lead in some occasions to contradictory judgments, as that in which information of which source was not revealed, was considered as not sufficiently proven.⁵⁰

The only law still in force was issued during Franco's dictatorship. Decree 744/1967, with the consolidated text of the Journalist Profession Statute, recognises the journalist's obligation to maintain the professional secret, with the only exception of judicial cooperation. In April 2004 a proposition of law on the Statute of the professional journalist was presented, even though it

⁴⁹ ATC 195/1991, of 26 June 1991.

⁵⁰ STC 21/2000, of 31 January 2000.

declined with the Parliament's dissolution in 2008. In Article 14, professional secrecy was recorded, and the disclosure of confidential sources offence was contained in Article 15.

ECHR case-law⁵¹ has consistently underlined the strong importance of whistle-blowers protection, as well as the significance of the information disclosed when it affects to a strong public interest. That is confirmed at Recommendation CM/Rec (2014)7 of April 30 2014, where it was recognised that the disclosure of information on threats or harm to the public interest can contribute to strengthening transparency and democratic accountability. Even though this Recommendation call upon States to stimulate, facilitate and protect whistle-blowers, for the time being this indications have not been implemented across Spanish legal system. On that regard, Spanish Constitutional Court has reiterated that, for the protection of whistle-blowers under Article 20(1)(d) is not necessary an absolute concordance among the real facts occurred and the information provided, but is enough the whistle-blowers' diligence in confirming the information.

Thus, it can be concluded that in front of the lack of regulation, the protection of journalistic professional secrecy must be protected pleading the constitutional direct effect, as well as the analogical application of the procedural rules on regard to the professional secrecy in other professions as the Lawyer or Doctor. Apart from those cases, Spanish system of journalistic professional secrecy can be defined as self-regulatory, being composed of various sorts of rules such as reporting Statutes of each media- subscribed between the owners of the media and the editors-, Ethics Codes, or collective agreements. Although in most of this self-regulatory instruments, professional secrecy is defined as an obligation, is rather a journalist's right. At the same time, regulation is scattered at national and regional level.

On the one side, reporting Statutes are valid as far as a private agreement between parties, thus journalists and the owners of the media. Taking into account more concrete examples, and with regard to the professional secrecy, reporting Statutes of *El Mundo* or *El Periódico de Cataluña* directly set up this right, while *El País* only covers professional secrecy indirectly.

In relation to Labour regulation, is applicable whenever unfair dismissal and discriminatory treatment of employees are concerned.⁵² Workers' Statute contains in its Article 5 the good faith and non-concurrence obligations, in relation to which the journalist must not disclose the information at his/her disposal as a consequence of his/her job or professional activity. In Article 85.1 is contained the possibility to regulate professional secrecy through collective agreement.

Collective agreements concluded at the workplace between workers and the media's owners, in contrast to the previous categories, have a stronger legal nature, constituting legal sources when law lacks. Their efficacy is *erga omnes*, affecting all the workers covered under their influence.

⁵¹ Case of Matúz v. Hungary, Application no. 73571/10, 21 January 2015; Case of Guja v. Moldova, Application no. 14277/04, 12 February 2008.

⁵² *Ibid* 4.

Nevertheless, professional secrecy is not frequently regulated by collective agreements in practice, and the treatment at a national level is not unified. While some agreements recognise professional secrecy only in relation to the business' internal organization, others set up a right also in relation to third parties. Summarising it can be concluded that there is not a clear trend to the open recognition of the professional secrecy at this level.

In relation to the Ethics Code, the most relevant at national level is the one issued by the Journalists Association Federation in Spain, which in Article 10 contains the right to professional secrecy which guarantees the information sources' confidentiality. At the same time is established a clear limit to this right in case is clearly established the source has manipulated the information, or when the revelation of the source is the only path to avoid a severe and imminent injury to people.

Regarding the Criminal sphere, Spanish Criminal Code, Article 199(2) sets up the disclosure of confidential sources offence, by virtue of which journalists and the editorial board can be punished. However, a journalist is obliged to reveal the source's identity when a crime against life, integrity, health, freedom or sexual liberty might be avoided. In the contrary case, shall be sanctioned by virtue of Article 450.

Criminal Procedure Code exempts the journalist from declaring under Article 410. In case the journalist is processed for a severer disobedience lawful authority offence as a consequence of the negative to reveal the sources, might avoid responsibility by invoking the legitimate exercise of a right, under Article 20(7) of Criminal Code.

11. Conclusions

1. In the Spanish Constitution there's an explicit protection of the right of the journalists not to disclose their source of information.
 - a. Nevertheless, the Spanish legal system has never clearly developed a law related to the protection of the sources.
 - b. On one hand, the Spanish Criminal Code doesn't protect explicitly the rights not to disclosure the sources of information, in the articles 199 and following.
 - c. On the other hand, as these articles don't mention specifically the protection of the sources, and as the field of criminal law doesn't accept the analogy, there's a legal vacuum. The protection depends on, the interpretation of the Supreme Court in every particular case.
2. The professional secrecy of the media professionals has not been regulated in depth yet.
3. Consequently, the Spanish regulation for the protection of the journalist sources and the professional secret is poor and it is not endorsed by the legislative power.
4. It is necessary to reform the procedural regulation, as the Sentence of the Supreme Court 184/2003 of October 3 declared it. As long as the Spanish Criminal Procedure Code will not be reformed, the case-law (national and European) will still be used.
5. Actually we will have to wait to find a legislation providing protection to journalists and defining the right of non-disclosure of its sources and its limits in Spain.

6. The Spanish regulation of the electronic surveillance is really poor and insufficient. As a consequence, the jurisprudence fills this legislative insufficiency.
 - a. The investigation of the telephonic communications shows deficiencies that have not been object of the necessary legal reform in spite of the case-law. It is to the legislator to solve this deficiency and not to the case-law or the doctrine.
7. In November 27 1993 the General Assembly of the FAPE established the Spanish Deontological Code (for the Journalistic Profession as an essential ethic principle for the journalists in the exercise of their profession).

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13. Table of national provisions and articles.

Spanish Regulation		
	Spanish version	English version
Article 16.2, Spanish Constitution	2. Nadie podrá ser obligado a declarar sobre su ideología, religión o creencias.	2. No one may be compelled to make statements regarding his or her ideology, religion or beliefs.
Article 18, Spanish Constitution	<p>1. Se garantiza el derecho al honor, a la intimidad personal y familiar y a la propia imagen.</p> <p>2. El domicilio es inviolable. Ninguna entrada o registro podrá hacerse en él sin consentimiento del titular o resolución judicial, salvo en caso de flagrante delito.</p> <p>3. Se garantiza el secreto de las comunicaciones y, en especial, de las postales, telegráficas y telefónicas, salvo resolución judicial.</p> <p>4. La ley limitará el uso de la</p>	<p>1. The right to honour, to personal and family privacy and to the own image is guaranteed.</p> <p>2. The home is inviolable. No entry or search may be made without the consent of the householder or a legal warrant, except in cases of flagrante delicto.</p> <p>3. Secrecy of communications is guaranteed, particularly regarding postal, telegraphic and telephonic communications, except in the event of a court</p>

	<p>informática para garantizar el honor y la intimidad personal y familiar de los ciudadanos y el pleno ejercicio de sus derechos.</p>	<p>order.</p> <p>4. The law shall restrict the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights.</p>
<p>Article 20.1, 20.2, 20.3, 20.4, 20.5, Spanish Constitution</p>	<p>1. Se reconocen y protegen los derechos:</p> <p>a) A expresar y difundir libremente los pensamientos, ideas y opiniones mediante la palabra, el escrito o cualquier otro medio de reproducción.</p> <p>b) A la producción y creación literaria, artística, científica y técnica.</p> <p>c) A la libertad de cátedra.</p> <p>d) A comunicar o recibir libremente información veraz por cualquier medio de difusión. La ley regulará el derecho a la cláusula de conciencia y al secreto profesional en el ejercicio de estas libertades.</p> <p>2. El ejercicio de estos derechos no puede restringirse mediante ningún tipo de censura previa.</p> <p>3. La ley regulará la organización y el control parlamentario de los medios de comunicación social dependientes del Estado o de cualquier ente público y</p>	<p>1. The following rights are recognised and protected:</p> <p>a) The right to freely express and spread thoughts, ideas and opinions through words, in writing or by any other means of reproduction.</p> <p>b) The right to literary, artistic, scientific and technical production and creation.</p> <p>c) The right to academic freedom.</p> <p>d) The right to freely communicate or receive truthful information by any means of dissemination whatsoever. The law shall regulate the right to the clause of conscience and professional secrecy in the exercise of these freedoms.</p> <p>2. The exercise of these rights may not be restricted by any form of prior censorship.</p> <p>3. The law shall regulate the organization and parliamentary control of the mass</p>

	<p>garantizará el acceso a dichos medios de los grupos sociales y políticos significativos, respetando el pluralismo de la sociedad y de las diversas lenguas de España.</p> <p>4. Estas libertades tienen su límite en el respeto a los derechos reconocidos en este Título, en los preceptos de las leyes que lo desarrollen y, especialmente, en el derecho al honor, a la intimidad, a la propia imagen y a la protección de la juventud y de la infancia.</p> <p>5. Sólo podrá acordarse el secuestro de publicaciones, grabaciones y otros medios de información en virtud de resolución judicial.</p>	<p>communication media under the control of the State or any public agency and shall guarantee access to such media by the significant social and political groups, respecting the pluralism of society and of the various languages of Spain.</p> <p>4. These freedoms are limited by respect for the rights recognised in this Part, by the legal provisions implementing it, and especially by the right to honour, to privacy, to the own image and to the protection of youth and childhood.</p> <p>5. The seizure of publications, recordings and other means of information may only be carried out by means of a court order.</p>
Article 53(1), Spanish Constitution	<p>1. Los derechos y libertades reconocidos en el Capítulo II del presente Título vinculan a todos los poderes públicos. Sólo por ley, que en todo caso deberá respetar su contenido esencial, podrá regularse el ejercicio de tales derechos y libertades, que se tutelarán de acuerdo con lo previsto en el artículo 161, 1, a).</p>	<p>1. The rights and freedoms recognised in Chapter 2 of the present Part are binding on all public authorities. Only by an act which in any case must respect their essential content, could the exercise of such rights and freedoms be regulated, which shall be protected in accordance with the provisions of section 161(1) a).</p>
Article 55, Spanish Constitution	<p>1. Los derechos reconocidos en los artículos 17, 18, apartados 2 y 3; artículos 19, 20, apartados 1, a) y d), y 5; artículos 21, 28, apartado 2, y artículo 37, apartado 2, podrán ser suspendidos cuando se</p>	<p>1. The rights recognised in sections 17 and 18, subsections 2 and 3; sections 19 and 20, subsection 1, paragraphs a) and d), and subsection 5; sections 21 and 28, subsection 2; and section</p>

	<p>acuerde la declaración del estado de excepción o de sitio en los términos previstos en la Constitución. Se exceptúa de lo establecido anteriormente el apartado 3 del artículo 17 para el supuesto de declaración de estado de excepción.</p> <p>2. Una ley orgánica podrá determinar la forma y los casos en los que, de forma individual y con la necesaria intervención judicial y el adecuado control parlamentario, los derechos reconocidos en los artículos 17, apartado 2, y 18, apartados 2 y 3, pueden ser suspendidos para personas determinadas, en relación con las investigaciones correspondientes a la actuación de bandas armadas o elementos terroristas. La utilización injustificada o abusiva de las facultades reconocidas en dicha ley orgánica producirá responsabilidad penal, como violación de los derechos y libertades reconocidos por las leyes.</p>	<p>37, subsection 2, may be suspended when a state of emergency or siege (martial law) is declared under the terms provided in the Constitution. Subsection 3 of section 17 is excepted from the foregoing provisions in the event of the declaration of a state of emergency.</p> <p>2. An organic act may determine the manner and the circumstances in which, on an individual basis and with the necessary participation of the courts and proper parliamentary control, the rights recognised in section 17, subsection 2, and 18, subsections 2 and 3, may be suspended for specific persons in connection with investigations of the activities of armed bands or terrorist groups. Unwarranted or abusive use of the powers recognised in the foregoing organic act shall give rise to criminal liability as a violation of the rights and freedoms recognised by the laws.</p>
<p>Article 81, Spanish Constitution</p>	<p>1. Son leyes orgánicas las relativas al desarrollo de los derechos fundamentales y de las libertades públicas, las que aprueben los Estatutos de Autonomía y el régimen electoral general y las demás previstas en la Constitución.</p> <p>2. La aprobación, modificación o derogación de las leyes orgánicas exigirá mayoría absoluta del</p>	<p>1. Organic acts are those relating to the implementation of fundamental rights and public liberties, those approving the Statutes of Autonomy and the general electoral system and other laws provided for in the Constitution.</p> <p>2. The approval, amendment or repeal of organic acts shall require the overall majority of</p>

	Congreso, en una votación final sobre el conjunto del proyecto.	the Members of Congress in a final vote on the bill as a whole.
Article 20.7, Spanish Criminal Code	El que obre en cumplimiento de un deber o en el ejercicio legítimo de un derecho, oficio o cargo. En los supuestos de los tres primeros números se aplicarán, en su caso, las medidas de seguridad previstas en este Código.	Any person who acts in carrying out of a duty or in the lawful exercise of a right, authority or office. In the cases of the first three Sections, the security measures foreseen in this Code shall be applied
Article 45, Spanish Criminal Code	La inhabilitación especial para profesión, oficio, industria o comercio o cualquier otro derecho, que ha de concretarse expresa y motivadamente en la sentencia, priva al penado de la facultad de ejercerlos durante el tiempo de la condena.	Special barring from a profession, trade, industry or commerce, or any other right, that must be duly reasoned and specified in the sentence, deprives the convict of the right to exercise these during the term of the sentence.
Article 197, Spanish Criminal Code	1. El que, para descubrir los secretos o vulnerar la intimidad de otro, sin su consentimiento, se apodere de sus papeles, cartas, mensajes de correo electrónico o cualesquiera otros documentos o efectos personales, intercepte sus telecomunicaciones o utilice artificios técnicos de escucha, transmisión, grabación o reproducción del sonido o de la imagen, o de cualquier otra señal de comunicación, será castigado con las penas de prisión de uno a cuatro años y multa de doce a	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

	<p>veinticuatro meses.</p> <p>2. Las mismas penas se impondrán al que, sin estar autorizado, se apodere, utilice o modifique, en perjuicio de tercero, datos reservados de carácter personal o familiar de otro que se hallen registrados en ficheros o soportes informáticos, electrónicos o telemáticos, o en cualquier otro tipo de archivo o registro público o privado. Iguales penas se impondrán a quien, sin estar autorizado, acceda por cualquier medio a los mismos y a quien los altere o utilice en perjuicio del titular de los datos o de un tercero.</p> <p>3. Se impondrá la pena de prisión de dos a cinco años si se difunden, revelan o ceden a terceros los datos o hechos descubiertos o las imágenes captadas a que se refieren los números anteriores.</p> <p>Será castigado con las penas de prisión de uno a tres años y multa de doce a veinticuatro meses, el que, con conocimiento de su origen ilícito y sin haber tomado parte en su descubrimiento, realizare la conducta descrita en el párrafo anterior.</p> <p>4. Los hechos descritos en los apartados 1 y 2 de este artículo serán castigados con una pena de prisión de tres a cinco años cuando:</p> <p>a) Se cometan por las personas</p>	<p>twelve to twenty-four months.</p> <p>2. The same penalties shall be imposed upon whoever, without being authorized, 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 telematics 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 authorized, accesses these by any means, and whoever alters or uses them to the detriment of the data subject or a third party.</p> <p>3. 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.</p> <p>Whoever, being aware of their unlawful 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.</p>
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	<p>encargadas o responsables de los ficheros, soportes informáticos, electrónicos o telemáticos, archivos o registros; o</p> <p>b) se lleven a cabo mediante la utilización no autorizada de datos personales de la víctima.</p> <p>Si los datos reservados se hubieran difundido, cedido o revelado a terceros, se impondrán las penas en su mitad superior.</p> <p>5. Igualmente, cuando los hechos descritos en los apartados anteriores afecten a datos de carácter personal que revelen la ideología, religión, creencias, salud, origen racial o vida sexual, o la víctima fuere un menor de edad o una persona con discapacidad necesitada de especial protección, se impondrán las penas previstas en su mitad superior.</p> <p>6. Si los hechos se realizan con fines lucrativos, se impondrán las penas respectivamente previstas en los apartados 1 al 4 de este artículo en su mitad superior. Si además afectan a datos de los mencionados en el apartado anterior, la pena a imponer será la de prisión de cuatro a siete años.</p> <p>7. Será castigado con una pena de prisión de tres meses a un año o multa de seis a doce meses el que, sin autorización de la persona afectada, difunda, revele o ceda a terceros imágenes o grabaciones audiovisuales de aquella que</p>	<p>4. 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 telematics 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.</p> <p>5. 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.</p> <p>6. 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.</p>
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	<p>hubiera obtenido con su anuencia en un domicilio o en cualquier otro lugar fuera del alcance de la mirada de terceros, cuando la divulgación menoscabe gravemente la intimidad personal de esa persona.</p> <p>La pena se impondrá en su mitad superior cuando los hechos hubieran sido cometidos por el cónyuge o por persona que esté o haya estado unida a él por análoga relación de afectividad, aun sin convivencia, la víctima fuera menor de edad o una persona con discapacidad necesitada de especial protección, o los hechos se hubieran cometido con una finalidad lucrativa.</p>	<p>7. Should the acts described in the preceding Sections be committed within a criminal organization or group, the higher degree penalties shall be applied respectively.</p> <p>Whoever, without the permission of the victim, would spread, reveal or cede to third parties images or audio-visual recordings obtained with his/her consent in a residence or any other place beyond reach of third parties, producing by this action a serious damage in the intimacy of this person, shall be punished with imprisonment from three months to one years and a fine of six to twelve months.</p> <p>The penalty shall be imposed in the upper half when the facts would be committed by the spouse or a person in an analogue affective bond, even if they don't live together, or if the victim is under the age of 18 or is a handicapped person needing a special protection, or if the acts are perpetrated for profit-making purposes.</p>
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<p>Article 198, the Spanish Criminal Code</p>	<p>La autoridad o funcionario público que, fuera de los casos permitidos por la Ley, sin mediar causa legal por delito, y prevaliéndose de su cargo, realizare cualquiera de las conductas descritas en el artículo anterior, será castigado con las penas respectivamente previstas en el mismo, en su mitad superior y, además, con la de inhabilitación absoluta por tiempo de seis a doce años.</p>	<p>The authority or public officer who, outside the cases permitted by Law, without there being a legal cause due to an offence having being committed, and availing himself of his office, acts in any of the manners described in the preceding Article, shall be punished with the penalties respectively foreseen therein, in the upper half and also with that of absolute barring for a term from six to twelve years.</p>
<p>Article 199, Spanish Criminal code</p>	<p>1. El que revelare secretos ajenos, de los que tenga conocimiento por razón de su oficio o sus relaciones laborales, será castigado con la pena de prisión de uno a tres años y multa de seis a doce meses.</p> <p>2. El profesional que, con incumplimiento de su obligación de sigilo o reserva, divulgue los secretos de otra persona, será castigado con la pena de prisión de uno a cuatro años, multa de doce a veinticuatro meses e inhabilitación especial para dicha profesión por tiempo de dos a seis años.</p>	<p>1. Whoever discloses secrets of others that he obtains knowledge whereof through his trade or labour relations, shall be punished with a sentence of imprisonment from one to three years and a fine from six to twelve months.</p> <p>2. Professionals who, in breach of their obligation of secrecy or reserve, reveal secrets of another person, shall be punished with a sentence of imprisonment of one to four years, a fine of twelve to twenty- four months and special barring from that profession for a term from two to six years.</p>
<p>Article 200, Spanish</p>	<p>Lo dispuesto en este capítulo será</p>	<p>The terms set forth this Chapter</p>

<p>Criminal code</p>	<p>aplicable al que descubriere, revelare o cedere datos reservados de personas jurídicas, sin el consentimiento de sus representantes, salvo lo dispuesto en otros preceptos de este Código</p>	<p>shall be applicable to whoever, discloses, reveals or communicates reserved data of legal persons without the consent of their representatives, except for what is set forth in other provisions of this Code.</p>
<p>Article 201, the Spanish Criminal Code</p>	<p>1. Para proceder por los delitos previstos en este Capítulo será necesaria denuncia de la persona agraviada o de su representante legal. Cuando aquélla sea menor de edad, persona con discapacidad necesitada de especial protección o una persona desvalida, también podrá denunciar el Ministerio Fiscal.</p> <p>2. No será precisa la denuncia exigida en el apartado anterior para proceder por los hechos descritos en el artículo 198 de este Código, ni cuando la comisión del delito afecte a los intereses generales o a una pluralidad de personas.</p> <p>3. El perdón del ofendido o de su representante legal, en su caso, extingue la acción penal sin perjuicio de lo dispuesto en el segundo párrafo del número 5º del apartado 1 del artículo 130.</p>	<p>1. Prosecution of offences foreseen in this Chapter requires a report by the victim or his legal representative. When the former is a minor, incapacitated or handicapped person, it may also be reported by the Public Prosecutor.</p> <p>2. The report required in the preceding Section shall not be necessary to prosecute the acts described in Article 198 of this Code nor when the offence committed affect to general interests or persons at large.</p> <p>3. Forgiveness by the victim or his legal representative, as appropriate, extinguishes the penal action without prejudice to what is set forth in Paragraph Two of Sub-Section 5 of Section 1 of Article 130.</p>

<p>Article 450, Spanish Criminal Code</p>	<p>El que, pudiendo hacerlo con su intervención inmediata y sin riesgo propio o ajeno, no impidiere la comisión de un delito que afecte a las personas en su vida, integridad o salud, libertad o libertad sexual, será castigado con la pena de prisión de seis meses a dos años si el delito fuera contra la vida, y la de multa de seis a veinticuatro meses en los demás casos, salvo que al delito no impedido le correspondiera igual o menor pena, en cuyo caso se impondrá la pena inferior en grado a la de aquél</p>	<p>Whoever is able, by his immediate intervention and without risk to himself or another, and does not prevent a felony being committed that affects the life, integrity or health, freedom or sexual freedom of persons, shall be punished with a sentence of imprisonment of six months to two years and if the offence is against life, and that of a fine from six to twenty- four months in the other cases, except if the offence not prevented is subject to an equal or lower punishment, in which case a lower degree punishment than that for the actual felony shall be imposed.</p>
<p>Article 536, Spanish Criminal Code</p>	<p>La autoridad, funcionario público o agente de éstos que, mediando causa por delito, interceptare las telecomunicaciones o utilizare artificios técnicos de escuchas, transmisión, grabación o reproducción del sonido, de la imagen o de cualquier otra señal de comunicación, con violación de las garantías constitucionales o legales, incurrirá en la pena de inhabilitación especial para empleo o cargo público de dos a seis años.</p> <p>Si divulgare o revelare la información obtenida, se impondrán las penas de inhabilitación especial, en su mitad superior y, además, la de</p>	<p>Such an authority, civil servant or agent thereof who, tin the course of criminal proceedings, intercepts telecommunications or uses technical tapping devices to listen, transmit, record or play sound, image or any other communication signal, in breach of the constitutional or legal guarantees, shall incur the punishment of special barring from public employment and office for two to six years.</p> <p>Should he disclose or reveal the information obtained, the penalties of special barring, in the upper half and also a fine from six to eighteen months</p>

	multa de seis a dieciocho meses.	shall be imposed.
Article 410, Spanish Code of Criminal Procedure	Todos los que residan en territorio español, nacionales o extranjeros, que no estén impedidos, tendrán obligación de concurrir al llamamiento judicial para declarar cuanto supieren sobre lo que les fuere preguntado si para ello se les cita con las formalidades prescritas en la Ley.	Every person resident in Spanish territory, either national or foreigner, who is not disabled, shall have the obligation to attend the judicial call to declare all his/her knowledge on what would be asked if on that purpose are called under formalities stipulated by the Law. [Unofficial translation]
Article 520.1, Spanish Code of Criminal Procedure	La detención y la prisión provisional deberán practicarse en la forma que menos perjudique al detenido o preso en su persona, reputación y patrimonio	Pre-trial detention and imprisonment shall be carried out in the manner least harmful to the person, reputation and property of the detainee or prisoner.
Article 579, Spanish Code of Criminal Procedure	<p>1. El resultado de la detención y apertura de la correspondencia escrita y telegráfica podrá ser utilizado como medio de investigación o prueba en otro proceso penal.</p> <p>2. A tal efecto, se procederá a la deducción de testimonio de los particulares necesarios para acreditar la legitimidad de la injerencia. Se incluirán entre los antecedentes indispensables, en</p>	<p>1. The result of arrest and the openness of written and telegraphic corresponding might be used as investigation method or evidence in any other criminal process.</p> <p>2. To that purpose, the testimony of the persons need to substantiate the interference's legitimacy shall be processed. Initial request for the adoption, judicial resolution which adopts</p>

	<p>todo caso, la solicitud inicial para la adopción, la resolución judicial que la acuerda y todas las peticiones y resoluciones judiciales de prórroga recaídas en el procedimiento de origen.</p> <p>3. La continuación de esta medida para la investigación del delito casualmente descubierto requiere autorización del juez competente, para la cual, éste comprobará la diligencia de la actuación, evaluando el marco en el que se produjo el hallazgo casual y la imposibilidad de haber solicitado la medida que lo incluyera en su momento. Asimismo se informará si las diligencias continúan declaradas secretas, a los efectos de que tal declaración sea respetada en el otro proceso penal, comunicando el momento en el que dicho secreto se alce.</p>	<p>it, as well as all the other petitions and judicial resolutions of extension on the original procedure, shall be included among essential background.</p> <p>3. The continuation of the measure for the criminal investigation of any crime incidentally discovered requires authorization issued by the competent Court, and to that purpose, the Judge shall verify the diligence on the performance, evaluating the framework of the incidental find and the unlikeness of having requested that inclusive measure on any other moment. Likewise, information shall be provided if diligences continue under secrecy, for the purpose of the respect of the declaration before the other criminal procedure, giving notice of the secrecy withdrawal.</p> <p>[Unofficial translation]</p>
<p>Article 33 Law 14/1966 18th March, of Press and Print Law</p>	<p>Un Estatuto de la profesión periodística, aprobado por Decreto, regulará los requisitos para el ejercicio de tal actividad, determinando los principios generales a que debe subordinarse y, entre ellos, el de profesionalidad, previa inscripción en el Registro Oficial,</p>	<p>A statute of the journalistic profession, approved by Decree, will regulate the requirements for the exercise of such activity. It will determine the subordination to the General principles as it is being part of the profession, with fixed rights and duties for journalists and</p>

	<p>con fijación de los derechos y deberes del periodista y especialmente del Director de todo medio informativo; el de colegiación, integrada en la Organización Sindical, que participará en la formulación, redacción y aplicación del mencionado Estatuto, y el de atribución a un Jurado de ética profesional de la vigilancia de sus principios morales.</p>	<p>specially Directors of the news media; also unionisation, in a Union that will participate in the formulation, drafting and implementation of the above mentioned Statute; and creation to a panel of professional ethics in charge of surveying their moral principles.</p>
<p>Article 1 of the Statute of the Journalistic Profession</p>	<p>A todos los efectos legales es periodista quien esté inscrito en el Registro Oficial de Periodistas.</p> <p>Sólo serán inscritos quienes estén en posesión del título de periodista que únicamente se obtendrá una vez aprobados los estudios en alguna de las Escuelas de Periodismo legalmente reconocidas y tras de superar la prueba de Grado en la Escuela Oficial de Periodismo o las establecidas para las restantes como requisito para su obtención.</p>	<p>For all legal purposes, a journalist is someone who is registered in the Official Register of Journalists (Registro oficial de periodistas).</p> <p>The journalists in possession of a Degree in Journalism will be only registered in the Official Register of Journalists. The degree will only be obtained once approved the studies in any of the legally recognized schools of journalism and after passing an exam at the official school of journalism or those established for the remaining as a requirement for its achievement.</p>
<p>Article 1 of the Statute of the Journalistic Profession</p>	<p>Se considerará periodista en activo, con derecho a la obtención del carnet que lo acredite como tal, a quien, cumplidos los requisitos del artículo primero y, en general, los exigidos en la legislación de</p>	<p>A journalist has the right to obtain the press card that identifies him/her as such, if he/she meets the requirements of Article 1 and, in general, all the requirements of the Press and Print legislation, and this for</p>

	<p>Prensa e Imprenta, realice profesionalmente en forma escrita, oral o gráfica, tareas de información periodística, ya sea impresa, radiada, televisada o cinematográfica, tanto en los medio de difusión como en Organismo o Entidades de carácter público.</p>	<p>the doing the tasks of journalistic information (written, oral, or graphic), whether printed, radiated, televised or filmed, in both broadcast media as a body or public entities</p>
<p>Article 16 section 1 of the Statute of the Journalistic Profession</p>	<p>Todos los Periodistas en activo, cualquiera que sea la forma en que ejerzan su actividad profesional, serán miembros de la Federación Nacional de las Asociaciones de la Prensa de España, a través de la Asociación de la Prensa que les corresponda. En caso de duda, la Federación resolverá a través de qué Asociación determinada se realizará dicha integración.</p>	<p>All active journalists has the obligation to become members of the Spanish Federation of Journalist Associations, through the Press Association they belong to. In case of doubt, the Federation will solve through that particular association will be such integration.</p>
<p>Section 5 of Statute of the Journalistic Profession' Annex</p>	<p>El Periodista tiene el deber de mantener el secreto profesional, salvo en los casos de obligada cooperación con la justicia, al servicio del bien común.</p>	<p>The journalist has a duty to keep professional secrecy, except in cases of forced cooperation with justice, at the service of the common good.</p>
<p>Article 1 of the FAPE's code of ethics</p>	<p>El Periodista actuará siempre manteniendo los principios de profesionalidad y ética contenidos en el presente Código Deontológico, cuya aceptación expresa será condición necesaria para su incorporación al Registro Profesional de Periodistas y a las Asociaciones de</p>	<p>The journalist shall act always maintaining the principles of professionalism and ethics contained in the present Code of ethics, whose acceptance will be a necessary condition for its incorporation to the professional registration of journalists and the associations of the Federated</p>

	<p>la Prensa federadas.</p> <p>Quienes con posterioridad a su incorporación al Registro y a la correspondiente Asociación actúen de manera no compatible con estos principios, incurrirán en los supuestos que se contemplan en la correspondiente reglamentación.</p>	<p>Press.</p> <p>Who after joining the register and the corresponding Association to act in a manner not consistent with these principles, will incur in the cases contemplated in the corresponding regulation.</p>
<p>Article 10 of the FAPE's code of ethics</p>	<p>El secreto profesional es un derecho del periodista, a la vez que un deber que garantiza la confidencialidad de las fuentes de información.</p> <p>Por tanto, el periodista garantizará el derecho de sus fuentes informativas a permanecer en el anonimato, si así ha sido solicitado. No obstante, tal deber profesional podrá ceder excepcionalmente en el supuesto de que conste fehacientemente que la fuente ha falseado de manera consciente la información o cuando el revelar la fuente sea el único medio para evitar un daño grave e inminente a las personas.</p>	<p>Professional secrecy is the right of the journalist, as well as a duty that guarantees the confidentiality of the sources of information.</p> <p>Therefore the journalist will guarantee the right of their sources of information remains anonymous, if it has been applied. However, such professional duty may assign exceptionally assuming that truthfully stating that the source has deliberately distorted information or when revealing the source is the only way to avoid a serious and imminent harm to the people.</p>
<p>Draft law on the right to access information and the duties and rights of the information workers): art 15</p>	<p>Los periodistas y responsables editoriales que falten al secreto profesional serán castigados como autores del delito previsto en el artículo 199. 2 del Código Penal. El periodista estará obligado a revelar la identidad de la fuente cuando de este modo se pueda evitar la comisión cierta de un</p>	<p>The journalists and editorial responsible that do not fulfil the professional secret will be punished as perpetrators of the crime included at article 199.2 of the Penal Code.</p> <p>The journalist has to disclosure the source identity when it can</p>

	delito contra la vida, la integridad, la salud, la libertad o la libertad sexual de las personas. Quien en estos supuestos no revele la fuente reservada será castigado con las penas previstas en el artículo 450 del Código Penal	be avoided the commission of a crime against life, integrity, health, freedom or sexual freedom of people. In this case, not disclosing the source will be punished by article 450 of the Criminal Code.
Article 1 of the Organic Law 2/1984, Right of Rectification, March 26 1984	Toda persona natural o jurídica, tiene derecho a rectificar la información difundida, por cualquier medio de comunicación social, de hechos que le aludan, que considere inexactos y cuya divulgación pueda causarle perjuicio. Podrán ejercitar el derecho de rectificación el perjudicado aludido o su representante y, si hubiese fallecido aquél, sus herederos o los representantes de éstos.	The right of rectification is mainly for those who suffer from the exercise of information freedom. This right is for both natural and legal entities who consider that the information provided is inaccurate and its divulgation can cause a detriment. The right can be exercised by the aggrieved person, representatives and in the case of deceased, representatives of them.
Article 2.2, Organic Law 2/1984, Right of Rectification, March 26 1984	La rectificación deberá limitarse a los hechos de la información que se desea rectificar.	The rectification should be limited to the facts of the information that would be rectified.
Article 7 of the Organic Law 1/1982, May 5, Right of Civil Protection, personal and family privacy and image.	Tendrán la consideración de intromisiones ilegítimas en el ámbito de protección delimitado por el artículo 2 de esta ley: 1. El emplazamiento en cualquier lugar de aparatos de escucha, de	They are considered illegitimate intromissions in the protection of the second article of this law: 1. The location in any place of listening, filming or optical devices or other media to record

	<p>filmación, de dispositivos ópticos o de cualquier otro medio apto para grabar o reproducir la vida íntima de las personas.</p> <p>2. La utilización de aparatos de escucha, dispositivos ópticos, o de cualquier otro medio para el conocimiento de la vida íntima de las personas o de manifestaciones o cartas privadas no destinadas a quien haga uso de tales medios, así como su grabación, registro o reproducción.</p> <p>3. La divulgación de hechos relativos a la vida privada de una persona o familia que afecten a su reputación y buen nombre, así como la revelación o publicación del contenido de cartas, memorias u otros escritos personales de carácter íntimo.</p> <p>4. La revelación de datos privados de una persona o familia conocidos a través de la actividad profesional u oficial de quien los revela.</p> <p>5. La captación, reproducción o publicación por fotografía, filme o cualquier otro procedimiento, de la imagen de una persona en lugares o momentos de su vida privada o fuera de ellos, salvo los casos previstos en el artículo 8.2.</p> <p>6. La utilización del nombre, de la voz o de la imagen de una persona para fines publicitarios, comerciales o de naturaleza</p>	<p>or reproduce the private life of people.</p> <p>2. The use of listening or optical devices, or any other media in order to discover the private life of people, their opinions or their private correspondence, which are neither to be known by the people using these media, nor to be recorded, registered or reproduced in any way.</p> <p>3. The divulgation of facts of the private life of a person or family which may affect the reputation and good name as a consequence of the revelation or publication of the content of letters, memories or any other personal private writings.</p> <p>4: The revelation of private information of a person or family, obtained in the course of the fulfilling of professional or official activities.</p> <p>5. The caption, reproduction or publication of the image of a person (photographs, films or any other media) in places or moments of the life, private or not, except as described of in Article 8.2.</p> <p>6. The use of the name, voice or image of a person for advertising or commercial purposes, or of similar nature.</p>
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	<p>análoga.</p> <p>7. La imputación de hechos o la manifestación de juicios de valor a través de acciones o expresiones que de cualquier modo lesionen la dignidad de otra persona, menoscabando su fama o atentando contra su propia estimación.</p>	<p>7. The divulcation of expressions or facts about a person, who by these means could be defamed and become undeserving for other people.</p>
<p>Article 8 of the Organic Law 1/1982, de 5 de mayo, Right of Civil Protection, personal and family privacy and image.</p>	<p>Las excepciones contempladas en los párrafos a) y b) no serán de aplicación respecto de las autoridades o personas que desempeñen funciones que por su naturaleza necesiten el anonimato de la persona que las ejerza.</p>	<p>The right to the own image will not prevent the exceptions of the paragraphs a) and b) and it will not be applicable when the functions of the authorities or people will need anonymity’.</p>
<p>Article 30.3 Organic Law on the protection on citizen’s security</p>	<p>Se considerarán organizadores o promotores de las reuniones en lugares de tránsito público o manifestaciones las personas físicas o jurídicas que hayan suscrito la preceptiva comunicación</p>	<p>It will be considered as organizer or promoter of the meetings in public places or protests, the natural persons or legal entities that have subscribed the required communication.</p>
	<p>Ley Orgánica 2/2002, de 6 de mayo, reguladora del control judicial previo del Centro Nacional de Inteligencia</p>	<p>Organic Law 2/2002, May 6 2002, 2002 on the Prior Judicial Control applicable to the National Intelligence Centre</p>

<p>Article 63, Royal Decree 424/2005 15th April 2005, approving the Regulation on the conditions for electronic communications services, the universal service and users protection.</p>	<p>La protección de los datos personales vinculados a las redes y servicios de comunicaciones electrónicas se regirá por lo dispuesto en el artículo 38 de la Ley 32/2003, de 3 de noviembre, por este título V y, en lo no previsto por aquellas normas, por lo dispuesto en legislación vigente sobre protección de los datos de carácter personal.</p>	<p>Personal data protection linked to networks and electronic communications services, shall be ruled by Article 38 Law 32/2003 3rd November, by the present Title V and, if not otherwise specifically provided, by the legislation in force on personal data protection.</p>
<p>Article 65(1), Royal Decree 424/2005 15th April 2005, approving the Regulation on the conditions for electronic communications services, the universal service and users protection</p>	<p>1. Los operadores deberán eliminar o hacer anónimos los datos de carácter personal sobre el tráfico referidos a una comunicación y relacionados con los usuarios y los abonados que hayan sido tratados y almacenados para establecer una comunicación, en cuanto ya no sean necesarios a los efectos de su transmisión, sin perjuicio de lo dispuesto en los apartados siguientes.</p>	<p>1. Operators shall eliminate or make anonymous the personal character information on the traffic referred to a communication and related to the users and subscribers which had been treated and stored in order to establish a communication, as it is no longer necessary for transmission purposes, except as provided below.</p>
<p>Article 101(2), Royal Decree 1720/2007 21st December, on behalf of which is approved the development regulation of the Organic Act 15/1999 13th December, on Personal Data Protection</p>	<p>2. La distribución de los soportes que contengan datos de carácter personal se realizará cifrando dichos datos o bien utilizando otro mecanismo que garantice que dicha información no sea accesible o manipulada durante su transporte.</p> <p>Asimismo, se cifrarán los datos que contengan los dispositivos portátiles cuando éstos se</p>	<p>2. Distribution of media containing personal data shall be carried out with the encryption of such data, or using any other mechanism which guarantees the non-accessibility of that information, or that it is not manipulated in the course of the transport. Likely, data contained in electronic devices will be encrypted when those are found out of the facilities under the</p>

	<p>encuentren fuera de las instalaciones que están bajo el control del responsable del fichero.</p>	<p>control of the data controller.</p>
<p>Article 5, Royal Legislative Decree 1/1995 March 24 1995, on behalf of which is approved the Statute of Workers Rights</p>	<p>Los trabajadores tienen como deberes básicos:</p> <p>a) Cumplir con las obligaciones concretas de su puesto de trabajo, de conformidad con las reglas de la buena fe y diligencia.</p> <p>b) Observar las medidas de prevención de riesgos laborales que se adopten.</p> <p>c) Cumplir las órdenes e instrucciones del empresario en el ejercicio regular de sus facultades directivas.</p> <p>d) No concurrir con la actividad de la empresa, en los términos fijados en esta ley.</p> <p>e) Contribuir a la mejora de la productividad.</p> <p>f) Cuantos se deriven, en su caso, de los respectivos contratos de trabajo.</p>	<p>Basic responsibilities of all workers are:</p> <p>a) Comply with his/her concrete obligations in relation to his/her work position, in conformity with good faith and diligence rules.</p> <p>b) Observe adopted measures for the prevention of occupational risks.</p> <p>c) Comply with orders and instructions from the employer on the normal exercise of his/her directive faculties.</p> <p>d) Not to compete against the company's activity, in the terms established on this Act.</p> <p>e) Contribute to the improvement of productivity.</p> <p>f) Any other derived from employment contracts.</p>

<p>Article 85(1), Royal Legislative Decree 1/1995 March 24 1995, on behalf of which is approved the Statute of Workers Rights</p>	<p>1. Dentro del respeto a las leyes, los convenios colectivos podrán regular materias de índole económica, laboral, sindical y, en general, cuantas otras afecten a las condiciones de empleo y al ámbito de relaciones de los trabajadores y sus organizaciones representativas con el empresario y las asociaciones empresariales, incluidos procedimientos para resolver las discrepancias surgidas en los periodos de consulta previstos en los artículos 40, 41, 47 y 51; los laudos arbitrales que a estos efectos puedan dictarse tendrán la misma eficacia y tramitación que los acuerdos en el periodo de consultas, siendo susceptibles de impugnación en los mismos términos que los laudos dictados para la solución de las controversias derivadas de la aplicación de los convenios.</p> <p>Sin perjuicio de la libertad de las partes para determinar el contenido de los convenios colectivos, en la negociación de los mismos existirá, en todo caso, el deber de negociar medidas dirigidas a promover la igualdad de trato y de oportunidades entre mujeres y hombres en el ámbito laboral o, en su caso, planes de igualdad con el alcance y contenido previsto en el capítulo III del título IV de la Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres.</p>	<p>1. Within the respect for Law, collective bargaining agreements may regulate matters of an economic, labour and associative nature and, in general any other matters as may affect working conditions and the field of workers' and their representative organizations' relations with the employer and employers' associations, including procedures for resolving the discrepancies arising during the consultation periods provided for in Articles 40, 41, 47 and 51 of this Law. The arbitration awards that may be dictated for these purposes shall have the same effect and treatment as the resolutions emerging from consultation periods, being subject to challenge in the same terms as the awards dictated to resolve controversies deriving from the application of the agreements. Without restriction to the freedom of the parties to determine the content of collective bargaining agreements, in negotiating these, the duty shall exist, in any case, to negotiate measures aimed at promoting equality in treatment and opportunities between men and women at work or, as applicable, equality plans having the scope and content projected in Chapter III of Heading IV of the Organic Law for the Effective Equality between Men and Women.</p>
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<p>Article 9 Complaints and Deontological Commission</p>	<p>1. Cualquier persona natural o jurídica afectada por una actividad periodística que, en su opinión, no cumpla las normas del Código Deontológico, podrá solicitar la apertura de expediente ante la Comisión de Arbitraje, Quejas y Deontología del Periodismo.</p> <p>2. El plazo para la formulación de la queja será de dos meses.</p> <p>Excepcionalmente la Comisión Arbitral podrá admitir a trámite las quejas que, aun siendo formuladas por quien no esté directamente afectado, trate de supuestos de alarma o escándalo social. En la resolución habrán de razonarse los motivos que fundamenten la admisión.</p>	<p>1. Every natural person or legal entity affected by a journalist information that, in his/her opinion doesn't respect the rules of the Deontological Code, can submit a complaint before the Foundation of Arbitration, Complaints and Deontology of the Journalism.</p> <p>2. The person directly affected has two months to submit the complaint.</p> <p>Exceptionally, complaints filed by third parties, even if they're not directly affected, will be admitted in cases of social alarm or scandal. The resolution will explain the reasons for the admittance.</p>
<p>Article 10, Deontological Code approved by the Ordinary Assembly of the Federation of Associations of the Press of Spain</p>	<p>El secreto profesional es un derecho del periodista, a la vez que un deber que garantiza la confidencialidad de las fuentes de información.</p> <p>Por tanto, el periodista garantizará el derecho de sus fuentes informativas a permanecer en el anonimato, si así ha sido solicitado. No obstante, tal deber profesional podrá ceder excepcionalmente en el supuesto de que conste fehacientemente que la fuente ha falseado de</p>	<p>The right to keep professional secrecy is a right of a journalist, but it is also an obligation which guarantees the confidentiality of the sources of information.</p> <p>Therefore, a journalist shall guarantee the right of the sources of information to remain anonymous, if such has been requested. However, this professional obligation shall exceptionally not be applied if it has been proved that the source has deliberately falsified</p>

	manera consciente la información o cuando el revelar la fuente sea el único medio para evitar un daño grave e inminente a las personas	information or if revealing the source is the only way to avoid serious and instant damage to people.
Article 39, Organic Act 9/2014 9th May 2014, on Telecommunications		Due to the lengthy of Article 39, we have considered not to translate the whole text. It rules extensively secrecy on communications.
Article 43, Organic Act 9/2014 May 9 2014, on Telecommunications	<p>1. Cualquier tipo de información que se transmita por redes de comunicaciones electrónicas podrá ser protegida mediante procedimientos de cifrado.</p> <p>2. El cifrado es un instrumento de seguridad de la información. Entre sus condiciones de uso, cuando se utilice para proteger la confidencialidad de la información, se podrá imponer la obligación de facilitar a un órgano de la Administración General del Estado o a un organismo público, los algoritmos o cualquier procedimiento de cifrado utilizado, así como la obligación de facilitar sin coste alguno los aparatos de cifra a efectos de su control de acuerdo con la normativa vigente.</p>	<p>1. Any type of information transmitted by electronic communication networks might be protected through encryption methods.</p> <p>2. Encryption is an information security method. Among its use conditions, when it is used to protect information's confidentiality, might be imposed the obligation to provide to the General State Administration or any other public organism, the algorithms or any other encryption procedure used, as well as the obligation to provide at any cost the encryption devices for control purposes in accordance to current regulations.</p>

	Decreto 744/1967, de 13 de abril, por el que se aprueba el texto refundido del Estatuto de la Profesión Periodística	Decree 744/1967 April 13 1967, on behalf of which is approved the Statute of the Journalist Profession
European Regulation		
Article 8.1 and 2, European Convention of Human Rights	<p>1. Toda persona tiene derecho al respeto de su vida privada y familiar, de su domicilio y de su correspondencia.</p> <p>2. No podrá haber injerencia de la autoridad pública en el ejercicio de este derecho sino en tanto en cuanto esta injerencia esté prevista por la ley y constituya una medida que, en una sociedad democrática, sea necesaria para la seguridad nacional, la seguridad pública, el bienestar económico del país, la defensa del orden y la prevención de las infracciones penales, la protección de la salud o de la moral, o la protección de los derechos y las libertades de los demás.</p>	<p>1. Everyone has the right to respect for his private and family life, his home and his correspondence.</p> <p>2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others</p>
Article 8.2, European Convention of Human	2. No podrá haber injerencia de la autoridad pública en el ejercicio de este derecho sino en tanto en	2. There shall be no interference by a public authority with the exercise of this right except such

<p>Rights</p>	<p>cuanto esta injerencia esté prevista por la ley y constituya una medida que, en una sociedad democrática, sea necesaria para la seguridad nacional, la seguridad pública, el bienestar económico del país, la defensa del orden y la prevención de las infracciones penales, la protección de la salud o de la moral, o la protección de los derechos y las libertades de los demás.</p>	<p>as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.</p>
<p>Art 10, European Convention of Human Rights</p>	<p>1. Toda persona tiene derecho a la libertad de expresión. Este derecho comprende la libertad de opinión y la libertad de recibir o de comunicar informaciones o ideas sin que pueda haber injerencia de autoridades públicas y sin consideración de fronteras. El presente artículo no impide que los Estados sometan a las empresas de radiodifusión, de cinematografía o de televisión a un régimen de autorización previa.</p> <p>2. El ejercicio de estas libertades, que entrañan deberes y responsabilidades, podrá ser sometido a ciertas formalidades, 12 13 condiciones, restricciones o sanciones, previstas por la ley, que constituyan medidas necesarias, en una sociedad democrática, para la seguridad nacional, la integridad territorial o la seguridad pública, la defensa del orden y la prevención del delito, la protección de la salud o de la</p>	<p>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.</p> <p>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</p>

	<p>moral, la protección de la reputación o de los derechos ajenos, para impedir la divulgación de informaciones confidenciales o para garantizar la autoridad y la imparcialidad del poder judicial</p>	<p>information received in confidence, or for maintaining the authority and impartiality of the judiciary”.</p>
<p>Article 14 of the European Ethics of Journalism</p>	<p>En función de estas exigencias es necesario reforzar las garantías de libertad de expresión de los periodistas a quienes corresponde en última instancia ser los emisores finales de la información. En este sentido es necesario desarrollar jurídicamente y clarificar las figuras de la cláusula de conciencia y el secreto profesional de las fuentes confidenciales, armonizando las disposiciones nacionales sobre estas materias para ejercerlas en el marco más amplio del espacio democrático europeo.</p>	<p>These requirements are such that we must reinforce the safeguards of the journalist's freedom of expression, for they must in the last instance operate as the ultimate sources of information. In this connection we must legally expand and clarify the nature of the conscience clause and professional secrecy vis-à-vis confidential sources, harmonizing national provisions on this matter so that they can be implemented in the wider context of democratic Europe.</p>
<p>Article 18, Convention on Cybercrime</p>	<p>1. Cada Parte adoptará las medidas legislativas y de otro tipo que resulten necesarias para facultar a sus autoridades competentes a ordenar:</p> <p>a) A una persona que se encuentre en su territorio que comunique determinados datos informáticos que posea o que se encuentren bajo su control, almacenados en un sistema informático o en un medio de</p>	<p>1. Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities to order:</p> <p>a) a person in its territory to submit specified computer data in that person's possession or control, which is stored in a computer system or a computer-data storage medium; and</p> <p>b) a service provider offering its</p>

	<p>almacenamiento de datos informáticos; y</p> <p>b) a un proveedor de servicios que ofrezca prestaciones en el territorio de esa Parte que comunique los datos que posea o que se encuentren bajo su control relativos a los abonados en conexión con dichos servicios.</p> <p>2. Los poderes y procedimientos mencionados en el presente artículo están sujetos a lo dispuesto en los artículos 14 y 14.</p> <p>3. A los efectos del presente artículo, por «datos relativos a los abonados» se entenderá toda información, en forma de datos informáticos o de cualquier otra forma, que posea un proveedor de servicios y esté relacionada con los abonados a dichos servicios, excluidos los datos sobre el tráfico o sobre el contenido, y que permita determinar:</p> <p>a) El tipo de servicio de comunicaciones utilizado, las disposiciones técnicas adoptadas al respecto y el periodo de servicio;</p> <p>b) la identidad, la dirección postal o geográfica y el número de teléfono del abonado, así como cualquier otro número de acceso o información sobre facturación y pago que se encuentre disponible sobre la base de un contrato o de un acuerdo de prestación de servicios;</p>	<p>services in the territory of the Party to submit subscriber information relating to such services in that service provider's possession or control.</p> <p>2. The powers and procedures referred to in this article shall be subject to Articles 14 and 15.</p> <p>3. For the purpose of this article, the term “subscriber information” means any information contained in the form of computer data or any other form that is held by a service provider, relating to subscribers of its services other than traffic or content data and by which can be established:</p> <p>a) the type of communication service used, the technical provisions taken thereto and the period of service;</p> <p>b) the subscriber's identity, postal or geographic address, telephone and other access number, billing and payment information, available on the basis of the service agreement or arrangement;</p> <p>c) any other information on the site of the installation of communication equipment, available on the basis of the service agreement or arrangement.</p>
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	c) cualquier otra información relativa al lugar en que se encuentren los equipos de comunicaciones, disponible sobre la base de un contrato o de un acuerdo de servicios.	
	Reglamento (CE) n° 428/2009 del Consejo de 5 de mayo de 2009, por el que se establece un régimen comunitario de control de las exportaciones, la transferencia, el corretaje y el tránsito de productos de doble uso	Council Regulation (EC) No 428/2009 of May 5 setting up a Community regime for the control of exports, transfers, brokering and transit of dual-use items
	Directiva 2002/19/CE del Parlamento Europeo y del Consejo de 7 de marzo de 2002, relativa al acceso a las redes de comunicaciones electrónicas y recursos asociados, y a su interconexión (Directiva acceso)	Directive 2002/19/EC of the European Parliament and of the Council of March 7 2002, on Access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)
	Directiva 2002/20/CE del Parlamento Europeo y del Consejo de 7 de marzo de 2002, relativa a un autorización de redes y servicios de comunicaciones electrónicas (Directiva autorización)	Directive 2002/20/EC of the European Parliament and of the Council of March 7 2002, on the authorization of electronic communications networks and services (Authorisation Directive)
	Directiva 2002/21/CE del Parlamento Europeo y del Consejo, de 7 de marzo de 2002, relativa a un marco regulador común de las redes y los servicios de comunicaciones electrónicas	Directive 2002/21/EC of the European Parliament and of the Council of March 7 2002 on a common regulatory framework for electronic communications networks and services

	(Directiva marco).	(Framework Directive)
	Directiva 2002/22/CE del Parlamento Europeo y del Consejo de 7 de marzo de 2002, relativa al servicio universal y los derechos de los usuarios en relación con las redes y los servicios de comunicaciones electrónicas (Directiva servicio universal)	Directive 2002/22/EC of the European Parliament and of the Council of March 7 2002, on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)
	Directiva 2002/58/CE del Parlamento Europeo y del Consejo, de 12 de julio de 2002, relativa al tratamiento de los datos personales y a la protección de la intimidad en el sector de las comunicaciones electrónicas (Directiva sobre la privacidad y las comunicaciones electrónicas).	Directive 2002/58/EC of the European Parliament and of the Council of July 12 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).
	Reglamento (CE) 45/2001 del Parlamento Europeo y del Consejo de 18 de diciembre de 2000, relativo a la protección de las personas físicas en lo que respecta al tratamiento de datos personales por las instituciones y los organismos comunitarios y a la libre circulación de estos datos.	Regulation (EC) No 45/2001 of the European Parliament and of the Council of December 18 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data
	COM (2014) 38, de 3 de febrero del 2014. Informe de la Comisión al Consejo y al Parlamento Europeo. Informe sobre la lucha contra la corrupción en la UE.	COM (2014) 38 final, of February 3 2014. Report from the Commission to the Council and the European Parliament. EU Anti-Corruption Report

	Recomendación CM/Rec(2014) 7, de 30 de abril del 2014, sobre la protección de informantes	Recommendation CM/Rec(2014) 7, of April 30 2014, on the protection of whistle-blowers
	Recomendación nº R(2000) 7, sobre el derecho de los periodistas a no revelar sus fuentes de información	Recommendation No R (2000) 7 on the right of journalists not to disclose their sources of information
International Regulation		
Article 12, the Universal Declaration of Human rights	Nadie será objeto de injerencias arbitrarias en su vida privada, su familia, su domicilio o su correspondencia, ni de ataques a su honra o a su reputación. Toda persona tiene derecho a la protección de la ley contra tales injerencias o ataques	No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.
Article 17, International Covenant on Civil and Political Rights	1. Nadie será objeto de injerencias arbitrarias o ilegales en su vida privada, su familia, su domicilio o su correspondencia, ni de ataques ilegales a su honra y reputación. 2. Toda persona tiene derecho a la protección de la ley contra esas	1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

	injerencias o esos ataques.	2. Everyone has the right to the protection of the law against such interference or attacks.
Principle IV of the UNESCO's Declaration	El papel social del periodista exige el que la profesión mantenga un alto nivel de integridad. Esto incluye el derecho del periodista a abstenerse de trabajar en contra de sus convicciones o de revelar sus fuentes de información, y también el derecho de participar en la toma de decisiones en los medios de comunicación en que esté empleado.	The social role of the journalist demands that the profession maintain high standards of integrity, including the journalist's right to refrain from working against his or her conviction or from disclosing sources of information as well as the right to participate in the decision-making of the medium in which he or she is employed.

ELSA SWEDEN

Contributors

National Coordinator

Emma Arenbo-Larsson

National Researchers

Åsa Stattin
Johanna Sjöholm
Anna Helmner
Nathalie Holvik
Petra Giessbeck

1. Introduction

During the Second World War freedom of expression and liberty of the press were subjected to a high political pressure in Sweden. This since the Swedish authorities felt the need to censure opinions, which were critical towards the Nazi-regime in Germany. As a consequence the Swedish minister of justice confiscated over 300 printed works without any prior trial. After the war had ended, the Freedom of the Press Act was reformed. The reformation contained stricter regulations on how the aforementioned freedoms could be restricted. However, after the terrorist attacks in New York, Madrid and London in the beginning of the 21th century, the strengthened protection of the freedom of expression and the liberty of the press has been diminished, and the possibility of using electronic surveillance and other means of coercion has been extended.

The protection of journalistic sources is regulated in a combination of provisions within these constitutional laws. The Freedom of Press Act regulates the liberty of the press and grants every Swedish citizen the right to publish written works, and to exchange ideas and information in any subject, without interference by the authorities. The Fundamental law on Freedom of Expression provides a corresponding protection for the freedom of expression. These rights only apply if such information is given with a purpose of publication and it must be granted to a legally authorised source. Such a source includes for example writers, publicists and editorial staff. As for the term journalist, there is no explicit definition of the word within the Swedish legal system.

Furthermore, in order for a journalistic source to be protected by these rights, the recipient of the information must have a publication license. A journalist is under obligation of professional secrecy regarding the information she or he presents for publishing. The obligation of professional secrecy for a journalist is connected to the right to anonymity of sources. The right to anonymity is twofold and concerns both a right to anonymity for sources, together with a sanctioned prohibition for journalists not to reveal their anonymous sources.

Anyone can provide a news desk with information and be guaranteed anonymity. If the source wants to remain anonymous, the journalist is under obligation of professional secrecy. This prohibition is strong and demands the journalist as well as the editor to carefully make sure no disclosure of personal data, pictures, names of places or anything else that can reveal to the public the identity of a source. The right to anonymity is far reaching and covers also an explicit freedom of liability of criminal acts. It is only the editor of a periodic print who can never be anonymous and so it is in these cases the editor's choice to publish a certain material or not, with the risk of criminal prosecution for violation of the right to freedom of speech. Only if explicit consent has been given by the source, to reveal the identity of the source, a journalistic code of ethics can be considered to apply. The right to anonymity is protected by law and any use of a code of ethics postulates the source has first agreed to have her or his identity revealed.

Due to the civil-law characteristics of the Swedish legal system, it is mainly the Supreme Court's judgments which have precedence although there is no doctrine of *stare decisis*. Therefore, the case-law analysed are mainly from the Supreme Court of Sweden. When it comes to case-law

dealing with this issue, one should also keep in mind that Sweden did not incorporate the European Convention on Human Rights into Swedish law until 1995. The importance of the possibility for journalistic sources to be anonymous has been considered in several cases. The protection of anonymity is therefore necessary for the Freedom of the Press to fulfil its function in a democratic society. The right to anonymity is a key element in the protection of journalistic sources. If anonymity is not protected the source might choose not to communicate significant facts in the light.

The use of secret means of coercion in preliminary investigations of crimes is regulated in the 27th chapter of Rättegångsbalken (the Swedish Code of Judicial Procedure). These means includes secret taping of electronic communication, camera surveillance, and wiretapping of closed areas. Only persons, whom are suspected for a crime of a more serious nature, can be subjected to these measures. These crimes include for example child pornography, trafficking, and rape. However, wiretapping in closed areas is forbidden in places which are permanently used or specifically meant for activities covered by the journalistic confidentiality provided for in the Freedom of Press Act and the Fundamental law on Freedom of Expression.

In conclusion, the Swedish legislation regarding secret means of coercion are drafted in a way, which do not interfere with the journalistic confidentiality. The standards for using these measures are very high, and are not allowed unless the person being surveyed is suspected for a crime, which means that none of the laws can be used with the purpose of exposing a journalistic source. This does not exempt unintended exposure of information regarding the identity of a source, but such information cannot be used unless it is of relevance for an on-going investigation. Exceptions to the journalistic confidentiality in criminal cases is also regulated in the Freedom of Press Act (see question 1 for a more detailed description of such exemptions).

Every Swedish citizen has the right to spread ideas and information in any subject and in any forum without being censored or legally implicated by the authorities. However, this right can be restricted by regulations of confidentiality in other laws for example *Offentlighet- och sekretesslagen* (the Public Access to Information and Secrecy Act), which apply for public companies whereas private companies uses contracts as a means of assuring the discretion of their employees. Such clauses of secrecy cannot be too far-reaching according to *Avtalslagen* (the Contracts Act), and they cannot be contrary to general contractual customs. Furthermore, within the public sector, it is not allowed for the authorities to research on the identity of a “messenger”. This is provided that the information has been spread in accordance with the prerequisites prescribed for in the Freedom of Press Act and the Fundamental law on Freedom of Expression. Thusly, whistle-blowers within in the public sector have a strong protection against sanctions.

1. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

1.1 National legislation

The Swedish legal system is built on democratic principles, and the initial paragraph in Swedish Instrument of government, *Regeringsformen*, states that all public power shall derive from the people.¹ The second chapter in the Instrument of Government, which regulates the fundamental rights and freedoms in Sweden, further establishes everyone's right to freedom of expression.² Additional protection of democratic principles such as the liberty of the press and the freedom of expression are provided for in two other constitutional laws, namely, the Freedom of the Press Act, *Tryckfrihetsförordningen*, and the Fundamental law on Freedom of Expression, *Yttrandefrihetsgrundlagen*.

The protection of journalistic sources is regulated in a combination of provisions within these constitutional laws. The Freedom of the Press Act, as mentioned, regulates the liberty of the press and grants every Swedish citizen the right to publish written works, and to exchange ideas and information in any subject, without interference by the authorities.³ The Fundamental law on Freedom of Expression provides a corresponding protection for the freedom of expression.⁴

However, in order for these rights to apply, the information in question must have been submitted to a legally authorised source, and the intention of the deliverer must have been to have the material published intention. Legally authorised sources include for example writers, publicists and editorial staff.⁵ Furthermore, in order for a journalistic source to be protected by these rights, the recipient of the information must have a publication license.⁶

As for the term journalist, there is no explicit definition of the word within the Swedish legal system. The legislation covering the subject is formulated in a way, which includes everyone working with tasks one usually associates with the profession.⁷ A more profound explanation of

¹ The Instrument of Government 1974:152 (*Regeringsformen*) ch 1 para 1.

² *Ibid* ch 2 para 1 pt 1.

³ The Freedom of the Press Act 1949:105 (*Tryckfrihetsförordningen*) ch 1 para 1.

⁴ The Fundamental Law on Freedom of Expression 1991:1469 (*Yttrandefrihetsgrundlagen*) ch 1 para 1.

⁵ The Freedom of the Press Act, ch 1 para 1 pt 3; *ibid* ch 1 para 2.

⁶ The Freedom of the Press Act, ch 5, para 5.

⁷ *ibid* ch 3 para 3 states that besides journalists, the following persons and institutions are prohibited from disclosing the identity of a journalistic source: persons working with the making or publishing of a printed text, or the intended inclusion of a printed text. Moreover, persons otherwise working with companies providing periodic papers, or companies providing news to such intuitions, are also included.

the term will be provided for in question 3. Neither is there an explicit definition of what constitutes a journalistic source. However, anyone can become a source by exercising their right to provide information to companies working with the production or publication of news and other written or verbalised works⁸, i.e. this definition is very broad. Consequently, the definition is very broad and anyone who shares information to the press becomes a journalistic source.

In addition to the right of disseminate information to the press, sources are also protected by journalistic confidentiality. This means that journalists are prohibited from revealing the identity of their sources.⁹ However, there are five exceptions to this rule. The first exemption applies when a source has consented to the disclosure of his or her identity. In cases concerning breaches of the Freedom of the Press Act, journalistic sources can be exposed if they have consented to it, if the source is operating under a well-known pseudonym, or if the author's name has already been printed. Thirdly, the source of information must be revealed if it is a question of a gross political crime, as prescribed for in the Freedom of the Press Act chapter 7 part 3 point 1. The interference must, nevertheless, have been unavoidable. Confidentiality may also be set aside if a court decides that is necessary for the proceedings in cases where official documents have been wrongfully extradited, or in situations where professional secrecy has been breached. However, in order to override confidentiality in such cases, the source must be suspected of, or convicted for the crime of which he or she has provided information for. This also applies if the source has been involved in the making of the written work in question. Lastly, in an ordinary criminal procedure, the source of information may be disclosed if it is of "particular importance"¹⁰ with consideration to the public, or to the individual in that specific case.

The same right applies for information, which has been presented orally, and it can be found in the Fundamental law on Freedom of Expression, ch. 2 para 3. The right contained in the mentioned paragraph is very similar to the one presented above, namely liberty of the press. Correspondingly, journalistic sources are protected from disclosure, but there are some exceptions provided for in the paragraph. These include for example voluntarily disclosure of one's identity, and disclosure a source's identity in cases where the informant is suspected of having committed a freedom of expression related crime. However, the latter requires a court order, and it must be justified on the basis that it is necessary for the continuance of the proceedings. Moreover, a court may issue an order of disclosure, with regards to the interest of individuals or the public, if it is of "particular importance" in a criminal proceeding. In cases

⁸ The Freedom of the Press Act, ch 1 para 1, ch 3 para 3; The Fundamental Law on Freedom of Expression , ch 1 para 1, ch 2 para 3.

⁹ The Freedom of the Press Act, ch 3 para 3.

¹⁰ The criterion of particular importance (*synnerlig vikt*) is a very strong requisite within the Swedish legal system.

Wiwecka Warnling-Nerep, Hedvig Bernitz, *En orientering i Tryckfrihet och Yttrandefrihet* (5 edn., Jure Förlag AB, 2013) p64 [Swedish].

regarding breaches of the press law in periodic works, the legal responsibility lies exclusively on the publisher,¹¹ whereas the source is in principle free from responsibility.¹²

1.2 National case law

The protection of journalistic sources within the Swedish legal system is far-reaching, and aside from legislation protecting the sources, case law also safeguards this right. Any deviation from this protection can only be made in accordance with the exceptions provided for in the aforementioned situations in the previous section. This has been affirmed in for example in case NJA 2012 s. 342. The case involved the publishing of a local new paper, and the Supreme Court stated that the principle of confidentiality cannot be revoked even if there is another interest that could be perceived to be of higher relevance in a particular case. Furthermore, the use of information that directly, or indirectly, can expose a source's identity is prohibited.¹³

1.3 Compliance with ECtHR case law

The European Court of Human Rights (ECtHR) has emphasised the importance of the protection of journalistic sources in order to preserve the freedom of the press. The rationale behind this is that the exposure of sources can be detrimental to reputation of the newspapers and it may discourage future sources from revealing information which may be of public interest.¹⁴ Contracting states can only justify such disclosure by showing that there is an overriding requirement in the public interest¹⁵. The preamble and investigations made prior to the adoption of the Swedish legislation covering this topic, contains the same rationale as the within the Case law of the ECtHR. The importance of confidentiality within the press is stressed, since it is a prerequisite for the functioning of the freedom of the press in a democratic society.¹⁶ The Swedish legal system ought to therefore be on par with the standards of the European Convention of Human Rights and the case law of the ECtHR regarding the protection of journalistic sources.

¹¹ The Freedom of the Press Act, ch 8 para 1.

¹² prop. 1975/76:204 s. 93, 97; prop. 1986/87:151 s. 115 - 116

¹³ B 2962-10 (NJA 2012 s. 342) § 9

¹⁴ *Financial Times Ltd and Others v. the United Kingdom*, no. 821/03, § 63, 15 December 2009.

¹⁵ *Goodwin v. the United Kingdom*, 27 March 1996, § 39, Reports of Judgments and Decisions 1996-II; *Voskuil v. the Netherlands*, no. 64752/01, § 65, 22 November 2007; *Tillack v. Belgium*, no. 20477/05, § 53, 27 November 2007; *Financial Times Ltd and Others v. the United Kingdom*, no. 821/03, § 59, 15 December 2009.

¹⁶ prop. 1975/76:204 s. 94–96, s. 110, 141; prop. 1986/87:151 s. 116 – 117; SOU 1990:12 s. 64

1.4 Compliance with international recommendations

The presented legislation within the Swedish legal system is in line with the relevant recommendations from the Council of Europe on the assessed topic.

2. Is there in domestic law a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

A journalist is under obligation of professional secrecy regarding the information she or he presents for publishing. The obligation of professional secrecy for a journalist is connected to the right to anonymity of sources. The right to anonymity is twofold and concerns both a right to anonymity for sources, together with a sanctioned prohibition for journalists not to reveal their anonymous sources.¹⁷

Anyone can provide a news desk with information and be guaranteed anonymity. If the source wants to remain anonymous, the journalist is under obligation of professional secrecy. This prohibition is strong and demands the journalist as well as the editor to carefully make sure no disclosure of personal data, pictures, names of places or anything else that can reveal to the public the identity of a source.¹⁸

The right to anonymity is far reaching and covers also an explicit freedom of liability of criminal acts. It is only the editor of a periodic print who can never be anonymous and so it is in these cases the editor's choice to publish a certain material or not, with the risk of criminal prosecution for violation of the right to freedom of speech. The prohibition is stated in the Freedom of the Press Act ch. 1 para. 3. If a certain recording, broadcasting or publishing falls within the scope of protection of the freedom of the press, the rules of the freedom of the press act apply. If the publication is a non-periodic publication the author and the publisher has a choice to be anonymous or not. However it follows that if a publisher chooses to not disclose her or his identity the publication cannot fall within the scope of protection under the freedom of press act.

2.1 Case law

The Supreme Court addressed the matter of professional secrecy and a journalist and publisher's responsibility to make sure the identity of the source was not revealed in the case NJA 2015 s. 166. The court stated that an informant or a messenger does not have to ask for anonymity, to be protected under the Freedom of the Press Act chap. 1 para. 1 and chap. 1 para. 3. The case was dealing with the issue of consent. The journalist arguing the source had given consent to the

¹⁷ Axberger, Hans-Gunnar, *Yttrandefrihetsgrundlagarna*, upplaga två, Norstedts Juridik 2014, p33 , p155 [Swedish]

¹⁸ Axberger, p158, p160

information published in an article covering a story of rape. The source, in the court case the plaintiff, pleaded her identity had been revealed in the article and so her right to anonymity violated. The court concluded that there is no room within the regulation of the Freedom of the Press Act to argue for any "grading" or classification of anonymity. The journalist in this case had the journalistic code of ethics allowed for a grading to be done by the professional journalist to decide what information would fall within the protection of the right to anonymity and what would not. The court disagreed and made clear that the presumption for protection of a source by guaranteeing anonymity is presumed and absolute. It also stated that once the information has been published no discretion applies for an editor to decide whether to reveal the identity of an anonymous source. In the case the editor argued she had not known the political ideology of the source and when it was revealed that the source belonged to an extremist organization, she refused to have the information printed anonymously. However, the Court found that such decisions cannot be made by the editor after that the source has been guaranteed anonymity.¹⁹

The journalistic code of ethics is applicable only if explicit consent has been given by the source. The right to anonymity is protected by law and any use of a code of ethics postulates that the source has first agreed to have her or his identity revealed. As long as information has been disclosed as described in the statutory text, protection arises. What must happen is therefore that the source or a messenger provides a journalist or another professional with information meant to be disseminated to the public by publication. The requisite "to be published" shall be interpreted broadly.

This concerns any information, even what is regarded personal about the source. The prohibition to reveal the identity of a source concerns the person disclosing the information and regards not only the person's name to remain secret. No information may be published which can lead to reveal directly or indirectly the identity of a source. The right to anonymity is far reaching and covers also an explicit freedom of liability of criminal acts.²⁰

It is only the editor of a periodic publication who can never be anonymous and so it is in these cases the editor's choice to publish a certain material or not, with the risk of criminal prosecution for violation of the right to freedom of speech. The identity of sources can generally not be asked for in a criminal prosecution.

2.2 Labour code

The Swedish system makes a distinction between private and public employees, where the employment contract is always at the core of the relationship between employer and employee. All employees, public as well as private, are subject to the provisions and protection of RF, Freedom of the Press Act, and Constitution of Freedom of Speech.

¹⁹ Axberger, p 10-16

²⁰ Axberger, p 162

It is stressed that no employment contract can out rule the basic protection of freedom of speech for all citizens. The loyalty expected due to employment, of an employee towards an employer, can only to a limited extent be regulated in an employment contract and any contractual limitations of freedom of speech are considered null and void.²¹ In addition to the general protection of the Instrument of the Government, Freedom of the Press Act, and Constitution of Freedom of Speech employees in the public sector are subject to the rules of secrecy and discretion regarding conditions of the individual, regulated in The Public Access to Information and Secrecy Act. Chapter 13 para. 1 of this law refers to Freedom of the Press Act and Constitution of Freedom of Speech and the provisions given there.²²

The authority of control and protection of employee's right to freedom of speech in the public sector is JO (the Parliamentary Ombudsman) and JK (Chancellor of Justice). An individual can make a report and request investigation regarding breach of secrecy of journalistic sources to both these institutions. Regarding public employees and the protection of whistle-blowers critique has been raised. The assessment of which sanctions by an employer are to be regarded reprisal is an unacceptable grey zone.

Which conduct is considered a breach of secrecy is said to be split and unclear.²³

2.3 Sanctions

One who violates the professional secrecy through negligence or by deliberate intent shall be sentenced to payment of a fine or to imprisonment for up to one year²⁴. If the source is a public employee chapter 14 of The Public Access to Information and Secrecy Act is applicable. One who by deliberate intent violates the provisions of The Public Access to Information and Secrecy Act chapter 13 para. 2, section 2 shall be sentenced to payment of a fine or imprisonment for up to one year.

3. Who is a “journalist” according to the national legislation?

There is no definition in the Swedish legislation of who is included in the definition of a ‘journalist’. Thus, the explanation of the profession is found by turning to other sources than the law, such as general descriptions of what the accepted definitions of journalism and journalists are. Accordingly, the definition is that journalism is a collective term of collecting, selecting,

²¹ Fransson, *Yttrandefrihet och whistleblowing, om gränserna för anställdas kritikrätt*, Premiss Förlag 2013, p 59 [Swedish]

²² Fransson p 69

²³ For further reading see Bull 2007 p. 65-78

²⁴ Tryckfrihetsförordningen 3rd chapter 3§

processing and presenting material with the purpose to portray reality through media²⁵. Furthermore, the media forums that are relevant for the journalism to take place are newspapers, periodicals, radio and television etc. The Constitutions of Sweden that regulates the collecting, selecting, processing and presenting of information via those channels are of basic, overriding importance. In the Constitution of Freedom of Speech ch. 1 § 1 ph. 1, it is stated that every Swedish citizen is insured the right to express opinion, thoughts and feelings and is given the right to provide information in any subject through radio, television or other technical records such as Internet. In question of written text, the same rights are stated in the Freedom of Press Act, ch. 1 § 1 ph. 1 and 2.

Since there is no provision which clearly defines who is a journalist according to the Swedish legislation, the definition of who is a 'journalist' can be made by identifying who is insured the rights to collect, select, process and present information. Because these Constitutional Rights are insured every Swedish citizen, the right to call oneself 'journalist' exists for any Swedish citizen aiming to inform about the reality through the media forms applicable to the Freedom of Speech Act ch. 1 para. 6 and the The Fundamental Law on Freedom of Press ch. 1 para. 5-6. Furthermore, these rights are also stated in the European Convention on the Human Rights art. 10, giving all EU citizens the same rights. Due to the incorporation of the European Convention on the Human Rights through ch. 2 para. 19 of the Instrument of Government, the meaning of this is that the national law cannot be legislated in violation of EU law²⁶. Consequently, this means that all EU citizens can be considered journalists to the extent that their actions fall within the definition of journalism. Furthermore, ICCPR art. 19.2²⁷ contain the same rights to seek, receive and provide information as the rights stated in the Acts of Freedom of Speech and Freedom of Press. As a result, the ratification of the ICCPR alongside with the generally accepted idea of who is a journalist means that the definition mentioned above is applicable to everyone regardless of his or her origin.²⁸

The Swedish legislation does not provide any guidelines or quality requirements of the information shared from individuals. On the contrary, the Constitutions rather state that the freedom to write and speak applies in respect of all subjects. Nevertheless, there are provisions in the Swedish Penal Code²⁹ in order to avoid expressions of several matters, for example violation of other vital human rights.

²⁵ Nationalencyklopedien, "Journalist" <http://www.ne.se/uppslagsverk/encyklopedi/l%C3%A5ng/journalist> assessed 31 Mars 2016 (Swedish)

²⁶ Dag Viktor, "Svenska domstolars hantering av Europakonventionen" (Underlag1 till ett föredrag den 17 augusti 2012 på konferens anordnad av Nordiska Föreningen för Processrätt) <http://svjt.se/svjt/2013/343>, assessed 31 Mars 2016 (Swedish)

²⁷ <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>

²⁸ United Nation of the Human Rights, Office of the High Commissioner "STATUS OF RATIFICATION INTERACTIVE DASHBOARD" <http://indicators.ohchr.org>, assessed 28 Mars 2016

²⁹ The Swedish Penal Code, Brottsbalken (1962:700)

Therefore, hate speech is a crime in Sweden according to the Penal Code ch. 16 para. 8. This is also the case in the matter of defamation, Penal Code ch. 5 para. 1. Furthermore, the Act of Freedom of Press chapter 7 and the Act of Freedom of Speech chapter 5 include other crimes that also are stated in the Penal Code chapter 16, 18 and 19. The provisions regulates such as unlawful depiction of violence, espionage, willful breach of confidentiality, high treason etc.

As a conclusion, there is a freedom for journalists to inform in any subjects, but some information can be criminal to share according to regulations within the Penal Code with the purpose to protect the State or other human rights. These regulations can be observed as limitations of the journalism; since the classification of the actions is that they are criminal.

3.1 Is it in your view a restricted definition for the purpose of the protection of journalistic sources?

Since the definition of journalism is knit to the fundamental rights of expression and press and the rights are given to anyone sharing information, the definition is not restricted in question of who can call themselves journalists. What may be questioned and what has been questioned before is whether the criminalization mentioned above is a restriction of journalistic sources, or in other words the freedom of press and speech. The Supreme Court has stated in case B 2115-06³⁰ that a conviction for a freedom of speech violation may include a restriction of the right to speech, but that this might be necessary in order to maintain a democratic society in accordance with the EU law. The Supreme Court took in account the European Court's four-stage trial when complaints about violations of the ECHR are to be considered. The trial begins with a consideration whether the action is a restriction of the freedom of expression. If that is the case, the restriction has to be supported by law. Furthermore, the European Court questions if the restriction has a legitimate purpose and if it is necessary in a democratic society to allow the restriction³¹. The Supreme Court stated in the case B 2115-06 that the ECHR gives the restrictions in the Swedish Constitutions and Penal Code legitimacy and the question is therefore whether the restrictions are necessary or not.

In the case, the Supreme Court brings up the fact that the freedoms of speech and press comprise the right to share information that might shock, offend or disturb. To explain how these rights can be restricted anyway, the Supreme Court states that in order for this kind of information to be needed in a democratic society, the information must cater an urgent social need. The Supreme Court declared:

³⁰ The Swedish Supreme Court abstracts NJA 2007 s 805 (No 99)

³¹ Council of Europe Publishing, 'Freedom of Expression in Europe' (Case-law concerning Article 10 of the European Convention on Human Rights)

“In order for the restriction to be acceptable, it also requires that the reasons which laid the basis of the individual case are relevant and sufficient and that the restriction is proportionate to the legitimate purposes that motivated the restriction.”³²

Thus, the Supreme Court emphasises the purposes of the restriction. This gives room for split opinions amongst the Court Members since the proportionality is a matter of subjective judgment. This happened in case B 2115-06 where there were disagreements between the Court Members whether the action was a violation of the Constitution of Freedom of Speech. In addition, the EU case-law points toward the necessity for the democratic society as being one of the most vital requirements to restrict the freedom to speak one’s mind, which again requires a subjective judgment³³. Therefore, the criminalization of certain expressions is in some ways a restriction of the journalistic sources. Nevertheless, the restrictions may be necessary to protect other human rights and that the Swedish legislation follows the EU case law in order to make the subjective assessment as properly constituted as they can be.

In conclusion, the definition of who is a journalist is not a restricted nor legal definition in Sweden, but what a journalist chooses to express can be restricted if the subjective view is that other human rights trumps the subjects expressed.

3.2 Is the protection of journalists’ sources extended to anyone else?

The Supreme Court has stated that if an individual that is not a journalist by profession publishes material, the material can still be protected as a journalistic source. In this specific court case³⁴, which was a question of publishing personal data on the Internet and whether the exemption for journalistic purposes would be applicable, the Supreme Court stated that:

“In the preamble to the Personal Data Act regarding the exemption for journalistic sources, it is stated the starting point is that this is a matter of “accepted” journalism (a. SOU p. 264) and that there is an unanimity that “serious” journalism is worth protecting. Regardless of the choice of words, it is clear that the intention of the statements in the preamble have not been to claim that applying any kind of quality criterion in terms of content should be enforced, but merely sought to indicate the characteristics of the business nature.”³⁵

Consequently, the Supreme Court came to the conclusion in it’s’ judgement that journalistic sources can be protected for any individual. Nevertheless, in order for the exemptions in the Swedish legislation that protects the journalistic sources to be applicable, the material should be solely for journalistic purposes. The Supreme Court described this as the following:

³²As translated by the author

³³Jersild v. Denmark, 23 September 1994, Series A no. 298 and Vereniging Weekblad Bluf! v. the Netherlands, 9 February 1995, Series A no. 306-A

³⁴NJA 2001 s 409 (No. 60)

³⁵As translated by the author

“The limitation to “solely” journalistic purposes aims primarily to clarify that such personal data processing which takes place within the media and by journalists for other than editorial purposes falls outside the exception”³⁶.

This judgement points to the fact that there has to be a journalistic purpose in order for the material to fall under the strong protection of journalistic sources. In conclusion, there is a right to protection of journalistic sources but not as an extended right to others than those who call themselves a journalist.

3.3 What is the scope of protection of other media actors?

As previously mentioned, the scope of protection is the same for everyone since journalistic sources can be published by anyone. As a result of the definition of journalism in Sweden, the protection of its sources is a consequence of universal human rights that appertain to all.

4. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

Official authorities and governmental agencies may not trace a journalistic source³⁷. This rule has a connection to the “exclusive responsibility” of the source. Since the editor is the exclusively responsible person of what has been printed or broadcasted³⁸, it would not make sense to make the author or journalist suffer inquires for what they cannot be held liable for. Non-governmental agencies, such as enterprises, may inquire a source when the source might be one of their employees³⁹.

Those protected against means of inquiry are the very same persons as those with a right to anonymity. It is the tracing of the source or the attempt to trace the source that is prohibited. Any questioning or other measures attempted to gather knowledge about a messenger, leak or informant as well as how the information has been provided to the publisher are prohibited. No questions concerning the informant are allowed, regardless of whether the intent is to disclose a source or not.⁴⁰

³⁶ As translated by the author

³⁷ SOU 2004:114 “Vissa tryck- och yttrandefrihetsrättsliga frågor” p150

³⁸ <https://www.prv.se/en/our-services/periodicals/applying-for-a-certificate-of-publication/responsible-editor/>

³⁹ <http://sverigesradio.se/sida/artikel.aspx?programid=4069&artikel=4380834> “Meddelarskydd och källskydd”

⁴⁰ Axberger p. 163-164

As for employees of the public sector The Public Access to Information and Secrecy Act chapter 13 para. 2 provide a prohibition against reprisal of journalistic sources. JO and JK guard the prohibition against reprisal of public employees.

4.1 Exemptions for when inquiry is allowed

For criminal prosecution according to chapter 7 of the Freedom of the Press Act, inquiry is allowed due to a violation of the Freedom of Press Act or the Fundamental Law on Freedom of Expression. Only JK can act as special prosecutor according to the Freedom of the Press Act. An official body or a governmental authority can report a printed text to JK if suspicion arises about a freedom of press crime.⁴¹

4.2 Legal procedural safeguards

For criminal prosecution due to a violation of the freedom of press or the freedom of speech only Justitiekanslern (JK)⁴², i.e. the Chancellor of Justice, can be a prosecutor according to the Freedom of the Press Act ch 9 para. 2. An official body or an instrument of government can only give notice to JK if suspicion arises about a criminal action in regards to limits of the freedom of the press. During the conduction of a criminal investigation, one must respect the professional secrecy. A person, such as an author or journalist, does not have to be heard regarding their sources. In addition to this, there is no explicit right for the journalist to be heard. Only at the point of prosecution of a specific suspect JK may ask a court for special permission to hear a journalist about their sources. JK may ask only whether the specific suspect has delivered the information and the journalist may only answer that one question with either a yes or a no. No further questions than this may be asked and JK can never ask a journalist to disclose its source.⁴³

Journalists with a duty of testimony in court can still as a matter of ethics claim to have forgotten the source. Not remembering the source is no ground for liability. To provide a broader protection of their sources than what the law requires can be a question of professional pride.⁴⁴

There is no provision which protects the source after it has been revealed. The personal information does not have to be disclosed when the case has become a public document.

4.3 Sanction for conducting prohibited inquiry

⁴¹ Olsson p. 53

⁴² <http://www.jk.se/other-languages/english/>

⁴³ Axberger, p 163-164

⁴⁴ Olsson p. 58

One who violates the prohibition of inquiry shall be sentenced to payment of a fine or to imprisonment for up to one year⁴⁵. Violation of the prohibition to ask questions during a criminal investigation is not sanctioned.⁴⁶

4.4 Self-regulatory code of ethics

The extensive freedom of the press and freedom of expression in Sweden place considerable responsibility on individual newspapers and responsible editors. Therefore the market actors have drawn up their own ethical rules.⁴⁷

The code of ethics for publicists in Sweden has been developed in order to protect the use of freedom of speech. This has been achieved by composing a contract based code of ethics. The code of ethics, as formulated in the preamble, being *“in favor of upholding a responsible approach regarding the duty of publishing”*⁴⁸. Rather than a more strict legislation it is considered as a preferred provision to ensure a self-regulatory mechanism within the publicist field in Sweden. This aim has been achieved by composing a contract based code of ethics.

The legal safeguards protection journalistic sources are strict and extensive. The self-regulatory mechanism realised in the journalistic code of ethics has a tort law construction and is most closely related to the Swedish legal provision of prohibition against slander and defamation.⁴⁹ The code of ethics is voluntary, contract based and applicable only when an individual suffers a damage due to a published text in a printed paper or on the website of a contracted publication. According to the code of ethics, there is no liability to pay damages from the publisher to the complaining individuals. To achieve this, the code of ethics is instead used to force the publicist to publish a correction in the publication and to pay a penalty fine to the organization issuing the decision.

The rules of the journalistic code of ethics call for an assessment of the right of the individual to privacy (rule 7) and the right of the individual to anonymity (rule 15) and the common interest of the public. The interest for the common good of certain information to be published is considered counter to the interest of the individual⁵⁰.

The institute dealing with complaints are called PO and PON. PO is the Press Ombudsman of the Public (Pressombudsmannen) and PON is the Pendulum Commission of the Press (Pressens Opinionsnämnd). The code of ethics as well as the structure for regulating review is issued by a

⁴⁵ Tryckfrihetsförfordningen 3 chap. para. 5

⁴⁶ Axberger p. 164-165

⁴⁷ Swedish Government, The Freedom of the Press Act [Internet Source]

⁴⁸ Axberger p. 115, Olsson, Anders R, *Yttrandefrihet och tryckfrihet - handbok för journalister*, sjunde upplagan, Studentlitteratur, 2012, p 227

⁴⁹ Olsson, p. 229-230

⁵⁰ Axberger p. 118

joint committee of market actors called Pressens samarbetsnämnd.⁵¹ If a published text is regarded in violation of the code of ethics PO and PON has the authority to demand a correction by the publicist. If the individual suffering from the published text demands damages to be paid, a separate tort process must be initiated in the applicable district court.⁵²

The journalistic code of ethics may be applicable only if explicit consent has been given by the source to reveal the identity of the source. The right to anonymity is protected by law and any use of a code of ethics postulates that the source has first agreed to have her or his identity revealed. Furthermore, there are no other self-regulatory mechanisms that intervenes in this kind of cases.

5. In the respective national legislation are the limits of non-disclosure of the information in line with the principles of the *Recommendation No R (2000) 7*? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

5.1 The national legislation in relation to non-disclosure of journalistic information

According to the Constitution of Sweden, Sweden is bound to incorporate the European Convention of Human Rights in the Swedish legal system⁵³ and therefore, article 10 of the Convention is directly applicable in the Swedish legal system and Swedish legislation regarding non-disclosure of journalistic sources shall comply with Article 10 of the Convention. This means that everyone is granted the protection that is described in Recommendation No R (2000) 7 and that the right shall be limited only if exceptional circumstances occur or if the limitation is in line with the ECtHR case law or the Article 10(2) of the Convention.

This right to not disclose sources applies for journalists even if they are working for a private newspaper or magazine, which is an exemption from the general exemption in the Swedish law where the right of nondisclosure does not cover employees of private businesses. This is also regulated explicitly in the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, which further grants the right to nondisclosure of sources of the journalists and it means that a journalist have a constitutional right to not give any information regarding her

⁵¹ Axberger p 116

⁵² Axberger p. 118-119, Olsson p. 227-228

⁵³ Instrument of Government, 2 chap 19 §, 11 chap 4 § and 12 chap 10 §

sources even though it is an exceptional circumstance. This also provides further protection for the messenger, since he or she has to give its explicit consent in order for the journalist to be able to consider revealing the source⁵⁴.

Except for the direct implementation of the European Convention of Human Rights and its case law, Sweden has their own set of laws connected to article 10 which are mostly in line with the principles stated in Recommendation No R (2000) 7. The *Guja v Moldova* case⁵⁵ in the ECtHR is an important case which has provided guidelines for Swedish courts regarding the proportionality of the Swedish court cases and how the State can interact regarding disclosure of sources. The *Guja v Moldova* case brought forward a wide “margin of appreciation” for the States, meaning that they may decide themselves what is acceptable in their own democratic society. It has also given guidelines on how to evaluate the good respectively bad faith of the source and other principles including the relationship between article 10 of the Convention and the Swedish labour law, principles that are useful for the Swedish courts⁵⁶.

5.2 Non-disclosure and labour law

Regarding labour law, Sweden provides a wide protection for workers in paragraph 7 of Lagen om Anställningsskydd (LAS), the Employment Protection Act, which grants protection in the event of unjustified dismissal. In order to achieve this protection, the source i.e. the employee, may not go outside the scope of the right to criticise their employer. This applies generally regardless if the employer is private or public.

This is a right in Sweden⁵⁷, and the information can be provided to media and to general public debate without fearing any reprisals from the employer. The exemption to this is when you have a temporary employment contract, where the employer may choose to not extend the contract if you have gone outside the scope of the right to criticise the company and to give information to media regarding your critics⁵⁸. This has been discussed in Arbetsdomstolen, the Labour Court, in the cases AD 1982:110 and AD 1997:57 where the Court has stated that this right is in line with the right to freedom of speech as a general principle of law⁵⁹ and that the right to inform media about the critics that you may have regarding the employer is not in conflict with the

⁵⁴ Freedom of Press Act 3 chap. 3 § p. 1, Fundamental Law on Freedom of Expression 2 chap. 3 § p.1.

⁵⁵ *Guja v Moldova* no. 14277/04

⁵⁶ Nessmar, *Visselblåsare - Sverige*, EKMR och Europarådet.

Behövs förslaget i SOU 2014:31 rörande visseblåsare? P9 [Swedish]

⁵⁷ This is not explicitly stated in any law, but it is a product of the combination of freedom of expression and the duty of loyalty which is a common principle of Swedish labour law.

⁵⁸ Nessmar, p15

⁵⁹ AD 1982:110

employment contract as such and the loyalty that you should show towards the employer⁶⁰ according to Swedish labour law principles⁶¹. For journalists, this means that sources that are giving information regarding their employer are exercising their rights and therefore the journalists have protection for their sources and do not have to disclose these if the source has not given its' explicit consent.

5.3 Nondisclosure and criminal law

Generally, the right to not disclose journalistic sources and the crime that is connected to it, failure of duty to keep secret, is stated in chapter 3 para 3 of the Freedom of the Press Act,

“A person who has engaged in the production or publication of printed matter, or material intended for insertion therein, and a person who has been active in an enterprise for the publication of printed matter, or an enterprise which professionally purveys news or other material to periodicals, may not disclose what has come to his knowledge in this connection concerning the identity of an author, a person who has communicated information under Chapter 1, Article 1, paragraph three, or an editor of non-periodical printed matter. (...)”

The anonymity is granted through that the ones handling the printed matters have a duty to keep secret regarding their sources, not only the name of the source but also personal data that may be traced back to the source. The personal scope of this provision includes journalists, editorial offices, media companies, news agencies, publishing companies, freelance journalists and employees of printing firms. The personal scope does not include bookstores.⁶²

It is seen as a crime if a public authority tries to investigate the source of a journalist, and the crime is classified as “Misuse of Office”⁶³,

“A person who in the exercise of public authority by act or by omission, intentionally or through carelessness, disregards the duties of his office, shall be sentenced for misuse of office to a fine or imprisonment for at most two years. If, having regard to the perpetrator's official powers or the nature of his office considered in relation to his exercise of public power in other respects or having regard to other circumstances, the act may be regarded as petty, punishment shall not be imposed.”

As stated, this provision is only applicable when the investigator is a public authority or works for a public authority, and as well is in exercise of the public authority. In Swedish law, the exercise of public authority means public authority where someone makes a decision that may be

⁶⁰ As in footnote 52, this is not explicitly stated in any law. It means that you as an employee may not hurt the employer in any way, by for example avoiding conflicting interests with the employer, do your tasks properly and be generally loyal to your employer.

⁶¹ AD 1997:57

⁶² SOU 1990:12 p. 247 and 273

⁶³ Brottsbalken 20:1

beneficial or burdensome and the decision leads to either giving benefits and/or rights or impose duties.⁶⁴ Connected to this is chapter 3 para 4 of the Freedom of the Press Act, where the journalists are given protection from reprisals relating to disclosing the information if the investigator is a public authority of any kind,

“No public authority or other public body may inquire into the identity of the author of material inserted, or intended for insertion, in printed matter, a person who has published, or who intends to publish, material in such matter, or a person who has communicated information under Chapter 1, Article 1, paragraph three, except insofar as this is necessary for the purpose of such prosecution or other action against him as is not contrary to the provisions of this Act. In cases in which such inquiries may be made, the duty of confidentiality under Article 3 shall be respected.”

If the investigator is found to be guilty of this crime, willful tracing, the sentence is either fines or imprisonment for maximum one year⁶⁵. This provision has been mentioned in several cases from the Supreme Court and is seen as a prerequisite for the freedom of the press in the democratic society. The Court stated in the case NJA 2015 s 166 that if there is no protection for the right to not disclose sources, there will not be any information regarding the wrongs in our society. Furthermore, it also predicted that without this provision, the current debate in the society regarding sources would have been negatively affected. This provision is also connected to what was mentioned in 5.2 regarding the relationship between the nondisclosure and labour law. It does not only provide protection for the journalists and their employment, but also grants protection for the employees of the Government on both state and municipal level.

When employees of private companies provides journalists with information, the abovementioned provisions do not apply. There is no such protection for employees when it comes to private companies. In these cases, only the provision in chapter 3 para 3 is applicable.

5.4 Alternative measures against the disclosure of journalistic sources

Principle 3 (b) (i) of the Recommendation No. R (2000) 7 emphasizes that “the disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure”. Alternative measures has been listed in the Explanatory Memorandum to the Recommendation, and these are internal/police investigations, the reinforcing of restrictions on access to certain secret information, dissemination of contrasting information as a countermeasure, investigation of other persons who are connected with the journalists (employees, colleagues, contracting partners or business partners of the person requesting the disclosure).

⁶⁴ Prop. 1985/86:80 s. 55.

⁶⁵ JK Beslut 2008-12-02

The Swedish legislation regarding journalistic sources are compliant with these above-mentioned requirements and goes beyond the requirements when providing an protection of journalists and their sources if they write in a so-called “periodical paper”⁶⁶, meaning that no investigation can be made about the source and the journalist can never be charged for breach of the press law.

The Supreme Court has stated in the case NJA 2003 s 107 that the only legal exemption to find out about a source is through an interrogation in court if exceptional circumstances apply. It also stated in the case that the interrogation may not interfere with the other provisions regarding the protection of the journalistic sources and the provision may not be interpreted widely. There are no specific alternative measures regarding this provision.

6. In the *Recommendation No R (2000) 7* the following principles should be respected when the necessity of disclosure is stated: absence of reasonable alternative measures, outweighing legitimate interest (protection of human life, prevention of major crime, defence of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the disclosure outweigh the interest in the non-disclosure?

6.1 Outweighing legitimate interest and the Recommendation No R (2000) 7

In the Explanatory Memorandum to the Recommendation No R (2000) 7 outweighing legitimate interest is described as following,

ii. outweighing legitimate interest

35. With due regard to the established jurisprudence of the European Court of Human Rights, any restriction to Article 10 of the Convention has to be proportionate to the legitimate aim pursued (...) there must be "a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim" (see, Goodwin v. the United Kingdom, para. 46). The concrete interest of the person or public authority in the disclosure of the source must be "sufficient to outweigh the vital public interest in the protection of the (...) journalist's source" (see, ibid., para. 45).

36. Given the importance of freedom of expression and freedom of the media for any democratic society and every individual, and taking into account the potentially chilling effect a source disclosure may have on the readiness of future sources to provide information to journalists, only exceptional cases where a vital personal or public interest is at stake might justify or be proportional to the disclosure of a source. Paragraph c, sub-paragraph ii refers to this proper use of discretion by the competent authorities and requires that (1) a legitimate interest should outweigh or override the public interest in the non-disclosure and be proven, (2) the vital and serious nature of the circumstances warrants such disclosure and (3) be

⁶⁶ Chapter 1 para. 7 of the Freedom of the Press Act

identified as responding to a pressing social need by the competent authorities; (4) the assessment of the necessity of the disclosure under Article 10 of the European Convention on Human Rights is subject to supervision and review by the European Court of Human Rights.”

This means that for the outweighing legitimate interest to be applicable, it has to override the public interest, be proportionate and be of a vital and serious nature responding to the need of the competent authority. This is something that the Swedish courts need to follow, which will be assessed briefly in this question. The main conclusion is that the Swedish legislation is to be seen as compliant with the ECHR regulations in this matter. There are clear provisions stating what is to be seen as outweighing legitimate interest which is also supported by case law from the Swedish Supreme Court.

6.2 Outweighing legitimate interest and Swedish law

According to chapter 3 para.3 of the Freedom of the Press Act, it is stated that

A person who has engaged in the production or publication of printed matter, or material intended for insertion therein, and a person who has been active in an enterprise for the publication of printed matter, or an enterprise which professionally purveys news or other material to periodicals, may not disclose what has come to his knowledge in this connection concerning the identity of an author, a person who has communicated information under Chapter 1, Article 1, paragraph three, or an editor of non-periodical printed matter.

The duty of confidentiality under paragraph one shall not apply

- 1. if the person in whose favour the duty of confidentiality operates has given his consent to the disclosure of his identity;*
- 2. if the question of identity may be raised under Article 2, paragraph one;*
- 3. if the matter concerns an offence specified in Chapter 7, Article 3, paragraph one, point 1;*
- 4. unless, where the matter concerns an offence under Chapter 7, Article 2 or 3, paragraph one, point 2 or 3, a court of law deems it necessary for information to be produced during the proceedings as to whether the defendant, or the person suspected on reasonable grounds of the offence, has communicated information or contributed to an item; or*
- 5. unless, in any other case, a court of law deems it to be of exceptional importance, having regard to a public or private interest, for information as to identity to be produced in testimony under oath or in testimony by a party in the proceedings under an affirmation made in lieu of oath.*

In examination under paragraph two, point 4 or 5, the court shall scrupulously ensure that no questions are put which might encroach upon a duty of confidentiality in excess of what is permissible in each particular case.”

In this provision, public interest means interest of the state or a general interest of the Swedish citizens.⁶⁷ Conversely, private interest means the interest of a private entity. Conclusively, crime

⁶⁷ Nationalencyklopedin, “allmänintresse” [Swedish]

is a part of the definition of outweighing legitimate interest in the Swedish legislation and may be conditions for revealing sources, as mentioned above in 5.4 and stated by the Supreme Court in the case NJA 2003 s 107. Similar legislation is found in chapter 7 para 3 of the same law, which mentions that crimes such as high treason, espionage, gross unauthorised trafficking in secret information, insurrection, treason or betrayal of country, or any attempt, preparation or conspiracy to commit such an offence, wrongful release of an official document and deliberate disregard of a duty of confidentiality may be reason for disclosing the source if demanded by the Court.⁶⁸ This means that even if the journalists generally have protection regarding their sources, they might have to disclose the sources without the consent of the source if the information is regarding such serious crimes.

Similar provisions are found in the Public Access to Information and Secrecy Act, which is connected to chapter 7 para 3, where the wrongful release of an official document to which the public does not have access and/or release of such a document in contravention of a restriction imposed by a public authority at the time of its release is seen as the crime “intentional commission of a breach of professional secrecy” and also as a condition for revealing sources because of outweighing legitimate interest. In a case of intentional commission of a breach of professional secrecy the penalty is either a fine or imprisonment for a maximum of one year. Petty cases of carelessness are not subject to any penalty according the Swedish law.⁶⁹

The Swedish legislation on this matter is to be seen as rather strict and it is very hard to get access to information about the source, since the only legal way is through an interrogation in Court. Compared to for example Norway, with whom Sweden share the legal tradition and a lot of similar legislation⁷⁰, the Swedish law is to be seen as stricter since the Norwegian legislation does not contain any provision regarding the confidentiality of the journalists.⁷¹ As stated before, the Swedish legislation is to be seen as compliant with the ECHR regulations in this matter. It provides clear criterias and has a high level of protection for both the source and the journalist.

7. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear

⁶⁸ Comment by Axberger from Karnov database, assessed on 2016-05-16

⁶⁹ Swedish Government, The Freedom of the Press Act

⁷⁰ Nationalencyklopedin, “Rättsväsen” [Swedish]

⁷¹ Susic, Europakonventionens journalistiska källskydd i jämförelse med TF och YGL - källskyddets optimala effektivitet i det progressiva internetsamhället, 2013, p 44 [Swedish]

legislative norms in the context of surveillance and anti-terrorism provisions?

7.1 Relevant Case-Law of European Court of Human Rights

Article 10 of the European Convention on Human Rights (ECHR) provides a protection for journalistic sources, which is considered to be the core of the Freedom of Press. By examining the case law from the European Court of Human Rights (ECtHR) it can be concluded that Article 10 also covers the measures used when transferring information to journalists.⁷²

In the case *Goodwin v. the United Kingdom* the Court stated that:

*“An order of source disclosure...cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.”*⁷³

There are circumstances in which the disclosure of a journalist source can be justified. For instance, in *Nordisk Film & TV A/S v. Denmark* the Court concluded that the disclosure of the source was necessary in order to prevent crime.⁷⁴

7.2 Legislation in Sweden

In the Instrument of Government, chapter 1 para. 1, it is stated that all public power stem from the people through parliamentary representation. The Instrument of Government is the part of the Constitution which lays down the basic foundation of the Swedish democracy. The Constitution stipulates how the country shall be governed, what the democratic rights are and how public power shall be distributed.⁷⁵ The courts constitute the core of the Swedish justice system. They are independent and autonomous in relation to the parliament, government and other authorities. With respect for each individual and in an objective and impartial approach, the courts strive to achieve the objective of the Swedish judicial system which are to protect individual legal rights and maintain the rule of law.⁷⁶ The Fundamental Law on Freedom of Expression is a part of the Constitution and establish the right for journalistic sources to be anonymous.

Chapter 2 §1

“The originator of a radio programme or technical recording is not obliged to disclose his identity. The same applies

⁷² Factsheet – Protection of journalistic sources January 2016 European Court of Human Rights, p1

⁷³ *Goodwin v. the United Kingdom*, Judgment of 27 March 1996 §39

⁷⁴ Factsheet – Protection of journalistic sources January 2016 European Court of Human Rights, p1

⁷⁵ Swedish Government, The Instrument of Government (Swedish)

⁷⁶ Sveriges Domstolar, the Courts (Swedish)

*to a person taking part in such an item and to a person who has communicated information under Chapter 1, Article 2. .*⁷⁷

Chapter one lays down a right to leave statements without disclosing the source. There is also a similar protection in the Freedom of the Press Act, which is also a part of the Constitution. It states that everyone is free to communicate information and intelligence on any subject whatsoever for publication in printed matter to the writer.⁷⁸ The same regulation also lays down a protection against authorities to investigate in sources of journalism⁷⁹.

Due to the civil-law characteristics of the Swedish legal system, it is mainly the Supreme Court's judgments which has precedence although there is no doctrine of *stare decisis*. Therefore, the case-law analysed are mainly from the Supreme Court of Sweden. When it comes to case-law dealing with this issue, one should also keep in mind that Sweden did not incorporate the European Convention on Human Rights into Swedish law until 1995.

7.3 Swedish Case-Law

The importance of the possibility for journalistic sources to be anonymous has been considered in several cases. The protection of anonymity is therefore necessary for the Freedom of the Press to fulfil its function in a democratic society. The right to anonymity is a key element in the protection of journalistic sources. If anonymity is not protected the source might choose not to communicate significant facts in the light.⁸⁰

In the Supreme Court there was a case regarding the above mentioned provisions of the Freedom of Press Act. The court held that in order to establish a breach of the mentioned regulation it had to be clear that the respondent had investigated the source of published text in a local newspaper and that he did so with intent and that he was doing the research as a member of the city council. The outcome of the case was that the respondent was not found guilty since the intent could not be proven.⁸¹ In the same case the court referred to the case-law of ECtHR and the importance of protection of sources was emphasised.⁸² In this case the court weighed the different interests, namely the one of the respondent who claimed that her source had consented not to be anonymous against that of the applicants rights to be anonymous. The court concluded that the applicant had not given consent and thus the respondent breached the provisions of the Regulation on Freedom of Press.⁸³

⁷⁷ Yttrandefrihetsgrundlagen Chapter 2 para 1,

⁷⁸ Tryckfrihetsförrordningen Chapter 3 para 4,

⁷⁹ Tryckfrihetsförrordningen Chapter 1 para 1

⁸⁰ NJA 2012 s 342

⁸¹ NJA 2001 s 673, Swedish Supreme Court, p 686

⁸² NJA 2012 s 342, Swedish Supreme Court, p 356

⁸³ NJA 2012 s 342, Swedish Supreme Court, p 356

In HD B 3594/14, the Supreme Court held the respondents guilty of disclosing the source without her consent and the respondents manner was found to be negligent.⁸⁴ In HovR B 776-13, the Court of Appeals the respondent was held guilty since he intended to disclose the source and thus he breached the provisions of the Freedom of Press Act. The court also stated that it does not matter whether the information at stake has been published or not, it is enough to do research regarding who actually left the information.⁸⁵

When analysing the above mentioned cases, some main principles connected to the protection of journalistic sources can be seen. Namely, whether or not the disclosure has been intentionally conducted, if it has been conducted with negligence and whether or not the source consented to be disclosed. Another principle worth mentioning is that the information does not have to be published to be covered by the protection.

In the case-law of the Swedish courts one can also draw the conclusion that the courts are referring to the ECHR and the importance of sources to stay anonymous, as it is a cornerstone of a democratic society. Some critique with regard to the identified cases analysed in the light of ECtHR jurisprudence is that it can be brought to the reader's attention that the intention of a person doing research about a source is very hard for the courts to establish, which might constitute a threshold when applying the right of anonymity of sources.

7.4. Personal analysis

My personal reflection when analysing the cited cases is that the Court emphasises the importance of the intention. It is the intention of the disclosing person which is the determining factor when the courts decide whether or not the conduct are in violation of the provisions protecting journalistic sources. This constitutes a threshold when determining a case and consequently also to protect the source in line with ECHR. But on the other hand, since this regards a criminal offense it might be positive that people cannot be prosecuted due to their own lack of knowledge in this field. On the other hand, one could argue that it is within the framework of the journalistic profession to be aware of the protection of sources as well as the different regulations in force.

8. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear

⁸⁴ HD B 3594/14, Swedish Supreme Court, § 20-21

⁸⁵ HovR B 776-13, Swedish Court of Appeal

legislative norms in the context of surveillance and anti-terrorism provisions?

8.1 National legislation

During the Second World War freedom of expression and liberty of the press were subjected to a high political pressure in Sweden. This since the Swedish authorities felt the need to censure opinions, which were critical towards the Nazi-regime in Germany. As a consequence the Swedish minister of justice confiscated over 300 printed works without any prior trial. After the war had ended, the Freedom of the Press Act, was reformed. The reformation contained stricter regulations on how the aforementioned freedoms could be restricted. However, after the terrorist attacks in New York, Madrid and London in the beginning of the 21th century, the strengthened protection of the freedom of expression and the liberty of the press has been diminished, and the possibility of using electronic surveillance and other means of coercion has been extended.⁸⁶

The use of secret means of coercion in preliminary investigations of crimes is regulated in the 27th chapter of the Swedish Code of Judicial Procedure, *Rättegångsbalken*. These means includes secret taping of electronic communication, camera surveillance, and wiretapping of closed areas.⁸⁷ Only persons, whom are suspected for a crime of a more serious nature, can be subjected to these measures.⁸⁸ These crimes include for example child pornography, trafficking, and rape.⁸⁹ However, wiretapping in closed areas is forbidden in places which are permanently used or specifically meant for activities covered by the journalistic confidentiality provided for in the Freedom of Press Act and the Fundamental law on Freedom of Expression.⁹⁰ A court must approve the use of secret means of coercion, and a prosecutor must apply for such an order. An approved application by the court must contain information on the allowed amount of time for the usage of the secret means of coercion. Furthermore, the allowed time limit cannot exceed what is considered necessary.⁹¹ However, if the prosecutor deems that an application to the court would be too time-consuming for the case at hand and amount to implications, she or he may permit such means of coercion before receiving an acceptance by the court. The decision by the prosecutor must be tried by the Court, which could abrogate the means of coercion if it finds

⁸⁶ Anders Olsson, *Yttrandefrihet och Tryckfrihet. Handbok för journalister* (7 edn, Studentlitteratur AB, 2012) 197-198 [Swedish].

⁸⁷ *Rättegångsbalken* ch 27 para 18, ch 27 para 20a, ch 27 para 20d.

⁸⁸ For crimes prescribing more than 2 years of imprisonment The Code of Judicial Procedure, ch 27 para 18 point 1, ch 27 para 20a point 1. For crimes prescribing more than 4 years of imprisonment The Code of Judicial Procedure, ch 27 para 20d pt 2 point 1.

⁸⁹ See for example The Code of Judicial Procedure, ch 27 para 20 d pt 3 a,b, c.

⁹⁰ The Code of Judicial Procedure, ch 27 para 20e pt 3 point 1.

⁹¹ The Code of Judicial Procedure, ch 27, para 21.

that there was no cause for such measures to be inflicted.⁹² The measures must also be abrogated as soon as they are deemed to no longer be necessary to the preliminary investigation.⁹³ During a case concerning the approval of the usage of means of coercion in a court, a public attorney safe-guarding the integrity of the individuals in question must be present.⁹⁴

There are other laws, which are applied in concurrence with the Code of Judicial Procedure. One of these is for example, *Lag (2008:854) om åtgärder för att utreda vissa samhällsfarliga brott* (the Swedish Act on measures on the investigation on certain crimes which harmful for the public and the state). It regulates the procedural aspects of preliminary investigations in crimes such as espionage, terrorism, and the recruitment of such activities.⁹⁵ The law permits the same means of coercion as prescribed for in the 27th chapter of Rättegångsbalken. Since it regulates crimes of a particularly serious nature, it can deviate from the prerequisites set out in Rättegångsbalken, i.e. it expands the possibilities of using such measures. Although, it does not permit deviations from the rule, which prohibits wiretapping in closed areas where journalistic confidentiality prevails.⁹⁶

Another law, *Lag 2007:978 om hemlig rumsavlyssning* (the Swedish Act on wiretapping in closed areas), is applicable in relation to preliminary investigations concerning crimes, which can lead to imprisonment for more than four years. Or other crimes, which are explicitly mentioned in the law itself.⁹⁷ By virtue of protecting freedom of expression and the liberty of the press, the regulation prohibiting wiretapping in places, which are permanently used or specifically meant for activities covered by the journalistic confidentiality, is included in this law as well.⁹⁸

In addition, there is *Lag (2007:979) om åtgärder för att förhindra vissa särskilt allvarliga brott* (the Swedish Act on measures counteracting specifically grouse crimes) which allows for electronic surveillance and camera surveillance in order to prevent particularly serious crimes.⁹⁹ The means of coercion provided for in this law are only permitted if it has been approved by the district court of Stockholm.¹⁰⁰ A prosecutor can in issue an order in exceptional cases when time is of the essence.¹⁰¹

⁹² The Code of Judicial Procedure, ch 27, para 21a.

⁹³ The Code of Judicial Procedure, ch 27, para 23

⁹⁴ The Code of Judicial Procedure, ch 27, para 26

⁹⁵ The Law on Measures on the Investigation on Certain Crimes which is Harmful for the Public and the State 2008:854 (*Lag om åtgärder för att utreda vissa samhällsfarliga brott*) para 1 point. 4,6.

⁹⁶ The Law on Measures on the Investigation on Certain Crimes which is Harmful for the Public and the State, para 3.

⁹⁷ The Law on Wiretapping in Closed Areas (*Lag om hemlig rumsavlyssning*) para 1-2.

⁹⁸ The Law on Wiretapping in Closed Areas, para 4 point 1.

⁹⁹ The Law on Measures Counteracting Specifically Grouse Crimes 2007:979 (*Lag om åtgärder för att förhindra vissa särskilt allvarliga brott*) para 1.

¹⁰⁰ The Law on Measures Counteracting Specifically Grouse Crimes, para 6.

¹⁰¹ The Law on Measures Counteracting Specifically Grouse Crimes, para 6a.

The Act on Signal Intelligence Within the Military Intelligence Service, *Lag (2008:717) om signalspaning i försvarsunderrättelseverksamhet*, has the purpose of combatting international terrorism and other trans border crimes, which can constitute significant threats towards national interests. In the preparatory works it is stated that restrictions in the protection of one's integrity may only be conducted for purposes which can be considered acceptable in a democratic society. Such restrictions cannot exceed what is necessary in order to fulfil the aim of the law. Furthermore, restrictions cannot constitute a threat against the freedom of opinion as set out in the Instrument of Government.¹⁰² The law applies to signals, which are being transmitted between wires abroad and within Sweden, i.e. not only between two transmitters, which are both within the borders of Sweden.¹⁰³ In order to maintain the protection for journalistic sources, the law imposes an obligation to immediately destroy information provided by such sources, if it has been collected by means of signal intelligence surveillance. This also applies to information related to the prohibition of inquiry of the identity of a source employed in the public sector.¹⁰⁴

In regards of secret measures in terrorist cases, the special laws supplementing the general one in the Swedish code of procedure, i.e. the ones provided in this section, include crimes of terrorism as cases in which the regulations apply. Hence, secret measures in case of crimes of terrorism are regulated by the same criteria as for other gross crimes mentioned in the laws.¹⁰⁵

In conclusion, the Swedish laws on secret means of coercion are drafted in a way, which do not interfere with the journalistic confidentiality. The standards for using these measures are very high, and are not allowed unless the person being surveyed is suspected for a crime, which means that none of the laws can be used with the explicit purpose of exposing a journalistic source. This does not exempt unintended exposure of information regarding the identity of a source, but such information cannot be used unless it is of relevance for an on-going investigation. Exceptions to the journalistic confidentiality in criminal cases is also regulated in the Freedom of Press Act (see question 1 for a more detailed description of such exemptions).

8.2 ECtHR case law

Member states are obliged, under Article 10 in addition to Article 8, to strike a fair balance between interests in searching a journalist's home, and such an interference must also be in

¹⁰² Prop. 2011/12:179, p. 9-10

¹⁰³ The Law on Signals Intelligence Within the Military Intelligence Service 2008:717 (*Lag om signalspaning i försvarsunderrättelseverksamhet*) para 2- 2a.

¹⁰⁴ The Law on Signals Intelligence Within the Military Intelligence Service, para 7 point 2.

¹⁰⁵ See The Law on Measures on the Investigation on Certain Crimes which is Harmful for the Public and the State, para 1 point 6; The Law on Wiretapping in Closed Areas, para 2 point 1; The Law on Measures Counteracting Specifically Grouse Crimes para 1 point 6; The Law on Signals Intelligence Within the Military Intelligence Service para 1 point 3.

compliance with the criteria of being lawful and proportional.¹⁰⁶ ECtHR has established minimum standards regarding national legislation on secret surveillance as an obligation under Article 8 of the Convention.¹⁰⁷ The minimum standards includes that the legislation must be foreseeable, and the crimes that could lead to a request of surveillance must be clearly stated. Moreover, there must be a definition of who can be subjected to secret surveillance, and the time of the wiretapping must be limited. There must also be procedural rules in place for inquiries, the use and storage of the gathered information, and cautionary measures must be in place if the information is being transmitted. Lastly, those circumstances in which the recordings can or must be deleted shall be specified.¹⁰⁸

In order to ensure principles connected to the rule of law, the Swedish authorities has inter alia taken these criteria regarding article 8 into consideration in regards of the latest changes of the Swedish law on measures counteracting specifically gross crimes.¹⁰⁹ The crimes which can give rise to surveillance actions are prescribed for in the law, and that the only persons who pose a real risk of committing one of these crimes could be subjected to this.¹¹⁰ The law also established that such actions can only be temporary, and must be terminated when it has been concluded that it is no longer necessary to continue.¹¹¹ Furthermore, the procedural aspects of the inquiries are regulated in several paragraphs of the law, including the treatment of gathered information and when it is to be destroyed.¹¹² Based on this, the Swedish law should be considered in line with the criteria in the case law of the Court. Similar provisions can also be found in the Swedish law on measures counteracting specifically grouse crimes and in the Swedish law on wiretapping in closed area, which render them coherent with the obligations under the Convention.

The Swedish law on signal intelligence was criticised in its preparatory works before it was adopted, on grounds of not being compatible with Article 8 and 13 of the Convention. *Svenska avdelningen av internationella juristkommissionen* (the Swedish part of the International Commission of Jurists) gave a statement of opinion, in which they argued that the law would not be foreseeable enough, and that it would not be proportionate to its aim. Moreover, the commission also stated that the condition of a right to an effective remedy is not fulfilled. Furthermore, Lagrådet (the Swedish Council on Legislation) stated that in order to comply with the case law of the Court, the existence of a law is not in itself enough, it must also be foreseeable. Based on this, Lagrådet claimed, in accordance with the statement of the Swedish department of the International Commission of Jurists, that the law is not foreseeable enough. They argued that the vague

¹⁰⁶ Roemen and Schmit v. Luxembourg, no. 51772/99, ECHR 2003-IV; Ernst and Others v. Belgium, no. 33400/96, 15 July 2003

¹⁰⁷ Uzun v. Germany, no. 35623/05, ECHR 2010 (extracts)

¹⁰⁸ *ibid*

¹⁰⁹ Prop 2013/14:237, p.54

¹¹⁰ The Law on Measures Counteracting Specifically Grouse Crimes, para 1.

¹¹¹ The Law on Measures Counteracting Specifically Grouse Crimes, para 7.

¹¹² The Law on Measures Counteracting Specifically Grouse Crimes, para 11 pt 2, 13.

definition of what situations that could constitute such a crime that would result in a signal intelligence surveillance. Lagrådet did not oppose the proposition in itself, but stressed that the critique put forward should be duly noted, and taken into consideration. However, the Swedish authorities did not share this view and claimed that the case law of the ECtHR was taken into consideration in the drafting process of the law, and the majority of institutions leaving their statements of opinion approved the legislative proposal.

9. Can journalists rely on encryption and anonymity online to protect themselves and their sources against surveillance?

As mentioned above in question 1, the protection of journalistic sources is regulated in a combination of provisions which regulates the liberty of the press and grants every Swedish citizen the right to publish written works, and to exchange ideas and information in any subject, without interference by the authorities. These rights only apply if such information is given with a *purpose of publication* and it must be granted to a legally authorised source. There is no specific law which protects journalists from surveillance nor any legislation granting 100% anonymity regarding online communication, as stated by Dr Gustaf Lind in his report to OCHR in 2015.¹¹³

One ECHR case which is relevant for this question in the light of the Swedish similar legislation is *Klass v Germany*¹¹⁴ where Germany had a system where they could put surveillance on their citizens in order to be able to protect their country if they were suspected to commit certain kinds of crime.

The Court stated in its judgement that

"Powers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions."

The Swedish legislation is compliant with the judgement of *Klass v Germany*, since it is built on the same foundation. The States do not have to grant full anonymity if it is needed to investigate in the online communication whether the State is threatened by any means.

The IP-number is the main channel regarding surveillance, since it provides information about your online activities to the relevant server and can easily be identified. During some circumstances, the internet providers are required by law to be able to provide relevant information on who uses the IP number and information connected to that. Lag (2003:389) om elektronisk kommunikation, or the Electronic Communications Act, states in chapter 6 para. 16a-16c that the Internet providers have to keep the information regarding information that is generated or used through phone, messaging and internet usage. This information can be accessed if the circumstances are such as described in The Code of Judicial Procedure chap 27 para. 19, where it either have to lead to a sentence of more than 6 months in jail, or if it is

¹¹³ <http://www.ohchr.org/Documents/Issues/Opinion/Communications/States/Sweden.pdf>

¹¹⁴ *Klass v Germany* (application no. 5029/71)

regarding hacking or severe cases of child pornography or drug-related crime. This means that if the journalist gets information through internet about this and then writes about it, the Police and/or the Courts can force the Internet provider to give out information about the relevant communication in order to investigate the case, even though an encrypted IP number has been used. Therefore, the journalists can not rely on online anonymity and encryption to protect themselves from surveillance if the topics are described in The Code of Judicial Procedure chap. 27 para. 19. There are no provisions granting that journalists or other citizens can fully rely on encryption or anonymity in the Swedish data protection laws due to above-mentioned exemptions.

10. Are whistle-blowers explicitly protected under law protecting journalistic sources? Is there another practice protecting whistle-blowers? Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

10.1 National legislation

The term whistle-blower is not explicitly defined within Swedish legislation, but in a governmental investigation on the subject from 2014, it is understood to be a “worker whom sheds light on work related abuses or other ill-treatments”. Within a jurisprudential context, such a person is called a “messenger” in cases revolving liberty of the press, and “informer” within criminal law.¹¹⁵

As mentioned in question 1, every Swedish citizen has the right to spread ideas and information in any subject and in any forum without being censored or legally implicated by the authorities.¹¹⁶ However, this right can be restricted by regulations of confidentiality in other laws for example¹¹⁷ the Public Access to Information and Secrecy Act, *Offentlighet- och sekretesslagen*, which applies for public companies whereas private companies use contracts as a means of assuring the discretion of their employees.¹¹⁸ Such clauses of secrecy cannot be too far-reaching according to the Contracts Act, *Avtalslagen*,¹¹⁹ and they cannot be contrary to general contractual customs.¹²⁰ Furthermore, within the public sector, it is not allowed for the authorities to research on the identity of a “messenger”.¹²¹ This is provided that the information has been spread in accordance with the prerequisites prescribed for in the Freedom of Press Act and the Fundamental Law on

¹¹⁵ SOU 2014:31 p. 50-54

¹¹⁶ The Freedom of the Press Act, ch 1 para 1; The Fundamental Law on Freedom of Expression, ch 1 para 2 (?)

¹¹⁷ The Public Access to Information and Secrecy Act 2009:400 (*Offentlighets- och sekretesslagen*) ch 1 para 1

¹¹⁸ SOU 2014:31 p. 72

¹¹⁹ The Contracts Act 1915:218 (*Lagen om avtal och andra rättshandlingar på förmögenhetsrättens område*) para 36.

¹²⁰ SOU 2014:31 p. 73

¹²¹ The Freedom of the Press Act, ch 3 para 4; The Fundamental Law on Freedom of Expression, ch 2 para 4.

Freedom of Expression. Thusly, whistle blowers within in the public sector have a strong protection against sanctions. Furthermore, employees within the public sector have a more extensive right to express ideas, opinions, and emotions than individuals working in the private sector. This is because public entities are bound by the Swedish constitutional laws, and as aforementioned, any restrictions on their employees' rights to freedom of expression must be prescribed by laws.¹²²

When it comes to the working relationships in the private sector, the prohibition on the inquiry of sources does not apply. Therefore, informants working for private companies are much less protected. Moreover, the constitutional liberties of providing information to the press must be weighed against the principle of loyalty, which applies in the relation between employees and their employer, and can often be found in the employment agreement. This duty is well-established within the Swedish legal system, and its founding objective is to protect companies from being harmed by the actions of their employees.¹²³ This further weakens the protection of whistle-blowers working within the private sector, since their employers legally can make investigations regarding their identity and the principle of loyalty includes confidentiality in many cases.¹²⁴ Another aspect hindering the freedom of expression in work-related matters is the law prohibiting exposure of industrial secrets; namely, *Lag (1990:409) om skydd för företagshemligheter*¹²⁵. It was created in order to protect the operational aspects of companies, and prevent disclosure of information, which could harm their competitiveness. Hence, their freedom to express ideas, opinions, and emotions is not as extensive as within the public sector.

The Swedish labour laws does not regulate the protection of whistle-blowers; however, they are safe-guarded from arbitrary dismissals.¹²⁶ The Employment Protection Act, *Lag (1982:80) om anställningsskydd*, regulates the conditions for rightful dismissals.¹²⁷ One of the main principles regarding dismissals, is the requisite of just cause,¹²⁸ and according to Swedish case-law, notifying public authorities can be considered a justified cause if the sole intention of the employee was to harm the private entity in question. This is closely tied to the principle of loyalty.¹²⁹ When determining whether the employee has acted disloyally, the Swedish Labor Arbitration Court will examine questions such as if the employee has notified the employer of the harmful conditions before notifying the authorities. Furthermore, the court will take in consideration if the employer has tried to remedy the remarks in question, as well as the factual circumstances of the case as a

¹²² Per Larsson, 'Whistleblowing: Förutsättningar och skydd för dem som slår larm om korruption och andra oegentligheter', (2012) Transparency International Sverige, Rapport no 1, p. 34. [Swedish]

¹²³ Folke Schmidt *Löntagarbrät* 1994 p. 257-; AD 1994 nr 79; AD 2003 nr 84; Ad 2012 nr 25.

¹²⁴ Bet. 1988/89:LU30, s. 110

¹²⁵ The Law Prohibiting Exposure of Industrial Secrets 1990:409 (*Lag om skydd för företagshemligheter*) para 1.

¹²⁶ Larsson, p 33

¹²⁷ The Employment Protection Act, para. 7-23

¹²⁸ The Employment Protection Act, para. 7

¹²⁹ AD 1986 nr 95.

whole.¹³⁰ Noticeably, the employee has a greater freedom of criticising serious instances than minor incidents.¹³¹

10.2 Compliance with ECtHR case law

In *Guja v. Moldova*¹³² the Court established that employees in the public sector might be protected by the rights set out in Article 10 when it comes to cases revolving whistle blowing.¹³³ There are six principles which are used to decide whether a restriction on a workers freedom of expression has been proportionate or not. These include whether the employee had any alternative channels of revealing the information, and if there's an underlying public interest in regards of the information. Furthermore, the truthfulness of the information must be taken into account, and so must the damage inflicted on the organisation. The whistle-blower must also have been acting in good faith, and lastly, the seriousness of the sanction imposed on the person in question must be considered. These principles apply in cases where the whistle-blower has been a public official, but in case *Heinisch v. Germany*¹³⁴ these criteria were also used. The Court further established that whistle-blowers working within private industry may invoke their right to freedom of expression in order to expose illegal conduct by their employers. In practice this means that private officials are somewhat protected when it comes to whistleblowing, but the commercial interest and reputation of the employer must be weighed against the rights of the employee under Article 10.¹³⁵

Similarly to the Swedish system, the protection for public and private officials somewhat differ within the ECtHR case law. Public officials enjoy a higher level of protection since they are safeguarded by a combination of rights, namely the freedom of providing information to the press, the confidentiality of journalists, and that their employers are prohibited from making any inquires regarding their identity. Furthermore, public officials enjoy a far-reaching freedom to express ideas, opinions, and emotions. This right can only be restricted by law, and such restrictions must also pursue a legitimate aim, and must be considered necessary in a democratic society.¹³⁶ Accordingly, the Swedish legislation ought to be in line with the prerequisites in Art 10 of ECHR, as well as the case-law of the ECtHR. Civil servants on the other hand are less protected since their employers are legally allowed to make researches, which can expose the identity of the whistle-blower. Having said that, they are still protected by journalistic confidentiality and they have the freedom to reveal work-related information. By virtue of the strengthened protection provided for in *Heinisch v. Germany* it is questionable whether Swedish legislation lives up to the required level of protection when it comes to whistle-blowers within

¹³⁰ AD 1986 nr 95; AD 1994 nr 79.

¹³¹ AD 1986 nr 95.

¹³² *Guja v. Moldova* [GC], no. 14277/04, ECHR 2008

¹³³ *ibid* § 72

¹³⁴ *Heinisch v. Germany*, no. 28274/08, ECHR 2011 (extracts)

¹³⁵ *ibid*

¹³⁶ The Instrument of Government ch 3 para 21.

the private sector. This question has also been raised in a Swedish governmental assessment from 2014, a proposal for a new law with the purpose of strengthening the protection of workers acting as whistle-blowers in general was also made.¹³⁷ However, this has not become reality and no laws have been enacted. In summation, the protection of whistle-blowers within the private sector is far less extensive than for public officials.

10.3 CM/Rec(2014) 7 of the Committee of Ministers to member States on the protection of whistle-blowers

This recommendation has been addressed in the same governmental assessment, which mentioned in the previous section. According to the investigation, the proposed law would have been in explicit compliance with the aims set out in the recommendation in question, since it would ensure the same protection for both public and civil servants regardless of which form of employment they possess.¹³⁸

11. Conclusion

The main conclusion of this research is that Sweden has an extensive set of rules protecting both the journalist and its' source from investigation as long as the information does not interfere with the provisions regarding the exemptions of the right to protect journalistic sources.

Due to the civil-law characteristics of the Swedish legal system, it is mainly the Supreme Court's judgments which has precedence although there is no doctrine of *stare decisis*. Therefore, the case-law analysed are mainly from the Supreme Court of Sweden. When it comes to case-law dealing with this issue, one should also keep in mind that Sweden did not incorporate the European Convention on Human Rights into Swedish law until 1995. The importance of the possibility for journalistic sources to be anonymous has been considered in several cases. The protection of anonymity is therefore necessary for the Freedom of the Press to fulfil its function in a democratic society. The right to anonymity is a key element in the protection of journalistic sources. If anonymity is not protected the source might choose not to communicate significant facts in the light. The protection of journalistic sources is regulated in a combination of provisions within these constitutional laws. The Freedom of Press Act regulates the liberty of the press and grants every Swedish citizen the right to publish written works, and to exchange ideas and information in any subject, without interference by the authorities. the Fundamental law on Freedom of Expression, provides a corresponding protection for the freedom of expression. These rights only apply if such information is given with a purpose of publication and it must be granted to a legally authorised source. Such a source includes for example writers, publicists and editorial staff. As for the term journalist, there is no explicit definition of the word within the Swedish legal system.

¹³⁷ SOU 2014:31 p. 207, 217-218

¹³⁸ SOU 2014:31 p. 222

Anyone can provide a newsdesk with information and be guaranteed anonymity. If the source wants to remain anonymous, the journalist is under obligation of professional secrecy. This prohibition is strong and demands the journalist as well as the editor to carefully make sure no disclosure of personal data, pictures, names of places or anything else that can reveal to the public the identity of a source. The right to anonymity is far reaching and covers also an explicit freedom of liability of criminal acts. It is only the editor of a periodic print who can never be anonymous and so it is in these cases the editor's choice to publish a certain material or not, with the risk of criminal prosecution for violation of the right to freedom of speech. Only if explicit consent has been given by the source, to reveal the identity of the source, a journalistic code of ethics can be considered to apply. The right to anonymity is protected by law and any use of a code of ethics postulates the source has first agreed to have her or his identity revealed.

For future research, it would be interesting to look further into the separation between public and private employers, where the employee of the private employer has no protection from investigation since the provision regarding this only covers employees with a public employer. In Sweden, private healthcare and social care is getting more and more popular, but with this exemption of private employees, Sweden works against itself since the aim is to provide everyone with the same protection. We see the need of a legislative change in the future in order to ensure everyone the same rights.

12. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

12.1. Legislation

- Avtalslagen
- Lag (1982:80) om anställningsskydd
- Lag (1990:409) om skydd för företagshemligheter
- Lag (2007:978) om hemlig rumsavlyssning
- Lag (2007:979) om åtgärder för att förhindra vissa särskilt allvarliga brott
- Lag (2008:717) om signalspaning i försvarsunderrättelseverksamhet
- Lag (2008:854) om åtgärder för att utreda vissa samhällsfarliga brott
- Offentlighet- och sekretesslagen
- Regeringsformen
- Rättegångsbalken
- Tryckfrihetsförordningen
- Yttrandefrihetsgrundlagen
- European Convention on Human Rights and Fundamental Freedoms, Council of Europe
- International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966

12.2. Case Law

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- Goodwin v. the United Kingdom,
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- Prop 2013/14:237
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- SOU 2004:114
- SOU 2014:31
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- Per Larsson, 'Whistleblowing: Förutsättningar och skydd för dem som slår larm om korruption och andra oegentligheter', (2012) Transparency International Sverige, Rapport no 1, p. 34. [Swedish]
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13. Table of Provisions

Provisions in native language	Corresponding translation
<p>Avtalslagen</p> <p>Lag (1982:80) om anställningsskydd</p> <p>7 § Uppsägning från arbetsgivarens sida skall vara sakligt grundad.</p> <p>En uppsägning är inte sakligt grundad om det är skäligt att kräva att arbetsgivaren bereder arbetstagaren annat arbete hos sig.</p> <p>Vid en sådan övergång av ett företag, en verksamhet eller en del av en verksamhet som sägs i 6 b § skall övergången i sig inte utgöra saklig grund för att säga upp arbetstagaren. Detta förbud skall dock inte hindra uppsägningar som sker av ekonomiska, tekniska eller organisatoriska skäl där förändringar i arbetsstyrkan ingår.</p> <p>Om uppsägningen beror på förhållanden som hänför sig till arbetstagaren personligen, får den inte grundas enbart på omständigheter som arbetsgivaren har känt till antingen mer än två månader innan underrättelse lämnades enligt 30 § eller, om någon sådan underrättelse inte lämnats, två månader före tidpunkten för uppsägningen. Arbetsgivaren får dock grunda uppsägningen enbart på omständigheter som han har känt till mer än två månader, om tidsöverdraget berott på att han på arbetstagarens begäran eller med dennes medgivande dröjt med underrättelsen eller uppsägningen eller om det finns synnerliga skäl för att</p>	<p>the Contracts Act</p> <p>The Employment Protection Act</p> <p>7 § Termination by the employer must be objectively justified.</p> <p>A dismissal is not objectively justified if it is reasonable to require employer prepares the employee another job in itself.</p> <p>At such a transfer of an undertaking, business or part of an activity that is said in § 6 b transition shall not in itself constitute just cause to terminate the employee. This prohibition, however, not preclude dismissals which take place for economic, technical or organizational reasons entailing changes in the workforce</p> <p>If the termination is due to conditions relating to employee personally, it may not be based solely on circumstances which the employer has known either more than two months before the notification was submitted in accordance with § 30 or, if no such notice was given, two months before the date of termination. The employer may, however, base the termination only the circumstances that he has known for more than two months, and the delay was because he was due to the employee's request or with the consent of the employee, in the notification or termination process or if there are serious reasons for circumstances may be</p>

<p>omständigheterna får åberopas.</p> <p>Lag (1990:409) om skydd för företagshemligheter</p> <p>Lag (2007:978) om hemlig rumsavlyssning</p> <p>Lag (2007:979) om åtgärder för att förhindra vissa särskilt allvarliga brott</p> <p>Lag (2008:717) om signalspaning i försvarsunderrättelseverksamhet</p> <p>Lag (2008:854) om åtgärder för att utreda vissa samhällsfarliga brott</p> <p>Offentlighet- och sekretesslagen</p> <p>13 kap. 1 § Av 1 kap. 1 och 5 §§ tryckfrihetsförordningen och 1 kap. 1 och 2 §§ yttrandefrihetsgrundlagen framgår att var och en har rätt att meddela och offentliggöra uppgifter i vilket ämne som helst i tryckt eller därmed jämställd skrift eller i radioprogram, film, tekniska upptagningar eller därmed jämställt medium.</p> <p>13 kap. 2 § I förhållandet mellan å ena sidan ett sådant organ som avses i 2 kap. 4 §, beträffande den verksamhet som anges i bilagan till denna lag, eller ett sådant organ som avses i 2 kap. 3 §, och å andra sidan organets anställda eller uppdragstagare enligt 2 kap. 1 §, gäller vad som föreskrivs i tryckfrihetsförordningen och</p>	<p>invoked.</p> <p>Act on the Protection of Trade Secrets</p> <p>Act on wiretapping in closed areas</p> <p>Act on measures counteracting specifically grouse crimes</p> <p>Act on signal intelligence within the military intelligence service</p> <p>Act on measures on the investigation on certain crimes which are harmful for the public and the state</p> <p>The Public Access to Information and Secrecy Act</p> <p>13 chap. 1 § Under 1 chap. 1 and 5 §§ of the Freedom of the Press Act and 1 chap. 1 and 2 §§ of the Fundamental Law on Freedom of Expression, it is stated that everyone have the right to inform and release information on any subject in print or equal form or through radio broadcasting, film, technical recordings or through any other equal medium.</p> <p>13 chap. 2 § Regarding the relationship between such an institution referred to in 2 chap. 4 § regarding the area that is mentioned in the Appendix to this law, or such an institution referred to in 2 chap. 3 § and also the employees of the institution according to 2 chap 1 §, what is stated in the Freedom of the Press Act and The Fundamental Law on Freedom of</p>
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<p>ytrtrandefrihetsgrundlagen om</p> <ol style="list-style-type: none"> 1. rätt att lämna uppgifter i vilket ämne som helst för offentliggörande, 2. förbud mot att ingripa mot bruk eller missbruk av tryckfriheten eller ytrtrandefriheten eller medverka till sådant bruk eller missbruk, och 3. förbud mot att efterforska upphovsman, meddelare, den som har utgett eller avsett att utge en framställning i tryckt skrift, den som har tillhandahållit eller avsett att tillhandahålla en framställning för offentliggörande i ett radioprogram eller en teknisk upptagning och den som har framträtt i en sådan framställning. 	<p>Expression if</p> <ol style="list-style-type: none"> 1. the right to provide information regarding any subject in order to release it to the public, 2. Prohibition regarding intervention against usage or misuse of the Freedom of the Press or the Freedom of Expression or assistance to the usage or misuse, and 3. Prohibition regarding investigation of an author, source, the publisher or who has the intention of publishing a printed matter, the one providing or who has the intention of publishing information through a radio broadcast or a technical recording and the ones participating in such a publication.
<p>Regeringsformen</p> <p>1 kap. 1 § All offentlig makt i Sverige utgår från folket. Den svenska folkstyrelsen bygger på fri åsiktsbildning och på allmän och lika rösträtt. Den förverkligas genom ett representativt och parlamentariskt statsskick och genom kommunal självstyrelse. Den offentliga makten utövas under lagarna.</p> <p>2 kap. 19 § Lag eller annan föreskrift får inte meddelas i strid med Sveriges åtaganden på grund av den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna.</p>	<p>The Instrument of Government</p> <p>1 chap. para. 1 All public power in Sweden proceeds from the people. Swedish democracy is founded on the free formation of opinion and on universal and equal suffrage. It shall be realised through a representative and parliamentary polity and through local self-government. Public power shall be exercised under the law.</p> <p>2 chap. para. 19 No act of law or other provision may be adopted which contravenes Sweden's undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms.</p>

<p>Rättegångsbalken</p> <p>27 kap. 19 § (..) Hemlig övervakning av elektronisk kommunikation får användas vid en förundersökning om</p> <ol style="list-style-type: none"> 1. brott för vilket det inte är föreskrivet lindrigare straff än fängelse i sex månader, 2. dataintrång enligt 4 kap. 9 c § brottsbalken, barnpornografibrott enligt 16 kap. 10 a § brottsbalken som inte är att anse som ringa, narkotikabrott enligt 1 § narkotikastrafflagen (1968:64), narkotikasmuggling enligt 6 § första stycket lagen (2000:1225) om straff för smuggling, 3. brott som avses i 2 § andra stycket 2–7, eller 4. försök, förberedelse eller stämpling till brott som avses i 1–3, om en sådan gärning är belagd med straff. 	<p>The Code of Judicial Procedure</p> <p>27 chap. para. 19 (..) Secret tele-surveillance may be used in the preliminary investigation of:</p> <ol style="list-style-type: none"> 1. offences in respect of which a less severe sentence than six months imprisonment is not prescribed; 2. offences in violation of the 4th chapter 9c § of the Swedish Penal Code, child pornography crime not considered as petty according to 16th chapter 10a § of the Swedish Penal code, Penal Law on Narcotics (1968:64), 1 §, or narcotics offences in violation of the Law on Penalties for the Smuggling of Goods (1960:418), 6 § 1st Section; or 3. Crimes referred to in 2 § 2nd section part 2-7, or 4. Attempt, preparation, or conspiracy to commit an offence stated in 1-3 in respect of which a sentence is prescribed.
<p>Tryckfrihetsförordningen</p> <p>1 § Med tryckfrihet förstås varje svensk medborgares rätt att, utan några av myndighet eller annat allmänt organ i förväg lagda hinder, utgiva skrifter, att sedermera endast inför laglig domstol kunna tilltalas för deras innehåll, och att icke i annat fall kunna straffas därför, än om detta innehåll strider mot tydlig lag, given att bevara allmänt lugn, utan att återhålla allmän upplysning.</p>	<p>The Freedom of the Press Act</p> <p>1 chap. 1 § The freedom of the press is understood to mean the right of every Swedish citizen to publish written matter, without prior hindrance by a public authority or other public body, and not to be prosecuted thereafter on grounds of its content other than before a lawful court, or punished therefor other than because the content contravenes an express provision of law, enacted to preserve public order without</p>

<p>I överensstämmelse med de i första stycket angivna grunderna för en allmän tryckfrihet och till säkerställande av ett fritt meningsutbyte och en allsidig upplysning skall det stå varje svensk medborgare fritt att, med iakttagande av de bestämmelser som äro i denna förordning meddelade till skydd för enskild rätt och allmän säkerhet, i tryckt skrift yttra sina tankar och åsikter, offentliggöra allmänna handlingar samt meddela uppgifter och underrättelser i vad ämne som helst.</p> <p>Det skall ock stå envar fritt att, i alla de fall då ej annat är i denna förordning föreskrivet, meddela uppgifter och underrättelser i vad ämne som helst för offentliggörande i tryckt skrift till författare eller annan som är att anse som upphovsman till framställning i skriften, till skriftens utgivare eller, om för skriften finnes särskild redaktion, till denna eller till företag för yrkesmässig förmedling av nyheter eller andra meddelanden till periodiska skrifter.</p> <p>Vidare skall envar äga rätt att, om ej annat följer av denna förordning, anskaffa uppgifter och underrättelser i vad ämne som helst för att offentliggöra dem i tryckt skrift eller för att lämna meddelande som avses i föregående stycke.</p>	<p>suppressing information to the public.</p> <p>In accordance with the principles set out in paragraph one concerning freedom of the press for all, and to secure the free exchange of opinion and availability of comprehensive information, every Swedish citizen shall be free, subject to the rules contained in this Act for the protection of private rights and public safety, to express his thoughts and opinions in print, to publish official documents and to communicate information and intelligence on any subject whatsoever.</p> <p>All persons shall likewise be free, unless otherwise provided in this Act, to communicate information and intelligence on any subject whatsoever, for the purpose of publication in print, to an author or other person who may be deemed to be the originator of material contained in such printed matter, the editor or special editorial office, if any, of the printed matter, or an enterprise which professionally purveys news or other information to periodical publications.</p> <p>All persons shall furthermore have the right, unless otherwise provided in this Act, to procure information and intelligence on any subject whatsoever, for the purpose of publication in print, or in order to communicate information under the preceding paragraph.</p>
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1 kap. 3 § För missbruk av tryckfriheten eller medverkan däri må ej någon i annan ordning eller i annat fall än denna förordning bestämmer kunna tilltalas eller dömas till ansvar eller ersättningsskyldighet eller skriften konfiskeras eller läggas under beslag.

1 kap. 5 § Denna förordning äger tillämpning å skrift, som framställts i tryckpress. Den skall ock tillämpas å skrift, som mångfaldigats genom stencilering, fotokopiering eller liknande tekniskt förfarande, om

1. utgivningsbevis gäller för skriften; eller

2. skriften är försedd med beteckning, som utvisar att den är mångfaldigad, samt i anslutning därtill tydliga uppgifter om vem som har mångfaldigat skriften och om ort och år för mångfaldigandet.

Bestämmelse i förordningen som har avseende å skrift som framställts i tryckpress eller å tryckning skall, när ej annat angives, äga motsvarande tillämpning å annan skrift, varå förordningen enligt första stycket är tillämplig, eller å mångfaldigande av sådan skrift.

Till skrift hänföres bild, även om den ej åtföljes av text.

1 chap. para. 3 No person may be prosecuted, held liable under penal law, or held liable for damages, on account of an abuse of the freedom of the press or complicity therein, nor may the publication be confiscated or impounded other than as prescribed and in the cases specified in this Act.

1 chap. para. 5 This Act applies to all written matter produced using a printing press. It shall likewise apply to written matter duplicated by stencil, photocopying, or other like technical process, provided

1. a valid certificate of no legal impediment to publication exists in respect of the written matter; or

2. the written matter is supplied with a note indicating that it has been duplicated and, in association therewith, clear information concerning the identity of the person who duplicated it and the year and place of duplication.

Rules in this Act which refer to written matter produced using a printing press, or to printing, shall apply in like manner to other written matter to which the Act applies under paragraph one, or to the duplication of such matter, unless otherwise indicated.

Pictorial matter is classified as written matter even when there is no accompanying text.

<p>3 kap. 3 § Den som har tagit befattning med tillkomsten eller utgivningen av tryckt skrift eller med framställning som var avsedd att införas i tryckt skrift och den som har varit verksam inom företag för utgivning av tryckta skrifter eller inom företag för yrkesmässig förmedling av nyheter eller andra meddelanden till periodiska skrifter får inte röja vad han därvid erfarit om vem som är författare eller har lämnat meddelande enligt 1 kap. 1 § tredje stycket eller är utgivare av skrift som inte är periodisk.</p> <p>Tystnadsplikten enligt första stycket gäller inte</p> <ol style="list-style-type: none">1. om den till vars förmån tystnadsplikten gäller har samtyckt till att hans identitet röjs,2. om fråga om identiteten får väckas enligt 2 § första stycket,3. om det rör sig om brott som anges i 7 kap. 3 § första stycket 1,4. i den mån domstol, när det är fråga om brott enligt 7 kap. 2 § eller 3 § första stycket 2 eller 3, finner det erforderligt, att vid förhandling uppgift lämnas, huruvida den som är tilltalad eller skäligen misstänkt för den brottsliga gärningen har lämnat meddelandet eller medverkat till framställningen, eller	<p>3 chap. para. 3 A person who has engaged in the production or publication of printed matter, or material intended for insertion therein, and a person who has been active in an enterprise for the publication of printed matter, or an enterprise which professionally purveys news or other material to periodicals, may not disclose what has come to his knowledge in this connection concerning the identity of an author, a person who has communicated information under Chapter 1, Article 1, paragraph three, or an editor of non-periodical printed matter.</p> <p>The duty of confidentiality under paragraph one shall not apply</p> <ol style="list-style-type: none">1. if the person in whose favour the duty of confidentiality operates has given his consent to the disclosure of his identity;2. if the question of identity may be raised under Article 2, paragraph one;3. if the matter concerns an offence specified in Chapter 7, Article 3, paragraph one, point 1;4. unless, where the matter concerns an offence under Chapter 7, Article 2 or 3, paragraph one, point 2 or 3, a court of law deems it necessary for information to be produced during the proceedings as to whether the defendant, or the person
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5. i den mån domstol i annat fall av hänsyn till ett allmänt eller enskilt intresse finner det vara av synnerlig vikt att uppgift om identiteten lämnas vid vittnesförhör eller förhör med en part under sanningsförsäkran.

Vid förhör som avses i andra stycket 4 eller 5 skall rätten noga vaka över att frågor inte ställs som kan inkräkta på tystnadsplikten utöver vad som i varje särskilt fall är medgivet.

3 kap 4 § En myndighet eller ett annat allmänt organ får inte efterforska författaren till framställning som införts eller varit avsedd att införas i tryckt skrift, den som utgett eller avsett att utge framställning i sådan skrift eller den som lämnat meddelande enligt 1 kap. 1 § tredje stycket, i vidare mån än vad som erfordras för åtal eller annat ingripande mot honom som inte står i strid med denna förordning. Får efterforskning förekomma, ska den i 3 § angivna tystnadsplikten beaktas.

Inte heller får en myndighet eller ett annat allmänt organ ingripa mot någon för att han eller hon i en tryckt skrift har brukat sin tryckfrihet eller medverkat till ett sådant

suspected on reasonable grounds of the offence, has communicated information or contributed to an item; or

5. unless, in any other case, a court of law deems it to be of exceptional importance, having regard to a public or private interest, for information as to identity to be produced in testimony under oath or in testimony by a party in the proceedings under an affirmation made in lieu of oath.

In examination under paragraph two, point 4 or 5, the court shall scrupulously ensure that no questions are put which might encroach upon a duty of confidentiality in excess of what is permissible in each particular case.

3 chap. para. 4 No public authority or other public body may inquire into the identity of the author of material inserted, or intended for insertion, in printed matter, a person who has published, or who intends to publish, material in such matter, or a person who has communicated information under Chapter 1, Article 1, paragraph three, except insofar as this is necessary for the purpose of such prosecution or other action against him as is not contrary to the provisions of this Act. In cases in which such inquiries may be made, the duty of confidentiality under Article 3 shall be respected.

No public authority or other public body may intervene against someone because he or she has used the right of Freedom of Press in a printed media or has contributed

<p>bruk.</p> <p>7 kap. 3 § Om någon lämnar meddelande, som avses i 1 kap. 1 § tredje stycket, eller, utan att svara enligt 8 kap., medverkar till framställning, som är avsedd att införas i tryckt skrift, såsom författare eller annan upphovsman eller såsom utgivare och därigenom gör sig skyldig till</p> <ol style="list-style-type: none"> 1. högförräderi, spioneri, grovt spioneri, grov obehörig befattning med hemlig uppgift, uppror, landsförräderi, landssvек eller försök, förberedelse eller stämpling till sådant brott; 2. oriktigt utlämnande av allmän handling som ej är tillgänglig för envar eller tillhandahållande av sådan handling i strid med myndighets förbehåll vid dess utlämnande, när gärningen är uppsåtlig; eller 3. uppsåtligt åsidosättande av tystnadsplikt i de fall som angivas i särskild lag, <p>gäller om ansvar för sådant brott vad i lag är stadgat.</p> <p>Om någon anskaffar uppgift eller underrättelse i sådant syfte som avses i 1 kap. 1 § fjärde stycket och därigenom gör sig skyldig till brott som anges i förevarande paragrafs första stycke 1, gäller om ansvar härför vad i lag är stadgat.</p> <p>Det som föreskrivs i 2 kap. 22 § första stycket <i>regeringsformen</i> ska gälla också i fråga om förslag till föreskrifter som avses i första</p>	<p>to such.</p> <p>7 chap. para. 3 If a person communicates information under Chapter 1, Article 1, paragraph three, or if, without being responsible under the provisions of Chapter 8, he contributes to material intended for insertion in printed matter, as author or other originator or as editor, thereby rendering himself guilty of</p> <ol style="list-style-type: none"> 1. high treason, espionage, gross espionage, gross unauthorised trafficking in secret information, insurrection, treason or betrayal of country, or any attempt, preparation or conspiracy to commit such an offence; 2. wrongful release of an official document to which the public does not have access, or release of such a document in contravention of a restriction imposed by a public authority at the time of its release, where the act is deliberate; or 3. deliberate disregard of a duty of confidentiality, in cases specified in a special act of law; provisions of law concerning liability for such an offence apply. <p>If a person procures information or intelligence for a purpose referred to in Chapter 1, Article 1, paragraph four, thereby rendering himself guilty of an offence under paragraph one, point 1 of this Article, provisions of law concerning liability for such an offence apply.</p> <p>The provisions of Chapter 2, Article 12, paragraph three of the Instrument of</p>
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<p>stycket 3.</p> <p>9 kap. 2 § Justitiekanslern är ensam åklagare i mål om tryckfrihetsbrott. Ej må annan än Justitiekanslern inleda förundersökning rörande tryckfrihetsbrott. Endast Justitiekanslern och rätten äga besluta om tvångsmedel med anledning av misstanke om sådant brott, om ej annat är föreskrivet i denna förordning.</p> <p>Regeringen äger hos Justitiekanslern anmäla skrift till åtal för tryckfrihetsbrott. I lag må föreskrivas att allmänt åtal för tryckfrihetsbrott må väckas endast efter regeringens medgivande.</p> <p>Justitiekanslern är tillika ensam åklagare i annat tryckfrihetsmål än mål om tryckfrihetsbrott samt i mål som eljest avser brott mot bestämmelse i denna förordning; om befogenhet för Riksdagens ombudsman att vara åklagare i mål som nu angivits gäller dock vad i lag är stadgat.</p> <p>Yttrandefrihetsgrundlagen</p> <p>1 kap. 1 § Varje svensk medborgare är gentemot det allmänna tillförsäkrad rätt enligt denna grundlag att i ljudradio, television och vissa liknande överföringar, offentliga uppspelningar ur en databas samt filmer, videogram, ljudupptagningar och andra tekniska upptagningar offentligen</p>	<p>Government shall apply also in respect of proposals for provisions under paragraph one, point 3.</p> <p>9 chap. para. 2 The Chancellor of Justice is sole prosecutor in cases concerning offences against the freedom of the press. No one other than the Chancellor of Justice may institute prejudicial inquiries concerning offences against the freedom of the press.</p> <p>Only the Chancellor of Justice and the court of law may approve coercive measures on suspicion that such an offence has been committed, unless otherwise provided in this Act. The Government has the right to report printed matter to the Chancellor of Justice for prosecution on account of an offence against the freedom of the press.</p> <p>It may be laid down in an act of law that public criminal proceedings on account of an offence against the freedom of the press may be instituted only with the Government's consent.</p> <p>The Fundamental Law on Freedom of Expression</p> <p>1 chap. para. 1 Every Swedish citizen is guaranteed the right under this Fundamental Law, vis-à-vis the public institutions, publicly to express his thoughts, opinions and sentiments, and in general to communicate information on any subject whatsoever on sound radio, television and certain like transmissions, films, video recordings, sound</p>
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uttrycka tankar, åsikter och känslor och i övrigt lämna uppgifter i vilket ämne som helst.

Yttrandefriheten enligt denna grundlag har till ändamål att säkra ett fritt meningsutbyte, en fri och allsidig upplysning och ett fritt konstnärligt skapande. I den får inga andra begränsningar göras än de som följer av denna grundlag.

Vad som sägs i grundlagen om radioprogram gäller förutom program i ljudradio också program i television och innehållet i vissa andra överföringar av ljud, bild eller text som sker med hjälp av elektromagnetiska vågor samt innehållet i vissa offentliga uppspelningar ur en databas.

Med tekniska upptagningar avses i denna grundlag upptagningar som innehåller text, bild eller ljud och som kan läsas, avlyssnas eller på annat sätt uppfattas endast med tekniskt hjälpmedel.

Med databas avses i denna grundlag en samling av information lagrad för automatiserad behandling.

1 kap. 6 § Grundlagen är tillämplig på sändningar av radioprogram som är riktade till allmänheten och avsedda att tas emot med tekniska hjälpmedel. Som sändningar av radioprogram anses också tillhandahållande till allmänheten på särskild begäran av direktsända eller inspelade program, om starttidpunkten och innehållet inte kan påverkas av mottagaren.

I fråga om radioprogram som förmedlas genom satellitsändning som utgår från Sverige gäller vad som i denna grundlag

recordings and other technical recordings.

The purpose of freedom of expression under this Fundamental Law is to secure the free exchange of opinion, free and comprehensive information, and freedom of artistic creation. No restriction of this freedom shall be permitted other than such as follows from this Fundamental Law.

References in this Fundamental Law to radio programmes shall apply also to television programmes and to the content of certain other transmissions of sound, pictures or text made using electromagnetic waves, as well as to sound radio programmes.

Technical recordings are understood in this Fundamental Law to mean recordings containing text, pictures or sound which may be read, listened to or otherwise comprehended only using technical aids.

Database is understood in this Fundamental Law to mean a corpus of information stored for the purpose of automatic data processing.

1 chap. para. 6 This Fundamental Law applies to transmissions of radio programmes which are directed to the general public and intended for reception using technical aids. Such transmissions of radio programmes are understood to include also the provision of direct broadcasts and recorded programmes taken from a database.

In the case of radio programmes transmitted by satellite and emanating from Sweden, the provisions of this Fundamental Law concerning radio programmes in general

<p>föreskrivs om radioprogram i allmänhet.</p> <p>I lag får föreskrivas om undantag från denna grundlag i fråga om radioprogram som huvudsakligen är avsedda att tas emot utomlands och radioprogram som sänds genom tråd men inte är avsedda att tas emot av någon större allmänhet. Sådant undantag får dock inte gälla vad som föreskrivs i 2 och 3 §§</p> <p>2 kap. 1 § Upphovsmannen till ett radioprogram eller en teknisk upptagning är inte skyldig att röja sin identitet. Detsamma gäller den som har framträtt i en sådan framställning och den som har lämnat en uppgift enligt 1 kap. 2 §.</p> <p>2 kap. 3 § Den som har tagit befattning med tillkomsten eller spridningen av en framställning som utgjort eller varit avsedd att ingå i ett radioprogram eller en teknisk upptagning och den som har varit verksam på en nyhetsbyrå får inte röja vad han därvid har fått veta om vem som är upphovsman till framställningen eller har tillhandahållit den för offentliggörande eller om vem som har framträtt i den eller lämnat uppgifter enligt 1 kap. 2 §.</p> <p>Tystnadsplikten enligt första stycket gäller inte</p> <ol style="list-style-type: none"> 1. om den till vars förmån tystnadsplikten gäller har samtyckt till att hans identitet röjs, 2. om fråga om identiteten får väckas enligt 2 	<p>apply.</p> <p>Exceptions from this Fundamental Law in respect of radio programmes intended primarily for reception abroad and radio programmes transmitted by landline but not intended for reception by a wider public may be laid down in law. Such exceptions may not however relate to the provisions of Articles 2 and 3.</p> <p>2 chap. para. 1 The originator of a radio programme or technical recording is not obliged to disclose his identity. The same applies to a person taking part in such an item and to a person who has communicated information under Chapter 1, Article 2.</p> <p>2 chap. para. 3 A person who has been concerned in the production or dissemination of an item comprising or intended to form part of a radio programme or technical recording and a person who has been active in a news agency may not disclose what has come to his knowledge in this connection concerning the identity of the person who originated the item or made it available for publication, took part in it or communicated information under Chapter 1, Article 2.</p> <p>The duty of confidentiality under paragraph one does not apply</p> <ol style="list-style-type: none"> 1. if the person in whose favour the duty of confidentiality operates has given his consent to the disclosure of his identity; 2. if the question of identity may be raised
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<p>§ andra stycket,</p> <p>3. om det rör sig om brott som anges i 5 kap. 3 § första stycket 1,</p> <p>4. i den mån domstol, när det är fråga om brott enligt 5 kap. 2 § eller 3 § första stycket 2 eller 3, finner det erforderligt att vid förhandling uppgift lämnas, huruvida den som är tilltalad eller skäligen misstänkt för den brottsliga gärningen är den till vars förmån tystnadsplikten enligt första stycket gäller, eller</p> <p>5. i den mån domstol i annat fall av hänsyn till ett allmänt eller enskilt intresse finner det vara av synnerlig vikt att uppgift om identiteten lämnas vid vittnesförhör eller förhör med en part under sanningsförsäkran.</p> <p>Vid förhör som avses i andra stycket 4 eller 5 skall rätten noga vaka över att frågor inte ställs som kan inkräkta på tystnadsplikten utöver vad som i varje särskilt fall är me</p>	<p>under Article 2, paragraph two;</p> <p>3. if the matter concerns an offence specified in Chapter 5, Article 3, paragraph one, point 1;</p> <p>4. unless, where the matter concerns an offence under Chapter 5, Article 2 or 3, paragraph one, point 2 or 3, a court of law deems it necessary for information to be produced during the proceedings as to whether the defendant, or the person suspected on reasonable grounds of the offence, is the person in whose favour the duty of confidentiality operates under paragraph one; or</p> <p>5. unless, in any other case, a court of law deems it to be of exceptional importance, having regard to a public or private interest, for information as to identity to be produced in testimony under oath or testimony by a party in the proceedings under an affirmation made in lieu of oath. In examination under paragraph two, point 4 or 5, the court shall scrupulously ensure that no questions are put which might encroach upon a duty of confidentiality in excess of what is permissible in each particular case.</p>
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ELSA TURKEY

Contributors

National Coordinator

Deniz Yagzan

National Academic Coordinator

Sibel İnceođlu

Ulař Karan

National Researchers

Ataberk Özcan

Ayře Özge Erceiř

Ecem Kumsal Bařyurt

Süleyman Yasir Zorlu

Yasemin Seękin

Introduction to Freedom of Expression in Turkey

Every individual has the right to be informed, have access to news, freedom of thought, expression, and the right to criticise freely. Journalists' rights constitute the basis of the public's right to be informed and its freedom of expression. Freedom of expression constitutes the primary and basic element of the public order of a democratic society and freedom of press and publication, which is the main tool of freedom of thought and expression, is one of the basic human rights. It is a general rule that these rights should be guaranteed by the constitution in a democratic state.¹ This right constitutes the foundation of a democratic society and an indispensable requirement for its progress and the development of every individual. Free, independent and pluralist media are a necessary condition of any true democratic society. Democracy and good governance require accountability and transparency and, in this respect, media play an essential role in the public's scrutiny of public and private sectors in society.²

Journalists have the right of free access to all sources of information and the right to observe and research all phenomena that affect public life or are of interest to the public. This occupation group can refuse to answer information received by them or give evidence or specific questions because of the location of their profession.

The right of journalists not to disclose their sources of information is a professional privilege, intended to encourage sources to provide journalists with important information which they would not give without a commitment to confidentiality. According to the principle of protection of sources, the journalists cannot be enforced to reveal his or her sources or testify about them. The journalist may reveal the identity of his or her source in cases where he or she has been clearly deceived by the source.

On the basis of the European Convention on Human Rights and the European Court of Human Rights' case-law, member States have both negative and positive obligations to protect journalists. Not only must they refrain from intimidating political declarations or judicial practices against media actors, they also have the duty to actively grant them full protection of the law and the judiciary in order to create an enabling environment for their journalistic activities. To achieve implementation of the Council of Europe standards in all member States, a strong and specific legal framework is needed, along with an effective enforcement of the protection of media actors by the judiciary.³

The European Court of Human Rights has repeatedly emphasised that Article 10 of the European Convention on Human Rights safeguards not only the substance and contents of

¹ Turkish Journalists Declaration of Rights and Responsibilities

² Assembly debate on 25 January 2011 (4th Sitting) (see Doc. 12443, report of the Committee on Culture, Science and Education, rapporteur: Mr Johansson). Text adopted by the Assembly on 25 January 2011 (4th Sitting).

³ <http://www.coe.int/en/web/freedom-expression/safety-of-journalists>

information and ideas, but also the means of transmitting it. The press has been accorded the broadest scope of protection in the Court's case-law, including with regard to confidentiality of journalistic sources.

“Protection of journalistic sources is one of the basic conditions for press freedom. ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined, and the ability of the press to provide accurate and reliable information be adversely affected. ... An order of source disclosure ... cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.”⁴

Disclosure of sources is one of the more tricky areas for media lawyers and journalists. But the importance of sources to journalists cannot be understated: they are a reporter's meat and drink. Even more so is the confidential source, who asks for anonymity because more often than not they are an insider, a cuckoo in the nest, and whose job or livelihood may be at risk if they are identifiable.

Journalists would find it difficult to gain access to places and situations where they can report on matters of public interest and fulfill their role as watchdogs if they cannot when necessary give a strong and genuine promise of confidentiality to their sources. If they cannot guarantee a source's anonymity, then they may not be able to report at all.

As Lord Denning said, in a 1981 case (*British Steel Corporation v Granada Television Ltd*):

“If [newspapers] were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. Charlatans could not be exposed. Unfairness would go unremedied. Misdeeds in the corridors of power, in companies or in government departments would never be known.”⁵

1. Does the national legislation provide (explicit or otherwise) protection of the right of the journalists not to disclose their source of information? What type of legislation provides this protection? How exactly is this protection construed in national law?

Despite legal protections, media freedom in Turkey has steadily deteriorated over the last five years. Since 2013, Freedom House ranks Turkey as "Not Free". Reporters Without Borders rank

⁴ http://www.echr.coe.int/Documents/FS_Journalistic_sources_ENG.pdf

⁵ <http://journalism.cmpf.eu.eu/discussions/on-protection-of-journalistic-sources/>

Turkey at the 149th place over 180 countries, between Mexico and DR Congo, with a score of 44.16. In the third quarter of 2015, Bianet recorded a strengthening of attacks on the opposition media during AKP interim government, with the censorship of 101 websites, 40 Twitter accounts, 178 news; attacks against 21 journalists, three media organs, and one printing house; civil pursuits against 28 journalists; and the six-fold increase of arrests of media representatives, with 24 journalists and 9 distributors imprisoned.⁶

According to Freedom House

“The government enacted new laws that expanded both the state’s power to block websites and the surveillance capability of the National Intelligence Organization (MIT). Journalists faced unprecedented legal obstacles as the courts restricted reporting on corruption and national security issues. The authorities also continued to aggressively use the penal code, criminal defamation laws, and the antiterrorism law to crack down on journalists and media outlets. Verbal attacks on journalists by senior politicians—including Recep Tayyip Erdoğan, the incumbent prime minister who was elected president in August—were often followed by harassment and even death threats against the targeted journalists on social media. Meanwhile, the government continued to use the financial and other leverage it holds over media owners to influence coverage of politically sensitive issues. Several dozen journalists, including prominent columnists, lost their jobs as a result of such pressure during the year, and those who remained had to operate in a climate of increasing self-censorship and media polarisation.”

Constitutional guarantees of press freedom and freedom of expression are only partially upheld in practice. They are generally undermined by provisions in the penal code, the criminal procedure code, and the harsh, broadly worded antiterrorism law that effectively leave punishment of normal journalistic activity to the discretion of prosecutors and judges.

Article 285 of the Turkish Penal Code (TPC) criminalises the ‘violation of confidentiality.’ Article 288 of the TPC criminalises ‘influencing the independence of the judiciary.’ These Articles have been used to prosecute journalists reporting on the same criminal activities that are the subject of witness protection laws.

For example, in 2007, thousands of cases were filed against journalists for claimed violations of the TPC when reporting on the criminal behavior of the Ergenekon (a criminal network accused of various terrorist activities). Turkish newspapers, the Zaman Daily, the Star Daily and the Yeni Saraf are currently involved in up to 185, 150 and 100 court cases respectively in relation to claimed breaches of confidentiality in reporting on the Ergenekon.

⁶ <https://freedomhouse.org/report/freedom-press/2015/turkey>

Moreover, in Turkish Legislation, the sanctions on the right of non-disclosure and the protections on this matter are as followed:

- Turkish Press Law, Article 12 states that “the owner of periodicals, responsible manager and the author cannot be forced to disclose their source of information and testify in the law court.”
- Constitution of Rep. of Turkey, Article XXVI Section II: (As amended on October 3, 2001; Act No. 4709) The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.

At the Parliamentary Justice Commission in May 2012, it was recommended that harsher penalties of two to five years imprisonment be adopted for journalists who report on secretly taped voice recordings posted online by whistle-blowers.

Further to this, News Source of Turkish Press Law Article 12 states that “the owner of the periodical, responsible editor, and owner of the publication cannot be forced to either disclose their news sources or to legally testify on this issue.” Under this article, academicians and legal workers consider the core of the definition of journalistic source.

2. Is there, in domestic law, a provision that prohibits a journalist from disclosing his/her sources? How exactly is this prohibition construed in national law? What is the sanction?

News Source of Turkish Press Law Article 12 states that “the owner of the periodical, responsible editor, and owner of the publication cannot be forced to either disclose their news sources or to legally testify on this issue.” According to this article, district attorney (*turkish : savcı*) and court may ask for the sources of journalists, however, shall not force journalists to disclose their sources and moreover, journalists have all right to deny courts’ request on the disclosure of the journalistic sources.

In addition to that, there are several articles under the Turkish Criminal Code, concerning prohibitions of the disclosure of journalistic sources. These are as follows:

Turkish Criminal Code, Article CXXIV

- Section I: In case of unlawful prevention of communication among the persons, the offender is sentenced to imprisonment from six years to two years or imposed punitive fine.

- Section II: Any person who unlawfully prevents communication among the public institutions is punished with imprisonment from one year to five years.
- Section III: Punishment is imposed according to the provisions of second subsection in case of unlawful prevention of broadcasts or announcements of all kinds of press and publication organs.
- Turkish Criminal Code, Article CXXXII
 - Section I: 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.
 - Section II: Any person who unlawfully publicizes the contents of communication between the persons is punished with imprisonment from one year to three years.
 - Section III: 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,
 - Section IV: 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.
- Turkish Criminal Code, Article CXXXIII:
 - Section I: 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.
 - Section II: 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.
 - Section III: 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.
- Turkish Criminal Code, Article CXXXVI
 - Section I: 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.

Turkish Law On The Right To Information, Law No: 4982

Article 8: The information and documents that are published or disclosed to the public either through publication, brochure, proclamation or other similar means, may not be made the subject of an application for access to information. However, the applicant will be informed of the date, the means and the place of the publication or disclosure of the information or the document.

Article 16: The information and documents which qualify as state secrets which their disclosure clearly cause harm to the security of the state or foreign affairs or national defence and national security are out of the scope of the right to information provided herein.

Article 17: The information or documents of which their disclosure cause harm to the economical interests of the state or will cause unfair competition or enrichment, are out of the scope of this law.

Article 19: The information or the document that is related to the administrative investigation held by the administrative authorities and which will;

- a) clearly violate the right of privacy of the individuals,
- b) endanger the security or the life of the individuals or the officials that carry out the investigation,
- c) jeopardise the security of the investigation,
- d) disclose the source of the information which needs to be kept secret, or endanger the procurement of similar information in connection with the investigation,

are out of the scope of this Law.

Article 20: The information or the document of which its disclosure or untimely disclosure will

- a) give rise to a criminal offence,
- b) endanger prevention and investigation of the crime or endanger the legal procedure for the detention and the prosecution of the criminals,
- c) obstruct the proper operation judicial duty.
- d) violate right to fair trial of a defendant in a pending case

are out of the scope of this law.

Article 21: With the provision where the consent of the concerned individual has been received, the information and documents that will unjustly interfere with the health records, private and family life, honour and dignity, and the economical and professional interests of an individual, are out of the scope of the right to information.

Due to public interest considerations, personal information or documents may be disclosed by the institutions on the condition that concerned individual is notified of the disclosure at least 7 days in advance and his/her written consent is obtained.

3. Who is a “journalist” according to the national legislation? Is it in your view a restricted definition for the purpose of the protection of journalistic sources? What is the scope of protection of other media actors? Is the protection of journalists’ sources extended to anyone else?

According to the Turkish Press Labor Law No. 212, Article 1 states that:

“ This law shall apply to who is employed in all manner of literary and artistic activities at newspapers, periodical, news and photography agencies and who is working outside the statement of definition of the ‘worker’ on Turkish Labor Law.

Within the bound of this law, people who are employed in the literary and artistic activities are called journalist.”

In this context, the Turkish Journalists Declaration of Rights and Responsibilities by the Association of Turkish Journalists (TGS) which is the only trade union with the authority to negotiate collective agreements for journalists in Turkey establishes:

“Any individual whose job is to gather, process, communicate news or express opinion, ideas and views regularly at a daily or periodical printed, video, audio, electronic or digital medium employed on a fulltime, contractual or copyright basis and whose main employment and means of livelihood consist of this job, and who is defined as such by the legislation that covers the functioning of the organization at which he or she is employed is a journalist.

All enterprises functioning in the field of press and publication are obliged to recognise the rights granted to journalists by law.”⁷

By law, the union can only recruit journalists as defined under Law 212. If a media employer does not provide a contract under this law, the employee is unable to obtain a press card (i.e. the yellow card) and cannot join the TGS. The union is limited in its potential to build its membership by this legal restriction.

In accordance with Turkish law, journalists working for newspapers, periodicals, news and photography agencies and news departments of radio and television companies have the right to join the TGS. However, in addition to Law 212, the threat of victimisation and dismissal discourages union membership.

In order to further understand the scope of protection of other media actors, a further look at the elements of Turkish Press Law. According to Article 1 of the Turkish Press Law, the aim of the law is to arrange freedom of the press and the implementation and the law just covers the printing and publication of printed matter. (Turkish Press Law, No. 5187, Article 1)

Article 2 of the Law 5187 states to definitions of the elements that are covered by the law:

“The implementation of the Press Law includes the following:

- a) Printed matter: All articles, images and similar material as well as publications of news agencies printed using printing equipment or copied with other equipment with the aim of publication.
- b) The act of publication: The presentation of a published work to the public.
- c) Periodicals: Regularly published printed matter such as newspapers and magazines and the releases of news agencies.
- d) Nationwide periodicals: Periodicals published by a single press organization in at least 70% of the country, that is, in at least one province in each geographical region, and the publications of news agencies.

⁷ *Turkish Journalists Declaration of Rights and Responsibilities*(1998) [Electronic Version].

- e) Regional periodicals: Periodicals printed by a single press organization and published in at least three neighboring provinces or in at least one geographical region.
- f) Local periodicals: Periodicals published in a single settlement, and nationwide or regional periodicals published on a weekly basis or at longer intervals.
- g) The form of the publication: It must be indicated whether these periodicals are nationwide, regional or local.
- h) Non-periodicals: Printed matter such as books, presents which are not published at regular intervals.
- i) Owner of the material: The individual who writes the news or the text which forms the content of the periodical or the non-periodical, the translator or the person who produces the image or the cartoon.
- j) Publisher: The real or corporate body that prepares and publishes printed matter.
- k) Printer: The real or corporate body that prints the matter with printing equipment or copies it with other equipment.
- l) Authorized representative of the corporate body: If the owner of the publication or the publisher is a corporate body, the authorized organ will designate a real person from among the managers, or the public institutions and organizations will designate a real person. ”

As is seen the law limits, enumerates and defines the actors of media, also not mentions about neither journalists' sources nor protection of journalists' sources. Likewise, there is a specific article about the protection of journalists' sources under the subject 'News Source', which is Article 12 of the Law 5187 refers to the owner of the periodical, responsible editor, and owner of the publication that they cannot be forced to either disclose their news sources or to legally testify on this issue. Grammatical interpretation of the law indicates the protection of journalists' sources cannot be extended to anyone else besides the people mentioned in the Article 12 of the Law 5187. It seems the definition of journalist is too restrictive because of terminological and etymological description. On the other hand there are some developments. Turkey adopted a freedom of information law in 2003. However, state secrets that may harm national security, economic interests, state investigations, or intelligence activity, or that “violate the private life of the individual,” are exempt from requests. In practice, access to official information remains challenging.

4. What are the legal safeguards for the protection of journalistic sources? How are the laws implemented? How are the legal safeguards combined with self-regulatory mechanisms?

The Special Rapporteur on Freedom of Expression, recently emphasised: “ensuring that journalists can carry out their work means not only preventing attacks against journalists and prosecuting those responsible, but also creating an environment where independent, free and pluralistic media can flourish and journalists are not placed at risk of imprisonment.” In this context, journalists should not be forced to declare their sources and they should not be punished by law.

Article 26, as amended on October 3, 2001 by Act No. 4709, states that the exercise of the freedom of expression and dissemination of thought may be restricted “for the purpose of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary”. The majority of Turkey’s violations of Article 10 of the European Convention on Human Rights (ECHR) arise from the exceedingly wide “margin of appreciation” and lack of proportionality in the interpretation and implementation in delivering judgements.-

In reference to fourth principle; In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of establishing the truth or otherwise of the allegation, all evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist.⁸ In that case; under which conditions the journalist will be expected to do an explanation? First of all, such a request is made only by the authorities or the people having the direct legal interest. Besides, journalists should be informed about this topic. Any sanctions against a journalist who refuses to disclose the identity of a source should only be applied by an impartial court after a fair trial, and should be subject to appeal to a higher court.⁹

5. In the respective national legislation are the limits of non-disclosure of the information in line with the principles of the Recommendation No R (2000) 7? What are the procedures applied? Is the disclosure limited to exceptional circumstances, taking into consideration vital public or individual interests at stake? Do the authorities first search for and apply alternative measures, which adequately protect their respective rights and interests and at the same time are less intrusive with regard to the right of journalists not to disclose information?

⁸ (International Standards: Regulation of Media Workers, 2012)

⁹ İlkiz, F. (2008, February). *Journalists' Sources are Confidential*. Bianet.org: <http://bianet.org/bianet/ifade-ozgurlugu/105129-haber-kaynagi-gizlidir>

The Special Rapporteur on Freedom of Expression, recently emphasised: “[e]nsuring that journalists can carry out their work means not only preventing attacks against journalists and prosecuting those responsible, but also creating an environment where independent, free and pluralistic media can flourish and journalists are not placed at risk of imprisonment.”¹⁰ In this context, journalists should not be forced to declare their sources and they should not be punished by law.

Since the case of *Goodwin v UK*, the European Court of Human Rights has given priority to the protection of journalistic sources as “one of the basic conditions for press freedom”. The court held that:

“Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.”¹¹

5.1. Constitution

The freedom of expression and dissemination of thought are issued by Article 26 of Turkish Constitution, which follows as: *“Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing.”*

As is seen, Article 26 of Constitution mentions, this freedom is not obstacle to make such as television, radio, visual and audio communication tools as well as newspapers, magazines, printed media tools by means of mass communication a subject to permission by government. Furthermore, when considered in the context of the right to disseminate thought and ideas have also arisen the close relationship of freedom of expression and press freedom.¹²

Article 26, as amended on October 3, 2001 by Act No. 4709, states that the exercise of the freedom of expression and dissemination of thought may be restricted “for the purpose of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the

¹⁰ Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank la Rue, 4 June 2012, A/HRC/20/17 at para 78.

¹¹ European Court of Human Rights, *Goodwin v UK*, Application No 17488/90, Judgment of 27 March 1996, para 39.

¹² Ulusoy, Demet Celik(2013). A Comparative Study of the Freedom of Expression in Turkey and EU. Ankara University, Faculty of Political Science The Turkish Yearbook of International Relations, 68.

reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary”. According to Demet Celik Ulusoy, the majority of Turkey’s violations of Article 10 of the European Convention on Human Rights (ECHR) arise from the exceedingly wide “margin of appreciation” and lack of proportionality in the interpretation and implementation in delivering judgements.¹³

Actually, there is a separate article concerning freedom of the press. Article 28 of Constitution expresses that:

“The press is free, and shall not be censored. The establishment of a printing house shall not be subject to prior permission or the deposit of a financial guarantee.”

Although the press is considered as free judicially, the State shall take the necessary measures to ensure freedom of the press and provisions of Articles 26 and 27 of Constitution shall apply as the limitation of freedom of the press.

Article 28 of the Constitution states that anyone who writes any news or articles which threaten the internal or external security of the State or the indivisible integrity of the State with its territory and nation, which tend to incite offence, riot or insurrection, or which refer to classified state secrets or has them printed, and anyone who prints or transmits such news or articles to others for the purposes above, shall be held responsible under the law relevant to these offences. Distribution may be prevented as a precautionary measure by the decision of a judge, or in case delay is deemed prejudicial, by the competent authority explicitly designated by law.

The article also refers to the limits specified by law. Except by the decision of judge issued within the limits specified by law, there would be no ban placed on the reporting of events, to ensure proper functioning of the judiciary. Article 28 of the Constitution follows as:

“Periodical and non-periodical publications may be seized by a decision of a judge in cases of ongoing investigation or prosecution of crimes specified by law; or by order of the competent authority explicitly designated by law, in situations where delay may constitute a prejudice with respect to the protection of the indivisible integrity of the State with its territory and nation, national security, public order or public morals and for the prevention of crime. The competent authority issuing the order to seize shall notify a competent judge of its decision within twenty-four hours at the latest; the order to seize shall become null and void unless upheld by a judge within forty-eight hours at the latest.

General provisions shall apply when seizing and confiscating periodicals and non-periodicals for reasons of criminal investigation and prosecution.

Periodicals published in Turkey may be temporarily suspended by court ruling if found to contain material which contravenes the indivisible integrity of the State with its territory and nation, the fundamental principles of the Republic, national security and public morals. Any publication which clearly bears the characteristics of being a continuation of a suspended periodical is prohibited; and shall be seized by decision of a judge.”

¹³ Ulusoy, Demet Celik(2013). A Comparative Study of the Freedom of Expression in Turkey and EU. Ankara University, Faculty of Political Science The Turkish Yearbook of International Relations, 68.

Besides these regulations, Articles 29 and 30 of the Constitution issue “Right to publish periodicals and non-periodicals”¹⁴ and “Protection of printing facilities”¹⁵.

According to the Principle 3 of the Recommendation No R (2000) 7, the right of journalists not to disclose information identifying a source must not be subject to other restrictions. However, those mentioned in Article 10, paragraph 2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of Article 10, paragraph 2 of the Convention should outweigh the public interest in not disclosing information identifying a source and competent authorities of member States must pay particular regard to the importance of the right and also the pre-eminence given to it in the case-law of the European Court of Human Rights, and may only order a disclosure if there is an existence of an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.

As the Principle 3 of the Recommendation No R (2000) 7, freedom of expression is regulated in Article 10 of the Convention. In this regard, paragraph 2 of the article regulates the duties and responsibilities and limitation of the freedom of expression.

According to the Convention, the limitation must be based on reasons which are stated in the 2nd paragraph of the Article 10:

“...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.”

Consequently, Constitution of the Republic of Turkey regulates this freedom and comparing with Convention, there are no excessive differences between them.

5.2. Penal Law

Constitutional guarantees of freedom of the press and expression are only partially upheld in practice. They are also generally undermined by provisions in the Penal Code and a strict Anti-Terror Law. Turkish law does not meet press freedom standards as laid out in the European

¹⁴ Art. 29; “Publication of periodicals or non-periodicals shall not be subject to prior authorization or the deposit of a financial guarantee. Submission of the information and documents specified by law to the competent authority designated by law is sufficient to publish a periodical. If these information and documents are found to contravene the laws, the competent authority shall apply to the court for suspension of publication.

The principles regarding the publication, the conditions of publication and the financial resources of periodicals, and the profession of journalism shall be regulated by law. The law shall not impose any political, economic, financial, and technical conditions obstructing or making difficult the free dissemination of news, thoughts, or opinions. Periodicals shall have equal access to the means and facilities of the State, other public corporate bodies, and their agencies. ”

¹⁵ Art. 30- “(As amended on May 7, 2004; Act No. 5170) A printing house and its annexes, duly established as a press enterprise under law, and press equipment shall not be seized, confiscated, or barred from operation on the grounds of having been used in a crime. ”

Convention on Human Rights (ECHR).¹⁶ Countries that are party to the European Council, have automatically agreed to follow ECHR and observe its regulations. The restrictive Penal Code overshadows positive reforms that have been implemented since Turkey became an EU candidate (Freedom house: 2012).

According to the Turkish Penal Code, press and broadcast are described as all kinds of written, visual, audio and electronic means used for public announcements.

Article 125 of the Penal Code refers that:

“Any person who acts with the intention to harm the honor, reputation or dignity of another person through concrete performance or giving impression of intent, is sentenced to imprisonment from three months to two years or imposed punitive fine. The offender is subject to above stipulated punishment in case of commission of offense in writing or by use of audio or visual means directed to the aggrieved party.”

According to Judgement No. 1577(2007), Council of Europe Parliamentary Assembly determined some of member countries, such as Turkey and Azerbaijan, have prison sentence for offence of libel and the Assembly expressed their opinion to change the prison sentence immediately. Also, Turkey had been summoned by Council of Europe Parliamentary Assembly about misuse of penal prosecution, protection of freedom of state attorneys and also to change Article 125/2 of Turkish Penal Code. Nevertheless, in practice, Article 125/3 is still applicable and as a matter of fact, nowadays people are jailed pending trial in regard to Article 299¹⁷ which regulates “Insulting President” and these practices are perturbative for the democratic constitutional state.¹⁸

Defamation cases against journalists who criticize the government have been brought by high level officials, including the Prime Minister. In 2011, 24 journalists were sentenced to a total of 21 years and nine months of imprisonment and 48,000 TL in fines in defamation cases. Two newspapers were fined to a total of 50,000 TL. The European Court of Human Rights (ECtHR) found a violation of freedom of expression in their judgment of this issue in February 2012.¹⁹ Additionally, Art. 215 and 216, continue to be used against reporters and journalists. Article 216 states that:

“1) Any person who openly provokes a group of people belonging to different social class, religion, race, sect, or coming from another origin, to be rancorous or hostile

¹⁶ STAV Ragnhild, FRETHEIM Ragnhild (2013). Press ethics and perceptions of journalism in Turkey,23.

¹⁷ Article 299 of the Penal Code:” 1. *Any person who publicly denigrates Turkishness, the Republic or the Grand National Assembly of Turkey shall be sentenced to 6 months to 3 years of imprisonment.*

2. *Any person who publicly denigrates the Government of Republic of Turkey, the judicial institutions of the State, the military or security organizations shall be sentenced to 6 months to 2 years imprisonment.*

3. *Where denigration of Turkishness is committed by a Turkish citizen in another country, the sentence shall be increased by one third.*

4. *Expression of thoughts intended to criticize shall not constitute a crime.”*

¹⁸ TEZCAN/ERDEM/ONOK(2015). Ceza Özel Hukuku, p.531.

¹⁹ STAV Ragnhild, FRETHEIM Ragnhild (2013). Press ethics and perceptions of journalism in Turkey,24.

against another group, is punished with imprisonment from one year to three years in case of such act causes risk from the aspect of public safety.

(2) Any person who openly humiliates another person just because he belongs to different social class, religion, race, sect, or comes from another origin, is punished with imprisonment from six months to one year.

(3) Any person who openly disrespects the religious belief of group is punished with imprisonment from six months to one year if such act causes potential risk for public peace.”

Uygun emphasised that the cases concerning freedom of expression discussed in Article 216/1 should apply for a fourstage evaluation: a- having a characteristic hostility and inciting to hatred through the content of the expression; b- due to the characteristic of the owner of the expression (such as an important political leader) it has a provocative opinion that effects a particular segment of the population; c- The form of the announcement of the expressions (such as television broadcasting, publications in national newspapers); d- the situation made of the expression (such as the presence of intense terrorist activity).²⁰

Indecency is issued by Article 226 of the Penal Code. According to Article 226/2, the persons who publicise indecent scenes, words or articles through press and broadcast organs or act as intermediary in publication of the same is punished with imprisonment from six months to three years.

The most widely debated and criticised provision of the Penal Code has been Article 301²¹, indeed, “denigrating the Turkish nation” is considered to be a criminal offence. For instance, the offices of Ahmet Alper Görmüs, the editor of the weekly magazine Nokta, were raided, equipment searched and journalists interrogated in 2007, after it had published stories about the military blacklisting journalists based on a leaked report prepared by the Office of the Chief of General Staff. The owners of the newspaper and the editor were prosecuted for libel, while two others were charged with inciting disrespect against the military. The magazine closed under military pressure.²²

²⁰ Oktay Uygun, “Avrupa İnsan Hakları Sözleşmesi ve Türk Hukukunda İfade Özgürlüğünün Sınırlanması”,Kamu Hukuku Gncelemeleri, 2. Edition , 2013, Istanbul, p.153-154.

²¹ ARTICLE 301:”(1) Any person who agrees to serve in the army of a country which is at war with Turkish Republic, or Turkish citizen who participates in an armed attack against Turkish Republic, is punished with life imprisonment.

(2) Any citizen who undertakes commanding duty in the army of a foreign country is punished with heavy life imprisonment.

(3) In case of commission of another offense along with the offenses defined in first and second subsection, the offender is additionally punished according to the provisions relating to this offense.

(4) No punishment is imposed for the citizen who is obliged to serve in the army of a foreign country due to his presence in the territory of the enemy at the time of the war. Provocation of war against the State.”

²² JOHANSSON Morgan(2010). The protection of journalists' sources ,7. Revealed on 21.02.2016 <http://www.refworld.org/pdfid/4d87520b2.pdf>

As Orhan Pamuk said: “If we are going to enjoy freedom of expression in Turkey, Article 301 should be reconsidered. This law and another law about ‘general national interests’ were put into the new penal code as secret guns. They were not displayed to the international community but nicely kept in a drawer, ready for action in case they decided to hit someone in the head. These laws should be changed, and changed fast, before the EU and the international community puts pressure on Turkey to do so. We have to learn to reform before others warn us”.

Also Dr. Bulent Algan mentioned in his research that:

‘...In a nutshell, article 301 has great importance for not only its juridical aspect, but also political. In other words, its application can vary dramatically subject to changes in political atmosphere and legal or interpretative attitudes in the field of civil and political rights, especially in the field of freedom of expression. Legal texts in such content can easily be interpreted by adjudicators in a liberticidal and draconian manner. Its application, then, is strictly related to the structure of the state and how basic rights and their limits are understood by the sovereign powers, especially by the judiciary...’²³

According to the Turkish Penal Code, failure of public officer in notification of an offense is issued as a crime. Article 278 mentions that if any public officer neglects or delays in notification of an offense to the authorized bodies being aware of commission of an offense which requires investigation or prosecution, is punished with imprisonment from six months to two years. Besides that, Article 284 states to recording of sound or vision which is also a crime that 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.

5.3. Anti-Terror Law

According to Demet Ulusoy, generally the Anti-Terror Law (Law no. 3713) confronts the limitation of the freedom of expression and the judgements of oppression against Turkey in the front of the ECHR. In such cases in the front of the ECHR concerning with the Law, it must be remembered the ATL Article 6/2,²⁴ Article 6/5,²⁵ and Article Law 7/2²⁶.

ATL is the law that the case against Turkey grounded from Article 10 of the Convention causing violation articles by the ECHR in the following; Article 6, Paragraph 2; “...print or publish declarations or leaflets emanating from terrorist organisations..”, Article 6, paragraph 5:

²³ ALGAN Bulent, The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey. Retrieved on: https://www.researchgate.net/publication/47276770_The_Brand_New_Version_of_Article_301_of_Turkish_Penal_Code_and_the_Future_of_Freedom_of_Expression_Cases_in_Turkey?enrichId=rgreq-73116d25-83d4-4c63b359627dfc9e5e62&enrichSource=Y292ZXJQYWdlOzQ3Mjc2NzZwO0FTOjI1OTM0NDE1OTczNTgwOUAxNDM4ODQzODc0MjI4&el=1_x_2 12 January 2016.

²⁴ The ECHR Gözel and Özer v. Turkey, (6 July 2010) judgement.

²⁵ Ürper and Others v. Turkey (20 of October 2009)

²⁶ Gül and Others v. Turkey, (June 8, 2010)

“Periodicals whose content openly encourages the commission of offenses within the framework of the activities of a terrorist organisation, approves of the offenses committed by a terrorist organisation or its members or constitutes propaganda in favor of the terrorist organisation may be suspended for a period of fifteen days to one month as a preventive measure by decision of a judge...”, and also Article 7; “Making propaganda for a terrorist organisation.”²⁷

Even freedom of the press and freedom of expression are constitutionally guaranteed, this may only apply partially in practice. As it always has been in Turkey is that the constitutional guarantees undermined by restrictive provisions of the laws such as Anti-Terror Law and the Penal Law.

Consequentially as Ragnhild Stav has mentioned: *Instead of having a well-functioning self-regulation mechanism, Turkey has a well-functioning governmental-regulated press. It is not well functioning in the sense that journalists themselves want it to be this way, but in the sense that the government succeed in functioning as a regulating mechanism for the press. The fact that the government regulates the press, results in a lot of self-censorship. The government regulates the press through different media laws, and through the Penal Code and the Anti-Terror Law.*²⁸

It is a positive step to include the right of journalist not to disclose journalistic sources in Turkish Press Law but unfortunately not enough. In addition to this regulation, it is required to inset a provision of journalists into Article 46 Criminal Procedure Code(TCPC)²⁹ of Turkish which regulates refraining from testimony because of professional privilege and privilege caused by permanent occupation. Because of not mentioning journalists in Article 46 of TCPC, sources that could disclose journalistic sources are not included in Article 126 of TCPC³⁰ which regulates letters and documents immune from seizure and also journalists are in danger to be tried under

²⁷ Karakaya and Özhabes, p. 14.

²⁸ STAV Ragnhild, FRETHEIM Ragnhild (2013). Press ethics and perceptions of journalism in Turkey,²⁷.

²⁹ Article 46:”The persons who have the right of refraining from taking the witness-stand because of their professions or their permanent occupations, as well as the subject matter and the conditions of refraining are listed below ;

a) The lawyers or their apprentices or assistants about the information they have learned in their professional capacity or during their judicial duty,
b) Medical doctors, dentists, pharmacist and their assistants, as well as other members of the medical profession, about their patients’ information and that of the relatives of the patients that they acquired in their capacity as a professional,
c) Certified public accountants and notary publics in respect to information of their clients that they acquired in their capacity as a professional.

(2) Except for those mentioned in the sub-section (a) of the subparagraph above, those persons shall not refrain from taking the witness-stand if the related person gives his consent.”

³⁰ Letters and documents immune from seizure Article 126: “Letters and documents communicated between the suspect or the accused and those persons capable of asserting a privilege to refrain from testimony as a witness in accordance with the provisions of Articles 45 and 46 may not be seized as long as such items are at the hands of persons who have this privilege.”

Article 278 and Article 284 of Turkish Penal Code. In recent years, several journalists were sent to jail even their crimes were not detected yet. For example, on 9 February, Claus Blok Thomsen, a Danish journalist working for daily newspaper Politiken, was detained by Turkish authorities at the Istanbul airport and then barred from entering Turkey. He was travelling to the country to report on refugees at the Turkish-Syrian border. At the airport, Thomsen allegedly identified himself as a journalist and then the police forced him to open his phone and computer, undermining the confidentiality of his sources.³¹

Various international organizations such as the Organization for Security and Co-operation in Europe (OSCE), the European Federation of Journalists and the Council of Europe (CoE) has pointed out the situation in Turkey, and has called on the government to take the necessary measures to ensure press freedom in the country.

The European Parliament published a critical report in March 2011, naming cases against journalists as 'police or judicial harassment' and expressing concern about 'the deterioration in freedom of the press, about certain acts of censorship and about growing self-censorship within the Turkish media, including on the Internet'. The Turkish Prime Minister blames the report for being biased and subjective, stating that the imprisoned journalists were behind the bars not because of their journalistic activities but 'because of their relations with terrorist organizations, and their attempts to topple the government.' Prime Minister Erdogan also protested RSF's World Press Freedom Index, which in their 2013 report rated Turkey as 154 out of 179 countries, which also means that Turkey dropped six places from 2012. Also in "The World Press Freedom Index" (WPFI) published by Reporters Without Borders (2013), they have found that in almost all parts of the world, influential countries that are regarded as "regional models" have fallen in the index. In the name of the fight against terrorism, Turkey is the country which has the most journalists in prison.³² In 2016 WPFI, Turkey has regressed 151st row.³³ Since 2013, Freedom House ranks Turkey as not free.³⁴

According to ECHR court data, the image of the freedom of expression was not considered well in the eye of the ECHR. The court has delivered a judgement that the freedom of expression was violated in 224 cases between 1959 and 2013 in Turkey. The 2nd rank belongs to the unity of 34 cases containing violations made by a government. The number of the violation of freedom of expression in Turkey in the year 2013 is only 9. The same number is 3 for the following country. Turkey took place in the 1st rank.³⁵

³¹ <http://politiken.dk/udland/ECE3064094/tilbageholdt-og-smidt-ud-politiken-journalist-bliver-kaldt-trussel-mod-tyrkiets-sikkerhed/>

³² <https://www.freedomhouse.org/sites/default/files/FOTP%202013%20Booklet%20Final%20Complete%20-%20Web.pdf>

³³ <https://rsf.org/en/turkey>

³⁴ https://en.wikipedia.org/wiki/Media_freedom_in_Turkey

³⁵ ECHR Reports, "Overview 1959-2013 ECHR", Violation judgments by State.

Since 1959, the European Court has sentenced Turkey for 248 violations of the freedom of expression, however, the government reactions to these rulings are reluctant. Responding to the Court's decision to overturn the ban on the social media platform Twitter in March 2014, Prime Minister Erdogan affirmed: "We have to obey the Court's decision, but we don't have to respect it. While the court sided with an American company in this decision, it denigrated our national values" (Today Zaman, 2015).

After three consecutive electoral victories by the Justice and Development Party (AKP), in 2002, 2007 and 2011, Turkey has inevitably undertaken the path towards a highly centralised executive democracy in which the state dominates society. As President Erdogan himself stated, during an interview to Milliyet, "Democracy is like a tram. You ride it until you arrive at your destination, then you step off". Today, the unparalleled power the President has gained makes us believe that he has long ago said goodbye to that tram. With the majority in parliament and an ample public consent, Erdogan keeps ruling with the upper hand on any opponent, be him peaceful or riotous (Cook, 2013).

6. In the Recommendation No R (2000) 7, the following principles should be respected when the necessity of disclosure is stated: absence of reasonable alternative measures, outweighing legitimate interest (protection of human life, prevention of major crime, defence of a person accused or convicted of having committed a major crime). Under which criteria can the interest in the disclosure outweigh the interest in the non-disclosure?

According to European Court of Human Rights's decision, the protection of journalistic sources as one of the generally accepted principles of press freedom is a fundamental principle which is reflected in the various international legal instruments; as mentioned in R (2000) The Committee of Ministers Recommendation No. 7. The most recent and comprehensive Council of Europe document in this regard is R (2000) No. 7 "Recommendation on the right of journalists not to disclose their source of information. In light of this decision except vital exceptional circumstances, there is no requirement of the journalist to disclose the source of information and news.

There is a need to provide additional information. According to Article 90 of the Turkish constitution says "International agreements duly put into effect have 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. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.

Perhaps the most crucial of Recommendation's principles is the requirement to balance interests: even when there is a strong public interest in uncovering the identity of a source, the vital function of the protection of sources in a democracy should not be overlooked.³⁶ The media depend to a large extent on members of the public for the supply of information of public interest. If it is required to talk about it, public interest according to the Random House Dictionary, is "1. the welfare or well-being of the general public; commonwealth. 2. appeal or relevance to the general populace: a news story of public interest." For instance, when an important criminal proceeding is at stake, courts may find that the public interest is better served by compelling the reporter to make evident.

Public authorities must not demand the disclosure of information identifying a source unless the requirements of Article 10, paragraph 2, of the Convention are met and unless it can be convincingly established that reasonable alternative measures to disclosure do not exist or have been exhausted, the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, and an overriding requirement of the need for disclosure is proved.³⁷

The disclosure of information identifying a source should therefore be limited to exceptional circumstances where vital public or individual interests are at stake and can be convincingly established. The competent authorities, requesting exceptionally the disclosure of a source, must specify the reasons why such vital interest outweighs the interest in the non-disclosure and whether alternative measures have been exhausted, such as other evidence. If sources are protected against any disclosure under national law, their disclosure must not be requested.³⁸

In this case, it is essential to recognise whether the intervention corresponds to mandatory and social requirements, is proportionate to the legitimate aim and reasons raised by the national authorities are appropriate and sufficient to justify it. The interest in disclosure should always be balanced against the harm of ordering disclosure to freedom of expression.

According to the first principle in the Recommendation; state parties should provide in their legal order, The right to freedom of expression as a "minimum standard". Governments are required to protect journalists' rights in "clear" and "in a detailed manner".

Even if required by law that explaining of a news source within the one subject to the limitations in the internal legal order; even assuming the public interest superior to the right to not disclose sources, the competent authorities of the Member States should give special attention to the importance of the right of not to disclose source of information and absolute superiority

³⁶ (International Standards: Regulation of Media Workers, 2012)

³⁷ Origin - Assembly debate on 25 January 2011 (4th Sitting) (see Doc. 12443, report of the Committee on Culture, Science and Education, rapporteur: Mr Johansson). Text adopted by the Assembly on 25 January 2011 (4th Sitting).

³⁸ Origin - Assembly debate on 25 January 2011 (4th Sitting) (see Doc. 12443, report of the Committee on Culture, Science and Education, rapporteur: Mr Johansson). Text adopted by the Assembly on 25 January 2011 (4th Sitting).

recognised to this right in the Human Rights Court case law. Well, the first condition is the news should enter to restriction indicated in paragraph 2 of Article 10.

If the benefits that the announcement of the news source will bring are superior and conditions exhibit “adequately essential” and “serious” character, the competent national authorities should make a decision in the way of explanation of aforementioned source of news.

This decision should be a satisfactory decision. In other words, the government should be tried and consumed all the alternative routes before taking decision in this direction. The legal interest obtained by the disclosure of news source is required to pass public benefit arising from the disclosure of the source. This requirement must be proved and response to a fundamental social need. Governments have margin of appreciation in these matters and can apply this right in the direction of explaining the sources. The case of this margin of appreciation’s violation the right of freedom of expression is subject to inspection by European Court of Human Rights.

When the Turkish Constitution is examined, it is clearly visible that there are provisions containing similar restrictions. For instance, Article 13, concerning restriction of fundamental rights and freedoms says (As amended on October 3, 2001; Act No. 4709) “Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence.” and the Article 26 concerning freedom of expression and dissemination of thought envisage that “the exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.”³⁹ The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law.” In addition to this, the control of the the constitutionality of the laws has been undertaken by the Constitutional Court.

In reference to the fourth principle; In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of establishing the truth or otherwise of the allegation, all evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist.⁴⁰

In that case; under which conditions the journalist will be expected to do an explanation? First of all, such a request is made only by the authorities or the people having the direct legal interest.

³⁹ Gönenç, D. L. (2010). *Control of Conformity of Laws with Constitution and Judicial Review*. www.tepav.org.tr: http://www.tepav.org.tr/upload/files/1295967249-5.Yasalarin_Anayasaya_Uygunlugunun_Denetimi_ve_Anayasa_Yargisi.pdf

⁴⁰ (International Standards: Regulation of Media Workers, 2012)

Besides, journalists should be informed about this topic. Any sanctions against a journalist who refuses to disclose the identity of a source should only be applied by an impartial court after a fair trial, and should be subject to appeal to a higher court.⁴¹

In the act of obtaining the news stating the source by security forces or legal authorities, sixth principle of the Recommendation recommends taking some precautions in the way to prevent mentioned news use as evidence in the subsequent courts even if it does not pose the purpose of these actions.

Journalists correspondence and interviews must not be hindered. Therefore, “monitoring and surveilling” decisions or similar precautions and search and other official reports, correspondence and written report on the business activities obtained as a result of the search conducted in the journalists residence and work places has been the violation of law with sixth principle. In other words, it is recommended that these proceeding accepted "obtained through unlawful means" should not be used as “evidence” in the courts.

When re-examining Turkish law, it is encountered in the Turkish Criminal Code that tapping and recording of conversations between the individual in unlawful way is subject to sanction. Article 133, Section 3 notes that “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.”

Considering the importance of the protection of sources for press freedom in a democratic society and the potential freezing impact of the order of not to disclose the sources, unless it is subjected to higher demand from the public interest, such a regulation is contradictory to Article 10.⁴²

As a general principle, “the necessity” imposing any restrictions on freedom of expression should be established in convincing manner. Was the interference "necessary in a democratic society"? At this point, *the Sunday Times v. The United Kingdom* (No. 2) should be examined. T argument before the Court was concentrated on the question whether the interference complained of could be regarded as "necessary in a democratic society". In this connection, the Court's judgments relating to Article 10 (art. 10) – starting with *Handyside* (7 December 1976; Series A no. 24), concluding, most recently, with *Oberschlick* (23 May 1991; Series A no. 204) and including, amongst several others, *Sunday Times* (26 April 1979; Series A no. 30) and *Lingens* (8 July 1986; Series A no. 103) - enounce the following major principles.

(a) Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or

⁴¹ İlkiz, F. (2008, February). *Journalists' Sources are Confidential*. Bianet.org: <http://bianet.org/bianet/ifade-ozgurlugu/105129-haber-kaynagi-gizlidir>

⁴² İlkiz, F. (2008, February). *Journalists' Sources are Confidential*. Bianet.org: <http://bianet.org/bianet/ifade-ozgurlugu/105129-haber-kaynagi-gizlidir>

"ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.

(b) These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, *inter alia*, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".

(c) The adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (art. 10).

(d) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".⁴³

All in all, the framework of the amendments made in constitution and other laws concerning freedom of expression is established by Turkey's National Programme for the Adoption of European Union Acquis.

According to the case-law of the European Court of Human Rights, not compelling the media to disclose the source of news is required for fulfilling the function of the press in a democratic society and no injuring of the right to public information. In this context, these articles are intended to ensure compliance with the jurisprudence of the European Court of Human Rights. Upon analysing the the Turkish case law, according to the Supreme Court, the freedom of the press is limited with reality, actuality, public interest and the intellectual commitment rules between the subject and the expression. In case, real and current news having a public interest

⁴³ Judgment by the European Court of Human Rights ,case of Sunday Times v. The United Kingdom (no.2), A Series no. 217, pages 28-29, § 50

in the publication eliminates illegality. When making evaluations whether there is an attack on personal rights and freedom of assessment, the post must be considered as a whole.⁴⁴

In the Turkish Criminal Code it is clearly seen such a crime, Article 327 named with Disclosure of confidential information: 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. 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.⁴⁵

However, such a case where the public interest is superior journalists can not be forced to say that from where the provided information related to state security. The public interest is respected by journalists rather than state.

Although, the boundaries of press freedom being drawn, a jurisprudence relating to the disclosure of the resources have not yet seen in the Turkish Case Law. Turkish legal system does not follow the line of Recommendations (particularly 2000 7) even two famous journalists Can Dündar and Erdem Gül are penalised for this reason.

7. In the light of the case law of the European Court of Human Rights how do national courts apply the respective laws with regard to the right to protect sources? In particular, how do they balance the different interests at stake?

At the beginning of the legal protective mechanisms, first and foremost comes the assurance of an audit by an independent and impartial judge and decision-making body. As we gave reference to the Article 90 of Turkish Constitution, Turkish national courts are bound to apply ECtHR jurisprudence when its laws conflict with freedom. Moreover, it is underlined in the Press Law (Law No: 5187), Article 12 that "the owner of the periodical, responsible editor, and owner of the publication cannot be forced to either disclose their news sources or to legally testify on this issue." This principle is written in the law. According to second paragraph of Article 26 and fifth paragraph of Article 28 of the Constitution, expression and press freedom can be limited in the aim of "National security", "prevention of crime", "punishment of the guilty," "not to disclose the information duly classified as a state secret" and "to prevent the disclosure of confidential information belonging to the state".⁴⁶

⁴⁴ Turkish Supreme Court, General Law Assembly, E.2002/4-115,K.2002/151, 06.03.2002

⁴⁵ Hafizogulları Prof.Z, Turkish Criminal Law, An Overview of State Secrets, (2010) <http://www.ankarabarasu.org.tr/siteler/ankarabarasu/tekmakale/2010-1/2010-1-hafizogullari.pdf>

⁴⁶ Turkish Constitutional Court, N. 2015/18567, E.Gul-C.Dundar Case 25/2/2016

In the crucial case of *Goodwin v. United Kingdom*, the European Court of Human Rights ruled that an attempt to force a journalist to reveal his source for a news story violated his right to receive and impart information, and hence the right to freedom of expression. It considered that orders to disclose sources reduce the flow of information, to the detriment of democracy and are, therefore, only justifiable in very exceptional cases.

Journalists are free to seek access to and maintain contacts with, public and private sources of information and that their need for professional confidentiality is respected.⁴⁷

As reviewed in the tenth article of European Convention on Human Rights, it is clear that not only the protection of freedom of publication but also expanding the concept of the protection of fundamental research for which preliminary investigative journalism and The recent jurisprudence of the European Court of Human Rights should be placed in accordance with domestic law.

Events, cases and applications are likely to point to violations of the law in Turkey. To show this fact, the example of the draft of National Intelligence Organization Law can be given. According to Turkish Journalists' Association, whether the draft will be enacted, the freedom of press will be damaged. It will not be done news on the activities of this organisation and the right of journalists not to disclose their sources will be eliminated in respect of all news.

When international law and Turkish law are considered together, all people who can identify the source of information while obtaining during the collection of information, editorial review or the dissemination should benefit this protection. Academic studies also failed due to the poor Turkish jurisprudence on this issue.

8. What are the criteria for using electronic surveillance and anti-terrorism laws, which may include measures such as interceptions of communications, surveillance actions and search or seizure actions in order to identify journalists' sources of information? Are the national law provisions accessible, precise, foreseeable and include clear legislative norms in the context of surveillance and anti-terrorism provisions?

The right of journalists not to disclose their sources applies also to sources from within the police or judicial authorities. Where such provision of information to journalists was illegal, police and judicial authorities must pursue internal investigations instead of asking journalists to disclose their sources International law increasingly recognises that information collected or

⁴⁷ International Standards: Regulation of Media Workers, 2012

created for journalistic purposes enjoys a special degree of protection from search and seizure by the authorities. There are various justifications for according journalists stronger immunity against search and seizure than others.

In the first place, there is an obvious risk that the police will use the power to search premises as a means to circumvent the protection of sources. A search and seizure operation whose purpose is to uncover the identity of an anonymous source is particularly objectionable. Not only does it prejudice a question which should normally be ruled on by a court, after carefully weighing both sides of the argument; it is also far more intrusive than a court order to disclose a source's identity. This point was underscored by the European Court of Human Rights, in the case of *Roemen and Schmit v. Luxembourg*. The Court considers that, even if unproductive, a search conducted with a view to uncover a journalist's source is a more drastic measure than an order to divulge the source's identity. This is because investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist. The Court ... thus considers that the searches of the first applicant's home and workplace undermined the protection of sources to an even greater extent than the measures in issue in *Goodwin*.^{48 49}

The European Court, in its judgment of 15 July 2003, has come to the conclusion that the searches and seizures violated the protection of journalistic sources guaranteed by the right to freedom of expression and 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, an issue which called for the most careful scrutiny by the Court.⁵⁰

Legal proceedings directed towards the seizure of the working papers of an individual journalist, or the premises of the newspaper or television programme publishing his or her reports, or the threat of such proceedings, tend to inhibit discussion. When a genuine investigation into possible corrupt or reprehensible activities by a public authority is being investigated by the media, compelling evidence is normally needed to demonstrate that the public interest would be served by such proceedings. Otherwise, to the public disadvantage, legitimate inquiry and discussion, and 'the safety valve of effective investigative journalism' ... would be discouraged, perhaps stifled.⁵¹

⁴⁸ International Standards: Regulation of Media Workers, 2012

⁴⁹ *Roemen and Schmit v. Luxembourg*, 25 February 2003, Application No. 51772/99 (European Court of Human Rights), para. 57. For the *Goodwin* case, see section 6.1.6.1.

⁵⁰ Judgment by the European Court of Human Rights (Second Section), case of *Ernst and others v. Belgium*, Application no. 33400/96 of 15 July 2003

⁵¹ Ex parte the Guardian, the Observer and Martin Bright, [2001] 2 All ER 244, 262.

Concerns like these have led several countries to specify a separate procedure in their code of criminal procedure for the search and seizure of journalistic premises and materials. This procedure usually has most or all of the following characteristics: search warrants may only be issued by a judge, who must balance the importance of the search against the importance of preventing harm to the right to gather news. No warrants may be issued if the same goal can be achieved in a way less detrimental to freedom of expression. No warrants may be issued for the seizure of material covered by the protection of sources, except in very exceptional circumstances. Moreover, the police must be accompanied on their search by a judge or prosecutor.

It is very important to underline that assisting member states in analysing and improving their legislation on the protection of the confidentiality of journalists' sources, in particular by supporting the review of their national laws on surveillance, anti-terrorism, data retention and access to telecommunications records.⁵²

If we examine Article 135 of the Turkish Code of Criminal Procedure concerning location, listening and recording of correspondence, it rules that “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.”

Moreover, the Article 132 of Turkish Criminal Code concerning Violation of Communicational Secrecy determines that “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 realised 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 publicises 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.

The Article 124 of Turkish Criminal Code regarding the prevention of communication says “In case of unlawful prevention of communication among the persons, the offender is sentenced to

⁵² Guidelines of the Committee of Ministers of the Council of Europe on protecting Freedom of Expression and Information in Times of Crisis (Adopted by the Committee of Ministers on 26 September 2007 at the 1005th meeting of the Ministers' Deputies)

imprisonment from six years to two years or imposed punitive fine. Any person who unlawfully prevents communication among the public institutions is punished with imprisonment from one year to five years. Punishment is imposed according to the provisions of second subsection in case of unlawful prevention of broadcasts or announcements of all kinds of press and publication organ

According to Demet Ulusoy, generally the Anti-Terror Law (Law no. 3713) confronts the limitation of the freedom of expression and the judgements of oppression against Turkey in the front of the ECHR. In such cases in the front of the ECHR concerning the Law, it must be remembered the ATL Article 6/2,⁵³ Article 6/5,⁵⁴ and Article Law 7/2⁵⁵.

ATL is the law that the case against Turkey grounded from Article 10 of the Convention causing violation articles by the ECHR in the following; Article 6, Paragraph 2; "...print or publish declarations or leaflets emanating from terrorist organisations..", Article 6, paragraph 5: "Periodicals whose content openly encourages the commission of offenses within the framework of the activities of a terrorist organisation, approves of the offenses committed by a terrorist organisation or its members or constitutes propaganda in favor of the terrorist organisation may be suspended for a period of fifteen days to one month as a preventive measure by decision of a judge...", and also Article 7; "Making propaganda for a terrorist organisation."⁵⁶

9. Can journalists rely on encryption and anonymity online to protect themselves and their sources against surveillance?

The surveillance of people especially journalists are very common in 21st century. The technology to keep an eye on the journalists is sold everywhere across globe and the surveillance programmes are used by governments, companies and individuals such as hackers. Online censorship, mass and targeted surveillance and data collection, digital attacks on civil society and repression resulting from online expression force individuals around the world to seek security to hold opinions without interference and seek, receive and impart information and ideas of all kinds.⁵⁷ Many try to protect themselves through encryption, anonymity online and at rest (hard drives, cloud etc.). Encryption and anonymity, today's leading vehicles for online security, provide individuals with a means to protect their privacy, empowering them to browse, read, develop and share opinions and information without interference and enabling journalists, civil society organisations, members of ethnic or religious groups, those persecuted because of their sexual orientation or gender identity, activists, scholars, artists and others to exercise the rights to freedom of opinion and expression.⁵⁸ So, encryption and anonymity is a way for the journalists

⁵³ The ECHR, Gözel and Özer v. Turkey, (6 July 2010) judgement.

⁵⁴ Ürper and Others v. Turkey (20 of October 2009)

⁵⁵ Gül and Others v. Turkey, (June 8, 2010)

⁵⁶ Karakaya and Özhabes, p. 14.

⁵⁷ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, p.1

⁵⁸ Ibid, p.1

to shield themselves and their sources from surveillance and harassment. However, encryption protects the content of communications but not identifying factors such as the Internet Protocol (IP) address, known as metadata. Third parties may gather significant information concerning an individual's identity through metadata analysis if the user does not employ anonymity tools. Anonymity is the condition of avoiding identification.⁵⁹ In other words, encryption and anonymity, separately or together, create a zone of privacy to protect opinion and belief.⁶⁰

The human rights legal framework for encryption and anonymity are evaluated in respect to the rights of privacy⁶¹ and freedom of opinion and expression⁶² which are regulated in different universal human rights instruments. Also national legislations also protect the rights of privacy and freedom of opinion and expression with constitutional and basic laws. In Turkey, notwithstanding the fact that there exists no legal framework specifically regulating the protection of personal data, the Constitution and several other laws provisions to safeguard the protection of personal data. Moreover as to “the ability of individuals and organisations to employ encryption tools in order to secure their transactions and communications online” Article 39 of the Law on Electronic Communications (no.5809), titled “encoded and encrypted communications” provides that “the following institutions are authorised to conduct encrypted communications on wireless communications systems: Turkish Armed Forces, the General Command of the Gendarmie, the Coast Guard Command, the National Intelligence Organization, the general Directorate of Security and the Ministry of Foreign Affairs. The procedure and principles relating to how other institutions and organisations and real and legal persons may carry out encoded and encrypted communications through electronic communications means shall be determined by the Institution (Institution of Information Technologies and Communications)”.⁶³ So legal persons and journalists can use encrypted technologies only under certain circumstances where the Institution can give permission. In practical the Institution does not give permission easily so thus journalists and real person can not use encrypted devices in practise. Also, according to article 5 of the “Regulation on the procedure and principles relating to encoded and encrypted communications within the electronic communication services by public institutions and organizations, real and legal persons” (enacted in 2010) real persons such as journalists can use encrypted communication in accordance with the provisions of the regulation. According to the article 7 of the abovementioned regulation the Institution of Information Technologies and Communications

⁵⁹ Ibid, p.4

⁶⁰ Ibid, p.5

⁶¹ Article 12 of the Universal Declaration of Human Rights, article 17 of the International Covenant on Civil and Political Rights, article 16 of the Convention on the Rights of the Child, article 22 of the Convention on the Rights of Persons with Disabilities, article 14 of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, article 8 of the European Convention on Human Rights and article 11 of the American Convention on Human Rights protect the right to privacy.

⁶² Article 19 of the Universal Declaration and the International Covenant on Civil and Political Rights, article 9 of the African Charter on Human and Peoples' Rights, article 13 of the American Convention on Human Rights and article 10 of the European Convention on Human Rights protect freedom of expression.

⁶³ Informaitve nore regarding measures taken by the Turkish Government in the context of the relationship between freedom of expression and the right to privacy in the digital context, 2015

evaluates the application to use encryption programmes. Article 6 regulates the requirements for creating encoded and encrypted communications and pursuant to this article the creators of the encoded and encrypted communication should not have been violated the unity and territorial integrity of state, committed crimes against the security of the state and main principles of Republic, committed crimes against the constitutional order, committed crimes such as corruption, theft, espionage, fraud, smuggling and be sentenced in accordance with Anti-terror law. So the Institution will assess the application within these conditions and has the discretionary power on the result of the application. Also, the encrypted and encoded devices which are imported from other countries can be used after sharing the code to the Institution in other words the Institution has again the right to give the permission on usage of any encoded and encrypted devices.

In cases of anonymity, there are not provisions covering the anonymity under the constitution and press law. The anonymity of journalists are not regulated specifically only the right to communicate and right of expression is regulated in several articles under constitution and laws. All in all encryption and anonymity, and the security concepts behind them, provide the privacy and security necessary for the exercise of the right to freedom of opinion and expression in the digital age. Such security may be essential for the exercise of other rights, including economic rights, privacy, due process, freedom of peaceful assembly and association, and the right to life and bodily integrity. Because of their importance to the rights to freedom of opinion and expression, restrictions on encryption and anonymity must be strictly limited according to principles of legality, necessity, proportionality and legitimacy in objective.

10. Are whistle-blowers (muhbir) explicitly protected under law protecting journalistic sources? Is there another practice protecting whistle-blowers? Is the legislation prohibiting authorities and companies from identifying whistle-blowers?

There are some provisions in several laws regulating the press and the press freedom however obviously there is no specific law regarding the protecting journalistic sources in Turkey. Also whistle-blowers are not protected under any national law protecting journalistic sources.

Also, the implementation of UNCAC (United Nations Convention against Corruption) Article 32 and 33 which are about the protection of whistle-blowers is not implemented and the provisions enforced in practise is poor according to Turkey: Civil Society Report by Transparency International Turkey An input to the UNCAC Implementation Review Mechanism: Fourth year of review of UNCAC chapters III and IV. Also according to the EU Commission Report on Turkey 2015 “whistleblowing is rare given the inadequate protection by the current law” and “whistle-blowers are obliged to rely on ad hoc provisions of the witness protection law as there is no comprehensive law in either the public or private sector.”

The only law regulating the press and press freedom is Press Law (No. 5187) which is enacted in 2004. The aim of this law is mentioned in the first article of the Press Law:

Article 1– The aim of the Press Law is to arrange freedom of the press and the implementation of this freedom.

The press freedom also includes the protection of the whistle-blowers and journalistic sources. The whistle-blowers are one of the journalistic sources and therefore the whistle-blowers should be protected by the law regulating the press freedom.

Whistle-blowers can be called as reporters who deliver journalists different useful informations from several sources. However, whistle-blowers are disreputable in Turkey because of their job providing information to the journalists and if these informations are about the government security or secrets of an important person then the journalist publishing these informations will be under the surveillance of the government.

As abovementioned the whistle-blowers are one of the journalistic sources and should be protected under the law also there should be a legislation prohibiting authorities and companies from identifying whistle-blowers. There is actually one article protecting whistle-blowers implicitly in the Press Law which is article 12.

Journalistic Sources

Article 12 - The owner of the periodical, responsible editor, and owner of the publication cannot be forced to either disclose their journalistic sources or to legally testify on this issue.

This article indirectly protects the whistle-blowers when the whistle blowers are considered as a journalistic source. Additionally this article helps to keep the identity of the whistle-blowers secret by giving right to the editors and owners of the publication not to denounce. So this legislation also prohibits authorities and companies from identifying whistle-blowers by protecting the journalistic sources all the way.

11. Conclusion

Conditions for media freedom in Turkey continued to deteriorate in 2014 after several years of decline. The government enacted new laws that expanded both the state's power to block websites and the surveillance capability of the National Intelligence Organization (MİT). Journalists faced unprecedented legal obstacles as the courts restricted reporting on corruption and national security issues. The authorities also continued to aggressively use the penal code, criminal defamation laws, and the antiterrorism law to crack down on journalists and media outlets.

According to government data, there are approximately 3,100 newspapers operating in Turkey, including some 180 national papers; however, only about 15 percent of these are published daily, and many have small circulations. Independent domestic and foreign print media are able to carry diverse views, including criticism of the government and its policies, though Turkish print outlets contain a high proportion of columns and opinion articles as opposed to pure news.

Furthermore, press freedom in Turkey was categorized as "under siege", by the Committee to Protect Journalists (CPJ). This is because of increasing numbers of journalists in jail, violence against journalists on the rise, and critical news outlets officially harassed or obstructed.

Currently, constitutional guarantees of press freedom and freedom of expression are only partially upheld in practice. They are generally undermined by provisions in the penal code, the criminal procedure code, and the harsh, broadly worded antiterrorism law that effectively leave punishment of normal journalistic activity to the discretion of prosecutors and judges.

12. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

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- European Court of Human Rights, *Goodwin v UK*, Application No 17488/90, Judgment of 27 March 1996, para 39.
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- Art. 29; *“Publication of periodicals or non-periodicals shall not be subject to prior authorization or the deposit of a financial guarantee. Submission of the information and documents specified by law to the competent authority designated by law is sufficient to publish a periodical. If these information and documents are found to contravene the laws, the competent authority shall apply to the court for suspension of publication.*
- *The principles regarding the publication, the conditions of publication and the financial resources of periodicals, and the profession of journalism shall be regulated by law. The law shall not impose any political, economic, financial, and technical conditions obstructing or making difficult the free dissemination of news, thoughts, or opinions. Periodicals shall have equal access to the means and facilities of the State, other public corporate bodies, and their agencies. ”*
- Art. 30- *“(As amended on May 7, 2004; Act No. 5170) A printing house and its annexes, duly established as a press enterprise under law, and press equipment shall not be seized, confiscated, or barred from operation on the grounds of having been used in a crime. ”*
- STAV Ragnhild, FRETHEIM Ragnhild (2013). Press ethics and perceptions of journalism in Turkey,23.

- Article 299 of the Penal Code:” 1. *Any person who publicly denigrates Turkishness, the Republic or the Grand National Assembly of Turkey shall be sentenced to 6 months to 3 years of imprisonment.*
2. *Any person who publicly denigrates the Government of Republic of Turkey, the judicial institutions of the State, the military or security organizations shall be sentenced to 6 months to 2 years imprisonment.*
3. *Where denigration of Turkishness is committed by a Turkish citizen in another country, the sentence shall be increased by one third.*
4. *Expression of thoughts intended to criticize shall not constitute a crime.”*
- TEZCAN/ERDEM/ONOK(2015). Ceza Özel Hukuku, p.531.
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- ARTICLE 301:”(1) Any person who agrees to serve in the army of a country which is at war with Turkish Republic, or Turkish citizen who participates in an armed attack against Turkish Republic, is punished with life imprisonment.
(2) Any citizen who undertakes commanding duty in the army of a foreign country is punished with heavy life imprisonment.
(3) In case of commission of another offense along with the offenses defined in first and second subsection, the offender is additionally punished according to the provisions relating to this offense.
(4) No punishment is imposed for the citizen who is obliged to serve in the army of a foreign country due to his presence in the territory of the enemy at the time of the war. Provocation of war against the State.”
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- The ECHR Gözel and Özer v. Turkey, (6 July 2010) judgement.
- Ürper and Others v. Turkey (20 of October 2009)
- Gül and Others v. Turkey, (June 8, 2010)
- Karakaya and Özhabes, p. 14.
- STAV Ragnhild, FRETHEIM Ragnhild (2013). Press ethics and perceptions of journalism in Turkey,27.
- Article 46:”The persons who have the right of refraining from ta king the witness-stand because of their professions or their permanent occupations, as well as the subject matter and the conditions of refraining are listed below ;
a) The lawyers or their apprentices or assistants about the information they have learned in their professional capacity or during their judicial duty,

- b) Medical doctors, dentists, pharmacist and their assistants, as well as other members of the medical profession, about their patients' information and that of the relatives of the patients that they acquired in their capacity as a professional,
- c) Certified public accountants and notary publics in respect to information of their clients that they acquired in their capacity as a professional.
- (2) Except for those mentioned in the sub-section (a) of the subparagraph above, those persons shall not refrain from taking the witness-stand if the related person gives his consent.”
 - Letters and documents immune from seizure Article 126: “Letters and documents communicated between the suspect or the accused and those persons capable of asserting a privilege to refrain from testimony as a witness in accordance with the provisions of Articles 45 and 46 may not be seized as long as such items are at the hands of persons who have this privilege.”
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- International Standards: Regulation of Media Workers, 2012
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- Judgment by the European Court of Human Rights (Second Section), case of Ernst and others v. Belgium, Application no. 33400/96 of 15 July 2003
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- Article 19 of the Universal Declaration and the International Covenant on Civil and Political Rights, article 9 of the African Charter on Human and Peoples' Rights, article 13 of the American Convention on Human Rights and article 10 of the European Convention on Human Rights protect freedom of expression.
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13. Table of Provisions

Provisions in native language	Corresponding translation
<p>Türkiye Cumhuriyeti Anayasası Madde 90:</p> <p>Usulüne göre yürürlüğe konulmuş milletlerarası andlaşmalar kanun hükmündedir. Bunlar hakkında Anayasaya aykırılık iddiası ile Anayasa Mahkemesine başvurulamaz. (Ek cümle: 7/5/2004-5170/7 md.) Usulüne göre yürürlüğe konulmuş temel hak ve özgürlüklere ilişkin milletlerarası andlaşmalarla kanunların aynı konuda farklı hükümler içermesi nedeniyle çıkabilecek uyuşmazlıklarda milletlerarası andlaşma hükümleri esas alınır.</p>	<p>Constitution of Turkish Republic, Article 90: International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard</p> <p>to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international</p> <p>agreements shall prevail.</p>
<p>Türkiye Cumhuriyeti Anayasası Madde 13: Temel hak ve hürriyetler, özlerine dokunulmaksızın yalnızca Anayasanın ilgili maddelerinde belirtilen sebeplere bağlı olarak ve ancak kanunla sınırlanabilir. Bu sınırlamalar, Anayasanın sözüne ve ruhuna, demokratik toplum düzeninin ve lâik Cumhuriyetin gereklerine ve ölçülülük ilkesine aykırı olamaz.</p>	<p>Constitution of Turkish Republic Article 13: Fundamental rights and freedoms may be restricted only by</p> <p>law and in conformity with the reasons mentioned in the relevant</p> <p>articles of the Constitution without infringing upon their essence.</p>

<p>Türk Ceza Kanunu Madde 327:</p> <p>Devletin güvenliği veya iç veya dış siyasal yararları bakımından, niteliği itibarıyla, gizli kalması gereken bilgileri temin eden kimseye üç yıldan sekiz yıla kadar hapis cezası verilir.</p>	<p>Turkish Criminal Code Article 327:</p> <p>Disclosure of confidential information: 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.</p>
<p>Basın Kanunu Madde 12</p> <p>Madde 12- Süreli yayın sahibi, sorumlu müdür ve eser sahibi, bilgi ve belge dahil her türlü haber kaynaklarını açıklamaya ve bu konuda tanıklık yapmaya zorlanamaz.</p>	<p>Turkish Press Law Article 12: the owner of the periodical, responsible editor, and owner of the publication cannot be forced to either disclose their news sources or to legally testify on this issue.</p>
<p>Türkiye Cumhuriyeti Anayasası Madde 26: Herkes, düşünce ve kanaatlerini söz, yazı, resim veya başka yollarla tek başına veya toplu olarak açıklama ve yayma hakkına sahiptir. Bu hürriyet resmî makamların müdahalesi olmaksızın haber veya fikir almak ya da vermek serbestliğini de kapsar. Bu fıkra hükmü, radyo, televizyon, sinema veya benzeri yollarla yapılan yayımların izin sistemine bağlanmasına engel değildir.</p> <p>(Değişik: 3/10/2001-4709/9 md.) Bu hürriyetlerin kullanılması, millî güvenlik, kamu düzeni, kamu güvenliği, Cumhuriyetin temel nitelikleri ve Devletin ülkesi ve milleti ile bölünmez bütünlüğünün korunması, suçların önlenmesi, suçluların cezalandırılması, Devlet sırrı olarak usulünce belirtilmiş bilgilerin açıklanmaması, başkalarının şöhret veya</p>	<p>Constitution of Turkish Republic Article 26: Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing.</p> <p>(As amended on October 3, 2001; Act No. 4709)</p>

<p>haklarının, özel ve aile hayatlarının yahut kanunun öngördüğü meslek sırlarının korunması veya yargılama görevinin gereğine uygun olarak yerine getirilmesi amaçlarıyla sınırlanabilir.</p> <p>(Mülga: 3/10/2001-4709/9 md.)</p> <p>Haber ve düşünceleri yayma araçlarının kullanılmasına ilişkin düzenleyici hükümler, bunların yayımını engellemek kaydıyla, düşünceyi açıklama ve yayma hürriyetinin sınırlanması sayılmaz.</p> <p>(Ek fıkra: 3/10/2001-4709/9 md.) Düşünceyi açıklama ve yayma hürriyetinin kullanılmasında uygulanacak şekil, şart ve usuller kanunla düzenlenir.</p>	<p>The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of</p> <p>the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation</p> <p>or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.</p> <p>(Repealed on October 3, 2001; Act No. 4709)</p> <p>Regulatory provisions concerning the use of means to</p> <p>disseminate information and thoughts shall not be deemed as the restriction of freedom of expression and dissemination of thoughts as long as the transmission of information and thoughts is not prevented.</p> <p>(Paragraph added on October 3, 2001; Act No. 4709) The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law.</p>
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Türkiye Cumhuriyeti Anayasası Madde 28:

Basın hürdür, sansür edilemez. Basımevi kurmak izin alma ve malî teminat yatırma şartına bağlanamaz.

(Mülga: 3/10/2001-4709/10 md.)

Devlet, basın ve haber alma hürriyetlerini sağlayacak tedbirleri alır.

Basın hürriyetinin sınırlanmasında, Anayasanın 26 ve 27 nci maddeleri hükümleri uygulanır.

Devletin iç ve dış güvenliğini, ülkesi ve milletiyle bölünmez bütünlüğünü tehdit eden veya suç işlemeye ya da ayaklanma veya isyana teşvik eder nitelikte olan veya Devlete ait gizli bilgilere ilişkin bulunan her türlü haber veya yazıyı, yazarlar veya bastırınlar veya aynı amaçla, basanlar, başkasına verenler, bu suçlara ait kanun hükümleri uyarınca sorumlu olurlar. Tedbir yolu ile dağıtım hâkim kararıyla; gecikmesinde sakınca bulunan hallerde de kanunun açıkça yetkili kıldığı merciin emriyle önlenabilir. Dağıtım önleyen yetkili merci, bu kararını en geç yirmidört saat içinde yetkili hâkime bildirir. Yetkili hâkim bu kararı en geç kırksekiz saat içinde onaylamazsa, dağıtım önleme kararı hükümsüz sayılır.

Yargılama görevinin amacına uygun olarak yerine getirilmesi için, kanunla belirtilecek sınırlar içinde, hâkim tarafından verilen kararlar saklı kalmak üzere, olaylar hakkında yayım yasağı konamaz.

Sürelili veya süresiz yayınlar, kanunun gösterdiği suçların soruşturma veya kovuşturmasına geçilmiş olması hallerinde hâkim kararıyla; Devletin ülkesi ve milletiyle bölünmez bütünlüğünün, millî güvenliğinin, kamu düzeninin,

Constution of Turkish Republic Article 28:

The press is free, and shall not be censored.

The establishment of a printing house shall not be subject to prior permission or the deposit of a financial guarantee.

(Repealed on October 3, 2001; Act No. 4709)

The State shall take the necessary measures to ensure freedom of the press and information.

In the limitation of freedom of the press, the provisions of articles 26 and 27 of the Constitution shall apply. Anyone who writes any news or articles which threaten the internal or external security of the State or the indivisible integrity of the State with its territory and nation, which tend to incite offence, riot

or insurrection, or which refer to classified state secrets or has them printed, and anyone who prints or transmits such news or articles to others for the purposes above, shall be held responsible under the

law relevant to these offences. Distribution may be prevented as a precautionary measure by the decision of a judge, or in case delay is deemed prejudicial, by the competent authority explicitly designated

by law. The authority preventing the distribution shall notify a competent judge of its decision within twenty-four hours at the latest. The order preventing distribution shall become null and void unless

upheld by a competent judge within forty-

<p>genel ahlâkın korunması ve suçların önlenmesi bakımından gecikmesinde sakınca bulunan hallerde de kanunun açıkça yetkili kıldığı merciin emriyle toplatılabilir. Toplatma kararı veren yetkili merci, bu kararını en geç yirmidört saat içinde yetkili hâkime bildirir; hâkim bu kararı en geç kırksekiz saat içinde onaylamazsa, toplatma kararı hükümsüz sayılır.</p> <p>Sürelî veya süresiz yayınların suç soruşturma veya kovuşturması sebebiyle zapt ve müsaderesinde genel hükümler uygulanır.</p> <p>Türkiye’de yayımlanan sürelî yayınlar, Devletin ülkesi ve milletiyle bölünmez bütünlüğüne, Cumhuriyetin temel ilkelerine, millî güvenliğe ve genel ahlâka aykırı yayımlardan mahkûm olma halinde, mahkeme kararıyla geçici olarak kapatılabilir. Kapatılan sürelî yayının açıkça devamı niteliğini taşıyan her türlü yayın yasaktır; bunlar hâkim kararıyla toplatılır.</p>	<p>eight hours at the latest.</p> <p>No ban shall be placed on the reporting of events, except by the decision of judge issued within the limits specified by law, to ensure proper functioning of the judiciary.</p> <p>Periodical and non-periodical publications may be seized by a decision of a judge in cases of ongoing investigation or prosecution of crimes specified by law; or by order of the competent authority</p> <p>explicitly designated by law, in situations where delay may constitute a prejudice with respect to the protection of the indivisible integrity of</p> <p>the State with its territory and nation, national security, public order or public morals and for the prevention of crime. The competent</p> <p>authority issuing the order to seize shall notify a competent judge of its decision within twenty-four hours at the latest; the order to seize</p> <p>shall become null and void unless upheld by a judge within forty-eight hours at the latest.</p> <p>General provisions shall apply when seizing and confiscating periodicals and non-periodicals for reasons of criminal investigation and prosecution.</p> <p>Periodicals published in Turkey may be temporarily suspended by court ruling if found to contain material which contravenes the indivisible integrity of the State with its territory and nation, the fundamental principles of the Republic, national security and public morals. Any publication which clearly bears the characteristics of being a</p>
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<p>Türk Ceza Kanunu Madde 124:</p> <p>(1) Kişiler arasındaki haberleşmenin hukuka aykırı olarak engellenmesi halinde, altı aydan iki yıla kadar hapis veya adli para cezasına hükmolunur.</p> <p>(2) Kamu kurumları arasındaki haberleşmeyi hukuka aykırı olarak engelleyen kişi, bir yıldan beş yıla kadar hapis cezası ile cezalandırılır.</p> <p>(3) Her türlü basın ve yayın organının yayınının hukuka aykırı bir şekilde engellenmesi halinde, ikinci fıkra hükmüne göre cezaya hükmolunur.</p>	<p>continuation of a suspended periodical is prohibited; and shall</p> <p>be seized by decision of a judge.</p> <p>Turkish Criminal Code Article 124:</p> <p>In case of unlawful prevention of communication among the persons, the offender is</p> <p>sentenced to imprisonment from six years to two years or imposed punitive fine.</p> <p>(2) Any person who unlawfully prevents communication among the public institutions is punished with</p> <p>imprisonment from one year to five years.</p> <p>(3) Punishment is imposed according to the provisions of second subsection in</p> <p>case of unlawful prevention of</p> <p>broadcasts or announcements of all kinds of press and publication organs.</p> <p>.</p>
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<p>Türk Ceza Kanunu Madde 132:</p> <p>1) Kişiler arasındaki haberleşmenin gizliliğini ihlal eden kimse, bir yıldan üç yıla kadar hapis cezası ile cezalandırılır. Bu gizlilik ihlali haberleşme içeriklerinin kaydı suretiyle gerçekleşirse, verilecek ceza bir kat artırılır.⁽¹⁾</p> <p>(2) Kişiler arasındaki haberleşme içeriklerini hukuka aykırı olarak ifşa eden kimse, iki yıldan beş yıla kadar hapis cezası ile cezalandırılır.⁽¹⁾</p> <p>(3) Kendisiyle yapılan haberleşmelerin içeriğini diğer tarafın rızası olmaksızın hukuka aykırı olarak alenen ifşa eden kişi, bir yıldan üç yıla kadar hapis cezası ile cezalandırılır. İfşa edilen bu verilerin basın ve yayın yoluyla yayımlanması halinde de aynı cezaya hükmolunur.⁽¹⁾</p>	<p>Turkish Criminal Code Article 132:</p> <p>1) 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.</p> <p>(2) Any person who unlawfully publicizes the contents of communication between the persons is punished with imprisonment from one year to three years.</p> <p>(3) 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.</p>
<p>Türk Ceza Kanunu Madde 133: Madde 133-</p> <p>(1) Kişiler arasındaki aleni olmayan konuşmaları, taraflardan herhangi birinin rızası olmaksızın bir aletle dinleyen veya bunları bir ses alma cihazı ile kaydeden kişi, iki yıldan beş yıla kadar hapis cezası ile cezalandırılır.⁽²⁾</p> <p>(2) Katıldığı aleni olmayan bir söyleşiyi, diğer konuşanların rızası olmadan ses alma cihazı ile kayda alan kişi, altı aydan iki yıla kadar hapis veya adli para cezası ile cezalandırılır.⁽²⁾</p> <p>(3) (Değişik: 2/7/2012-6352/80 md.) Kişiler arasındaki aleni olmayan konuşmaların kaydedilmesi suretiyle elde edilen verileri hukuka aykırı olarak ifşa eden kişi, iki yıldan beş yıla</p>	<p>Turkish Criminal Code Article 133: 1) 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.</p> <p>(2) 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.</p> <p>(3) Any person who derives benefit from</p>

<p>kadar hapis ve dörtbin güne kadar adli para cezası ile cezalandırılır. İfşa edilen bu verilerin basın ve yayın yoluyla yayımlanması halinde de aynı cezaya hükmolunur.</p> <p>Türk Ceza Kanunu Madde 136:</p> <p>(1) Kişisel verileri, hukuka aykırı olarak bir başkasına veren, yayan veya ele geçiren kişi, iki yıldan dört yıla kadar hapis cezası ile cezalandırılır.</p>	<p>disclosure of information obtained unlawfully as declared above, or</p> <p>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.</p> <p>Turkish Criminal Code Article 136:</p> <p>1) 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.</p>
<p>Bilgi Edinme Hakkı Kanunu No.4982 Madde 8: Kurum ve kuruluşlarca yayımlanmış veya yayın, broşür, ilân ve benzeri yollarla kamuya açıklanmış bilgi veya belgeler, bilgi edinme başvurularına konu olamaz. Ancak, yayımlanmış veya kamuya açıklanmış bilgi veya belgelerin ne şekilde, ne zaman ve nerede yayımlandığı veya açıklandığı başvurana bildirilir.</p>	<p>Turkish Law On The Right To Information, Law No: 4982 , Article 8: The information and documents that are published or disclosed to the public either through publication, brochure, proclamation or other similar means, may not be made the subject of an application for access to information. However, the applicant will be informed of the date, the means and the place of the publication or disclosure of the information or the document.</p>

<p>Bilgi Edinme Kanunu No.4982, Madde 16:</p> <p>Açıklanması hâlinde Devletin emniyetine, dış ilişkilerine, millî savunmasına ve millî güvenliğine açıkça zarar verecek ve niteliği itibarıyla Devlet sırrı olan gizlilik dereceli bilgi veya belgeler, bilgi edinme hakkı kapsamı dışındadır.</p>	<p>Turkish Law On The Right To Information, Law No: 4982, Article 16: The information and documents which qualify as state secrets which their disclosure clearly cause harm to the security of the state or foreign affairs or national defence and national security are out of the scope of the right to information provided herein.</p>
<p>Bilgi Edinme Kanunu No. 4982 Madde 17:</p> <p>Açıklanması ya da zamanından önce açıklanması hâlinde, ülkenin ekonomik çıkarlarına zarar verecek veya haksız rekabet ve kazanç sebep olacak bilgi veya belgeler, bu Kanun kapsamı dışındadır.</p>	<p>Turkish Law On The Right To Information, Law No: 4982, Article 17:</p> <p>The information or documents of which their disclosure cause harm to the economical interests of the state or will cause unfair competition or enrichment, are out of the scope of this law.</p>
<p>Bilgi Edinme Kanunu No. 4982 Madde 19: Kurum ve kuruluşların yetkili birimlerince yürütülen idarî soruşturmalarda ilgili olup, açıklanması veya zamanından önce açıklanması hâlinde;</p> <p>a) Kişilerin özel hayatına açıkça haksız müdahale sonucunu doğuracak,</p> <p>b) Kişilerin veya soruşturmayı yürüten görevlilerin hayatını ya da güvenliğini tehlikeye</p>	<p>Turkish Law On The Right To Information, Law No: 4982, Article 19:</p> <p>The information or the document that is related to the administrative investigation held by the administrative authorities and which will;</p> <p>a) clearly violate the right of privacy of the</p>

<p>sokacak,</p> <p>c) Soruşturmanın güvenliğini tehlikeye düşürecek,</p> <p>d) Gizli kalması gereken bilgi kaynağının açığa çıkmasına neden olacak veya soruşturma ile ilgili benzeri bilgi ve bilgi kaynaklarının temin edilmesini güçleştirecek,</p> <p>Bilgi veya belgeler, bu Kanun kapsamı dışındadır.</p> <p>Bilgi Edinme Kanunu No. 4982 Madde 20:</p> <p>Açıklanması veya zamanından önce açıklanması hâlinde;</p> <p>a) Suç işlenmesine yol açacak,</p>	<p>individuals,</p> <p>b) endanger the security or the life of the individuals or the officials that carry out the investigation,</p> <p>c) jeopardise the security of the investigation,</p> <p>d) disclose the source of the information which needs to be kept secret, or endanger the procurement of similar information in connection with the investigation,</p> <p>are out of the scope of this Law.</p> <p>Turkish Law On The Right To Information, Law No: 4982, Article 20:</p> <p>The information or the document of which its</p>
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<p>b) Suçların önlenmesi ve soruşturulması ya da suçluların kanunî yollarla yakalanıp kovuşturulmasını tehlikeye düşürecek,</p> <p>c) Yargılama görevinin gereğince yerine getirilmesini engelleyecek,</p> <p>d) Hakkında dava açılmış bir kişinin adil yargılanma hakkını ihlâl edecek,</p> <p>Nitelikteki bilgi veya belgeler, bu Kanun kapsamı dışındadır.</p>	<p>disclosure or untimely disclosure will</p> <p>a) give rise to a criminal offence,</p> <p>b) endanger prevention and investigation of the crime or endanger the legal procedure for the detention and the prosecution of the criminals,</p> <p>c) obstruct the proper operation judicial duty.</p> <p>d) violate right to fair trial of a defendant in a pending case</p> <p>are out of the scope of this law.</p>
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<p>Bilgi Edinme Kanunu No. 4982 Madde 21: Kişinin izin verdiği hâller saklı kalmak üzere, özel hayatın gizliliği kapsamında, açıklanması hâlinde kişinin sağlık bilgileri ile özel ve aile hayatına, şeref ve haysiyetine, meslekî ve ekonomik değerlerine haksız müdahale oluşturacak bilgi veya belgeler, bilgi edinme hakkı kapsamı dışındadır.</p> <p>Kamu yararının gerektirdiği hâllerde, kişisel bilgi veya belgeler, kurum ve kuruluşlar tarafından, ilgili kişiye en az yedi gün önceden haber verilerek yazılı rızası alınmak koşuluyla açıklanabilir.</p> <p>5953 Sayılı Basın İş Kanunu Madde 1 :</p> <p>Bu Kanun hükümleri Türkiye'de yayınlanan gazete ve mevkutelerle haber ve fotoğraf ajanslarında her türlü fikir ve sanat işlerinde çalışan ve İş Kanunundaki "işçi" tarifi şümulü haricinde kalan kimselerle bunların işverenleri hakkında uygulanır.</p> <p>Bu Kanunun şümulüne giren fikir ve sanat</p>	<p>Turkish Law On The Right To Information, Law No: 4982, Article 21:</p> <p>With the provision where the consent of the concerned individual has been received, the information and documents that will unjustly interfere with the health records, private and family life, honour and dignity, and the economical and professional interests of an individual, are out of the scope of the right to information.</p> <p>Due to public interest considerations, personal information or documents may be disclosed by the institutions on the condition that concerned individual is notified of the disclosure at least 7 days in advance and his/her written consent is obtained.</p> <p>Turkish Press Labor Law No. 5953 Article 1:</p> <p>This law shall apply to who is employed in all manner of literary and artistic activities at newspapers, periodical, news and photography agencies and who is working outside the statement of definition of the 'worker' on Turkish Labor Law.</p> <p>Within the bound of this law, people who are employed in the literary and artistic activities</p>
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<p>işlerinde ücret karşılığı çalışanlara gazeteci denir.</p>	<p>are called journalist</p>
<p>Basın Kanunu, No.5187 Madde 1:</p> <p>(Bu Kanunun amacı, basın özgürlüğünü ve bu özgürlüğün kullanımını düzenlemektir.</p> <p>Bu Kanun basılmış eserlerin basımı ve yayımını kapsar.</p>	<p>Turkish Press Law, No. 5187, Article 1:</p> <p>The aim of the Press Law is to arrange freedom of the press and the implementation of this freedom.</p> <p>The Press Law covers the printing and publication of printed matter.</p>
<p>Basın Kanunu, No.5187 Madde 2:</p> <p>a) Basılmış eser: Yayımlanmak üzere her türlü basım araçları ile basılan veya diğer araçlarla çoğaltılan yazı, resim ve benzeri eserler ile haber ajansı yayınlarını,</p> <p>b) Yayım: Basılmış eserin herhangi bir şekilde kamuya sunulmasını,</p> <p>c) Süreli yayın: Belli aralıklarla yayımlanan gazete, dergi gibi basılmış eserler ile haber ajansları</p>	<p>Turkish Press Law, No. 5187 Article 2:</p> <p>The implementation of the Press Law includes the following:</p> <p>a) Printed matter: All articles, images and similar material as well as publications of news agencies printed using printing equipment or copied with other equipment with the aim of publication.</p> <p>b) The act of publication: The presentation of a published work to the public.</p> <p>c) Periodicals: Regularly published</p>

<p>yayımlarını,</p> <p>d) Yaygın süreli yayın: Tek bir basın-yayın kuruluşu tarafından aynı isimle basılan ve her coğrafi bölgede en az bir ilde olmak üzere, ülkenin en az yüzde yetmişinde yayımlanan süreli yayın ile haber ajanslarının yayımlarını,</p> <p>e) Bölgesel süreli yayın: Tek bir basın-yayın kuruluşu tarafından basılan ve en az üç komşu ilde veya en az bir coğrafi bölgede yayımlanan süreli yayını,</p> <p>f) Yerel süreli yayın: Tek bir yerleşim biriminde yayımlanan süreli yayınlar ile haftada bir veya daha uzun aralıklarla yayımlanan yaygın ve bölgesel yayınları,</p> <p>g) Yayın türü: Süreli yayınların yaygın, bölgesel ve yerel yayın türlerinden hangisinin kapsamında olduğunu,</p> <p>h) Süresiz yayın: Belli aralıklarla yayımlanmayan kitap, armağan gibi basılmış eserleri,</p> <p>i) Eser sahibi: Süreli veya süresiz yayının içeriğini oluşturan yazıyı veya haberi yazanı, çevireni veya resmi ya da karikatürü yapanı,</p> <p>j) Yayımcı: Bir eseri basılmış eser durumuna getirip yayımlayan gerçek veya tüzel kişiyi,</p> <p>k) Basımcı: Bir eseri basım araçları ile basan veya diğer araçlarla çoğaltan gerçek veya tüzel kişiyi,</p> <p>l) Tüzel kişi temsilcisi: Yayın sahibi veya yayımcının tüzel kişi olması halinde bu tüzel kişiliğin yetkili organı tarafından, yöneticiler arasından belirlenen gerçek kişiyi veya kamu kurum ve kuruluşlarınca belirlenen gerçek kişiyi,</p>	<p>printed matter such as newspapers and magazines and the releases of news agencies.</p> <p>d) Nationwide periodicals: Periodicals published by a single press organization in at least 70% of the country, that is, in at least one province in each geographical region, and the publications of news agencies.</p> <p>e) Regional periodicals: Periodicals printed by a single press organization and published in at least three neighboring provinces or in at least one geographical region,</p> <p>f) Local periodicals: Periodicals published in a single settlement, and nationwide or regional periodicals published on a weekly basis or at longer intervals,</p> <p>g) The form of the publication: It must be indicated whether these periodicals are nationwide, regional or local.</p> <p>h) Non-periodicals: Printed matter such as books, presents which are not published at regular intervals.</p> <p>i) Owner of the material: The individual who writes the news or the text which forms the content of the periodical or the non-periodical, the translator or the person who produces the image or the cartoon.</p> <p>j) Publisher: The real or corporate body that prepares and publishes printed matter.</p> <p>k) Printer: The real or corporate body that prints the matter with printing equipment or copies it with other equipment.</p> <p>l) Authorized representative of the corporate body: If the owner of the publication or the publisher is a corporate body, the authorized organ will designate a real person from among the managers, or the public institutions and organizations will designate a real person</p>
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<p>İfade eder</p>	
<p>Türkiye Cumhuriyeti Anayasası Madde 29 : Süreli veya süresiz yayın önceden izin alma ve malî teminat yatırma şartına bağlanamaz.</p> <p>Süreli yayın çıkarabilmek için kanunun gösterdiği bilgi ve belgelerin, kanunda belirtilen yetkili mercie verilmesi yeterlidir. Bu bilgi ve belgelerin kanuna aykırılığının tespiti halinde yetkili merci, yayının durdurulması için mahkemeye başvurur.</p> <p>Süreli yayınların çıkarılması, yayım şartları, malî kaynakları ve gazetecilik mesleği ile ilgili esaslar kanunla düzenlenir. Kanun, haber, düşünce ve kanaatlerin serbestçe yayımlanmasını engelleyici veya zorlaştırıcı siyasal, ekonomik, malî ve teknik şartlar koyamaz.</p> <p>Süreli yayınlar, Devletin ve diğer kamu tüzelkişilerinin veya bunlara bağlı kurumların araç ve imkânlarından eşitlik esasına göre yararlanır.</p>	<p>Constitution of Turkish Republic Article 29: Publication of periodicals or non-periodicals</p> <p>shall not be subject to prior authorization or the deposit of a financial</p> <p>guarantee.</p> <p>Submission of the information and documents specified by</p> <p>law to the competent authority designated by law is sufficient to</p> <p>publish a periodical. If these information and documents are found to</p> <p>contravene the laws, the competent authority shall apply to the court</p> <p>for suspension of publication.</p> <p>The principles regarding the publication, the conditions</p>

	<p>of publication and the financial resources of periodicals, and the</p> <p>profession of journalism shall be regulated by law. The law shall not</p> <p>impose any political, economic, financial, and technical conditions</p> <p>15</p> <p>obstructing or making difficult the free dissemination of news,</p> <p>thoughts, or opinions.</p> <p>Periodicals shall have equal access to the means and facilities of</p> <p>the State, other public corporate bodies, and their agencies.</p>
<p>Türkiye Cumhuriyeti Anayasası Madde 30: Kanuna uygun şekilde basın işletmesi olarak kurulan basımevi ve eklentileri ile basın araçları, suç aleti olduğu gerekçesiyle zapt ve müsadere edilemez veya işletilmekten alıkonulamaz.</p> <p>.</p>	<p>Constitution of Turkish Republic Article 30</p> <p>A printing house and its annexes, duly established as a press enterprise under law, and press equipment shall not be seized, confiscated, or barred from operation on the grounds of having been used in a crime.</p>

<p>Türk Ceza Kanunu Madde 125:</p> <p>1) Bir kimseye onur, şeref ve saygınlığını rencide edebilecek nitelikte somut bir fiil veya olgu isnat eden (...) ⁽¹⁾ veya sövmek suretiyle bir kimsenin onur, şeref ve saygınlığına saldıran kişi, üç aydan iki yıla kadar hapis veya adli para cezası ile cezalandırılır. Mağdurun gıyabında hakaretin cezalandırılabilmesi için fiilin en az üç kişiyle ihtilat ederek işlenmesi gerekir.</p> <p>(2) Fiilin, mağduru muhatap alan sesli, yazılı veya görüntülü bir iletiyle işlenmesi halinde, yukarıdaki fıkrada belirtilen cezaya hükmolunur.</p> <p>(3) Hakaret suçunun;</p> <p>a) Kamu görevlisine karşı görevinden dolayı,</p> <p>b) Dini, siyasi, sosyal, felsefi inanç, düşünce ve kanaatlerini açıklamasından, değiştirmesinden, yaymaya çalışmasından, mensup olduğu dinin emir ve yasaklarına uygun davranmasından dolayı,</p> <p>c) Kişinin mensup bulunduğu dine göre kutsal sayılan değerlerden bahisle,</p> <p>İşlenmesi halinde, cezanın alt sınırı bir yıldan az olamaz.</p> <p>(4) (Değişik: 29/6/2005 – 5377/15 md.) Hakaretin alenen işlenmesi halinde ceza altıda biri oranında artırılır.</p> <p>(5) (Değişik: 29/6/2005 – 5377/15 md.) Kurul hâlinde çalışan kamu görevlilerine görevlerinden dolayı hakaret edilmesi hâlinde suç, kurulu oluşturan üyelere karşı işlenmiş sayılır. Ancak, bu durumda zincirleme suça ilişkin madde</p>	<p>Turkish Criminal Code Article 125: Any person who acts with the intention to harm the honor, reputation or dignity of another</p> <p>person through concrete performance or giving impression of intent, is sentenced to imprisonment from three months to two years or imposed punitive fine. In order to punish the offense committed in absentia of the victim, the act should be committed in presence of least three persons.</p> <p>(2) The offender is subject to above stipulated punishment in case of commission of offense in writing or by use of audio or visual means directed to the aggrieved party.</p> <p>(3) In case of commission of offense with defamatory intent;</p> <p>a) Against a public officer,</p> <p>b) Due to disclosure, change or attempt to spread religious, social, philosophical belief, opinion and convictions and to obey the orders and restriction of the one's religion,</p> <p>c) By mentioning sacred values in view of the religion with which a person is connected,</p> <p>the minimum limit of punishment may not be less than one year.</p> <p>(4) The punishment is increased by one sixth in case of performance of defamation act openly; if the offense is committed through press and use of any one of publication organs, then the punishment is increased up to one</p>
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<p>hükümleri uygulanır.</p> <p>Türk Ceza Kanunu Madde 216:</p> <p>Halkı kin ve düşmanlığa tahrik veya aşağılama</p> <p>(1) Halkın sosyal sınıf, ırk, din, mezhep veya bölge bakımından farklı özelliklere sahip bir kesimini, diğer bir kesimi aleyhine kin ve düşmanlığa alenen tahrik eden kimse, bu nedenle kamu güvenliği açısından açık ve yakın bir tehlikenin ortaya çıkması halinde, bir yıldan üç yıla kadar hapis cezası ile cezalandırılır.</p> <p>(2) Halkın bir kesimini, sosyal sınıf, ırk, din, mezhep, cinsiyet veya bölge farklılığına dayanarak alenen aşağılayan kişi, altı aydan bir yıla kadar hapis cezası ile cezalandırılır.</p> <p>(3) Halkın bir kesiminin benimsediği dini değerleri alenen aşağılayan kişi, fiilin kamu barışını bozmaya elverişli olması halinde, altı aydan bir yıla kadar hapis cezası ile cezalandırılır.</p>	<p>third.</p> <p>(5) In case of defamation of public officers working as a committee to perform a duty, the offense is considered to have committed against the members forming the committee.</p> <p>Turkish Criminal Code Article 216</p> <p>“1) Any person who openly provokes a group of people belonging to different social class, religion, race, sect, or coming from another origin, to be rancorous or hostile against another group, is punished with imprisonment from one year to three years in case of such act causes risk from the aspect of public safety.</p> <p>(2) Any person who openly humiliates another person just because he belongs to different social class, religion, race, sect, or comes from another origin, is punished with imprisonment from six months to one year.</p> <p>(3) Any person who openly disrespects the religious belief of group is punished with imprisonment from six months to one year if such act causes potential risk for public peace.”</p>
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<p>Türk Ceza Kanunu Madde 226:</p> <p>(2) Müstehcen görüntü, yazı veya sözleri basın ve yayın yolu ile yayınlayan veya yayınlanmasına aracılık eden kişi altı aydan üç yıla kadar hapis ve beşbin güne kadar adli para cezası ile cezalandırılır.</p> <p>Türk Ceza Kanunu Madde 301:</p> <p>Türk Milletini, Türkiye Cumhuriyeti Devletini, Devletin kurum ve organlarını aşağılama</p> <p>(1) Türk Milletini, Türkiye Cumhuriyeti Devletini, Türkiye Büyük Millet Meclisini, Türkiye Cumhuriyeti Hükümetini ve Devletin yargı organlarını alenen aşağılayan kişi, altı aydan iki yıla kadar hapis cezası ile cezalandırılır.</p> <p>(2) Devletin askerî veya emniyet teşkilatını alenen aşağılayan kişi, birinci fıkra hükmüne göre cezalandırılır.</p> <p>(3) Eleştiri amacıyla yapılan düşünce açıklamaları suç oluşturmaz.</p>	<p>Turkish Criminal Code Article 226:</p> <p>2) The persons who publicize indecent scenes, words or articles through press and broadcast organs or act as intermediary in publication of the same is punished with imprisonment from six months to three years.</p> <p>Turkish Criminal Code Article 301:</p> <p>Insulting Turkish Nation, the Republic, the organs and institutions of the State</p> <ol style="list-style-type: none">1. A person who publicly denigrates the Turkish Nation, the State of the Turkish Republic or the Grand Assembly of Turkey and the judicial institutions of the State shall be punishable by imprisonment from 6 months to 2 years.2. A person who publicly denigrates the military and police organizations of the State will too receive the same punishment.3. Expressions of thought intended to
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<p>(4) Bu suçtan dolayı soruşturma yapılması, Adalet Bakanının iznine bağlıdır.</p>	<p>criticize shall not constitute a crime.</p> <p>4. The prosecution under this article will require the approval of the Minister of Justice.</p>
<p>Türk Ceza Kanunu Madde 279:</p> <p>(1) Kamu adına soruşturma ve kovuşturmayı gerektiren bir suçun işlendiğini göreviyle bağlantılı olarak öğrenip de yetkili makamlara bildirimde bulunmayı ihmal eden veya bu hususta gecikme gösteren kamu görevlisi, altı aydan iki yıla kadar hapis cezası ile cezalandırılır.</p>	<p>Turkish Criminal Code Article 279:</p> <p>If any public officer neglects or delays in notification of an offense to the authorized bodies being aware of commission of an offense which requires investigation or prosecution, is punished with imprisonment from six months to two years.</p>
<p>Türk Ceza Kanunu Madde 286:</p> <p>Soruşturma ve kovuşturma işlemleri sırasındaki ses veya görüntüleri yetkisiz olarak kayda alan veya nakleden kişi, altı aya kadar hapis cezası ile cezalandırılır.</p>	<p>Turkish Criminal Code Article 286:</p> <p>Recording of sound or vision which is also a crime that 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.</p>
<p>Terörle Mücadele Kanunu Madde 6:</p> <p>2.) Terör örgütlerinin; cebir, şiddet veya tehdit</p>	<p>Anti-Terror Law Article 6:</p> <p>2.) Those who print or publish leaflets and</p>

<p>içeren yöntemlerini meşru gösteren veya öven ya da bu yöntemlere başvurmayı teşvik eden bildiri veya açıklamalarını basanlar veya yayınlayanlar bir yıldan üç yıla kadar hapis cezası ile cezalandırılır</p> <p>4.) Yukarıdaki fıkralarda belirtilen fiillerin basın ve yayın yoluyla işlenmesi hâlinde, basın ve yayın organlarının suçun işlenişine iştirak etmemiş olan yayın sorumluları hakkında da bin günden beşbin güne kadar adli para cezasına hükmolunur.</p> <p>Anayasa Madde 13:</p> <p>Temel Hak ve Özgürlüklerin sınırlandırılması</p> <p>Temel hak ve hürriyetler, özlerine dokunulmaksızın yalnızca Anayasanın ilgili maddelerinde belirtilen sebeplere bağlı olarak ve ancak kanunla sınırlanabilir. Bu sınırlamalar, Anayasanın sözüne ve ruhuna, demokratik toplum düzeninin ve lâik Cumhuriyetin gereklerine ve ölçülülük ilkesine aykırı olamaz</p> <p>Anayasa Madde 26:</p> <p>Düşünceyi açıklama ve yayma hürriyeti</p> <p>Bu hürriyetlerin kullanılması, millî güvenlik, kamu düzeni, kamu güvenliği, Cumhuriyetin temel nitelikleri ve Devletin ülkesi ve milleti ile bölünmez bütünlüğünün korunması, suçların önlenmesi, suçluların cezalandırılması, Devlet</p>	<p>declarations of terrorist organizations shall be punished with a sentence up to 3 years.</p> <p>4.) Those who commits the acts mentioned above through press and who are not part of the crime are fined from 1000 days up to 5000 days.</p> <p>Constitution of Turkish Republic Article 13</p> <p>Restriction of fundamental rights and freedoms</p> <p>Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality.</p> <p>Turkish Constitution Article 26:</p> <p>Freedom of expression and dissemination of thought</p> <p>The exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the</p>
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sırrı olarak usulünce belirtilmiş bilgilerin açıklanmaması, başkalarının şöhret veya haklarının, özel ve aile hayatlarının yahut kanunun öngördüğü meslek sırlarının korunması veya yargılama görevinin gereğine uygun olarak yerine getirilmesi amaçlarıyla sınırlanabilir.

Düşünceyi açıklama ve yayma hürriyetinin kullanılmasında uygulanacak şekil, şart ve usuller kanunla düzenlenir.

Türk Ceza Muhakemesi Kanunu Madde 135:

Bir suç dolayısıyla yapılan soruşturma ve kovuşturmada, suç işlendiğine ilişkin somut delillere dayanan kuvvetli şüphe sebeplerinin varlığı ve başka suretle delil elde edilmesi imkânının bulunmaması durumunda, ağır ceza mahkemesi veya gecikmesinde sakınca bulunan hâllerde Cumhuriyet savcısının kararıyla şüpheli veya sanığın telekomünikasyon yoluyla iletişimi (...) dinlenebilir, kayda alınabilir ve sinyal bilgileri değerlendirilebilir. Cumhuriyet savcısı kararını derhâl mahkemenin onayına sunar ve mahkeme, kararını en geç yirmi dört saat içinde verir. Sürenin dolması veya mahkeme tarafından aksine karar verilmesi hâlinde tedbir Cumhuriyet savcısı tarafından derhâl kaldırılır. Bu fıkra uyarınca alınacak tedbire ağır ceza mahkemesince oy birliğiyle karar verilir. İtiraz üzerine bu tedbire karar verilebilmesi için de oy birliği aranır.

indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.

The formalities, conditions and procedures to be applied in exercising the freedom of expression and dissemination of thought shall be prescribed by law.

Turkish Code of Criminal Procedure Article 135:

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.

Türk Ceza Kanunu Madde 132:

Kişiler arasındaki haberleşmenin gizliliğini ihlal eden kimse, bir yıldan üç yıla kadar hapis cezası ile cezalandırılır. Bu gizlilik ihlali haberleşme içeriklerinin kaydı suretiyle gerçekleşirse, verilecek ceza bir kat artırılır.

(2) Kişiler arasındaki haberleşme içeriklerini hukuka aykırı olarak ifşa eden kimse, iki yıldan beş yıla kadar hapis cezası ile cezalandırılır.

(3) Kendisiyle yapılan haberleşmelerin içeriğini diğer tarafın rızası olmaksızın hukuka aykırı olarak alenen ifşa eden kişi, bir yıldan üç yıla kadar hapis cezası ile cezalandırılır. İfşa edilen bu verilerin basın ve yayın yoluyla yayımlanması halinde de aynı cezaya hükmolunur

Türk Ceza Kanunu Madde 124:

Kişiler arasındaki haberleşmenin hukuka aykırı olarak engellenmesi halinde, altı aydan iki yıla kadar hapis veya adli para cezasına hükmolunur.

(2) Kamu kurumları arasındaki haberleşmeyi hukuka aykırı olarak engelleyen kişi, bir yıldan beş yıla kadar hapis cezası ile cezalandırılır. (3) Her türlü basın ve yayın organının yayınının hukuka aykırı bir şekilde engellenmesi halinde,

Turkish Criminal Code Article 132:

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.

Turkish Criminal Code Article 124:

In case of unlawful prevention of communication among the persons, the offender is sentenced to imprisonment from six years to two years or imposed punitive fine. Any person who unlawfully prevents communication among the public institutions is punished with imprisonment from one year to five years. Punishment is imposed

ikinci fıkra hükmüne göre cezaya hükmolunur

Elektronik Haberleşme Kanunu Madde 39:

Telsiz haberleşme sistemleri üzerinden kriptolu haberleşme yapmaya Türk Silahlı Kuvvetleri, Jandarma Genel Komutanlığı ve Sahil Güvenlik Komutanlığı, Milli İstihbarat Teşkilatı, Emniyet Genel Müdürlüğü ve Dışişleri Bakanlığı yetkilidir. Ayrıca yukarıda belirtilen kurumlara ait olanlar dışında kamu kurum ve kuruluşları ile gerçek ve tüzel kişilerin elektronik haberleşme hizmeti içinde kodlu veya kriptolu haberleşme yapma usul ve esasları Kurum tarafından belirlenir.

Kamu kurum ve kuruluşları ile gerçek ve tüzel kişilerin elektronik haberleşme hizmetleri içinde kodlu veya kriptolu haberleşme yapma usul ve esasları hakkında yönetmelik

according to the provisions of second subsection in case of unlawful prevention of broadcasts or announcements of all kinds of press and publication organ

**Law on Electronic Communications
Article 39:**

The following institutions are authorized to conduct encrypted communications on wireless communications systems: Turkish Armed Forces, the General Command of the Gendarmie, the Coast Guard Command, the National Intelligence Organization, the general Directorate of Security and the Ministry of Foreign Affairs. The procedure and principles relating to how other institutions and organizations and real and legal persons may carry out encoded and encrypted communications through electronic communications means shall be determined by the Institution.

Regulation on the procedure and principles relating to encoded and encrypted communications within the electronic communication services by public institutions and organizations, real and legal persons

<p>Madde 5:</p> <p>5809 sayılı Kanunda belirtilen istisnai kurumlar haricindeki tüm kamu kurum ve kuruluşları ile gerçek ve tüzel kişiler bu Yönetmelik hükümlerine aykırı olmamak kaydıyla kodlu ve/veya kriptolu haberleşme yapabilir.</p> <p>Madde 6:</p> <p>Üretici veya üretici firmayı temsilen imza yetkisini haiz kişilerin adli sicil kayıtlarında Devletin ülkesi ve milletiyle bölünmez bütünlüğüne, Cumhuriyetin temel ilkelerine ve devletin güvenliğine karşı suçlar, Anayasal düzene ve bu düzenin işleyişine karşı suçlar, milli savunmaya karşı suçlar, Devlet sırlarına karşı suçlar ve casusluk, zimmet, irtikâp, rüşvet, hırsızlık, dolandırıcılık, sahtecilik, güveni kötüye kullanma, hileli iflas, ihaleye fesat karıştırma, edimin ifasına fesat karıştırma, suçtan kaynaklanan malvarlığı değerlerini aklama veya kaçakçılık veya 12/4/1991 tarihli ve 3713 sayılı Terörle Mücadele Kanunu kapsamındaki suçlardan mahkûm olma durumu var ise yapılan başvuru reddedilir.</p> <p>Madde 7:</p> <p>Kodlu veya kriptolu elektronik haberleşme hizmeti başvuruları Kurum tarafından değerlendirilir. Başvurunun kabul edilmesi durumunda kod veya kripto Kuruma teslim edilir ve üreticiye izin verilebilir.</p>	<p>Article 5:</p> <p>Real persons and public institutions can use encrypted communication in accordance with the provisions of the regulation</p> <p>Article 6:</p> <p>The creators of the encoded and encrypted communication should not have been violated the unity and territorial integrity of state, committed crimes against the security of the state and main principles of Republic, committed crimes against the constitutional order, committed crimes such as corruption, theft, espionage, fraud, smuggling and be sentenced in accordance with Anti-terror law.</p> <p>Article 7:</p> <p>The Institution of Information Technologies and Communications evaluates the application to use encryption programmes</p>
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ELSA UKRAINE

Contributors

National Coordinator

Yuriy Pochtovyk

National Academic Coordinator

Yuriy Pochtovyk

National Researchers

Kateryna Lahodivets
Olexandra Ferlikovska
Pavlo Malyuta
Victor Komziuk

National Linguistic Editors

Ivan Chopyk
Olesia Gorbun
Mariia Skorikova

1. INTRODUCTION

Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: “Convention” or “ECHR”) establishes that 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.¹ In the *Goodwin v. the United Kingdom* judgment, the European Court of Human Rights (hereinafter: “ECtHR” or “Court”) stressed that Article 10 also includes the right of the journalists not to disclose their source of information. The ECtHR highlighted that it is one of the basic conditions for freedom of the press, without which ‘sources may be deterred from assisting the press in informing the public on matters of public interest.’² Taking into account the importance of journalists’ privilege not to disclose sources of information, the Council of Europe addressed this issue as well as adopted some requirements for adequate protection of this right in a set of its documents and instruments.³

2. Does the National Legislation Provide (Explicit or Otherwise) Protection of the Right of the Journalists Not to Disclose Their Source of Information? What Type of Legislation Provides This Protection? How Exactly is This Protection Construed in National Law?

2.1. Does the National Legislation Provide (Explicit or Otherwise) Protection of the Right of the Journalists Not to Disclose Their Source of Information?

Ukrainian legislation provides for certain legal measures for the protection of journalistic sources, however, they are not explicit. Whereas general legal rules are established, specific definitions and procedures are missing.

Under national law, journalists’ privilege of non-disclosure of their sources of information encompasses rights to keep in secret (1) a journalistic source; and (2) information identifying a journalistic source. Being prescribed by specific legislation on journalists’ rights, it is also protected under the Constitution of Ukraine and procedural law.

¹ Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) (ECHR) Art 10, 1950.

² *Goodwin v United Kingdom* App no 17488/90 (ECtHR, 27 March 1996) para 39.

³ Council of Europe (4th European Ministerial Conference on Mass Media Policy), ‘Resolution No 2 on Journalistic Freedoms and Human Rights’ (7-8 December 1994); Council of Europe (Committee of Ministers) ‘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’ (8 March 2000); Council of Europe (Committee on Culture, Science and Education) ‘Report on the Protection of Journalists’ Sources’ (1 December 2010); Council of Europe (Parliamentary Assembly) ‘Recommendation 1950 (2011) on the Protection of Journalists’ Sources’ (25 January 2011) et al.

2.2. What Type of Legislation Provides This Protection?

The Constitution of Ukraine describes the right for information as follows:

Everyone is entitled to the right to freedom of thought and speech, and to the free expression of his or her views and beliefs. Everyone has a right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice. The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice.⁴

Article 34 of the Constitution describes the right to information in general. However, it contains a provision on 'preventing the publication of information received confidentially', which, *inter alia*, concerns journalistic sources. Being a general rule, this provision grants constitutional protection to journalistic sources.

One of the main legal provisions regarding the protection of journalistic sources is established in the Law of Ukraine "On Information":

A journalist has the right not to disclose the source of information or information that allows to detect sources of information, except when it is ordered by the court and based on law.⁵

The Law "On the Print Media (Press) in Ukraine" provides for almost the same provision:

A journalist has the right [*inter alia*] to the secrecy of authorship and sources of information, unless such information is to be revealed at the request of the court.⁶

The mechanism for the legal protection of journalistic sources is also introduced in the Criminal Procedure Code of Ukraine. It is stated that journalists shall not be interrogated as witnesses about confidential information of a professional nature, provided on condition of non-disclosure of its authorship or source of information.⁷ Furthermore, under the Criminal Procedure Code such information is recognised as "secret" and "protected by law":

⁴ Law n. 254к/96-ВР (The Constitution of Ukraine) 1996 [Конституція України] art 34.

⁵ Law n. 2657-XII (On Information) 1992 [Про інформацію] art 25 pt 3.

⁶ Law n. 2782-XII (On Print Media (Press) in Ukraine) 1992 [Про друковані засоби масової інформації (пресу) в Україні] art 26 pt 2 para 11.

⁷ Law n. 4651-VI (Criminal Procedure Code of Ukraine) 2012 [Кримінальний процесуальний кодекс України] art 65 pt 2 para 6.

Secret information protected by law and contained in objects and documents includes [*inter alia*] information in possession of a mass medium or a journalist, which was provided to them on condition that its author or source would not be disclosed.⁸

Additionally, Article 11, Part 4 of the Law of Ukraine “On Investigative and Search Operations” prohibits involving journalists in such operations, if such co-operation is related to the disclosure of information of a professional nature. Failure to comply with this prescription results in inadmissibility of obtained evidence.

As for civil proceedings, Article 51, Part 1, paragraph 2 of the Civil Procedure Code of Ukraine prohibits to examine as witnesses individuals who are obliged by law to keep in secret information, entrusted to them in connection with their official or professional status. Article 65 Part 2 paragraph 5 of the Code of Administrative Procedure of Ukraine protects journalists from examination in the same manner.

There is no specific criminal liability for the breach of legal provisions concerning protection of journalistic sources. However, it falls under the scope of obstruction of lawful professional activity of a journalist. Criminal liability for such acts is established by the Criminal Code of Ukraine:

1. Illegal seizure of materials, collected, processed, prepared by journalist, and technical tools that he/she uses in connection with his/her professional activities [...] as well as any other wilful obstruction of legitimate professional activities of a journalist is punishable by a fine of up to 50 tax-free minimum incomes, or arrest for up to six months or imprisonment for up to three years.
2. Any obstruction of the performance of professional duties of a journalist or prosecution of a journalist in connection with his/her legitimate professional activities is punishable by a fine of up to two hundred tax-free minimum incomes, or arrest for up to six months or imprisonment for up to four years.
3. Actions stipulated in this Article, if committed by a public official using his official position or conducted in a conspiracy are punishable by a fine of two hundred to five hundred tax-free minimum incomes, or arrest for up to five years, with disqualification either to hold certain positions or engage in certain activities for up to three years or without such.⁹

2.3. How Exactly is This Protection Construed in National Law?

In the light of the national legislation, the privilege of non-disclosure of journalistic sources consists of four elements:

1. right to keep in secret a source of information and information identifying a source;

⁸ *ibid* art 162 pt 1 para 1.

⁹ Law n. 2341-III (Criminal Code of Ukraine) 2001 [Кримінальний кодекс України] art 171.

2. prohibition of interrogation of a journalist as a witness in criminal proceedings about confidential information provided on condition of non-disclosure of authorship or source of this information;
3. broadcasting organisations shall keep in secret information about persons who provided them with information or other materials, if the confidentiality of a person was the condition for such transmission of information;
4. investigators shall not demand disclosure of journalistic sources during covert investigation.

However, the wording of the provisions dealing with protection of journalistic sources is not consistent enough. The Law of Ukraine “On Information” provides for the terms of a “source” and “information identifying a source”¹⁰ with no further definition as it is set out in Appendix to Recommendation No. R (2000) 7.¹¹ Alternatively, it defines information about a natural person and information, access to which is restricted under the decision of natural or legal person, to be confidential.¹² In terms of criminal proceedings, information identifying a source is recognised as “secret information protected by law”.¹³ There is no definition of a “source” in Ukrainian legislation.

3. Is There, in Domestic Law, a Provision That Prohibits a Journalist From Disclosing His/Her Sources? How Exactly is This Prohibition Construed in National Law? What is the Sanction?

3.1. Is There, in Domestic Law, a Provision That Prohibits a Journalist From Disclosing His/Her Sources?

Ukrainian legislation prohibiting journalists to disclose his/her sources includes the following legal acts:

- Law of Ukraine n. 2657-XII “On Information” (1992);
- Law of Ukraine n. 2782-XII “On Print Mass Media (Press) in Ukraine” (1992);
- Law of Ukraine n. 3759-XII “On Television and Radio Broadcasting” (1993).

¹⁰ Law n. 2657-XII (On Information) 1992 [Про інформацію] art 25 pt 3.

¹¹ Council of Europe (Committee of Ministers) ‘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’ (8 March 2000) Appendix, Definitions, para c, d.

¹² Law n. 2657-XII (On Information) 1992 [Про інформацію] art 21 pt 2.

¹³ Law n. 4651-VI (Criminal Procedure Code of Ukraine) 2012 [Кримінальний процесуальний кодекс України] art 162 pt 1 para 1.

3.2. How Exactly is This Prohibition Construed in National Law?

National legislation outlines the journalists' obligation not to disclose confidential sources rather than clearly establishes the prohibition. Article 26 of the Law "On Print Mass Media (Press) in Ukraine" stipulates that the journalist is obliged to fulfil his/her sources requests regarding their confidentiality.¹⁴ Also, Article 59 of the Law "On Television and Radio Broadcasting" prescribes that broadcasting organisations shall keep confidentiality of their sources at the request of the latter.¹⁵ While recognising the journalists' privilege of non-disclosure, the Law of Ukraine "On Information" does not directly prohibit a journalist from disclosing sources. However, Article 21 Part 2 of the above-mentioned law provides that the confidential information may be disseminated upon the approval of a respective person in a manner prescribed by this person, and in other cases prescribed by law.

The prohibition for journalists to disclose their sources of information under Ukrainian law is not limited to the prohibition of disclosing personal information about a person. Such prohibition also encompasses the disclosure of materials that do not constitute sources themselves, but may be used to identify a person who acts as the source of information.¹⁶

There are some provisions on the prohibition of disclosure of journalistic sources in the Code of Ethics of Ukrainian Journalist, which was adopted by the National Society of Journalists of Ukraine and Independent Media Trade Union of Ukraine in 2013.¹⁷ The Code itself does not encompass legal rules; it is rather a compilation of moral and ethical principles that should be observed by every journalist in Ukraine. Article 5 of the aforesaid Code provides that journalist shall not disclose his/her sources of information, except in the cases prescribed by law.¹⁸

However, the Law "On Information" acknowledges certain exceptional circumstances when the sources may be legally disclosed. In particular, Article 29 of the Law provides that classified information may be disseminated in case of public necessity, i.e. it is a matter of public interest and the public's right to know this information overweight potential harm of its dissemination. According to the Law a matter of public interest is information that (1) indicates a threat to national sovereignty and territorial integrity of Ukraine; (2) facilitates implementation of constitutional rights, freedoms and duties; (3) indicates a possibility of violation of human rights,

¹⁴ Law n. 2782-XII (On Print Media (Press) in Ukraine) 1992 [Про друковані засоби масової інформації (пресу) в Україні] art 26 pt 3 para 3.

¹⁵ Law n. № 3759-XII (On Television and Radio Broadcasting) 1993 [Про телебачення і радіомовлення] art 59 pt 1 para ж.

¹⁶ Viktoriya Dobrynska, 'Європейський суд своїм рішенням поставив під загрозу журналістський привілей на збереження у таємниці джерел інформації' (Media Law Institute, 30 June 2009) <<http://medialaw.org.ua/analytics/yevropejskyj-sud-svoyim-rishennyam-postavyv-pid-zagrozu-zhurnalistykyj-pryvylej-na-zberezhennya-u-tayemnytsi-dzherel-informatsiyi/>> accessed 15 April 2016 [Ukrainian].

¹⁷ Congress of Journalists-Signatories of the Code of Ethics of Ukrainian Journalist, 'Code of Ethics of Ukrainian Journalist' (4 October 2013) [Кодекс етики українського журналіста].

¹⁸ *ibid* art 5.

deception of the public, harmful environmental and other negative effects of activity (or inactivity) of natural and legal persons.¹⁹

3.3. What is the Sanction?

General provisions governing sanctioning of journalists for not fulfilling their obligations are established by above-mentioned three key legal acts. However, provisions concerning sanctions applied for disclosure of journalistic sources are not formulated clearly. The Law of Ukraine “On Information” provides that violation of the national legislation concerning information entails disciplinary, civil, administrative or criminal liability under the laws of Ukraine²⁰, while Article 41 of the Law “On Print Mass Media (Press) in Ukraine” prohibits misuse of one’s journalist rights.²¹ However, Ukrainian law does not provide for specific provisions on disciplinary, civil and administrative liability of journalists with regard to unlawful disclosure. Thus, the subject matter falls under the scope of general provisions.

In terms of disciplinary liability, an employed journalist is a subject to disciplinary liability for labour discipline infringement. According to Article 147 of the Labour Code of Ukraine, an employer may apply only one of the following sanctions for such infringement: reprimand or dismissal.²²

Taking into account that unlawful disclosure may cause both material and moral damage, a journalist or a media outlet as a legal entity may be brought to civil liability under general provisions of the Civil Code of Ukraine concerning compensation for damage.²³

Provisions providing for administrative liability of a journalist for disclosure of confidential sources are absent.

At the same time, the Criminal Code of Ukraine provides for a clear provision, which may be applied to journalists in case of unlawful disclosure. In particular, Article 182 of the Criminal Code establishes the following:

Illegal collection, storage, use or dissemination of confidential information about a person without his/her consent, or dissemination of such information in a public speech, publicly demonstrated work, or mass media, – shall be punishable by a fine of five hundred to one thousand tax-free minimum incomes, or correctional labour for a term up to two years, or arrest for a term of up to six months, or imprisonment for a term of up to three years.²⁴

¹⁹ Law n. 2657-XII (On Information) 1992 [Про Інформацію] art 29 pt 2.

²⁰ *ibid* art 27.

²¹ Law n. 2782-XII (On Print Media (Press) in Ukraine) 1992 [Про друковані засоби масової інформації (пресу) в Україні] art 41 pt 2 para 5.

²² Law n. 322-VIII (Labour Code of Ukraine) 1971 [Кодекс законів про працю України] art 147 pt 1.

²³ Law n. 435-IV (Civil Code of Ukraine) 2003 [Цивільний кодекс України] ch 22.

²⁴ Law n. 2341-III (Criminal Code of Ukraine) 2001 [Кримінальний Кодекс України] art 181 pt 2.

For the purpose of this article, dissemination of confidential information is recognised as the transmission of a message containing confidential information in any way (oral, written, printed, via Internet, etc.) to at least one person. In addition, the dissemination of such information in the media may be embodied in the form of public notice in printed media (newspapers, magazines, newsletters) or through other types of media (radio, television, etc.).²⁵

When it comes to the broadcasting organisations, they are subject to sanctions for violating Ukrainian legislation on television and radio broadcasting. Such sanctions are to be determined by court or the National Television and Radio Broadcasting Council of Ukraine. According to Article 72 of the Law “On Television and Radio Broadcasting”, admonition, fine, initiation of the broadcast license revocation in court are among the possible sanctions for violation of the respective legislation.²⁶

In the context of the Code of Ethics of Ukrainian Journalist, violation of its provisions (including illegal disclosure of journalists’ sources) may also be subject to public condemnation or expulsion from trade union or National Union of Journalists of Ukraine. The Commission on Journalists’ Ethics considers such cases.²⁷ Although, the Commission is not a public authority, and does not have power of adjunction. It can only report violations to the respective authorities.

Given the Recommendation No. R (2000) 7 is limited to the right of journalists not to disclose their sources, the standards established in Recommendation should not prevent member States from introducing in their national legislation a higher protection of the sources.²⁸ Taking into consideration above-mentioned provisions, we think that national legislation provides for higher standards of protection of confidential sources with respect to journalists’ obligation not to disclose such sources themselves.

²⁵ Mykola Melnyk, Mykola Khavronyuk, *Науково-практичний коментар до Кримінального кодексу України* (9th edn, Yurydychna Dymka 2012) 493 [Ukrainian].

²⁶ Law n. № 3759-XII (On Television and Radio Broadcasting) 1993 [Про телебачення і радіомовлення] art 72 pt 1 para 6.

²⁷ Congress of Journalists-Signatories of the Code of Ethics of Ukrainian Journalist, ‘Code of Ethics of Ukrainian Journalist’ (4 October 2013) [Кодекс етики українського журналіста] art 19.

²⁸ Council of Europe (Committee of Ministers) ‘Explanatory Memorandum to 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’ (20 December 2000) para 42.

4. Who is a “Journalist” According to the National Legislation? Is It in Your View a Restricted Definition for the Purpose of the Protection of Journalistic Sources? What is the Scope of Protection of Other Media Actors? Is the Protection of Journalists’ Sources Extended to Anyone Else?

4.1. Who is a “Journalist” According to the National Legislation?

National law provides for a range of definitions of a “journalist” that are mostly similarly outlined in several legal acts. All of these definitions may be found below in the chronological order of the laws they are fixed in. One should bear in mind that all of the undermentioned laws are still in force.

Article 25 Part 1 of the Law “On Print Mass Media (Press) in Ukraine” of November 16 1992 states the following:

Journalist of a print mass medium is a creative worker, who professionally collects, receives, creates and prepares information for a print media outlet and acts on the basis of labour or other contractual relations with his/her editorial office or is authorised by the editorial office to perform these activities, which is confirmed by a certificate issued by the editorial office or by other document issued by the editorial office.

According to Article 1 of the Law of Ukraine “On Television and Radio Broadcasting” of December 21 1993:

journalist of television and radio is a staff or a freelance creative employee of a broadcasting organisation, who professionally collects, receives, creates and prepares information for distribution.²⁹

Article 21 of the Law of Ukraine “On Informational Agencies” of February 28 1995 states that:

Journalist of an informational agency is a creative employee, who collects, receives, creates and prepares information for an informational agency and acts on its behalf on the basis of a labour contract, or on the basis of other contractual relations, or under authorisation of an informational agency [...] Journalist of an informational agency enjoys rights and bears obligations prescribed by Ukrainian legislation on press, television and radio broadcasting.³⁰

Article 1 of the Law of Ukraine “On State Support of Mass Media and Social Protection of Journalists” of September 23 1997 provides for the following:

Journalist is a creative employee, who professionally collects, receives, creates and prepares information for a mass medium, performs official editorial duties for a mass

²⁹ Law n. № 3759-XII (On Television and Radio Broadcasting) 1993 [Про телебачення і радіомовлення] art 1 para 65.

³⁰ Law n. 74/95-BP (On Information Agencies) 1995 [Про інформаційні агентства] art 21 pt 1, 3.

media outlet (as a member of staff or on a freelance basis) according to the professional titles of jobs listed in the State Classifier of Professions in Ukraine.

It is necessary to mention that some amendments to the Law of Ukraine “On Information” were passed in May 2011. Before that, Article 20 of the above-mentioned law recognised only printed and audiovisual types of media, and defined them in a following way:

Print media are periodical publications (press) – newspapers, magazines, bulletins, etc. and separate editions with certain print runs. Audiovisual media are: radio broadcasting, television, film, audio recording, video recording, and others.³¹

A specific law that includes definition of a “journalist” regulates each type of media. In such a way, the Parliament limited definition of a journalist and his professional activities to a particular type of media. This resulted in exclusion of some individuals performing the same type of activities as media journalists for organisations that do not fall under the scope of the Parliament’s understanding of mass media. The most obvious example of this are journalists of web-based media outlets.

The amendments of 2011 showed that the Parliament took more flexible approach by considering mass media as ‘resources targeted for public distribution of printed or audiovisual information’.³² Thus, web-based media, which could not be considered as mass media according to the approach had been existing before 2011, now also fall under the scope of the term “mass media”. Consequently, a person working on collecting, processing and creating information for online media outlets is also considered a journalist similarly to a person performing journalistic activities for print and audiovisual mass media.

All of the above-mentioned types of journalists enjoy almost the same scope of rights and bear similar number of obligations that are established in several laws, while in other ones reference is only fixed, when it comes to journalists’ rights. For example, the Law of Ukraine “On Print Mass Media (Press) in Ukraine” states that a journalist of a print media outlet enjoys the rights and bears duties prescribed by the Law of Ukraine “On Information”.³³

Unfortunately, we observe the lack of clarity in national legislation governing the subject matter. Essentially, the above-mentioned laws differentiate such professions as a journalist, a journalist of print media, a journalist of television and radio and a journalist of an informational agency, which is contrary to the State Classifier of Professions.³⁴ It should be noted that the State Classifier of Professions is a regulation developed by the State Committee of Ukraine on Technical Regulation and Consumer Policy and approved by the Ministry of Economic Development and Trade of Ukraine. It provides for official titles of professions in Ukraine, which are classified into groups according to certain characteristics. Every employer while

³¹ Law n. 2657-XII (On Information) 1992 [Про інформацію] art 20 pt 2, 3 (as of 2 October 1992).

³² Law n. 2657-XII (On Information) 1992 [Про інформацію] art 22 pt 2.

³³ Law n. 2657-XII (On Information) 1992 [Про інформацію] art 26 pt 1.

³⁴ Decree n. 327 5 of the State Committee of Ukraine on Technical Regulation and Consumer Policy (Classifier of Professions ДК 003:2010) 2010 [Класифікатор професії ДК 003:2010].

maintaining employment records of the employees must follow this regulation. The Classifier provides only for professions of a journalist and a journalist of multimedia publications of mass media, while Ukrainian legislation does not define the term of a “journalist of multimedia publications of mass media”.

Furthermore, the requirement to hold an identification document confirming professional status of a journalist in order to be recognised as such, and enjoy all rights and guarantees deriving from this status should be considered. Not all of the above-mentioned laws require a journalist to have such a document. Nonetheless, the Law of Ukraine “On Print Mass Media in Ukraine” states that professional affiliation of a journalist can be confirmed by (1) a certificate issued by the editorial office; (2) other document issued by the editorial office; (3) a document issued by the professional association of journalists.³⁵ The Law “On Informational Agencies” prescribes that ‘journalist’s affiliation with an information agency is confirmed by an official identification document of this agency or other document issued by this agency’.³⁶

In this regard, the criminal legislation should be mentioned. The Criminal Code of Ukraine does not include a clear definition of a journalist. At the same time, Article 345-1 of the Criminal Code defines the term of “professional activities of a journalist”:

The professional activities of a journalist in this Article and articles 171, 347-1, 348-1 of the Code should be understood as a systematic activity of a person related to the collection, obtainment, creation, distribution, storage or other usage of the information with a purpose of its dissemination to the indefinite range of persons through print mass media, broadcasting organisations, informational agencies, the Internet. The status of a journalist or his/her affiliation with a mass medium is confirmed by editorial or official identity card or other document issued by a mass media outlet, its editorial office, or professional or creative union of journalists.

We think that this provision needs further clarification. While the first sentence of the provision does not define journalistic activities as activities performed by a holder of a special document, the second sentence provides that the status of a journalist is confirmed by relevant documents without any further explanation whether the possession of such documents is obligatory in order to be recognised as a journalist.

Thus, whether a person with no official documentation confirming his/her status of a journalist can be entitled to rights and bear obligations of a journalist in Ukraine is not clear. As a practical matter, such documentation facilitates access to information. Moreover, upon presentation of a document that confirms professional affiliation, a journalist has a right to collect information

³⁵ Law n. 2782-XII (On Print Media (Press) in Ukraine) 1992 [Про друковані засоби масової інформації (преси) в Україні] art 25 pt 1, 2.

³⁶ Law n. 74/95-BP (On Information Agencies) 1995 [Про інформаційні агентства] art 21 pt 2.

within the areas of natural disasters, catastrophes, accidents, in areas of mass riots, acts of war with exceptions prescribed by law.³⁷

4.2. Is it in Your View a Restricted Definition for the Purpose of the Protection of Journalistic Sources?

To summarise, the main features characterising the legal status of a journalist according to the national legislation can be described as follows:

- A journalist is a person, who performs the functions of collecting, processing and creating information for mass media outlets;
- He/she can work as a member of staff of a mass media outlet or on a freelance basis;
- His/her professional status is confirmed by official documentation issued by a mass media outlet or professional association of journalists.

As previously mentioned, national law is not precise enough with regard to the necessity of holding special identification documentation for being recognised as a journalist. It should be noted that Recommendation No. R (2000) 7 does not limit the definition of a “journalist” to the persons in possession of specific official documentation confirming their status. It extends the status of a journalist to ‘any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication’.³⁸ Therefore, as it is stressed in the Explanatory Memorandum to the Recommendation, ‘legal entities like publishing companies or news agencies are also to be protected like “journalists” under this Recommendation’.³⁹

It is not clear whether a legal entity is treated in the same manner as a journalist, who is a natural person, under Ukrainian legislation. There are no direct provisions as for the protection of legal persons from disclosure of confidential sources in the same manner as for natural persons. However, Article 59, Part 1 of the Law of Ukraine “On Television and Radio Broadcasting” prescribes that television and radio broadcasting organisations are obliged not to disclose confidential sources, while not establishing their right of non-disclosure. Moreover, national legislation does not consider other kinds of mass media outlets with regard to the privilege of non-disclosure. Therefore, we can conclude that the current definition of a “journalist” is largely limited for the purpose of the protection of journalistic sources.

³⁷ Law n. 2657-XII (On Information) 1992 [Про інформацію] art 25 pt 4.

³⁸ Council of Europe (Committee of Ministers) ‘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’ (8 March 2000) Appendix, Definitions, para a.

³⁹ Council of Europe (Committee of Ministers) ‘Explanatory Memorandum to 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’ (20 December 2000) para 13.

4.3. What is the Scope of Protection of Other Media Actors?

In order to determine the scope of protection of other media actors than journalists, it is useful to determine the scope of other media actors. For this purpose, the Recommendation (2011) 7 of the Committee of Ministers of the Council of Europe to member states on the notion of media should be taken into consideration. The Recommendation calls upon member states to adopt a broader notion of media, which encompasses the following:

all actors involved in the production and dissemination, to potentially large numbers of people, of content (for example information, analysis, comment, opinion, education, culture, art and entertainment in text, audio, visual, audiovisual or other form) and applications which are designed to facilitate interactive mass communication (for example social networks) or other content-based large-scale interactive experiences (for example online games), while retaining (in all these cases) editorial control or oversight of the contents.⁴⁰

This being stated, we may conclude that every legal or natural person involved in one of the above-mentioned activities should be considered as media actor and enjoy respective rights. However, Ukrainian legislation fails to adopt such notion of media as well as lacks provisions concerning other media actors than journalists. There are only a few clauses regarding actors involved in activities of mass media outlets.

The Law of Ukraine “On Print Mass Media (Press) in Ukraine” recognises a founder (co-founders) of a print media outlet, its editor (editor in chief), editorial office, editorial board, editorial board’s staff, journalistic staff, author, publisher and distributor as actors of print mass media activities.⁴¹ Additionally, Article 6 Part 1 of the Law “On Informational Agencies” considers as actors of informational agencies’ activities the following entities:

founder (co-founders) of informational agency; its manager (director, CEO, President, etc.), staff; creative team; journalist of an informational agency; specialist in the field of communication; author or other person who owns the right to information; publisher (producer) of informational agency’s production; distributor of informational agency’s production; consumer of informational agency’s production.

Each kind of the above-mentioned actors enjoys the scope of rights and guarantees of these rights under the relevant legislation (for instance, staff as subject to labour relations enjoy the rights under labour legislation), but none of them, besides journalists, is entitled to journalists’ rights. Thus, Ukrainian legislation does not provide ‘all actors delivering services or products in the media ecosystem’ with ‘relevant safeguards against interference that might otherwise have an

⁴⁰ Council of Europe (Committee of Ministers) ‘Recommendation (2011) 7 on a New Notion of Media’ (21 September 2011) para 7.

⁴¹ Law n. 2782-XII (On Printed Mass Media (Press) in Ukraine) 1992 [Про друковані засоби масової інформації (пресу) в Україні] art 7 pt 1.

adverse effect on Article 10 rights'.⁴²

4.4. Is the Protection of Journalists' Sources Extended to Anyone Else?

National legislation clearly establishes the right of non-disclosure of journalistic sources only for journalists. Article 25, paragraph 7 of the Law of Ukraine "On Information" extends the rights and obligations of a journalist to foreign journalists and employees of foreign mass media outlets, who work in Ukraine. However, national legislation does not either define the term of an "employee of a foreign mass media outlet" or an "employee of a mass media outlet" or prescribe which rights such actors are entitled to. Thus, we believe that national law fails to comply with the Recommendation No. R (2000) 7 as

'other persons active in the media sector than journalists should be entitled not to disclose a source of information, if they acquire knowledge of this source through the collection, editorial processing or dissemination of the information'.⁴³

These "other persons" may include secretarial staff, journalistic colleagues, printing staff, the editor or the employer of a journalist, and therefore shall be subject to the privilege of non-disclosure.⁴⁴

5. What are the Legal Safeguards for the Protection of Journalistic Sources? How are the Laws Implemented? How are the Legal Safeguards Combined with Self-Regulatory Mechanisms?

5.1. What are the Legal Safeguards for the Protection of Journalistic Sources? How are the Laws Implemented?

According to national legislation, the disclosure of confidential sources is possible solely at the request of the court as it is provided by the laws of Ukraine "On Information" and "On the Printed Media (Press) in Ukraine". Therefore, any disclosure motion is a subject for consideration by an independent judicial body, which complies with recommendations of the Council of Europe. Still, we can see the lack of legal safeguards for the protection of journalists' rights in national laws governing disclosure proceedings.

⁴² Council of Europe (Committee of Ministers) 'Recommendation (2011) 7 on a New Notion of Media' (21 September 2011) para 7.

⁴³ Council of Europe (Committee of Ministers) 'Explanatory Memorandum to 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' (20 December 2000) para 22.

⁴⁴ *ibid.*

The disclosure proceedings are specified in the Criminal Procedure Code and Civil Procedure Code of Ukraine. In terms of criminal proceedings, Article 162, Part 1 paragraph 1 of the Criminal Procedure Code of Ukraine establishes that information in possession of a mass medium or a journalist that is obtained on the terms of non-disclosure of its author or source of information is regarded as secret information protected by law. However, such information may be subject to temporary access under Article 160 of the Criminal Procedure Code, and, therefore, be disclosed only upon the court ruling or the order of the investigative judge. Article 159, Part 1 of the Code defines temporary access to objects and documents as an action providing a party to a criminal proceeding with an opportunity to examine objects and documents, make their copies or seize them by the person, who is in possession of such objects and documents. Thus, both parties to criminal proceedings (prosecution and defence) are given the right to file a disclosure motion. With regard to prosecution, Procedure law establishes additional requirements for disclosure motion. An investigator upon approval of the prosecutor shall submit such motion.⁴⁵ The prosecutor shall assess whether the motion is adequately justified, and if not refuses to approve it. Such two-step motion filing procedure seems to be a positive feature of national legislation. An investigator has an obligation to prove the necessity of disclosure not only before the court, but also before the respective prosecutor. This has a potential to eliminate groundless disclosure motions.

Together with a disclosure (temporary access) order, the court or investigative judge may order a seizure of objects and documents if a party to criminal proceedings proves there is a risk of destruction of these items.⁴⁶ However, a disclosure order is not equivalent to a search warrant.

This means that in case an investigator's temporary access request is refused, he/she cannot force the owner or keeper of the items to grant him/her access. If a journalist refuses to provide an investigator with a temporary access to objects or documents, an investigator should file a new motion to obtain a search warrant.⁴⁷

It is also important to mention that, as High Specialised Court of Ukraine stresses it for Civil and Criminal Cases in its case-law analysis of February 7 2014, temporary access to objects and documents shall only be conducted within the framework of criminal proceedings.⁴⁸

With regard to civil cases, parties to civil proceedings (plaintiff and defendant) as well as other persons involved in a case are entitled to file a disclosure motion as a mean of obtaining an evidence under Article 137 Part 1 of the Civil Procedure Code of Ukraine: "The court upon

⁴⁵ Law n. 4651-VI (Criminal Procedure Code of Ukraine) 2012 [Кримінальний процесуальний кодекс України] art 160 pt 1.

⁴⁶ *ibid* art 163 pt 7.

⁴⁷ Goncharenko V., V. Nor, M. Shumylo (eds.), *Кримінальний-процесуальний кодекс України. Науково-практичний коментар* (Pravo 2012) 323-324 [Ukrainian].

⁴⁸ Case-Law Analysis of the High Specialised Court of Ukraine for Civil and Criminal Cases (On review of the motions for the use of the means to maintain criminal proceedings) February 7 2014 [Узагальнення судової практики щодо розгляду слідчим суддею клопотань про застосування заходів забезпечення кримінального провадження] para 2.5.

motion of the parties and other persons involved in the case shall vindicate the evidence that is difficult for the persons involved in the case to obtain.’

Additionally, parties to proceedings are entitled to apply for a review of court orders. However, the right to appeal a disclosure order is relatively limited.

Disclosure order in civil proceedings is not a subject for a separate judicial review, and therefore may be reviewed together with the final court decision in a civil case under Article 293 Part 2 of the Civil Procedure Code of Ukraine. According to Article 392 Part 2 of the Criminal Procedure Code of Ukraine, court orders for a temporary access to objects and documents that contain secret information protected by law and for search are reviewed in the same manner. Thus, journalists can only appeal disclosure orders after a final court’s judgement in the case is entered. In our opinion, this does not meet the requirements of Recommendation No. R (2000) 7 as ‘fair and efficient administration of justice at national level might therefore require the possibility of a national review of disclosure orders’.⁴⁹

5.2. How are the Legal Safeguards Combined with Self-Regulatory Mechanisms?

We note, with regret, that self-regulation does not play a sufficient role in the protection of journalists’ rights in Ukraine yet. Two key journalistic organisations in Ukraine, the National Union of Journalists of Ukraine and the Commission on Journalists’ Ethics, do not provide Ukrainian journalists with sufficient self-regulation. Having been established in 1959, the National Union of Journalists of Ukraine was reorganised in 1992 after Ukraine declared its independence. According to the Statutes of the Union, one of the main goals of this organisation is to protect the rights and interests of journalists.⁵⁰ However, it does not seem to be active in journalists’ rights advocacy. The Commission on Journalists’ Ethics does not also appear to be an adequate self-regulatory body. Aimed at resolving conflicts of ethical and professional nature within the journalistic community, the last time the Commission reviewed complaints was in July 2015, while its website is completely outdated.⁵¹ In addition, objectivity of Commission’s decisions is often subject to criticism in the media. It was accused several times of serving the interests of particular mass media outlets and individuals.⁵²

In terms of their legal status, the Commission on Journalists’ Ethics is non-governmental organisation, while the National Union of Journalists of Ukraine is a creative union, which is

⁴⁹ Explanatory Memorandum to 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’ (20 December 2000) para 49.

⁵⁰ VII Special Congress of National Union of Journalists of Ukraine, ‘Statutes of National Union of Journalists of Ukraine’ (15 January 1992) [Статут Національної Спілки Журналістів України] para 2.

⁵¹ Commission on Journalists’ Ethics <<http://www.cje.org.ua/>> accessed 15 April 2016 [Ukrainian].

⁵² Natalia Sidorova, ‘Громадський осуд» з присмаком шахрайства’ (8 January 2011) <<http://stopkat.net/news/view/8182>> accessed 15 April 2016 [Ukrainian].

subject to Law of Ukraine “On Professional Creative Employees and Creative Unions”.⁵³ Both organisations are entitled to similar rights and do not exercise regulatory authority. Even though the Commission considers violations of the Code of Ethics of Ukrainian Journalist and applies sanctions (public condemnation or expulsion from trade union or the National Union of Journalists of Ukraine), it is not recognised as self-regulatory organisation by the state (as, for example, self-regulation of attorneys) and, therefore, lacks competence to provide journalists with sufficient self-regulation. Thus, journalistic self-regulation is not developed in Ukraine.

6. In the Respective National Legislation are the Limits of Non-Disclosure of the Information in Line With the Principles of the Recommendation No R (2000) 7? What are the Procedures Applied? Is the Disclosure Limited to Exceptional Circumstances, Taking into Consideration Vital Public or Individual Interests at Stake? Do the Authorities First Search for and Apply Alternative Measures, Which Adequately Protect Their Respective Rights and Interests and at the Same Time are Less Intrusive With Regard to the Right of Journalists Not to Disclose Information?

6.1. In the Respective National Legislation are the Limits of Non-Disclosure of the Information in Line with the Principles of the Recommendation No. R (2000) 7?

The privilege of non-disclosure of confidential sources is not absolute. Article 10 Paragraph 2 of the Convention provides that the freedom of expression may be subject to some limitations 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. These limitations are specified in Principle 3 (Limits to the right of non-disclosure) of Appendix to Recommendation No. R (2000) 7. In particular, the Recommendation establishes the following requirements for disclosure:

- legitimate aim under Article 10 of the European Convention on Human Rights
- necessity of the disclosure
 - i. absence of reasonable alternative measures
 - ii. outweighing legitimate interest
 - iii. protection of human life
 - iv. prevention of major crime
 - v. defence of a person accused or convicted of having committed a major crime

⁵³ Law n. 554/97-BP (On Professional Creative Employees and Creative Unions) 1997 [Про професійних творчих працівників та творчі спілки].

- application of the requirements to all stages of any proceedings.⁵⁴

Unfortunately, Ukrainian legislation does not fully meet these requirements. The laws of Ukraine “On Information” and “On the Printed Media (Press) in Ukraine” reserve the right of the court to request the disclosure while providing no further criteria or procedure for such disclosure. Neither do they limit the disclosure to exceptional circumstances listed in Article 10 of the ECHR.

The Criminal Procedure Code of Ukraine gives greater clarity on disclosure of journalistic sources. In particular, when requesting disclosure, parties to criminal proceedings have to indicate whether objects and documents they request include information, which can be used as evidence, and impossibility to otherwise prove circumstances, which are supposed to be proved in a criminal proceeding with the use of these objects and documents.⁵⁵

6.2. What are the Procedures Applied?

While discussing Principle 3 of the Recommendation, the Committee of Ministers of Council of Europe in its Explanatory Memorandum emphasises the following:

The requirements stipulated in this Principle [*Principle 3*] should be respected and applied by all public authorities and at all stages of any proceedings where the right of non-disclosure might be invoked by journalists. Such stages may include investigations by the police or prosecutor, court proceedings, parliamentary or political committees of enquiry and other bodies with the power to compel witnesses, as well as review procedures upon appeal or at higher instances.⁵⁶

National legislation does not provide for a general procedure applicable to any case of interference with the right of non-disclosure. In terms of criminal proceedings, there is a measure of temporary access to objects and documents, which is used in order to disclose the journalistic sources. For this purpose, a party to criminal proceedings should file a motion for disclosure pointing out specific circumstances prescribed by law. Such motion is subject to review by the court or investigative judge, who decides, upon their sole discretion, whether such a motion meets the criteria established in procedural law. Nevertheless, Article 160 of the Criminal Procedure Code of Ukraine, which provides for such measure, does not clearly indicate requirements of the Principle 3, thus granting courts excessive discretion in disclosure proceedings. The laws of Ukraine “On the Office of Public Prosecutor” and “On National Police” do not prescribe any requirements for authorities filing disclosure motion.

⁵⁴ Council of Europe (Committee of Ministers) ‘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’ (8 March 2000) Appendix, Principle 3.

⁵⁵ Law n. 4651-VI (Criminal Procedure Code of Ukraine) 2012 [Кримінальний процесуальний кодекс України] art 160 pt 2 para 6.

⁵⁶ Council of Europe (Committee of Ministers) ‘Explanatory Memorandum to 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’ (20 December 2000) para 42.

With regard to civil proceedings, it is possible to file a disclosure motion as a mean of obtaining evidence under Article 137 of the Civil Procedure Code of Ukraine. According to Article 137 Part 2 of the Civil Procedure Code, such motion shall indicate the evidence required the grounds based on which a person, who requests vindication, believes that the evidence is in possession of another person, the circumstances that this evidence may prove. In this case, the court also decides whether to grant such motion upon its sole discretion, while no further criteria are provided.

6.3. Is the Disclosure Limited to Exceptional Circumstances, Taking Into Consideration Vital Public or Individual Interests at Stake?

According to Article 34 Part 2 of the Constitution of Ukraine, the freedom of expression may be limited for the following purposes:

in the interest of national security, territorial integrity or public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice.

Additionally, Article 29 of the Law of Ukraine “On Information” establishes that confidential information may be disclosed based on the grounds of public interest, i.e. such information (1) indicates there is a threat to national sovereignty and territorial integrity of Ukraine; (2) facilitates implementation of constitutional rights, freedoms and duties; (3) indicates there is a possibility of violation of human rights, deception of the public, harmful environmental and other negative effects of activity (or inactivity) of natural and legal persons.⁵⁷

Thus, national laws provide for limits of non-disclosure rather than limit disclosure to exceptional circumstances. Furthermore, procedural law does not provide for any circumstances to which the right of non-disclosure or vice versa grounds for disclosure shall be limited.

6.4. Do the Authorities First Search For and Apply Alternative Measures, Which Adequately Protect Their Respective Rights and Interests and at the Same Time are Less Intrusive With Regard to the Rights of Journalists Not to Disclose Information?

Recommendation No. R (2000) 7 suggests that ‘a disclosure should only be justified if and after other means or sources have been unsuccessfully exhausted by the parties to a disclosure proceeding.’⁵⁸ ECtHR case-law also requires public authorities to consider alternative measures

⁵⁷ Law n. 2657-XII (On Information) 1992 [Про інформацію] art 29 pt 2.

⁵⁸ Council of Europe (Committee of Ministers) ‘Explanatory Memorandum to 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’ (20 December 2000) para 32.

before proceeding to disclosure. In *De Haes and Gijssels v. Belgium*, the Court held that under Article 6 of the Convention, national courts shall not reject an application from a journalist to consider alternative evidence to disclose the source of information, if such evidence for the proof of the journalist's statement is available to the judiciary.⁵⁹

Under Ukrainian legislation, the journalists' privilege of non-disclosure of confidential sources may be only interfered upon an order of the court. Thus, the only way for authorities to disclose the source of confidential information is to file a disclosure motion in the court within the framework of court proceedings. Nevertheless, national law does not clearly establish that the authorities shall first search for alternative measures instead of interfering journalists' privilege of non-disclosure.

With regard to criminal proceedings, when requesting temporary access to objects and documents that contain secret information, a party to a criminal proceeding shall indicate the possibility to use the information contained in the objects and documents as evidence, and impossibility to prove otherwise circumstances, which are supposed to be proved with the use of such objects and documents.⁶⁰ Thus, this provision meets the criteria of absence of reasonable alternative measures, which means that a disclosure should only be justified if and after other means or sources have been unsuccessfully exhausted by the parties to a disclosure proceeding. Nevertheless, this only applies to criminal proceedings, which does not meet the requirement of paragraph c of the Principle 3 – *application of the requirements to all stages of any proceedings*.⁶¹

7. In the Recommendation No. R (2000) 7, the Following Principles Should Be Respected When the Necessity of Disclosure Is Stated: Absence of Reasonable Alternative Measures, Outweighing Legitimate Interest (Protection of Human Life, Prevention of Major Crime, Defence of a Person Accused or Convicted of Having Committed a Major Crime). Under Which Criteria Can the Interest in the Disclosure Outweigh the Interest in the Non-Disclosure?

Principle 3 (Limits to the Right of Non-Disclosure)

While assessing whether the national legislation complies with the Recommendation No. R (2000) 7 or not, it is important to refer to ECtHR case-law. In *Goodwin v. United Kingdom*, the Court has stressed that

‘the relevant national law must be formulated with sufficient precision to enable the persons concerned – if need be with appropriate legal advice – to foresee, to a degree

⁵⁹ *ibid* para 43.

⁶⁰ Law n. 4651-VI (Criminal Procedure Code of Ukraine) 2012 [Кримінальний процесуальний кодекс України] art 160 pt 2 para 6.

⁶¹ Council of Europe (Committee of Ministers) ‘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’ (8 March 2000) Appendix, Principle 3.

that is reasonable in the circumstances, the consequences which a given action may entail.⁶²

Furthermore, any restriction on the freedom of expression must pursue a legitimate aim that is established by reference to those grounds, which can possibly override the rights and interests in the protection of the confidentiality of journalists' sources.⁶³ Most recently, in *Sanoma Uitgevers B.V. v The Netherlands* the Court concluded:

the judge or other independent and impartial body must thus be in a position must thus be in position to carry out this weighing of the potential risks and respective interests prior to any disclosure and with reference to the material that it is sought to have disclosed so that the arguments of the authorities seeking the disclosure can be properly assessed. The decision to be taken should be governed by clear criteria, including whether a less intrusive measure can suffice to serve the overriding public interests established'.⁶⁴

Based on an analysis of Ukrainian law, we may conclude that all of the above-mentioned is not adequately reflected in national legislation.

The laws "On Information" and "On the Print Media (Press) in Ukraine" grant courts a power to request disclosure of sources. Unfortunately, both legal acts are not in line with the requirements established in Principle 3. They do not provide for any criteria of legitimacy and necessity of disclosure order. Neither do they limit the disclosure to exceptional circumstances listed in Article 10 of the Convention. Despite the fact that the Court does not recognise laws conferring discretion inconsistent with the requirement of precision itself,⁶⁵ the previously mentioned legal acts lack clarity, and therefore grant courts excessive discretion in assessing the legitimate interest.

The Criminal Procedure Code of Ukraine provides for somewhat more clear provisions governing disclosure proceedings. While requesting disclosure, a party to a criminal proceeding shall indicate the possibility to use the information contained in the objects and documents as evidence, and impossibility to otherwise prove circumstances, which are supposed to be proved with the use of such objects and documents.⁶⁶ We may conclude that this provision, to a certain extent, meets the requirement of paragraph c of the Principle 3. Yet, the rest of the requirements of paragraph b (protection of human life, prevention of major crime, defence of a person accused or convicted of having committed a major crime) are not implemented in Ukrainian legislation, which deprives journalists "adequate protection against arbitrary interference".⁶⁷

⁶² *Goodwin v United Kingdom* App no 17488/90 (ECtHR, 27 March 1996) para 31.

⁶³ Council of Europe (Committee of Ministers) 'Explanatory Memorandum to 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' (20 December 2000) para 25.

⁶⁴ *Sanoma Uitgevers B.V. v the Netherlands* App no 38224/03 (ECtHR, 14 September 2010) para 92.

⁶⁵ *Goodwin v United Kingdom* App no 17488/90 (ECtHR, 27 March 1996) para 31.

⁶⁶ Law n. 2341-III (Criminal code of Ukraine) 2001 [Кримінальний кодекс України] art 160 pt 2 para 6.

⁶⁷ *Goodwin v United Kingdom* App no 17488/90 (ECtHR, 27 March 1996) para 31.

The Constitution and the Law “On Information” of Ukraine provide for a list of exceptional circumstances, when the interest of disclosure outweighs the privilege of non-disclosure. However, they are not reflected in the procedural law. Consequently, authorities are not directly prescribed to justify disclosure motions with such circumstances.

A year before the current Criminal Procedure Code was adopted in 2012, a group of Ukrainian MPs had proposed the Parliament to consider amendments to the Criminal Procedure Code of 1960 that grant journalists absolute testimonial immunity and regulate conduct of search and seizure concerning journalistic materials. In its Conclusions on the proposed draft law, the Main Scientific and Expert Department of the Parliament of Ukraine offered an opinion that the testimonial immunity should be narrowed down to cases, when non-disclosure may not result in dangerous consequences, specifically loss of human life.⁶⁸ The Department noted that a journalist in possession of information about major crimes, such as homicide, terrorist attack, etc., as well as about individuals, who are going to commit or have committed such crimes, should not have testimonial immunity and right to deny law enforcement in helping to eliminate or investigate such crimes, as information received from a journalist can save human lives.⁶⁹ Unfortunately, such remarks have not been afterwards reflected in Ukrainian legislation.

Principle 4 (Alternative Evidence to Journalist' Sources)

Principle 4 specifically covers defamation cases. It implies that in legal proceedings against a journalist on the grounds of an alleged infringement of the honour or reputation of a person, the competent authorities should consider all other evidence ‘which is available to them under national procedural law’ instead of requiring journalists to disclose their sources.⁷⁰ Recalling Article 6 of the Convention, which protects the right to a fair trial, the Court found in *De Haes and Gijssels v. Belgium* that authorities’ rejection to use alternative evidence rather than insisting on the disclosure of journalistic sources ‘put the journalists in substantial disadvantage *vis-à-vis* the plaintiffs’.⁷¹ The Court held that ‘there was therefore a breach of the principle of equality of arms’.⁷²

⁶⁸ Conclusions of the Main Scientific and Expert Department of the Parliament of Ukraine (On the Draft Law of Ukraine “On Amendments to the Criminal Procedure Code of Ukraine” (concerning the right of journalists to protect sources of information) 10 June 2011 [Висновок на проект Закону України "Про внесення змін до Кримінально-процесуального кодексу України" (щодо забезпечення права журналістів на захист джерел інформації)].

⁶⁹ Conclusions of the Main Scientific and Expert Department of the Parliament of Ukraine (On the Draft Law of Ukraine “On Amendments to the Criminal Procedure Code of Ukraine” (concerning the right of journalists to protect sources of information) 10 June 2011 [Висновок на проект Закону України "Про внесення змін до Кримінально-процесуального кодексу України" (щодо забезпечення права журналістів на захист джерел інформації)].

⁷⁰ Council of Europe (Committee of Ministers) ‘Explanatory Memorandum to 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’ (20 December 2000) para 45.

⁷¹ *De Haes and Gijssels v. Belgium* App no 19983/92 (ECtHR, 24 February 1997) para 58.

⁷² *ibid.*

Procedural law of Ukraine lacks specific provisions regulating defamation proceedings. It also does not prescribe rules that oblige the courts to consider alternative proof of the journalists' statements instead of confidential sources. Paragraph 6 of the Resolution of the Plenum of the Supreme Court of Ukraine No. 7 "On courts' application of legislation governing the protection of honour, dignity and business reputation of citizens and organisations" (28 September 1990), which, as for today, is not in force, stated that a media outlet is obliged to disclose a person who provided published or otherwise disseminated information at the request of the court.⁷³ It did not mention any criteria or procedure for such disclosure as well as a requirement to consider alternative sources. Current Resolution of the Plenum of the Supreme Court of Ukraine No. 1 "On judicial practice in cases of protection of honour and dignity of the individual and business reputation of individual and legal entity" (27 February 2009) does not specify requirements for disclosure procedure. At the same time, paragraph 2 of the Resolution stresses that when considering such cases, courts shall also take into consideration the Convention and ECtHR case-law.⁷⁴ It does not underline the necessity of considering alternative sources either, which results in non-compliance with the Council of Europe's recommendations and ECtHR case-law concerning disclosure proceedings.

According to the Kharkiv Human Rights Protection Group, one of the leading human rights NGOs in Ukraine, in cases against journalists on the grounds of an alleged infringement of the honour or reputation of a person, they generally disclose the sources.⁷⁵

Principle 5 (Conditions Concerning Disclosures)

Considering that 'the protection of journalists' sources of information constitutes a basic condition for journalistic work and freedom as well as for the freedom of the media',⁷⁶ the Council of Europe establishes some procedural safeguards regarding the disclosure of journalistic sources in Principle 5 of the Recommendation. Principle 5 sets out that requirements for disclosure proceedings shall encompass the following:

- Direct legitimate interest of a person or public authority that initiative an action of disclosure
- Journalists' right to be informed of their privilege not to disclose confidential sources as well as of its limitations
- Imposition of the sanctions for not disclosing sources only by judicial authorities

⁷³ Resolution of the Plenum of the Supreme Court of Ukraine No. 7 (On courts' application of legislation governing the protection of honour, dignity and business reputation of citizens and organisations) 28 September 1990 [Постанова Пленуму Верховного Суду України "Про застосування судами законодавства, що регулює захист честі, гідності і ділової репутації громадян та організацій"].

⁷⁴ Resolution of the Plenum of the Supreme Court of Ukraine No. 1 (On judicial practice in cases of protection of honour and dignity of the individual and business reputation of individual and legal entity) 27 February 2009. [Постанова Пленуму Верховного Суду України "Про судову практику у справах про захист гідності та честі фізичної особи, а також ділової репутації фізичної та юридичної особи"].

⁷⁵ Kharkiv Human Rights Protection Group, *Законодавство та практика ЗМІ в Україні* (20(61) edn Pholio 2002) [Ukrainian].

⁷⁶ Council of Europe (Committee of Ministers) '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' (8 March 2000).

- Journalists' right to have the imposition of a sanction for not disclosing a source reviewed by another judicial authority
- Limits of the extent of a disclosure

Procedural law of Ukraine does not provide for any limitations with regard to natural or legal persons, who have a right to introduce a motion for disclosure. Only in case of criminal proceedings, Article 160 Part 1 of the Criminal Procedure Code of Ukraine grants this right exclusively to the parties to criminal proceedings. There are also no provisions obliging public authorities to inform the journalists of their privilege of non-disclosure and its limitations. Moreover, some lawyers note that the law enforcement officials often violate the rights of journalists by inviting them for interrogation or directly visiting their offices and demanding to disclose confidential sources.⁷⁷

At the same time, Ukrainian legislation provides for sanctions for not disclosing sources in the same manner as for any other failure to comply with a court decision. Article 382 Part 1 of the Criminal Code of Ukraine establishes criminal liability for wilful failure to comply with a verdict, judgement, ruling or order of a court, which has come into force, or preclusion of their execution. Additionally, Article 166 Part 1 of the Criminal Procedure Code prescribes that upon failure to comply with a court order granting one of the parties to a criminal proceeding a temporary access to objects and documents that contain secret information protected by law, a court or investigative judge may grant this party a motion for search in order to find and seize the objects and documents concerned. In both cases, judicial authorities shall impose sanctions. In terms of judicial review of the imposed sanctions, procedural law does not establish specific provisions on review of sanctions for not disclosing information identifying a source.

According to Article 392 Part 2 of the Criminal Procedure Code of Ukraine, a search warrant is not a subject for a separate judicial review, and therefore may be reviewed only together with the final court decision in a criminal case. Thus, journalists can only appeal search warrants after a final court's judgment in a case is entered. As for criminal liability established in Article 382 of the Criminal Code, a verdict in a criminal case may be reviewed under Article 392 Part 1 paragraph 1 of the Criminal Procedure Code. An appeal against the decision of a first instance court is considered by another judicial authority – a court of appeals.

When it comes to state's obligation to limit the extent of a disclosure, procedural law of Ukraine provides for some provisions excluding the public from a disclosure. Article 27 Part 2 paragraph 4 of the Criminal Procedure Code gives court an authority to close a hearing for the public under the risk of disclosure of confidential information protected by law. Article 6 Part 3 of the Civil Procedure Code of Ukraine limits extent of a disclosure in the same manner. Only participants in the proceedings may attend closed court hearings.

⁷⁷ М.О. Yelnykova, *Конституційно-правові аспекти права на таємницю журналістських джерел* [2013] Матеріали Міжнар. наук.-практ. конф., присвяч. 20-річчю НАПрН України та обговоренню п'ятитом. моногр. "Правова доктрина України" 787 [Ukrainian].

Thus, we may conclude that national law is not clear and foreseeable enough to adequately protect the journalists' privilege of non-disclosure from "arbitrary interference". National courts are not directly obliged to assess whether the interest in the disclosure outweighs the interest in the non-disclosure in every case. The requirements for disclosure proceedings, which are established in Principle 5, are not fully implemented in Ukrainian legislation as well.

8. In the Light of the Case Law of the European Court of Human Rights, How Do National Courts Apply the Respective Laws With Regard to the Right to Protect Sources? In Particular, How Do They Balance the Different Interests at Stake?

Ukrainian legislation stipulates that journalists' sources shall be only disclosed at the request of the court. In the light of ECtHR case-law and Recommendation No. R (2000) 7, the disclosure of confidential sources shall be justified only in case when (1) such interference is necessary in democratic society, (2) there is a proven legitimate interest in the disclosure, which clearly outweighs the interest of non-disclosure, and (3) there are no other alternative measures to determine the facts in the case or such measures have been exhausted.

In *Handyside v. the United Kingdom*, the Court emphasised that any interference with exercise of freedom of expression must be "necessary in a democratic society", which is assessed through the reality of pressing social need.⁷⁸

When evaluating whether a particular legitimate interest under Article 10 paragraph 2 of the Convention justifies the restriction of the right to freedom of expression, the Court applies a balancing test, which determines whether restriction is "necessary in a democratic society".⁷⁹ The ECtHR has stressed that 'freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man', and therefore 'every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued'.⁸⁰ In *Sunday Times v. the United Kingdom*, the Court reaffirmed the balancing test emphasising that it has 'to look at the interference complained of in the light of the case as a whole, and determine whether it was 'proportionate to the legitimate aim pursued' as well as whether the reasons adduced by the national authorities to justify it are "relevant and sufficient"'.⁸¹ Recently, in *Roemen and Schmidt v. Luxembourg*, the ECtHR reaffirmed that 'an interference cannot be compatible with Article 10 of

⁷⁸ *Handyside v. the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) para 48.

⁷⁹ Council of Europe (Committee of Ministers) 'Explanatory Memorandum to 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' (20 December 2000) para 26.

⁸⁰ *Handyside v. the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976), para 49.

⁸¹ *Sunday Times v United Kingdom* App no 13166/87 (ECtHR, 24 October 1991), para 50.

the Convention unless it is justified by an overriding requirement in the public interest'.⁸² We note, with regret, that national courts do not fully comply with the respective case-law.

Nevertheless, national law obliges the courts to consider the Convention and ECtHR case-law, when deciding a case. In particular, Article 17 of the Law “On the Execution of Judgments and Application of the European Court of Human Rights Case-Law” establishes that while considering cases, courts apply the Convention and ECtHR case-law as a source of law. We can see that Ukrainian courts increasingly refer to ECtHR case-law in their decisions in recent years. Yet, they mostly fail to apply the balancing test.

Recalling the *Lingens v. Austria*, *De Haes and Gijssels v. Belgium*, *Goodwin v. United Kingdom* and *Prager and Oberschlick v. Austria* judgements, the Ukrainian court, in case No. 314/3755/15-II, recognised that ‘the freedom of expression constitutes one of the essential foundations of a democratic society, which is one of the basic conditions for its progress and for the development of every man’.⁸³ It also acknowledged that ‘the freedom of expression is not only applicable 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. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”’.⁸⁴ At the same time, in this case, against a journalist on the grounds of an alleged infringement of the honour and reputation of an official, Ukrainian court failed to comply with ECtHR case-law while requesting a disclosure of a journalist source. Rather than disclosing the source, who had provided a journalist with an audiotape exposing claimant’s corrupt activities,⁸⁵ the journalist submitted alternative evidence – a document, which allegedly confirms his statements. The court refused to consider the alternative source as an evidence because the document was drawn up two months after the article had been published.⁸⁶ Thus, the plaintiff’s claims were partially satisfied.⁸⁷ We believe that while not accepting alternative proof of the journalist’s statement, the national court put the defendant in ‘substantial disadvantage’ *vis-à-vis* the plaintiff.⁸⁸ Additionally, ‘the necessity of the interference with the exercise of the freedom of expression has not been shown’.⁸⁹

In case No. 757/9271/14-к, heard by the Pechersk District Court of Kyiv, an investigator filed a motion for temporary access to documents and objects that contained secret information protected by law. According to the case materials an individual, whose name is not revealed in the materials, was transferred into the second year of university programme based on a certificate

⁸² *Roemen and Schmidt v. Luxembourg* App no 51772/99 (ECtHR, 25 February 2003), para 46.

⁸³ Case n. 314/3755/15-II [2015] Vilniensk District Court of Zaporiz’ka Oblast <<http://www.reyestr.court.gov.ua/>> accessed 15 April 2015 [Ukrainian].

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ Case n. 314/3755/15-II [2015] Vilniensk District Court of Zaporizka Oblast <<http://www.reyestr.court.gov.ua/>> accessed 15 April 2015 [Ukrainian].

⁸⁷ *ibid.*

⁸⁸ See *De Haes and Gijssels v. Belgium* App no 19983/92 (ECtHR, 24 February 1997), para 58.

⁸⁹ *ibid* para 49.

from another higher education institution, which allegedly confirmed that this individual had been studying there for one academic year. A confidential source, whom journalist involved in this case refused to disclose, claimed that the stamp on this certificate had been forged. The court granted the investigator a motion for temporary access to documents and objects on the grounds that (1) such measures would allow a pre-trial investigation body to detect the conduct of offence (time, place, method), which was essential to establish the actual circumstances of the alleged offense; (2) it was impossible to determine the truth in this case otherwise.⁹⁰ Again, the national court did not apply the balancing test in order to justify the necessity of such interference. Neither did it discuss whether alternative measures have been taken. It is also worth mentioning that forgery of documents, stamps, seals or letterheads (Article 358 Part 1 of the Criminal Code of Ukraine), which was allegedly committed in this case, is minor offence according to Article 12 Part 2 of the Criminal Code of Ukraine, which doubts the proportionality of disclosure.

In case No. 760/7399/15-II, the national court again recalled *Lingens v. Austria* and ‘the demands of pluralism, tolerance and broadmindedness, without which there is no “democratic society”’.⁹¹ The court also referred to *Ukrainian Media Group v. Ukraine* judgement, which reaffirmed that:

While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfill and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10.⁹²

This time, the court did not grant an applicant motion for disclosure, while stressing that value judgments are not subject to refutation and proof of their veracity, while the applicant failed to prove that the information published was not a value judgment.⁹³

Therefore, we may conclude that national courts tend to take into consideration ECtHR case-law, especially in cases against journalists on the grounds of an alleged infringement of the honour or reputation of a person. In many ways, it is due to national legislation, which obliges the courts to do so, and a number of the Court’s judgments against Ukraine, when journalists were charged with defamation.⁹⁴ Nevertheless, national case-law on disclosure of journalistic sources is not well-established. The courts fail to apply the balancing test with regard to the right to protect sources. This is caused by the lack of clear criteria in national legislation under which

⁹⁰ Case n. 757/9271/14-K [2014] Pechersk District Court of Kyiv <<http://www.reyestr.court.gov.ua/>> accessed 15 April 2015 [Ukrainian].

⁹¹ Case n. 760/7399/15-II [2015] Solomenskyi District Court of Kyiv <<http://www.reyestr.court.gov.ua/>> [Ukrainian].

⁹² *Ukrainian Media Group v. Ukraine* App no 72713/01 (ECtHR, 29 March 2005) para 41.

⁹³ *ibid.*

⁹⁴ *Gazeta Ukraina-Tsentr v. Ukraine* App no 16695/04 (ECtHR, 15 July 2010); *Ukrainian Media Group v. Ukraine* App no 72713/01 (ECtHR, 29 March 2005); *Lyashko v. Ukraine* App no 21040/02 (ECtHR, 10 August 2006); *Marchenko v. Ukraine* App no 4063/04 (ECtHR, 19 February 2009).

the interest in the disclosure may outweigh the interest in the non-disclosure. Consequently, journalists continue to report on various interference with their privilege of non-disclosure.⁹⁵

9. What are the Criteria For Using Electronic Surveillance and Anti-Terrorism Laws, Which May Include Measures Such as Interceptions of Communications, Surveillance Actions and Search or Seizure Actions in Order to Identify Journalists' Sources of Information? Are the National Law Provisions Accessible, Precise, Foreseeable and Include Clear Legislative Norms in the Context of Surveillance and Anti-Terrorism Provisions?

Privacy of mail, telephone conversations, telegraph and other correspondence are among basic human rights provided to everyone by the Constitution of Ukraine. Exceptions to this rule shall be established only by a court in cases prescribed by law, with the purpose of preventing crime or ascertaining the truth in the course of the investigation of a criminal case, if it is not possible to obtain information by other means.⁹⁶ Article 32 of the Constitution establishes that no one shall be subject to interference with his/her personal and family life, except cases prescribed by the Constitution of Ukraine. Collection, storage, use and dissemination of confidential information about a person without his/her consent shall not be permitted, except cases prescribed by law, and only in the interests of national security, economic welfare and human rights.⁹⁷ Article 301 of the Civil Code of Ukraine corresponds to the foregoing provision. It stipulates that information on one's personal life may be disclosed only if it indicates elements of a crime as confirmed by court decision, or with consent of such person.⁹⁸ Finally, Article 21 Part 2 of the Law of Ukraine "On Information" provides that confidential information may be disseminated upon the approval of a respective person, and in a manner prescribed by this person, and in other cases prescribed by law.

The definition of "personal and family life" is set out in Decision of the Constitutional Court of Ukraine No. 2-рп/2012 of 20 January 2012. Information about personal and family life (personal information) is defined as any information about a person that is identified or may be identified through such information, including his/her nationality, marital status, religious

⁹⁵ The Independent Media Trade Union of Ukraine, 'НМПУ закликає підтримати законопроект на захист джерел інформації' (10 January 2012) <<http://nmpu.org.ua/2012/01/nmpu-zaklykaje-pidtrymaty-zakonoproekt-na-zahyst-dzherel-informatsiji/>> accessed 15 April 2015 [Ukrainian]; The Independent Media Trade Union of Ukraine, 'НМПУ вимагає перевірити законність обшуку квартири журналіста в Житомирській області' (16 July 2013) <<http://nmpu.org.ua/2013/07/nmpu-vymahaie-pereviryty-zakonnist-obshuku-kvartyry-zhurnalista-v-zhytomyrskij-oblasti/>> accessed 15 April 2015 [Ukrainian]; The Independent Media Trade Union of Ukraine, 'Обшукують журналіста. Що робити?' (19 July 2013) <<http://nmpu.org.ua/2013/07/obshukuyut-zhurnalista-scho-robyty/>> accessed 15 April 2015 [Ukrainian]; The Independent Media Trade Union of Ukraine, 'НМПУ: керченська влада комплексно знищує ТРК «Бриз» (відео)' (13 August 2013) <<http://nmpu.org.ua/2013/08/nmpu-kerchenska-vlada-kompleksno-znyshchuje-trk-bryz-video/>> accessed 15 April 2015 [Ukrainian].

⁹⁶ Law n. 254к/96-ВР (Constitution of Ukraine) 1996 [Конституція України] art 31.

⁹⁷ *ibid* art 32 pt 2.

⁹⁸ Law n. 435-IV (Civil Code of Ukraine) 2003 [Цивільний кодекс України] art 301 pt 4.

beliefs, medical condition, education, personal wealth, address, date and place of birth; events, that have occurred or occur in his/her daily, intimate, professional, business and other spheres of life.⁹⁹ The Constitutional Court also emphasises that it is confidential and shall not be disclosed, except cases prescribed by law and only in the interests of national security, economic welfare and human rights.¹⁰⁰

9.1. What are the Criteria for Using Electronic Surveillance and Anti-Terrorism Laws, Which May Include Measures Such as Interceptions of Communications, Surveillance Actions and Search or Seizure Actions in Order to Identify Journalists' Sources of Information?

According to the Criminal Procedure Code of Ukraine, the term “investigative (detective) operations” encompasses different measures of interference with private communications. There are the following types of such interference:

- audio and video monitoring of an individual;
- arrest, inspection and seizure of correspondence;
- interception of information in transport telecommunications networks;
- interception of information in electronic information systems.¹⁰¹

Audio, video monitoring of an individual is a variety of interference in private communication, conducted without the individual’s knowledge. It encompasses recording and processing of conversations or other sounds, movements, actions related to activity or place of residence of an individual by the technical means.¹⁰²

Arrest, inspection and seizure of correspondence implies a prohibition to agencies that provide postal services and financial institutions to deliver correspondence to addressee without relevant guidance of an investigator or prosecutor.¹⁰³

Interception of information in transport telecommunications networks includes conducting surveillance, selection and recording of information, which is transmitted by an individual, and is important for pre-trial investigation, as well as receiving, converting and recording signals of different types, which are transmitted by communication channels.¹⁰⁴ these investigative operations are conducted by responsible units of the agencies of internal affairs and

⁹⁹ Case n. 2-рп/2012 [2012] Constitutional Court of Ukraine [Ukrainian] para 3.3.

¹⁰⁰ *ibid.*

¹⁰¹ Law n. 4651-VI (Criminal Procedure Code of Ukraine) 2012 [Кримінальний процесуальний кодекс України] art 258 pt 4.

¹⁰² Decree n. 114/1042/516/1199/936/1687/5 of the Prosecutor General of Ukraine (Instruction on organising the conduct of covert investigating actions and the use of their results in criminal proceedings) 2012 [Про затвердження Інструкції про організацію проведення негласних слідчих (розшукових) дій та використання їх результатів у кримінальному провадженні] para 1.11.2.

¹⁰³ *ibid* para 1.11.3.

¹⁰⁴ *ibid* para 1.11.5.

agencies of security.¹⁰⁵ It shall be facilitated by managers and employees of telecommunication networks' operators, taking required measures in order not to disclose the fact of conducting such measures and the information obtained, and to preserve such information in its initial version.¹⁰⁶

Interception of information in electronic information systems encompasses acquisition of information contained in electronic computers, automatic systems or computer networks by technical means.¹⁰⁷ As established in the Article 264 Part 2 of the Criminal Procedure Code of Ukraine, when intercepting information from electronic information systems or their parts, the access to which is not restricted by the system's owner, possessor or keeper, or is not related to circumventing a system of logical protection, permission of investigative judge is not required. However, permission for conducting the rest of investigative (detective) operations connected with interference with private communications is granted by an investigative judge.¹⁰⁸ They shall be conducted exclusively in criminal proceedings regarding grave crimes or crimes of special gravity that have been committed or are being planned. According to the Article 12 of the Criminal Code of Ukraine, a grave criminal offense is an offense punishable by imprisonment for a term of up to ten years, while a special grave offence is punishable by more than ten years of imprisonment or a life sentence.¹⁰⁹

Ukrainian legislation, as well as legal doctrine, defines covert investigative actions as secondary means. Thus, they should be used when all other possible investigative measures are exhausted.¹¹⁰ According to Article 248 of the Criminal Procedure Code of Ukraine, a motion for conducting of covert investigative (detective) actions shall **provide for justification of impossibility to obtain information about crime and an individual who committed this crime in other way.**¹¹¹

¹⁰⁵ Law n. 4651-VI (Criminal Procedure Code of Ukraine) 2012 [Кримінальний процесуальний кодекс України] art 263 pt 4.

¹⁰⁶ *ibid.*

¹⁰⁷ Decree n. 114/1042/516/1199/936/1687/5 of the Prosecutor General of Ukraine (Instruction on organising the conduct of covert investigating actions and the use of their results in criminal proceedings) 2012 [Про затвердження Інструкції про організацію проведення негласних слідчих (розшукових) дій та використання їх результатів у кримінальному провадженні] para 1.11.6.

¹⁰⁸ Law n. 4651-VI (Criminal Procedure Code of Ukraine) 2012 [Кримінальний процесуальний кодекс України] *ibid* art 258 pt 1.

¹⁰⁹ Law n. 2341-III (Criminal Code of Ukraine) 2001 [Кримінальний кодекс України] art 13 pt 4, 5.

¹¹⁰ Valeriya Duntu, 'Аналіз процесуальних відмінностей у проведенні огляду житла чи іншого володіння особи й обмеженні публічно недоступних місць, житла чи іншого володіння особи' (Law and Society, n. 5-2 2015) <http://www.pravoisuspilstvo.org.ua/archive/2015/5_2_2015/part_1/38.pdf> accessed 15 April 2016 [Ukrainian].

¹¹¹ Law n. 4651-VI (Criminal Procedure Code of Ukraine) 2012 [Кримінальний процесуальний кодекс України] art 248 pt 2 para 7.

9.2. Are the National Law Provisions Accessible, Precise, Foreseeable and Include Clear Legislative Norms in the Context of Surveillance and Anti-Terrorism Provisions?

When it comes to the law's foreseeability, it is useful to refer to *Weber and Saravia v. Germany*. In this case, the Court stressed that in the context of secret measures of surveillance, it cannot mean that an individual should be able to foresee, when his communications are likely to be intercepted by authorities, so that he can adopt his conduct accordingly. Thus, the law is foreseeable when it is composed of sufficiently clear terms concerning the circumstances in which and the conditions on which public authorities are empowered to resort to any surveillance and other covert investigative measures.¹¹²

The Court has also developed the minimum safeguards that should be set out in statute law in order to avoid abuses of power, such as:

- the nature of the offences, which may give rise to an interception order;
- a definition of the categories of people liable to have their telephones tapped;
- a limit on the duration of telephone tapping;
- the procedure to be followed for examining, using and storing the data obtained;
- the precautions to be taken when communicating the data to other parties;
- the circumstances in which recordings may or must be erased or the tapes destroyed.¹¹³

Based on above criteria we may conclude that Ukrainian legislation under consideration is to some extent foreseeable. For example, the Criminal Procedure Code of Ukraine provides for that an interception order may be used during the investigation of grave crimes or crimes of special gravity. Thus, telephone tapping may be conducted to suspect or any other person if such covert actions can lead to obtaining information on the offence or the person who actually committed such offence or circumstances, indispensable for investigation.¹¹⁴ Duration of telephone tapping, as well as of any other covert investigative action may not exceed a period of 18 month.¹¹⁵ There is also the Instruction on organising the conduct of covert investigative actions and the use of their results in criminal proceedings, which sets out the procedure to be followed for examining, using and storing the data obtained.

However, we may hardly conclude that national legislation under consideration fully respects the right to privacy. First of all, the grounds for conducting surveillance and other covert

¹¹² *Weber and Saravia v. Germany*, App no. 54934/00 (ECtHR, admissibility decision 29 June 2006) para 93.

¹¹³ *ibid* para 95.

¹¹⁴ Decree n. 114/1042/516/1199/936/1687/5 of the Prosecutor General of Ukraine (Instruction on organizing the conduct of covert investigating actions and the use of their results in criminal proceedings) 2012 [Про затвердження Інструкції про організацію проведення негласних слідчих (розшукових) дій та використання їх результатів у кримінальному провадженні] para 1.1.

¹¹⁵ Law n. 4651-VI (Criminal Procedure Code of Ukraine) 2012 [Кримінальний процесуальний кодекс України] art 246 pt 5.

investigative actions in Ukraine are too wide. Another problem is unclear and inexact reports of responsible agencies on prerequisites, conduct and results of these actions.¹¹⁶ Provisions on interception of information from transport telecommunications networks and electronic information systems, and about establishing the whereabouts of a radio-electronic means, including a mobile terminal or communications system, are also considered vague.¹¹⁷ Given that, the main function of covert investigative actions is not uncovering a criminal, but establishing a fact that there is a crime. In some cases, covert investigative actions may be conducted prior to the commitment of a crime to gather information about the person or criminal gang, or possible acts of violence. Thus, operational divisions can effectively organise secret surveillance at their own discretion without the use of court control. For this reason, some human rights activists stress the necessity to guarantee the possibility of public monitoring over their actions.¹¹⁸

10. Can Journalists Rely on Encryption and Anonymity Online to Protect Themselves and Their Sources Against Surveillance?

Ukrainian legislation does not contain provisions addressing right to anonymity online or issues related to encryption in the context of privacy.

Only Article 26 of the Law of Ukraine “On Print Mass Media”, which establishes rights and duties of journalists working in printed mass media, stipulates, *inter alia*, that journalists have a right to publish messages and materials without signature (anonymously) or using an alias and a right to the secrecy of authorship and sources of information unless such an information has to be revealed at the request of the court.¹¹⁹

At the same time, national legislation neither prohibits nor restricts the ability of individuals to rely on encryption and anonymity online.

Therefore, these issues are not explicitly regulated under Ukrainian legislation. Consequently, we may conclude that journalists cannot rely on anonymity online in order to protect themselves and their sources of information as national legislation have no reservations concerning such protection.

¹¹⁶ Yevhen Zakharov, ‘Поліцейська держава’ (Kharkiv Human Rights Protection Group, 29 May 2013) <<http://www.khpg.org/index.php?id=1369818744>> accessed 15 April 2016 [Ukrainian].

¹¹⁷ *ibid.*

¹¹⁸ Yevhen Zakharov, ‘Поліцейська держава’ (Kharkiv Human Rights Protection Group, 29 May 2013) <<http://www.khpg.org/index.php?id=1369818744>> accessed 15 April 2016 [Ukrainian].

¹¹⁹ Law no. 2782-XII (On Printed Mass Media) 1992 [Про друковані засоби масової інформації (пресу) в Україні] art 26 para 9, 11.

11. Are Whistle-Blowers Explicitly Protected Under Law Protecting Journalistic Sources? Is There Another Practice Protecting Whistle-Blowers? Is There Legislation Prohibiting Authorities and Companies From Identifying Whistle-Blowers?

11.1. Are Whistle-Blowers Explicitly Protected Under Law Protecting Journalistic Sources?

In Ukraine, legislation concerning the protection of journalistic sources does not contain explicit provisions on the protection of whistle-blowers.

11.2. Is There Another Practice Protecting Whistle-Blowers?

To a certain extent, whistle-blowers are protected by two legislative acts: the Law of Ukraine “On Access to Public Information” and the Law of Ukraine “On Prevention of Corruption”.

Article 11 of the Law of Ukraine “On Access to Public Information” entitled ‘Protection of Person who Discloses Information’ contains provision protecting only certain categories of individuals, namely officials and civil servants. It stipulates that such persons

shall not be subject to legal liability, regardless of the breach of their duties, for disclosure of information on infringements or information concerning serious threat to the health or safety of citizens and environment, if the person is acting in good faith and has a justified belief that the information is accurate and contains evidence of infringement or concerns serious threat to the health or safety of citizens and environment.¹²⁰

Thus, this cited provision merely exempts whistle-blowers from liability without establishing any other protection mechanisms, and is of limited, personal scope.

The Law of Ukraine “On Prevention of Corruption” deals with the issue of whistle-blowers’ protection in Section VIII. In Article 53 of the Law, a whistle-blower is defined as a person who provides assistance in prevention and combating corruption by reporting violations of this Law committed by another person on the basis of justified belief that the information is accurate.¹²¹

Thus, unlike in the Law of Ukraine “On Access to Public Information” the personal scope of protection under this act is not limited; however, it covers only reports on offences connected with corruption allegations, whereas the Law of Ukraine “On Access to Public Information” deals with any kind of infringement.

¹²⁰ Law no. 2939-VI (On Access to Public Information) 2011 [Про доступ до публічної інформації] art 11.

¹²¹ Law no. 1700-VII (On Prevention of Corruption) 2014 [Про запобігання корупції] art 53 para 1.

Section VIII of the Law of Ukraine “On Prevention of Corruption” establishes guarantees for whistle-blowers regarding personal safety, employment relations and anonymity.

Firstly, Article 53 para 2 stipulates that in case of danger to life, home, health and property of whistle-blowers or persons, who are in close relations to them, in connection to reported violations, law enforcement bodies may apply measures provided in the Law of Ukraine “On the Protection of Individuals Involved in Criminal Proceedings” aimed at protecting such individuals from illegal actions.

Such measures may include: change of identification documents and appearance,¹²² change of place of work or education,¹²³ change of place of residence,¹²⁴ securing confidentiality of information about a person,¹²⁵ issuance of special individual protection means and warning devices,¹²⁶ usage of technical means of tracing and listening on telephone and other means of communication,¹²⁷ bodyguards, protection of home and property.¹²⁸

Secondly, Article 53 para 3 envisages that in connection to reported violations a person or a member of his family cannot be discharged or forced to resign, subjected to or threatened with disciplinary liability or any other negative measures (reassignment, attestation, labour conditions change, denial of appointment to a higher level position, wage cuts, etc.).

Additionally, Article 60 para 1 of the Civil Procedure Code of Ukraine stipulates that in disputes concerning such negative measures the burden of proof of their legality lies on the employer.¹²⁹ Article 235 of the Labour Code of Ukraine contains provision allowing a whistle-blower unlawfully dismissed in connection with reported violations to claim reinstatement or, alternatively, to leave an employer and claim a compensation worth six monthly salaries.¹³⁰

Thirdly, as a general rule, information about whistle-blower may be disclosed only upon his consent.¹³¹

The Law “On Prevention of Corruption” obliges National Agency on the Prevention of Corruption and other authorities to facilitate reporting corruption offences by their employees through special telephone lines, official web-sites and means of electronic communication.¹³² It

¹²² Law no. 3782-XII (On the Protection of Individuals Involved in Criminal Proceedings) 1993 [Про забезпечення безпеки осіб, які беруть участь у кримінальному судочинстві] art 11.

¹²³ *ibid* art 12.

¹²⁴ *ibid* art 13.

¹²⁵ *ibid* art 15.

¹²⁶ *ibid* art 9.

¹²⁷ *ibid* art 10.

¹²⁸ *ibid* art 8.

¹²⁹ Law no. 1618-IV (Civil Procedure of Ukraine) 2004 [Цивільно-процесуальний кодекс України] art 60 para 1.

¹³⁰ Law no. 322-VIII (Labour Code of Ukraine) 1971 [Кодекс законів про працю України] art 235 para 1, 4.

¹³¹ Law no. 1700-VII (On Prevention of Corruption) 2014 [Про запобігання корупції] art 53 para 3.

¹³² *ibid* para 4.

also sets out procedure for consideration of anonymous reports (normally 15 days, in special cases, 30 days).¹³³

The analysis of Ukrainian legislation indicates that the principles contained in Recommendation CM/Rec (2014) 7 of the Committee of Ministers are not fully implemented.

First of all, Recommendation provides that the material scope of protection should 'at least, include violations of law and human rights, as well as risks to public health and safety and to the environment'.¹³⁴ Ukrainian legislation contains comprehensive framework of protection only regarding corruption offences, whereas other violations are only covered by declaratory provision in the Law of Ukraine "On Access to Public Information" exempting a whistle-blower from liability.

As to the personal scope, Recommendation states that the protection framework should cover 'all individuals working in either the public or private sectors' as well as those who have already terminated employment and those who are at recruitment or other pre-contractual stage.¹³⁵ While the Law of Ukraine "On Prevention of Corruption" covers any individual, exemption from liability under the Law "On Access to Public Information" is only effective for officials and civil servants.

In relation to legal framework, Recommendation stipulates that it 'should reflect a comprehensive and coherent approach to facilitating public interest reporting and disclosures'.¹³⁶ Existing provisions in Ukrainian legislation ensuring whistle-blowers a certain level of protection are scattered in different legal acts: Laws "On Access to Public Information", "On Prevention of Corruption", "On the Protection of Individuals Involved in Criminal Proceedings", the Civil Procedure Code, the Labour Code. In order to remedy such situation representatives of Ukrainian non-governmental organisations created the coalition of civil society organisations called "Initiative 11" and developed draft law "On the Protection of Whistle-Blowers in Ukraine", which contains comprehensive framework and additional safeguards for the protection of whistle-blowers.¹³⁷

The Recommendation establishes that channels of reporting should include reports within organisation, to relevant public regulatory bodies, law enforcement and supervisory bodies, as well as to the public.¹³⁸ The Law "On Prevention of Corruption" deals with this issue and obliges

¹³³ *ibid* para 5.

¹³⁴ Council of Europe (Committee of Ministers) 'Recommendation CM/Rec (2014) 7 on the Protection of Whistle-Blowers' (30 April 2014) para 2.

¹³⁵ *ibid* para 3, 4.

¹³⁶ *ibid* para 7.

¹³⁷ Initiative 11, 'Draft Law "On the Protection of Whistle-Blowers in Ukraine"' <<http://initiativa11.org/draft-law-for-the-protection-of-whistle-blowers-in-ukraine/>> assessed 15 April 2016.

¹³⁸ Council of Europe (Committee of Ministers) 'Recommendation CM/Rec (2014) 7 on the Protection of Whistle-Blowers' (30 April 2014) para 14.

authorities to establish mechanisms to ensure internal reporting;¹³⁹ the only relevant outside body mentioned is the National Agency on the Prevention of Corruption, whereas public (journalists or members of the parliament) is not mentioned at all.

In respect of confidentiality requirement expressed in part V of the Appendix to the Recommendation, Article 53 para 5 of the Law “On Prevention of Corruption” allows whistle-blowers to report anonymously, whereas Article 53 para 3 provides that information about a whistle-blower may be disclosed only upon his consent.

The Recommendation states that disclosures should be investigated promptly and provides that a whistle-blower making an internal report should be informed of actions taken.¹⁴⁰ The Law “On Prevention of Corruption” sets the limit of time for consideration of anonymous reports,¹⁴¹ but it does not contain obligation of informing a whistle-blower about the results.

The Recommendation also provides that ‘whistle-blowers should be protected against retaliation of any form’.¹⁴² In this regard, Ukrainian legislation adequately protects whistle-blowers by provisions of the Law “On Prevention of Corruption” and the Labour Code.

11.3. Is There Legislation Prohibiting Authorities and Companies From Identifying Whistle-Blowers?

Article 53 para 3 of the Law “On Prevention of Corruption” stipulates that information about a whistle-blower may be disclosed only upon his consent.¹⁴³ However, this prohibition is only effective for allegations of corruption.

In conclusion, Ukrainian legislation includes comprehensive legal framework for the protection of whistle-blowers only in regards to corruption offences. There are no effective safeguards for individuals reporting other kinds of abuses.

12. Conclusion

The protection of professional relationships between journalists and their sources is of high importance as ‘without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of

¹³⁹ Law no. 1700-VII (On Prevention of Corruption) 2014 [Про запобігання корупції] art 53 para 4.

¹⁴⁰ Committee of Ministers of the Council of Europe, ‘Recommendation on the protection of whistle-blowers’ (30 April 2014) CM/Rec (2014) 7 para 19, 20.

¹⁴¹ Law no. 1700-VII (On Prevention of Corruption) 2014 [Про запобігання корупції] art 53 para 5. Council of Europe (Committee of Ministers) ‘Recommendation CM/Rec (2014) 7 on the Protection of Whistle-Blowers’ (30 April 2014) 7 para 21.

¹⁴³ Law no. 1700-VII (On Prevention of Corruption) 2014 [Про запобігання корупції] art 54 para 3.

the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.¹⁴⁴ Having regard to the importance of journalists' privilege of non-disclosure, the Council of Europe established a set of common principles for member states in order to ensure that for the right of journalists not to disclose their sources of information is adequately protected. However, in view of the National Research Group of ELSA Ukraine, these principles are not fully respected. Ukrainian legislation provides for certain legal measures for the protection of journalistic sources, however they are not explicit. Whereas general legal rules are established, specific definitions and procedures are missing.

Under Ukrainian law, journalists' privilege of non-disclosure of their sources of information encompasses rights to keep in secret (1) a journalistic source; and (2) information identifying a journalistic source. Being prescribed by specific legislation on journalists' rights, it is also protected under the Constitution of Ukraine and procedural law.

In addition to the privilege of non-disclosure, national legislation also establishes journalists' obligation not to disclose confidential sources. This also encompasses an obligation not to disclose materials that do not constitute sources themselves, but may be used to identify a person who acts as the source of information.¹⁴⁵ Such an obligation is extended to broadcasting organisations as legal entities. Failure to comply with this prohibition may entail disciplinary, civil or criminal liability. In such a way, Ukrainian law provides for higher standards of protection of confidential sources with respect to journalists' obligation not to disclose such sources themselves than Recommendation No. R (2000) 7.

As for a definition of a "journalist" under Ukrainian legislation, we find it restrictive for the purpose of protection of freedom of the press. This leads to situations when not all the persons who are actually engaged in journalistic activities enjoy the legal status of a journalist. Additionally, national law does not extend the definition of a "journalist" to legal entities as suggested by the Council of Europe.¹⁴⁶ Moreover, Ukrainian legislation almost neglects the right of non-disclosure of other media actors. Third parties, who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of such information, are not protected under provisions of national legislation in the same manner.

It is also worth mentioning that the limits of non-disclosure are not clearly set out in Ukrainian legislation. National courts enjoy relatively excessive discretion in disclosure proceedings, while specific mechanism as prescribed by Recommendation No. R (2000) 7 is not fully invoked

¹⁴⁴ *Goodwin v United Kingdom* App no 17488/90 (ECtHR, 27 March 1996) para 39.

¹⁴⁵ Viktoriya Dobrynska, 'Європейський суд своїм рішенням поставив під загрозу журналістський привілей на збереження у таємниці джерел інформації' (Media Law Institute, 30 June 2009) <<http://medialaw.org.ua/analytics/yevropejskyj-sud-svoyim-rishennyam-postavyv-pid-zagrozu-zhurnalistykyj-pryvilej-na-zberezhennya-u-tayemnytsi-dzherel-informatsiy/>> accessed 15 April 2016 [Ukrainian].

¹⁴⁶ Council of Europe (Committee of Ministers) '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' (8 March 2000) Appendix, Definitions, para a.

regarding such proceedings. More importantly, court order for the disclosure of journalistic sources is not a subject for a separate judicial review, and therefore may be reviewed together with the final court decision in a case.

When it comes to surveillance actions aimed at identification of journalistic sources, procedural law prohibits involving journalists in covert investigation, if such cooperation is related to the disclosure of information of a professional nature. However, it does not mean that journalists cannot be subjects to surveillance themselves. In this regards, Ukrainian legislation provides for certain procedure to be followed for examining, using and storing information obtained by the means of surveillance. Nevertheless, the legal grounds for conducting surveillance and other covert investigative actions in Ukraine are too wide. Moreover, we may conclude that journalists cannot rely on anonymity online in order to protect themselves and their sources of information as national legislation have no reservations concerning such protection.

Also, Ukrainian legislation does not provide for adequate protection of whistle-blowers. It includes comprehensive legal framework for the protection of whistle-blowers only in regards to corruption offences. There are no effective safeguards for individuals reporting other kinds of abuses.

Overall, we conclude that current Ukrainian legislation is not fully in line with ECtHR case-law and recommendations of the Council of Europe. While major provisions under consideration have been adopted in early 1990s, the current Criminal Procedure Code of Ukraine was adopted in 2012. Thus, there is not well-established case-law concerning disclosure of sources in criminal matters in Ukraine. With regard to other cases of disclosure, Ukrainian case-law may fairly be characterized as controversial. The lack of scholarly attention to the issues of protection of journalistic sources should be noted as well.

13. CASE LAW, LEGISLATION, BIBLIOGRAPHY AND ONLINE RESOURCES

13.1. Legislation

- Law n. 322-VIII (Labour Code of Ukraine) 1971 [Кодекс законів про працю України].
- Law n. 2135-XII (On Investigative and Search Operations) 1992 [Про оперативно-розшукову діяльність].
- Law n. 2657-XII (On Information) 1992 [Закон України Про Інформацію].
- Law n. 2782-XII (On Print Media (Press) in Ukraine) 1992 [Про друковані засоби масової інформації (преси) в Україні].
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13. Table of Provisions

**Legal acts appear in chronological order*

Provisions in Ukrainian	Corresponding translation
<p>Кодекс законів про працю України</p> <p>Стаття 147. Стягнення за порушення трудової дисципліни</p> <p>ч.1 За порушення трудової дисципліни до працівника може бути застосовано тільки один з таких заходів стягнення:</p> <p>п.1 догана;</p> <p>п.2 звільнення.</p>	<p>Labour Code of Ukraine</p> <p>Article 147. Sanctions for labour discipline infringements</p> <p>pt 1 Only following sanctions are applied for labour discipline infringements</p> <p>para 1 reprimand;</p> <p>para 2 dismissal.</p>
<p>Закон України “Про оперативно-розшукову діяльність”</p> <p>Стаття 11. Сприяння здійсненню оперативно-розшукової діяльності</p> <p>[...]</p> <p>ч.4 Забороняється залучати до виконання оперативно-розшукових завдань осіб, професійна діяльність яких пов'язана зі збереженням професійної таємниці, а саме: адвокатів, нотаріусів, медичних працівників, священнослужителів, журналістів, якщо таке співробітництво буде пов'язано з розкриттям конфіденційної інформації професійного</p>	<p>The Law of Ukraine “On Investigative and Search Operations”</p> <p>Article 11. Assistance in investigative and search operations</p> <p>[...]</p> <p>pt 4 It is prohibited to involve in investigative and search operations individuals whose work is related to secret information of a professional nature, namely: lawyers, notaries, medical staff, clergymen, journalists, if such cooperation is related to the disclosure of confidential information of a professional nature.</p>

<p>характеру.</p> <p>Закон України “Про інформацію” Стаття 21. Інформація з обмеженим доступом</p> <p>ч.2 Конфіденційною є інформація про фізичну особу, а також інформація, доступ до якої обмежено фізичною або юридичною особою, крім суб'єктів владних повноважень. Конфіденційна інформація може поширюватися за бажанням (згодою) відповідної особи у визначеному нею порядку відповідно до передбачених нею умов, а також в інших випадках, визначених законом.</p> <p>Відносини, пов'язані з правовим режимом конфіденційної інформації, регулюються законом.</p> <p>Стаття 22. Масова інформація та її засоби</p> <p>ч.2 Засоби масової інформації – засоби, призначені для публічного поширення друкованої або аудіовізуальної інформації.</p> <p>Стаття 25. Гарантії діяльності засобів масової інформації та журналістів</p> <p>ч. 3 Журналіст має право не розкривати джерело інформації або інформацію, яка дозволяє встановити джерела інформації, крім випадків, коли його зобов'язано до цього рішенням суду на основі закону.</p>	<p>The Law of Ukraine “On Information”</p> <p>Article 21. Classified information</p> <p>pt 2 Information about natural person and information, access to which is restricted under the decision of natural or legal person, is confidential. Confidential information may be disseminated upon the approval of a respective person, and in a manner prescribed by this person, and in other cases prescribed by law.</p> <p>Relations associated with the legal regime of confidential information shall be regulated by law.</p> <p>Article 22. Mass information and media</p> <p>pt 2 Mass media are resources aimed at public distribution of printed or audiovisual information.</p> <p>Article 25. Guarantees of media and journalist activities</p> <p>pt 3 A journalist has the right not to disclose the source of information or information that allows to identify sources of information, except when it is ordered by the</p>
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<p>ч.4 Після пред'явлення документа, що засвідчує його професійну належність, працівник засобу масової інформації має право збирати інформацію в районах стихійного лиха, катастроф, у місцях аварій, масових безпорядків, воєнних дій, крім випадків, передбачених законом.</p> <p>ч.7 Права та обов'язки журналіста, працівника засобу масової інформації, визначені цим Законом, поширюються на зарубіжних журналістів, працівників зарубіжних засобів масової інформації, які працюють в Україні.</p>	<p>court and based on law.</p> <p>pt 4 Upon presentation of a document that confirms professional affiliation, journalist is entitled to collect information within the areas of natural disasters, catastrophes, accidents, in areas of mass riots, acts of war with exceptions prescribed by law.</p> <p>pt 7 The rights and obligations of a journalist and employee of a media outlet defined in this Law are extended to foreign journalists and employees of foreign mass media outlets, who work in Ukraine.</p>
<p>Стаття 27. Відповідальність за порушення законодавства про інформацію</p> <p>Порушення законодавства України про інформацію тягне за собою дисциплінарну, цивільно-правову, адміністративну або кримінальну відповідальність згідно із законами України.</p>	<p>Article 27. Responsibility for violation of legislation on information</p> <p>Violation of legislation of Ukraine on information entails disciplinary, civil, administrative or criminal liability under the laws of Ukraine.</p>
<p>Стаття 29. Поширення суспільно необхідної інформації</p> <p>ч.1 Інформація з обмеженим доступом може бути поширена, якщо вона є суспільно необхідною, тобто є предметом суспільного інтересу, і право громадськості знати цю інформацію переважає потенційну шкоду від її поширення.</p> <p>ч.2 Предметом суспільного інтересу вважається інформація, яка свідчить про</p>	<p>Article 29. Dissemination of socially necessary information</p> <p>pt 1 Classified information may be disseminated in case of public necessity, i.e. it is a matter of public interest and the public's right to know this information outweighs potential harm of its dissemination.</p> <p>pt 2 A matter of public interest is information that indicates a threat to national</p>

загрозу державному суверенітету, територіальній цілісності України; забезпечує реалізацію конституційних прав, свобод і обов'язків; свідчить про можливість порушення прав людини, введення громадськості в оману, шкідливі екологічні та інші негативні наслідки діяльності (бездіяльності) фізичних або юридичних осіб тощо.

Закон України “Про друковані засоби масової інформації (пресу) в Україні”

Стаття 7. Суб'єкти діяльності друкованих засобів масової інформації

ч.1 До суб'єктів діяльності друкованих засобів масової інформації належать засновник (співзасновники) друкованого засобу масової інформації, його редактор (головний редактор), редакційна колегія, редакція, трудовий колектив редакції, журналістський колектив, журналіст, автор, видавець, розповсюджувач.

Стаття 25. Журналіст редакції друкованого засобу масової інформації

ч.1 Журналістом редакції друкованого засобу масової інформації відповідно до цього Закону є творчий працівник, який професійно збирає, одержує, створює і займається підготовкою інформації для друкованого засобу масової інформації та діє на підставі трудових чи інших договірних відносин з його редакцією або займається такою діяльністю за її

sovereignty and territorial integrity of Ukraine; facilitates implementation of constitutional rights, freedoms and duties; indicates a possibility of violation of human rights, deception of the public, harmful environmental and other negative effects of activity (or inactivity) of natural and legal persons.

The Law of Ukraine “On Print Media (Press) in Ukraine”

Article 7. Actors of printed mass media activities

pt 1 Actors of print mass media activities are founder (co-founders) of print media outlet, its editor (editor in chief), editorial office, editorial board, editorial board's staff, journalistic staff, author, publisher and distributor.

Article 25. Journalist of editorial office of print media outlet

pt 1 Journalist of a print mass medium is a creative employee, who professionally collects, receives, creates and prepares information for a print media outlet and acts on the basis of labour or other contractual relations with his/her editorial office or authorised by the editorial office to perform these activities, which is confirmed by a certificate issued by the editorial office or by

<p>уповноваженням, що підтверджується редакційним посвідченням чи іншим документом, виданим йому редакцією цього друкованого засобу масової інформації.</p> <p>ч.2 Професійна належність журналіста може підтверджуватися документом, виданим професійним об'єднанням журналістів.</p> <p>ч.3 На особу, якій видано редакційне посвідчення чи інший документ, що підтверджує повноваження, надані їй редакцією друкованого засобу масової інформації, або її професійну належність, поширюються права і обов'язки, зазначені у статті 26 цього Закону.</p> <p>Стаття 26. Права та обов'язки журналіста редакції</p> <p>ч.1 Здійснюючи свою діяльність на засадах професійної самостійності, журналіст використовує права та виконує обов'язки, передбачені Законом України “Про інформацію” та цим Законом.</p> <p>ч.2 Журналіст має право: [...]</p> <p>п.9 поширювати підготовлені ним повідомлення і матеріали за власним підписом, під умовним ім'ям (псевдонімом) або без підпису (анонімно); [...]</p> <p>п. 11 на збереження таємниці авторства та</p>	<p>other document issued by the editorial office.</p> <p>pt 2 Professional identity of a journalist can be confirmed by a document issued by the professional association of journalists.</p> <p>pt 3 A person in possession of a certificate issued by the editorial office or other document confirming his/her credentials granted by the editorial office, or his/her professional affiliation, enjoys the rights and obligations specified in Article 26 hereof.</p> <p>Article 26. Rights and obligations of the journalist of printed media</p> <p>pt 1 While conducting activities based on a principle of professional independence, a journalist uses the rights and fulfil the obligations stipulated by the Law of Ukraine “On Information” and this Law.</p> <p>pt 2 A journalist have a right: [...]</p> <p>para 9 to publish messages and materials without signature (anonymously) or using an alias [...]</p>
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<p>джерел інформації, за винятком випадків, коли ці таємниці обнародуються на вимогу суду.</p> <p>ч.3 Журналіст зобов'язаний: [...]</p> <p>п.3 задовольняти прохання осіб, які надають інформацію, щодо їх авторства або збереження таємниці авторства.</p> <p>Стаття 41. Підстави відповідальності [...]</p> <p>ч.2 Порушеннями законодавства України про друковані засоби масової інформації є: [...]</p> <p>п.5 зловживання правами журналіста.</p> <p>Закон України “Про телебачення і радіомовлення”</p>	<p>para 11 to the secrecy of authorship and sources of information, unless such information is to be revealed at the request of the court.</p> <p>pt 3 A journalist have a right: [...] para 3 meet the request of persons who provide information regarding their authorship or confidentiality of their authorship.</p> <p>Article 41. Grounds for liability [...]</p> <p>pt 2 Violations of legislation of Ukraine on printed media: [...]</p> <p>para 5 misuse of journalist's rights.</p>
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<p>Стаття 1. Визначення термінів</p> <p>Для цілей цього Закону вживаються такі терміни:</p> <p>[...]</p> <p>п. 65 телерадіожурналіст – штатний або позаштатний творчий працівник телерадіоорганізації, який професійно збирає, одержує, створює і готує інформацію для розповсюдження.</p> <p>Стаття 59. Обов'язки телерадіоорганізації</p> <p>ч.1 Телерадіоорганізація зобов'язана:</p> <p>[...]</p> <p>ж) зберігати у таємниці, на підставі документального підтвердження, відомості про особу, яка передала інформацію або інші матеріали за умови нерозголошення її імені.</p> <p>Стаття 72. Санкції за порушення законодавства про телебачення і радіомовлення</p> <p>ч.1 Санкції за порушення законодавства про телебачення і радіомовлення застосовуються за рішенням суду або, у встановлених цим Законом випадках, за</p>	<p>The Law of Ukraine “On Television and Radio Broadcasting”</p> <p>Article 1. Definitions</p> <p>For the purposes of this Act the following terms are used:</p> <p>[...]</p> <p>para 65 journalist of television and radio is a staff or a freelance creative employee of a broadcasting organisation, who professionally collects, receives, creates and prepares information for distribution.</p> <p>Article 59. Obligations of broadcasting organisation</p> <p>pt 1 A broadcasting organisation is obliged:</p> <p>[...]</p> <p>para “ж” to keep confidential, based on documentary evidence, information about the person who provided information or other materials, if the confidentiality of the person was a precondition for transmission of information.</p> <p>Article 72. Sanctions for violation of</p>
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<p>рішенням Національної ради.</p> <p>ч.2 Національна рада застосовує санкції до телерадіоорганізацій у разі порушення ними вимог цього Закону або ліцензійних умов.</p> <p>[...]</p> <p>ч.6 Національна рада може застосовувати до телерадіоорганізацій та провайдерів програмної послуги такі санкції:</p> <ul style="list-style-type: none"> – оголошення попередження; – стягнення штрафу; – подання до суду справи про анулювання ліцензії на мовлення. <p>Закон України “Про інформаційні агенства”</p> <p>Стаття 6. Суб'єкти діяльності інформаційних агентств</p> <p>ч.1 Суб'єктами діяльності інформаційних</p>	<p>legislation on television and radio broadcasting</p> <p>pt 1 Sanctions for violation of legislation on television and radio broadcasting are applied by the court or, in specified in this Act cases, by the National Council [National Television and Radio Broadcasting Council of Ukraine].</p> <p>pt 2 The National Council applies sanctions to broadcasters upon violation of the requirements of this Act or license conditions.</p> <p>[...]</p> <p>pt 6 The National Council may apply to broadcasters and providers of software programme the following sanctions:</p> <ul style="list-style-type: none"> – warning; – fine; – filing a case regarding broadcast license revocation in a court. <p>The Law of Ukraine “On Information Agencies”</p>
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<p>агентств є:</p> <ul style="list-style-type: none"> – засновник (співзасновники) інформаційного агентства; – його керівник (директор, генеральний директор, президент та ін.); – трудовий колектив; – творчий колектив; – журналіст інформаційного агентства; – спеціаліст у галузі засобів комунікації; – автор або інша особа, якій належать права на інформацію; – видавець (виробник) продукції інформаційного агентства; – розповсюджувач продукції інформаційного агентства; – споживач продукції інформаційного агентства. <p>Стаття 21. Журналіст інформаційного агентства</p> <p>ч.1 Журналіст інформаційного агентства – це творчий працівник, який збирає, одержує, створює та готує інформацію для інформаційного агентства і діє від його імені на підставі</p>	<p>Article 6. Actors of informational agencies' activities</p> <p>pt 1 Actors of informational agencies' activities are:</p> <ul style="list-style-type: none"> – founder (co-founders) of informational agency; – its manager (director, CEO, President, etc.); – staff; – creative team; – journalist of an informational agency; – specialist in the field of communication; – author or other person who owns the right to information; – publisher (producer) of informational agency's production; – distributor of informational agency's production; – consumer of informational agency's production. <p>Article 21. Journalist of information agency</p>
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<p>трудоуох чи інших договірних відносин з ним або за його уповноваженням.</p> <p>ч.2 Належність журналіста до інформаційного агентства підтверджується службовим посвідченням цього агентства чи іншим документом, виданим йому цим агентством.</p> <p>ч.3 Журналіст інформаційного агентства має права та виконує обов'язки, визначені чинним законодавством України про пресу, телебачення і радіомовлення.</p> <p>Конституція України</p> <p>Стаття 31.</p> <p>Кожному гарантується таємниця листування, телефонних розмов, телеграфної та іншої кореспонденції. Винятки можуть бути встановлені лише судом у випадках, передбачених законом, з метою запобігти злочинів чи з'ясувати істину під час розслідування кримінальної справи, якщо іншими способами одержати інформацію неможливо.</p> <p>Стаття 32.</p> <p>ч.1 Ніхто не може зазнавати втручання в його особисте і сімейне життя, крім випадків, передбачених Конституцією</p>	<p>pt 1 Journalist of an information agency is a creative employee, who collects, receives, creates and prepares information for information agency and acts on its behalf on the basis of a labour contract or on the basis of other contractual relations or under authorisation of the information agency.</p> <p>pt 2 Journalist's affiliation with an information agency is confirmed by a service certificate of this agency or other document issued by this agency.</p> <p>pt 3 Journalist of the information agency enjoys all rights and performs all obligations prescribed by Ukrainian legislation on press, television and radio broadcasting.</p> <p>Constitution of Ukraine</p> <p>Article 31.</p> <p>Everyone is entitled to privacy of mail, telephone conversations, telegraph and other correspondence. Exceptions from this rule shall be established only by a court in cases prescribed by law, with the purpose of preventing crime or ascertaining the truth in the course of the investigation of a criminal case, if it is not possible to obtain information by other means.</p>
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<p>України.</p> <p>ч.2 Не допускається збирання, зберігання, використання та поширення конфіденційної інформації про особу без її згоди, крім випадків, визначених законом, і лише в інтересах національної безпеки, економічного добробуту та прав людини.</p> <p>Стаття 34.</p> <p>ч.1 Кожному гарантується право на свободу думки і слова, на вільне вираження своїх поглядів і переконань.</p> <p>Кожен має право вільно збирати, зберігати, використовувати і поширювати інформацію усно, письмово або в інший спосіб – на свій вибір.</p> <p>ч.2 Здійснення цих прав може бути обмежене законом в інтересах національної безпеки, територіальної цілісності або громадського порядку з метою запобігання заворушенням чи злочинам, для охорони здоров'я населення, для захисту репутації або прав інших людей, для запобігання розголошенню інформації, одержаної конфіденційно, або для підтримання авторитету і неупередженості правосуддя.</p>	<p>Article 32.</p> <p>pt 1 No one shall be subject to interference with his/her personal and family life, except cases prescribed by the Constitution of Ukraine.</p> <p>pt 2 Collection, storage, use and dissemination of confidential information about a person without his/her consent shall not be permitted, except cases prescribed by law, and only in the interests of national security, economic welfare and human rights.</p> <p>Article 34.</p> <p>pt 1 Everyone is entitled to the right to freedom of thought and speech, and to the free expression of his or her views and beliefs.</p> <p>Everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice.</p> <p>pt 2 The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice.</p>
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<p>Закон України “Про державну підтримку засобів масової інформації та соціальний захист журналістів”</p> <p>Стаття 1. Поняття і терміни</p> <p>ч.1 Основні поняття і терміни, що вживаються в цьому Законі, мають таке значення:</p> <p>[...]</p> <p>п.6 журналіст - творчий працівник, який професійно збирає, одержує, створює і займається підготовкою інформації для засобів масової інформації, виконує редакційно-посадові службові обов'язки в засобі масової інформації (в штаті або на позаштатних засадах) відповідно до професійних назв посад (роботи) журналіста, які зазначаються в державному класифікаторі професій України;</p> <p>Кримінальний кодекс України</p> <p>Стаття 12. Класифікація злочинів</p> <p>[...]</p> <p>ч.4 Тяжким злочином є злочин, за який передбачене основне покарання у виді штрафу в розмірі не більше двадцяти п'яти тисяч неоподатковуваних мінімумів доходів громадян або позбавлення волі на строк не більше десяти років.</p> <p>ч.5 Особливо тяжким злочином є злочин,</p>	<p>The Law of Ukraine “On State Support of Mass Media and Social Protection of Journalists”</p> <p>Article 1. Definitions and terms</p> <p>pt 1 The main definitions and terms used in this Act have the following meanings:</p> <p>[...]</p> <p>para 6 Journalist is a creative employee who professionally collects, receives, creates and prepares information for mass media, performs official editorial duties for a mass media outlet (as a member of staff or on a freelance basis) according to the professional titles of jobs listed in the State Classifier of Professions in Ukraine.</p> <p>Criminal Code of Ukraine</p> <p>Article 12. Classification of criminal offences</p>
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за який передбачене основне покарання у виді штрафу в розмірі понад двадцять п'ять тисяч неоподатковуваних мінімумів доходів громадян, позбавлення волі на строк понад десять років або довічного позбавлення волі.

Стаття 171. Перешкоджання законній професійній діяльності журналістів

ч.1 Незаконне вилучення зібраних, опрацьованих, підготовлених журналістом матеріалів і технічних засобів, якими він користується у зв'язку із своєю професійною діяльністю, незаконна відмова у доступі журналіста до інформації, незаконна заборона висвітлення окремих тем, показу окремих осіб, критики суб'єкта владних повноважень, а так само будь-яке інше умисне перешкоджання здійсненню журналістом законної професійної діяльності - карається штрафом до п'ятдесяти неоподатковуваних мінімумів доходів громадян або арештом на строк до шести місяців, або обмеженням волі на строк до трьох років.

ч.2 Вплив у будь-якій формі на журналіста з метою перешкоджання виконанню ним професійних обов'язків або переслідування журналіста у зв'язку з його законною професійною діяльністю -

караються штрафом до двохсот неоподатковуваних мінімумів доходів громадян або арештом на строк до шести місяців, або обмеженням волі на строк до чотирьох років.

ч. 3 Дії, передбачені частиною другою цієї статті, якщо вони були вчинені

pt 4 A grave criminal offence shall mean an offense punishable by a fine of not more than twenty-five thousand tax-free minimum incomes, or imprisonment for a term of up to ten years.

pt 5 A special grave offence shall mean an offense punishable by a fine of more than twenty-five thousand tax-free minimum incomes, imprisonment for a term of more than ten years or life sentence.

Article 171. Obstruction of journalistic activities

pt 1 Illegal seizure of materials, collected, processed, prepared by journalist, and technical tools that he/she uses in connection with his/her professional activities [...] as well as any other willful obstruction of legitimate professional activities of a journalist is punishable by a fine of up to 50 tax-free minimum incomes, or arrest for up to six months or imprisonment for up to three years.

pt 2 Any obstruction of the performance of professional duties of a journalist or prosecution of a journalist in connection with his/her legitimate professional activities is punishable by a fine of up to two hundred tax-free minimum incomes, or arrest for up to six months or imprisonment for up to four years.

службовою особою з використанням свого службового становища або за попередньою змовою групою осіб, - караються штрафом від двохсот до п'ятисот неоподатковуваних мінімумів доходів громадян або обмеженням волі на строк до п'яти років, з позбавленням права обіймати певні посади чи займатися певною діяльністю на строк до трьох років або без такого.

Стаття 182. Порушення недоторканності приватного життя

ч.1 Незаконне збирання, зберігання, використання, знищення, поширення конфіденційної інформації про особу або незаконна зміна такої інформації, крім випадків, передбачених іншими статтями цього Кодексу, - караються штрафом від п'ятисот до однієї тисячі неоподатковуваних мінімумів доходів громадян або виправними роботами на строк до двох років, або арештом на строк до шести місяців, або обмеженням волі на строк до трьох років.

.Стаття 345-1. Погроза або насильство щодо журналіста

Примітка. Під професійною діяльністю журналіста у цій статті та статтях 171, 347-1, 348-1 цього Кодексу слід розуміти систематичну діяльність особи, пов'язану із збиранням, одержанням, створенням,

pt 3 Actions stipulated in this Article, if committed by a public official using his official position or conducted in a conspiracy are punishable by a fine of two hundred to five hundred tax-free minimum incomes, or arrest for up to five years, with disqualification either to hold certain positions or engage in certain activities for up to three years or without such.

Article 182. Violation of privacy

pt 1 Illegal collection, storage, use or dissemination of confidential information about a person without his/her consent, or dissemination of such information in a public speech, publicly demonstrated work, or mass media are punishable by a fine of five hundred to one thousand tax-free minimum incomes, or correctional labour for a term up to two years, or arrest for up to six months, or imprisonment for up to three years.

Article 345-1. Threats or violence against journalists

Note. The professional activities of a

<p>поширенням, зберіганням або іншим використанням інформації з метою її поширення на невизначене коло осіб через друковані засоби масової інформації, телерадіоорганізації, інформаційні агентства, мережу Інтернет. Статус журналіста або його належність до засобу масової інформації підтверджується редакційним або службовим посвідченням чи іншим документом, виданим засобом масової інформації, його редакцією або професійною чи творчою спілкою журналістів.</p> <p>Стаття 382. Невиконання судового рішення</p> <p>ч.1 Умисне невиконання вироку, рішення, ухвали, постанови суду, що набрали законної сили, або перешкодження їх виконанню – карається штрафом від п'ятисот до однієї тисячі неоподатковуваних мінімумів доходів громадян або позбавленням волі на строк до трьох років</p> <p>Цивільний кодекс України Стаття 301. Право на особисте життя та його таємницю</p> <p>[...]</p> <p>ч.4 Обставини особистого життя фізичної особи можуть бути розголошені іншими особами лише за умови, що вони містять ознаки правопорушення, що</p>	<p>journalist in this Article and articles 171, 347-1, 348-1 of the Code should be understood as a systematic activity of a person connected with the collection, obtainment, creation, distribution, storage or other use of the information for its indefinite extension to the range people through print media, broadcasting, news agencies, the Internet. The status of the journalist or his affiliation with mass media is confirmed by official identity card or other document issued by the mass media, his editorship or professional or creative union of journalists.</p> <p>Article 382. Failure to comply with a court decision</p> <p>pt 1 Wilful failure to comply with a verdict, judgment, ruling or order of a court, which has come into force, or preclusion of their execution are punishable by a fine of five hundred to one thousand tax-free minimum incomes, or imprisonment for up to three years.</p> <p>Civil Code of Ukraine</p> <p>Article 301. The right to privacy and confidentiality</p> <p>[...]</p>
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<p>підтверджено рішенням суду, а також за її згодою.</p> <p>Цивільно-процесуальний кодекс України</p> <p>Стаття 6. Гласність та відкритість судового розгляду</p> <p>[...]</p> <p>ч.3 Закритий судовий розгляд допускається у разі, якщо відкритий розгляд може привести до розголошення державної або іншої таємниці, яка охороняється законом, а також за клопотанням осіб, які беруть участь у справі, з метою забезпечення таємниці усиновлення, запобігання розголошенню відомостей про інтимні чи інші особисті сторони життя осіб, які беруть участь у справі, або відомостей, що принижують їх честь і гідність.</p> <p>Стаття 51. Особи, які не підлягають допиту як свідки</p> <p>ч.1 Не підлягають допиту як свідки:</p> <p>[...]</p>	<p>pt 4 Information on one's personal life may be disclosed only if it indicates elements of a crime as confirmed by court decision, or with consent of such person.</p> <p>Civil Procedure Code of Ukraine</p> <p>Article 6. Transparency and openness of the trial</p> <p>[...]</p> <p>pt 3 Closed trial is allowed if the public trial could lead to disclosure of state or other secrets, which is protected by law, as well as upon the petition of the persons involved in the case, to ensure the secrecy of adoption, preventing the disclosure of information or other intimate sides of personal live of the parties involved in the case, or information that may humiliate their honour and dignity.</p> <p>Article 51. Persons who are not subject to examination as witnesses</p> <p>pt 1 Persons who are not subject to examination as witnesses</p>
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<p>п.2 особи, які за законом зобов'язані зберігати в таємниці відомості, що були довірені їм у зв'язку з їхнім службовим чи професійним становищем, – про такі відомості</p> <p>Стаття 60. Обов'язки доказування і подання доказів</p> <p>ч.1[...]</p> <p>п.3 У справах щодо застосування керівником або роботодавцем чи створення ним загрози застосування негативних заходів впливу до позивача (звільнення, примушування до звільнення, притягнення до дисциплінарної відповідальності, переведення, атестація, зміна умов праці, відмова в призначенні на вищу посаду, скорочення заробітної плати тощо) у зв'язку з повідомленням ним або членом його сім'ї про порушення вимог Закону України “Про запобігання корупції” іншою особою обов'язок доказування правомірності прийнятих при цьому рішень, вчинених дій покладається на відповідача.</p> <p>Стаття 137. Витребування доказів</p> <p>ч.1 У випадках, коли щодо отримання доказів у сторін та інших осіб, які беруть участь у справі, є складнощі, суд за їх клопотанням зобов'язаний витребувати такі докази [...]</p> <p>ч.2 У заяві про витребування доказів має бути зазначено, який доказ вимагається, підстави, за яких особа вважає, що доказ</p>	<p>[...]</p> <p>para 2 individuals who are obliged by law to keep in secret information, entrusted to them in connection with their official or professional status, – regarding this information.</p> <p>Article 60. Burden of proof and submitting evidence</p> <p>pt 1 [...]</p> <p>para 3 In cases concerning the application negative measures or the creation of the threat of such to the plaintiff by a manager or employer (discharge, forced dismissal, disciplinary liability, reassignment, attestation, labour conditions change, denial of appointment to a higher level position, wage cuts etc.) in connection to reported violations of the Law of Ukraine “On the Prevention of Corruption” made by a whistle-blower or a member of his family the burden of proof of the legality of such measures lies on the defendant.</p> <p>Article 137. Vindication of evidence</p> <p>pt 1 The court upon motion of the parties and other persons involved in the case shall vindicate the evidence that is difficult for the persons involved in the case to obtain [...]</p>
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<p>знаходиться в іншій особі, обставини, які може підтвердити цей доказ.</p> <p>Стаття 293. Ухвали, на які можуть бути подані скарги окремо від рішення суду</p> <p>[...]</p> <p>ч.2 Заперечення на ухвали, що не підлягають оскарженню окремо від рішення суду, включаються до апеляційної скарги на рішення суду. У разі подання апеляційної скарги на ухвалу, що не підлягає оскарженню окремо від рішення суду, суд першої інстанції повертає її заявнику, про що постановляє ухвалу, яка не підлягає оскарженню.</p> <p>Кодекс адміністративного судочинства України</p> <p>Стаття 65. Свідок</p> <p>[...]</p> <p>ч.2 Не можуть бути допитані як свідки:</p> <p>[...]</p> <p>п.5 інші особи, які не можуть бути допитані як свідки згідно із законом чи міжнародним договором, згода на обов'язковість якого надана Верховною Радою України, без їхньої згоди.</p>	<p>pt 2 Such motion shall indicate evidence required, the grounds based on which a person, who requests vindication, believes that evidence is in possession of another person, the circumstances that this evidence can prove.</p> <p>Article 293. Court rulings that are subject to a separate from the judgment appeal</p> <p>[...]</p> <p>pt 2 Objections to court rulings that are not subject to a separate from the judgment appeal are included in the appeal against court's judgment. If an appeal against a ruling is not subject to a separate from the judgment appeal, the court of first instance rules to return it to the applicant, which is not subject to appeal.</p> <p>Code of Administrative Procedure of Ukraine</p> <p>Article 65. Witness</p> <p>[...]</p> <p>pt 2 Not subject to examination as witnesses:</p> <p>[...]</p> <p>para 5 other persons who cannot be examined as witnesses without their consent according to national law or international treaty ratified by the Parliament of Ukraine.</p>
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<p>Закон України «Про доступ до публічної інформації»</p> <p>Стаття 11. Захист особи, яка оприлюднює інформацію</p> <p>ч.1 Посадові та службові особи не підлягають юридичній відповідальності, незважаючи на порушення своїх обов'язків, за розголошення інформації про правопорушення або відомостей, що стосуються серйозної загрози здоров'ю чи безпеці громадян, довіллю, якщо особа при цьому керувалася добрими намірами та мала обґрунтоване переконання, що інформація є достовірною, а також містить докази правопорушення або стосується істотної загрози здоров'ю чи безпеці громадян, довіллю.</p>	<p>The Law of Ukraine “On the Access to Public Information”</p> <p>Article 11. Protection of a person who discloses information</p> <p>pt 1 Officials and civil servants shall not be subject to legal liability, regardless of the breach of their duties, for disclosure of information on infringements or information concerning serious threat to the health or safety of citizens and environment, if the person is acting in good faith and had has a justified belief that the information was is accurate and contains evidence of infringement or concerns serious threat to the health or safety of citizens and environment.</p>
<p>Кримінальний процесуальний кодекс України</p> <p>Стаття 27. Гласність і відкритість судового провадження та його повне фіксування технічними засобами</p> <p>[...]</p> <p>ч.2 Кримінальне провадження в судах усіх інстанцій здійснюється відкрито. Слідчий суддя, суд може прийняти рішення про здійснення кримінального провадження у закритому судовому засіданні впродовж усього судового провадження або його окремої частини лише у випадках:</p>	<p>Criminal Procedure Code of Ukraine</p> <p>Article 27. Transparency and openness of the proceedings and its full recording by technical means</p> <p>[...]</p> <p>pt 2 Criminal proceedings in the courts of all instances are open. Investigative judge or court may decide to hold closed criminal</p>

<p>[...]</p> <p>п.4 якщо здійснення провадження у відкритому судовому засіданні може призвести до розголошення таємниці, що охороняється законом.</p> <p>Стаття 65. Свідок</p> <p>[...]</p> <p>ч.2 Не можуть бути допитані як свідки: [...]</p> <p>п. 6 журналісти – про відомості, які містять конфіденційну інформацію професійного характеру, надану за умови нерозголошення авторства або джерела інформації.</p> <p>Стаття 159. Загальні положення тимчасового доступу до речей і документів</p> <p>ч.1 Тимчасовий доступ до речей і документів полягає у наданні стороні кримінального провадження особою, у володінні якої знаходяться такі речі і документи, можливості ознайомитися з ними, зробити їх копії та вилучити їх (здійснити їх виїмку).</p> <p>Стаття 160. Клопотання про тимчасовий доступ до речей і документів</p> <p>ч.1 Сторони кримінального провадження мають право звернутися до слідчого судді</p>	<p>hearings throughout duration of proceedings or separate closed hearing only in the following cases:</p> <p>[...]</p> <p>para 4 under the risk of disclosure of confidential information protected by law in case of open hearings.</p> <p>Article 65. Witness</p> <p>[...]</p> <p>pt 2 Shall not be interrogated as witnesses:</p> <p>[...]</p> <p>pt 6 journalists – about confidential information of a professional nature, provided on condition of non-disclosure of its authorship or source of information.</p> <p>Article 159. General provisions on temporary access to objects and documents</p> <p>pt 1 Temporary access to objects and documents is providing a party to a criminal proceeding by the person, who owns such objects and documents, with an opportunity</p>
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<p>під час досудового розслідування чи суду під час судового провадження із клопотанням про тимчасовий доступ до речей і документів, за винятком зазначених у статті 161 цього Кодексу. Слідчий має право звернутися із зазначеним клопотанням за погодженням з прокурором.</p> <p>ч.2 У клопотанні зазначаються:</p> <p>[...]</p> <p>п. 6 можливість використання як доказів відомостей, що містяться в речах і документах, та неможливість іншими способами довести обставини, які передбачається довести за допомогою цих речей і документів, у випадку подання клопотання про тимчасовий доступ до речей і документів, які містять охоронювану законом таємницю.</p> <p>Стаття 162. Речі і документи, які містять охоронювану законом таємницю</p> <p>ч. 1 До охоронюваної законом таємниці, яка міститься в речах і документах, належать:</p> <p>п. 1 інформація, що знаходиться у володінні засобу масової інформації або журналіста і надана їм за умови нерозголошення авторства або джерела інформації.</p> <p>Стаття 163. Розгляд клопотання про</p>	<p>to examine these objects and documents, make their copies or seize them.</p> <p>Article 160. Motion for temporary access to objects and documents</p> <p>pt 1 The parties to criminal proceedings may submit a motion to an investigative judge during the preliminary investigation or court during the court proceedings for temporary access to objects and documents, except as provided in Article 161 of this Code. An investigator may submit the motion upon the prosecutor's approval.</p> <p>pt 2 The motion shall include: [...]</p> <p>para 6 in case of filing a motion for temporary access to objects and documents that contain secret information protected by law – possibility to use information contained in these objects and documents as evidence, and impossibility to otherwise prove circumstances, which are supposed to be proved with the use of such objects and documents.</p> <p>Article 162. Objects and documents containing secrets protected by law</p> <p>pt 1 Secret information protected by law and</p>
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<p>тимчасовий доступ до речей і документів</p> <p>[...]</p> <p>ч.7 Слідчий суддя, суд в ухвалі про надання тимчасового доступу до речей і документів може дати розпорядження про надання можливості вилучення речей і документів, якщо сторона кримінального провадження доведе наявність достатніх підстав вважати, що без такого вилучення існує реальна загроза зміни або знищення речей чи документів, або таке вилучення необхідне для досягнення мети отримання доступу до речей і документів.</p> <p>Стаття 166. Наслідки невиконання ухвали слідчого судді, суду про тимчасовий доступ до речей і документів</p> <p>ч.1 У разі невиконання ухвали про тимчасовий доступ до речей і документів слідчий суддя, суд за клопотанням сторони кримінального провадження, якій надано право на доступ до речей і документів на підставі ухвали, має право постановити ухвалу про дозвіл на проведення обшуку згідно з положеннями цього Кодексу з метою відшукання та вилучення зазначених речей і документів.</p> <p>Стаття 246. Підстави проведення негласних слідчих (розшукових) дій</p> <p>[...]</p>	<p>contained in objects and documents includes:</p> <p>para 1 information in possession of a mass medium or a journalist, which was provided to them on condition that its author or source of information would not be disclosed</p> <p>Article 163. Review the motion for temporary access to objects and documents</p> <p>[...]</p> <p>pt 7 Investigative judge or the court in its decision to grant temporary access to objects and documents may order seizure of objects and documents, if a party of criminal proceedings provides sufficient grounds to believe that without seizure there is a real threat of alteration or destruction of objects or documents, or such seizure is necessary to access documents and objects.</p> <p>Article 166. The consequences of failure to comply with investigative judge's or court's order for temporary access to objects and documents</p> <p>pt 1 In case of failure to comply with for temporary access to objects and documents,</p> <p>an investigative judge or a court at the request of parties to the criminal</p>
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<p>ч.5 У рішенні про проведення негласної слідчої (розшукової) дії зазначається строк її проведення. Строк проведення негласної слідчої (розшукової) дії може бути продовжений: [...]до вісімнадцяти місяців.</p> <p>Стаття 248. Розгляд клопотання про дозвіл на проведення негласної слідчої (розшукової) дії</p> <p>[...]</p> <p>ч.2 У клопотанні зазначаються:</p> <p>[...]</p> <p>п.7 обґрунтування неможливості отримання відомостей про злочин та особу, яка його вчинила, в інший спосіб.</p> <p>Стаття 258. Загальні положення про втручання у приватне спілкування</p> <p>ч.1 Ніхто не може зазнавати втручання у приватне спілкування без ухвали слідчого судді.</p> <p>[...]</p> <p>ч.4 Втручанням у приватне спілкування є доступ до змісту спілкування за умов, якщо учасники спілкування мають достатні підстави вважати, що спілкування є приватним. Різновидами втручання в приватне спілкування є:</p> <ol style="list-style-type: none">1) аудіо-, відеоконтроль особи;2) арешт, огляд і виїмка кореспонденції;3) зняття інформації з транспортних	<p>proceedings, who have the right of access to objects and documents on the based on order, are entitled to order a search according to the provisions of the Code with search in order to find and seize the objects and documents concerned.</p> <p>Article 246. The grounds of covert investigative (detective) actions</p> <p>[...]</p> <p>pt 5 The decision on covert (investigative) action shall include a period of its implementation. A period of implementation of covert (investigative) action may be extended [...] up to eighteen months.</p> <p>Article 248. Consideration of a motion for covert investigative (detective) action</p> <p>[...]</p> <p>pt 2 A motion shall include: [...] para 7 justification of impossibility to obtain information about crime and an individual who committed this crime in other way.</p> <p>Article 258. General provisions on</p>
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<p>телекомунікаційних мереж;</p> <p>4) зняття інформації з електронних інформаційних систем.</p> <p>Стаття 263. Зняття інформації з транспортних телекомунікаційних мереж</p> <p>[...]</p> <p>ч.4 Зняття інформації з транспортних телекомунікаційних мереж покладається на уповноважені підрозділи органів Національної поліції та органів безпеки. Керівники та працівники операторів телекомунікаційного зв'язку зобов'язані сприяти виконанню дій із зняття інформації з транспортних телекомунікаційних мереж, вживати необхідних заходів щодо нерозголошення факту проведення таких дій та отриманої інформації, зберігати її в незмінному вигляді.</p> <p>Стаття 264. Зняття інформації з електронних інформаційних систем</p> <p>[...]</p> <p>ч.2 Не потребує дозволу слідчого судді здобуття відомостей з електронних інформаційних систем або її частини, доступ до яких не обмежується її власником, володільцем або утримувачем</p>	<p>interference with private communication</p> <p>pt 1 There shall be no interference with private communication without order of an investigative judge.</p> <p>[...]</p> <p>pt 4 Interference with private communication is access to the content of communication under conditions that participants of such communication have sufficient reasons to believe that communication is private. There are the following types of such interference:</p> <ol style="list-style-type: none"> 1) audio and video monitoring of an individual; 2) arrest, inspection and seizure of correspondence; 3) interception of information in transport telecommunications networks; 4) interception of information in electronic information systems. <p>Article 263. Interception of information from transport telecommunications networks</p> <p>[...]</p> <p>pt 4 Interception of information in transport telecommunications networks is conducted by responsible units of the agencies of internal affairs and agencies of security. It shall be facilitated by managers and employees of telecommunication networks' operators, taking required measures in order</p>
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<p>або не пов'язаний з подоланням системи логічного захисту.</p> <p>Стаття 275. Використання конфіденційного співробітництва</p> <p>ч.2 Забороняється залучати до конфіденційного співробітництва під час проведення негласних слідчих дій [...] журналістів, якщо таке співробітництво буде пов'язане з розкриттям конфіденційної інформації професійного характеру</p> <p>Стаття 392. Судові рішення, які можуть бути оскаржені в апеляційному порядку</p> <p>[...]</p> <p>ч.1 В апеляційному порядку можуть бути оскаржені судові рішення, які були ухвалені судами першої інстанції і не набрали законної сили, а саме:</p> <ol style="list-style-type: none">1) вироки, крім випадків, передбачених статтею 394 цього Кодексу;2) ухвали про застосування чи відмову у застосуванні примусових заходів медичного або виховного характеру;3) інші ухвали у випадках, передбачених цим Кодексом. <p>ч.2 Ухвали, постановлені під час судового провадження в суді першої інстанції до ухвалення судових рішень, передбачених частиною першою цієї статті, окремому</p>	<p>not to disclose the fact of conducting such measures and the information obtained, and to preserve such information in its initial version.</p> <p>Article 264. Interception of information from electronic information systems</p> <p>[...]</p> <p>pt 2 When intercepting information in electronic information systems or their parts, the access to which is not restricted by the system's owner, possessor or keeper, or is not related to circumventing a system of logical protection, permission of investigative judge is not required.</p> <p>Article 275. The use of confidential cooperation</p> <p>pt 2 When conducting covert investigative (detective) actions, it is forbidden to involve in confidential cooperation [...] journalists, if such cooperation would require disclosing confidential professional information.</p>
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<p>оскарженню не підлягають, крім випадків, визначених цим Кодексом. Заперечення проти таких ухвал можуть бути включені до апеляційної скарги на судове рішення, передбачене частиною першою цієї статті.</p> <p>Закон України “Про запобігання корупції”</p> <p>Стаття 53. Державний захист осіб, які надають допомогу в запобіганні і протидії корупції</p> <p>ч.1 Особа, яка надає допомогу в запобіганні і протидії корупції (викривач), - особа, яка за наявності обґрунтованого переконання, що інформація є достовірною, повідомляє про порушення вимог цього Закону іншою особою.</p> <p>ч.2 Особи, які надають допомогу в запобіганні і протидії корупції, перебувають під захистом держави. За наявності загрози життю, житлу, здоров'ю та майну осіб, які надають допомогу в запобіганні і протидії корупції, або їх близьких осіб, у зв'язку із здійсненим повідомленням про порушення вимог цього Закону, правоохоронними органами до них можуть бути застосовані правові, організаційно-технічні та інші спрямовані на захист від протиправних посягань заходи, передбачені Законом України "Про забезпечення безпеки осіб, які беруть участь у кримінальному</p>	<p>Article 392. Court decisions that can be appealed against</p> <p>[...]</p> <p>pt 1 Court decisions that have been adopted but have not entered into force yet may be appealed. In particular:</p> <ol style="list-style-type: none">1) verdicts, except cases prescribed by Article 394 of the Code;2) decision on approval or disapproval of compulsory measures of medical or educational nature;3) other decisions in cases prescribed by this Code. <p>pt 2 Court rulings made during the proceedings at the court of the first instance before the adoption of court decisions prescribed by Part 1 of this Article, are not subject to separate appeal, except as provided by this Code. Objections against such rulings can be included in appeal against the court decision prescribed by Part 1 of this Article.</p> <p>The Law of Ukraine “On the Prevention of Corruption”</p> <p>Article 53. State protection of individuals providing assistance in preventing and</p>
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<p>судочинстві".</p> <p>ч.3 Особа або член її сім'ї не може бути звільнена чи примушена до звільнення, притягнута до дисциплінарної відповідальності чи піддана з боку керівника або роботодавця іншим негативним заходам впливу (переведення, атестація, зміна умов праці, відмова в призначенні на вищу посаду, скорочення заробітної плати тощо) або загрози таких заходів впливу у зв'язку з повідомленням нею про порушення вимог цього Закону іншою особою.</p> <p>Інформація про викривача може бути розголошена лише за його згодою, крім випадків, встановлених законом.</p> <p>ч.4 Національне агентство, а також інші державні органи, органи влади Автономної Республіки Крим, органи місцевого самоврядування забезпечують умови для повідомлень їх працівниками про порушення вимог цього Закону іншою особою, зокрема через спеціальні телефонні лінії, офіційні веб-сайти, засоби електронного зв'язку.</p> <p>ч.5 Повідомлення про порушення вимог цього Закону може бути здійснене працівником відповідного органу без зазначення авторства (анонімно).</p>	<p>combating corruption</p> <p>pt 1 A person who assists in preventing and combating corruption (whistle-blower) is a person who provides assistance in preventing and combating corruption by reporting violations of this Law committed by another person on the basis of justified belief that the information is accurate</p> <p>pt 2 Persons who provide assistance in preventing and combating corruption are under the state protection. If there is danger to life, home, health and property of persons who assist in preventing and combating corruption, or persons, who are in close relations to them, in connection to reported violation of this Law, law enforcement bodies may apply legal, organisational, technical and other measures aimed at protection against illegal actions under the Law of Ukraine "On the Protection of Individuals Involved in Criminal Proceedings"</p> <p>pt 3 In connection to reported violations of the requirements of this Law by another person, a person or a member of his family cannot be discharged or forced to resign, subjected to or threatened with disciplinary liability or any other negative measures (reassignment, attestation, labour conditions change, denial of appointment to a higher level position, wage cuts etc.) by his employer or manager.</p> <p>Information on the whistle-blower may be disclosed only upon his consent, except in fixed in law.</p>
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pt 4 National Agency on the Prevention of Corruption and other state authorities, authorities of the Autonomous Republic of Crimea, local governments facilitate reporting violations of this Law by another person, through a special phone lines, official web-sites, means of electronic communication by their employees.

pt 5 Reporting of violations of this Law can be made by the employee of the relevant body anonym

ELSA UNITED KINGDOM

Contributors

National Coordinator

Stephania Elis Karasamani

National Researchers

Angelika Majchrowska

Freya Cassia

Lydia Leather

Mihaela Angelova

Nietta Keane

Nikoletta Zenonos

Ondrej Toloch

Panayiotis Constantinides

Stefanos Xenofontos

Yiota Constantinidou

National Linguistic editor

Stephania Elis Karasamani

Introduction

It is a basic tenet of journalistic ethics that, in the words of the National Union of Journalists' code of conduct, a journalist 'protects the identity of sources who supply information in confidence and material gathered in the course of her/his work.'¹ Hence, the need to ensure anonymity becomes evident in the process of source cultivation which, in turn, occupies a predominant role in the investigative endeavours of journalists.² A famous statement of principle by the European Court of Human Rights (ECtHR), stemming from the seminal case of *Goodwin v. United Kingdom*, recognises that:

Protection of journalistic sources is one of the basic conditions for press freedom... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press could be undermined and the ability of the press to provide accurate and reliable information could be adversely affected.³

Therefore, freedom of expression, guaranteed by Article 10 of the European Convention on Human Rights (ECHR)⁴ protects not just the right to disseminate information to the public but the preceding right to protect the source of that information. It is thus submitted that fear of disclosure can be a serious impediment to the confidential flow of information between source and journalist. Regrettably, despite the decision in *Goodwin*⁵, English courts may sometimes order disclosure. Their power to do so depends on who is asking the question and why.

1. Does the National Legislation Provide (explicit or otherwise) Protection of the Right of the Journalists not to Disclose their Source of Information? What Type of Legislation Provides this Protection? How Exactly is this Protection Construed in National Law?

1.1 The (in)adequacy of UK law to Protect Journalists' Rights

It can be said that UK legislation is severely lacking in the area of protection of journalistic sources, taking into consideration the lack of concrete primary legislation that enshrines the right

¹ 'NUJ Code of Conduct' (*National Union of Journalists*, 5 February 2013) <<https://www.nuj.org.uk/documents/nuj-code-of-conduct/>> accessed March 2 2016.

² Geoffrey Robertson and Andrew Nicol, *Media Law* (5th edn, Penguin 2008) 316.

³ (1996) 22 E.H.R.R. 123, para. 39.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10.

⁵ (n 3).

on a constitutional level and the very few instances of explicit elaboration of the scope of the right on a national level (which includes any term definitions). In the *Camelot*⁶ case, the UK focused more on the particular source (and its nature), unlike in *Goodwin*. It was made clear by the judgment in *Camelot* that a domestic courts' order to disclose depends on whether the source is 'worth protecting... [which could] undermine the main goal of protecting sources'⁷.

A lack of a firm grasp of all the elements involved in the protection of journalistic sources puts the national implementation of this right at risk. Judgments that qualify this right, like *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985*⁸, may restrict and complicate the national approach to the protection of journalistic sources, as without a definite and elaborate foundation upon which to base these more nuanced legislations, national courts may not have much to rely on when attempting to pinpoint the precise limits of domestic law in the area of source protection.

The main statutory provision, found in s.10 of the Contempt of Court Act (COCA) 1981⁹ does not provide an absolute protection to journalists to not disclose their sources. Instead, the provision is to be regarded as a presumption that can potentially be rebutted under the four grounds that are going to be subsequently analysed in Question 6. However, it is worth noting that courts have adopted a more favourable approach to the protection of journalistic sources as 'one of the basic conditions for press freedom following the seminal judgment of the ECtHR in *Goodwin v. United Kingdom*¹⁰, given the United Kingdom's obligation to do so under s.2 of the Human Rights Act (HRA) 1998.

1.2 Journalists and Their Sources: A *Sub Rosa* Relationship?

The common law did not give journalists an absolute right to preserve the confidentiality of their sources but it did recognise in the case of *R. v. Broadcasting Complaints Commission ex p. Granada TV*¹¹ that a judge had a discretion as to whether to force them to name their sources even where their identity was relevant to an issue in dispute. The common law approach has now been strengthened by section 10 of COCA 1981:

⁶ *Camelot v Centaur Communications Limited* [1997] EWCA Civ 2554.

⁷ Article 19, 'Freedom of Expression Litigation Project: Briefing Paper on the Protection of Journalistic Sources' (1998) <<https://www.article19.org/data/files/pdfs/publications/right-to-protect-sources.pdf>> accessed on February 6 2016.

⁸ '(1) Journalists should ordinarily be entitled to refuse to disclose the source of any information contained in any publication (2) if they are to be deprived of that privilege the party seeking disclosure will have to satisfy the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.'

⁹ (n 7).

¹⁰ (n 3).

¹¹ [1995] E.M.L.R. 16.

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible unless it is established to the satisfaction of the court that it is necessary in the interests of justice or national security or for the prevention of disorder or crime.¹²

Section 10 establishes a presumption in favour of journalists who wish to protect their sources, but that presumption will be rebutted if the court concludes that revelation is necessary on one or more of the following four stated grounds.

1.3 European Court of Human Rights: *Goodwin v. United Kingdom*¹³

Unsurprisingly, the ECtHR held that the approach of the English courts had led to a breach of the ECHR¹⁴. Indeed, the ECtHR was unimpressed by Lord Bridge's balancing act and pointed out that Article 10's jurisprudence would generally 'tip the balance of competing interests in favour of the interest of democratic society in securing a free press'.¹⁵ The ECtHR said that the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so could not be regarded as having been 'necessary in a democratic society'¹⁶ for the protection of the rights of the party seeking disclosure under UK law, even considering the margin of appreciation available to the national authorities.

Under section 2 of the HRA 1998¹⁷, English courts must treat *Goodwin* as precedent. Notably, the Court of Appeal said, in the first case after the HRA 1998 came into force, that 'the decisions of the [ECtHR] demonstrate that the freedom of the press has in the past carried greater weight in Strasbourg than it has in the courts of this country'.¹⁸ The *Ashworth* case¹⁹ itself makes a valuable recognition, as a result of *Goodwin*²⁰, that the effect of court orders requiring source disclosure is not affected by the importance of the information or the mercenary motives of the source.²¹

2. Is There, in Domestic Law, a Provision that Prohibits a Journalist From Disclosing his/her Sources? How Exactly is this Prohibition Construed in National law? What is the Sanction?

¹² Contempt of Court Act 1981, s.10.

¹³ (n 3).

¹⁴ (n 4).

¹⁵ (n 3) para 45.

¹⁶ (n 4) art. 10(2).

¹⁷ Human Rights Act 1998, s.2 requires domestic courts to 'take into account' relevant decisions of the European Court of Human Rights in Strasbourg.

¹⁸ *Ashworth Hospital Authority v MGN Ltd* [2001] 1 W.L.R. 515 CA at [101].

¹⁹ *ibid.*

²⁰ (n 3).

²¹ *ibid.*

It has already been demonstrated that journalists and their sources are awarded a qualified protection under English law: whereas a journalist, subject to exceptions provided for, cannot be forced to disclose his source, he can freely decide to do so.²² There, nonetheless, is a fairly strong presumption that each journalist would protect the identity of sources.²³

Upon further examination of available legal instruments, it can be observed that the legislator chose to prohibit disclosure of certain protected information: that is information received under special statutory power or for promise of confidentiality.²⁴ It can also be noted that a special status which, for instance, prevents its seizure and requires special care and consideration to be taken when deciding whether or not to disclose it, is accorded to journalistic material which, arguably, covers the identity of one's source as well.²⁵ Nevertheless, any 'personal data which are processed only for special purpose are exempt [not protected under this act] (...) if the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material.'²⁶ Therefore 'provided that certain criteria are met (...) there can be no challenge on data protection grounds to the processing of personal data for the special purposes.'²⁷

When a party wishes certain information to remain confidential, they can bring an action for interim injunction which then effectively prevents its publication.²⁸ There is, however, especially in relation to criminal proceedings, a strong general rule on unrestricted publicity.²⁹ Therefore, the proportionality test would be applied in each case.³⁰ Nevertheless, where the interim measure is granted and subsequently breached, the offender can be subjected to fine or even committal.³¹

It is evident that no Act of Parliament confers a direct duty to safeguard anonymity of a journalist's source. Consequently, any such disclosure by the journalist is not subject to any penalty. If, however, the details were published in breach of a court's order, then the journalist may face financial penalty and criminal conviction.

Similar outcome can be reached when referring to the case-law which, although rich in authorities on journalists' right to keep their sources anonymous,³² appears silent on whether there also exists a direct duty not to disclose.

²² Contempt of Court Act 1981 c49, s10.

²³ *ibid.*

²⁴ Energy Act 2013 c32, sch9; Constitutional Reform Act 2005 c4, s139; Bank of England Act 1998 c11, sch7.

²⁵ Police and Criminal Evidence Act 1984 c60, s13; Police Act 1997 c50, s100.

²⁶ Data Protection Act 1998 c29, s32(1).

²⁷ HL Deb 2 February 1998, vol 585, cols 438 and 441.

²⁸ *K v News Group Newspapers Ltd* [2011] 1 WLR 1827; *PJS v News Group Newspapers Ltd* [2016] EWCA Civ 393.

²⁹ *S (A Child) (Identification: Restriction on Publication) Re* [2005] 1 AC 593.

³⁰ *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457.

³¹ (n 22) s14.

³² See preceding question.

3. Who is a ‘Journalist’ According to the National Legislation? Is it, in your View, a Restricted Definition for the Purpose of the Protection of Journalistic Sources? What is the Scope of Protection of Other Media Actors? Is the Protection of Journalists’ Sources Extended to Anyone Else?

3.1. Who is a “Journalist” According to the National Legislation?

On a national level, the press/print media is self-regulated, meaning that there are no specific statutory rules governing it, thus no specific statutory definition of the term ‘journalist’. The United Kingdom, though, recognizing the importance of protecting journalistic sources in section 10 of COCA 1981, does not mention ‘journalists’ specifically, nor does it define what exactly is meant by ‘person’. The Data Protection Act (DPA) 1998³³ does not define the term ‘journalist’ and is intended to be interpreted broadly, covering all printed/broadcasted media (news, current affairs, art, literature) as well as the collection of information.

It is possible that the omission of any explicit reference to journalists and the lack of a clear definition could be so as to avoid limiting the scope of the right. However, this is widely criticized, as ‘in most countries where a law protecting journalistic sources was adopted, the number of cases incriminating journalists on this matter has decreased or can be more easily fought back at a legal level. In countries where no such law was adopted, journalistic sources are more often threatened³⁴. This was recognised by the Council of Europe in 2011, noting that ‘violations (of journalistic privilege) are more frequent in member states without clear legislation³⁵’.

Nevertheless, the UK’s fairly weak position on the protection of journalists and their sources appears to be strengthened not only by its reliance on European instruments, like Recommendation No. R (2000) 7, but by case-law, such as the landmark cases of *Goodwin*³⁶ and *Financial Times*³⁷. Prior to *Goodwin*, the COCA 1981 provision³⁸ was interpreted broadly and the domestic courts ordered disclosure frequently³⁹. Judge Walsh, in his dissenting opinion, briefly touched upon the distinction between an ordinary citizen and a journalist being the idea of

³³ Data Protection Act 1998, s.32.

³⁴Anthony Bellanger, deputy general secretary of the IFJ, speaking at the ‘Journalism in the age of mass surveillance’ conference in 2014.

³⁵ Recommendation 1950 (2011) of the Parliamentary Assembly on the protection of journalists sources.

³⁶ *Goodwin v United Kingdom* (1996) 22 EHRR 123.

³⁷ *Interbrew SA v financial Times Ltd & Others* [2002] EWCA Civ 274.

³⁸ (n 12).

³⁹ Geoffrey Robertson and Andrew Nicol (n 2).

‘profession’⁴⁰, from which one may infer the element of remuneration being important in the UK interpretation of the term.

3.2. Is it, in your View, a Restricted Definition for the Purpose of the Protection of Journalistic Sources?

The Leveson Report⁴¹ published pursuant to a phone hacking scandal in 2011, proposed the creation of an “independent” press regulator that would depend on state recognition. This sparked serious concerns regarding the protection of journalistic sources in the UK, as the inquiry’s underpinning concept poses a substantial threat to the freedom of press. The lack of clear legislation and protection exacerbates this issue. The report ‘appears to suggest that there has to be an express obligation of confidence between a journalist and a source in order for the source to qualify for legal protection’⁴², which is arguably an unnecessary restriction that threatens ‘the vital public-watchdog role of the press’⁴³ and its ability ‘to provide accurate and reliable information may be adversely affected’⁴⁴.

3.3. What is the Scope of Protection for Other Media Actors?

The Council of Europe stated that ‘other media actor’ can be anyone that fulfills the ‘public watchdog’ role and that ‘the scope of media actors has enlarged as a result of new forms of media in the digital age’⁴⁵. In most cases, the role of the information conveyor/messenger or ‘middleman’ is played by who we understand to be a traditional journalist (serving a mass media outlet for remuneration). However there is nothing to say that the ‘middleman’ cannot be someone else whose profession involves collecting and disseminating information, such as an NGO activist or academic commentator. Appendix Principle 2⁴⁶ extends this protection to individuals who form ‘professional relations with journalists but are not *per se* classified as journalists.

This is what is understood by the term ‘other media actors’ on an international level. The Council of Europe purposely formulated a very wide definition of ‘journalist’, covering anyone who serves as a conduit of information to the public, regardless of whether they would normally

⁴⁰ *Goodwin v United Kingdom* (1996) 22 EHRR 123 at para 1, 23.

⁴¹ Leveson Inquiry: Culture, Practices and Ethics of the Press Vol 4 (2012), Appendix 4.

⁴² Gill Philips, ‘On Protection of Journalistic Sources’ (*Journalism in Europe discussion series*, October 10 2014) <<http://journalism.cmpf.eu.eu/discussions/on-protection-of-journalistic-sources/>> accessed June 2 2016.

⁴³ (1996) 22 EHRR 123.

⁴⁴ (1996) 22 EHRR 123.

⁴⁵ Council of Europe, Committee of Ministers, Declaration of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors.

⁴⁶ 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: ‘Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established herein.’

be perceived as journalists. The Declaration⁴⁷ 'urges member states to fulfill their positive obligations to protect journalists and other media actors from any form of attack and to end impunity'⁴⁸.

The UK has been criticized by academics such as William Horsley, saying that despite any recent reform in the law, 'the job is still not fully done...further reforms are awaited'⁴⁹. David Anderson QC maintains that the lack of clear domestic legislation to protect journalists and other media actors is 'undemocratic and intolerable'⁵⁰.

3.4. Is the Protection of Journalists' Sources Extended to Anyone Else?

Although it is normally journalists (and other media actors) who have a claim to the protection of sources, it is really a right that enables and protects everyone who receives information and ideas. This means that, technically, persons who would not normally identify themselves or be identified by the general public as journalists can validly invoke this protection.

So, not only is this right available to journalists and other media actors, it is also available to any potential collaborators. The purpose of this rule is, of course, to prevent the protection of sources from being simply side-stepped⁵¹ due to formality.

In the UK, it can be said that an ordinary citizen may invoke the DPA, if they are publishing information for the public consumption online. The High Court made it clear in 2011⁵² that a private individual can indeed engage in 'internet journalism', though this is limited by the intention to create content for the public interest as opposed to a mere intention of recreational online publications.

In practice, however, one may say that the line is generally drawn, nationally and internationally, at the concept of 'profession'. This particular nature of protection seems to be granted to those whose line of work coincides with the area of news publication and media.

⁴⁷ Council of Europe, Declaration of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors.

⁴⁸ *ibid* para 11.

⁴⁹ William Horsley, 'Protecting Journalists from attack under International Law' (Ossigeno and The European Center For Press and Media Freedom (ECPMF) conference, 2 July 2015) <<http://notiziario.ossigeno.info/2015/07/protecting-journalists-from-attacks-under-international-law-by-william-horsley-60062/>> accessed March 16 2016.

⁵⁰ David Anderson QC, 'A Question of Trust – Report of the Investigatory Powers Review' (June 2015) <<https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Web-Accessible1.pdf>> accessed March 16 2016.

⁵¹ Article 19 (n 7).

⁵² *The Law Society and others v Kordowski* [2011] EWHC 3182 (QB) 99.

4. What are the Legal Safeguards for the Protection of Journalistic Sources? How are the Laws Implemented? How are the Legal Safeguards Combined with Self-regulatory Mechanisms?

4.1 Legal Safeguards in the Police and Criminal Evidence Act 1984 and Implementation of the Law

The Police and Criminal Evidence Act (PACE) 1984 was the first piece of legislation to provide for legal safeguards and the principle of journalistic privilege is enshrined within it. Journalistic material may be deemed to fall within either excluded material (confidential) or special procedure material (non-confidential).⁵³ Such material can only be seized by the police after a successful application for a warrant under Section 9 of PACE.⁵⁴ PACE set up a two-tiered system; under the first tier there is an inter-party hearing before a judge orders disclosure, and under the second tier a judge may authorise a search of premises.⁵⁵ The right for an order of disclosure to be subject to review by an independent judicial body is composed of numerous elements which heighten the robustness of the legal safeguards: police must have 'reasonable grounds for believing' information is substantial, valuable and relevant in order to demonstrate a serious arrestable offence has been committed, methods other than disclosure have been attempted, disclosure is in the public interest, the request is made by a senior officer, and the judge must conclude that a production order has not been complied with, a request for one would not be practical or would 'seriously prejudice' an investigation.⁵⁶

4.2 Legal Safeguards in the Regulation of Investigatory Powers Act 2000 and Implementation of the Law

Police access to journalistic source information is further governed by the Regulation of Investigatory Powers Act RIPA (2000), a controversial piece of legislation, which is concerned with the interception of the collection and monitoring of communications data and the interception of the content of the communications.⁵⁷ RIPA established the Investigatory Powers Tribunal (IPT) to hear complaints about surveillance by public bodies.⁵⁸ The Home Secretary must issue codes of practice detailing how the legislation is to be implemented; these emphasise

⁵³ Police and Criminal Evidence Act 1984, s 8(1)(d).

⁵⁴ *ibid* s 9.

⁵⁵ Privacy International, 'Silencing Sources: An International Survey of Protections and Threats to Journalists' Sources' (2007) <<https://wikileaks.org/w/images/c/c0/Silencingsources.pdf>> accessed January 4 2015, 33.

⁵⁶ Police and Criminal Evidence Act 1984, sch 1 s 2(a)(b)(c); Privacy International (n 5) 34.

⁵⁷ Regulation of Investigatory Powers Act 2000, part 1 ch 2; Philip Ward, 'Access to journalists' sources' (Briefing Paper No 07440, 2015) 4.

⁵⁸ Information Commissioner's Office, 'Surveillance Road Map: A shared approach to the regulation of surveillance in the United Kingdom' (2015) Version 3.5

<<https://ico.org.uk/media/fororganisations/documents/1042035/surveillance-road-map.pdf>> accessed March 13 2016.

the need to exercise investigatory powers in ways that are both necessary and proportionate.⁵⁹ In December 2014, a consultation on an updated code of practice, as required under RIPA, included the views of the National Union of Journalists (NUJ) who considered the code contained 'no safeguards on accessing journalists' communications', they called for a rigorous statutory framework, rather than 'mere codes of practice', and for reform to prevent police accessing journalists' phone records without authorisation from a judge.⁶⁰

4.3 Reform to RIPA, Revised Codes of Practice and Inquiries Impacting Legal Safeguards

As a consequence of parliamentary proceedings regarding the passage of the Serious Crime Bill in 2015, Section 83 of the Serious Crime Act 2015 inserted a subsection (2A) into Section 71 RIPA, requiring the Secretary of State to consult the Interception of Communications Commissioner and consider their reports.⁶¹ In February 2015, a Commissioner inquiry found current Home Office guidelines did not provide 'adequate safeguards' to protect journalistic sources and recommended police should be required to seek a judge's permission to disclose a journalist's confidential source.⁶² On the 25th of March 2015 a revised code came into force, which emphasised the nature of the freedom of expression rights to be interfered with when considering whether to acquire communications data to identify a journalist's source.⁶³ The revised code provides guidance on necessity, proportionality and the need to consider 'unintended outcomes'.⁶⁴ Until new legislation provides for judicial authorisation, law enforcement agencies must use PACE procedures to apply for a Production Order.⁶⁵ Only with an immediate threat to life can agencies use the existing internal authorisation procedure under RIPA.⁶⁶

An independent review of the operation and regulation of investigatory powers was conducted by David Anderson QC, as required by the Data Retention and Investigatory Powers Act

⁵⁹ Regulation of Investigatory Powers Act 2000 s 71; Philip Ward and Alexander Horne, 'Interception of Communications' (Home Affairs SN/HA/6332, 2015).

⁶⁰ Regulation of Investigatory Powers Act 2000 s 71; Philip Ward (n 57) 12.

⁶¹ Explanatory Notes to the Serious Crime Act 2015 <<http://www.legislation.gov.uk/ukpga/2015/9/notes>> accessed March 12 2016,334.

⁶² JUSTICE, 'Freedom from Suspicion: Building a Surveillance Framework for a Digital Age' (2011) <<http://2bqk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/11/JUSTICE-Building-a-Surveillance-Framework-for-a-Digital-Age.pdf>> accessed December 20 2015, 20; Interception of Communications Commissioners Office, 'Inquiry into the use of Chapter 2 of Part 1 of the Regulation of Investigatory Powers Act (RIPA) to identify journalistic sources' (2015), ss 8.7-8.10.

⁶³ Home Office, 'Acquisition and Disclosure of Communications Data Code of Practice' (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/426248/Acquisition_and_Disclosure_of_Communications_Data_Code_of_Practice_March_2015.pdf> accessed January 4 2016, s 3.81.

⁶⁴ *ibid* s 2.44.

⁶⁵ *ibid* s 3.78.

⁶⁶ *ibid* s 3.83.

(DRIPA) 2014.⁶⁷ The report, dated 11 June 2015, called for RIPA to be replaced with a new comprehensive law to provide 'clear limits and safeguards'⁶⁸. In July 2015, the Interception of Communications Commissioner reported that he was concerned by 'serious contraventions' of the new code of practice in cases of seizure of call logs of journalists' and their sources without prior judicial approval.⁶⁹

4.4 Draft Provisions

On the 4th of November 2015, the Draft Investigatory Powers Bill (DIPB) was published by the Home Office, which seeks to update and consolidate existing legislation governing the use of investigatory powers.⁷⁰ Clause 61 provides that a public authority must obtain the approval of a Judicial Commissioner before obtaining communications data which would identify a journalist's source, unless there is an imminent threat to life.⁷¹ There is no requirement to notify the source or their legal representative of the application. The Bill includes a new oversight body, the Investigatory Powers Commission (IPC), headed by the Investigatory Powers Commissioner and supported by Judicial Commissioners.⁷² The Joint Committee on the Draft Investigatory Powers Bill has advocated for a reconsideration of the level of protection afforded to journalistic material and sources.⁷³ The NUJ, appearing before the Committee, said the principle of prior notification was 'essential' to ensure that journalists are treated 'not as a first resort but as a last resort' and the provision for Judicial Commissioners did not go 'far enough'.⁷⁴

A full analysis of any changes to the provisions regarding legal safeguards of the protection of journalistic sources can only be made if the bill is passed into law. It should be noted that there has been calls for a British Bill of Rights to replace the HRA 1998, which supposedly would offer 'explicit protection for the role of journalists' and ban police accessing journalists' phone records to identify sources without prior judicial approval.⁷⁵

⁶⁷ David Anderson QC, 'A Question of Trust: Report of the Investigatory Powers Review' (2015)

<<https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Web-Accessible1.pdf>> accessed February 2 2016, s 1.1; Data Retention and Investigatory Powers Act 2014 s 7.

⁶⁸ *ibid* 4.

⁶⁹ Philip Ward (n 57) 13.

⁷⁰ Draft Investigatory Powers Bill 2015

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473770/Draft_Investigatory_Powers_Bill.pdf> accessed January 4 2016.

⁷¹ *ibid* cl 61.

⁷² *ibid* cls 167-187.

⁷³ Joint Committee on the Draft Investigatory Powers Bill, 'Draft Investigatory Powers Bill Report' (HL Paper 93 HC 651 2016) <<http://www.statewatch.org/news/2016/feb/uk-dip-bill-jt-committee-report.pdf>> accessed January 4 2016, 110.

⁷⁴ Philip Ward (n 57) 17.

⁷⁵ The Conservative Party Manifesto 2015

<<https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf>> accessed March 13 2016, 42.

4.5 Legal Safeguards Combined with Self-regulatory Mechanisms

The legal safeguards are combined with self-regulatory mechanisms, primarily in the form of professional codes of conduct.⁷⁶ The obligation on journalists to protect their sources, despite being a moral obligation, is 'deeply ingrained' in British journalism and journalists owe 'loyalty' to their source.⁷⁷ Principle 7 of the NUJ Code of Conduct details that journalists' should protect 'the identity of sources who supply information in confidence'.⁷⁸ Principle 14 of the Editor's Code of Practice provides for a 'moral obligation' on journalists to protect their sources (a similar provision was previously found in the Press Complaints Commission Code).⁷⁹ The Independent Press Standards Organisation (IPSO), replacing the Press Complaints Commission (PCC) in the wake of the Leveson Inquiry, administers self-regulation for the press and complaints about editorial content and journalist conduct.⁸⁰ The IPSO's mandate includes intervention after a complaint, the ability to initiate investigations where there has been systemic failures in adhering to the codes of practice and an arbitration scheme.⁸¹ It should be noted that the complaints procedure by IPSO cannot be used where the issue can be 'more appropriately' dealt with through the court system or where the issue is already 'the subject of legal

⁷⁶ 4th European Ministerial Conference on Mass Media Policy of the Council of Europe, 'Resolution on Journalistic Freedoms and Human Rights' (1994) <https://eos.cartercenter.org/uploads/document_file/path/260/CoE_Committee_of_Ministers_Declaration_on_Journalistic_Freedoms_and_Human_Rights_EN.pdf> accessed February 6 2016, 36, 37; ARTICLE 19 and INTERRIGHTS, 'Freedom of Expression Litigation Project: Briefing Paper on the Protection of Journalistic Sources' (1998) <<https://www.article19.org/data/files/pdfs/publications/right-to-protect-sources.pdf>> accessed February 6 2016, 4.

⁷⁷ Press Complaints Commission, Clause Fourteen – Confidential Sources <http://www.pcc.org.uk/assets/449/Clause_14.pdf> accessed March 13 2016, 66; Chris Frost, *Journalism Ethics and Regulation* (4th edn, Routledge 2016) 151.

⁷⁸ National Union of Journalists, 'Code of Conduct' (2013) <<https://www.nuj.org.uk/documents/nuj-code-of-conduct/>> accessed January 6 2016; Chris Frost (n 77) 16.

⁷⁹ Press Complaints Commission, 'Editor's Code of Practice' (2012) <http://www.pcc.org.uk/assets/696/Code_of_Practice_2012_A4.pdf> accessed February 2 2016; Independent Press Standards Organisation, 'Editor's Code of Practice' (2016) <<https://www.ipso.co.uk/IPSO/cop.html>> accessed April 30 2016; Ian Beales 'The Handbook to the Editor's Codebook' <<http://www.editorcode.org.uk/downloads/codebook/codebook-2014.pdf>> accessed February 2 2016, 19, 77, 78.

⁸⁰ Human Rights Review, 'Article 10: Freedom of Expression' (2010) <http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/hrr_article_10.pdf> accessed January 6 2016, 331; Ian Beales (n 79).

⁸¹ Media Standards Trust, 'The Independent Press Standards Organisation (IPSO): An Assessment' (2013) <<http://mediastandardstrust.org/wp-content/uploads/downloads/2013/11/MST-IPSO-Analysis-15-11-13.pdf>> accessed April 30 2016, 9, 14.

proceedings'.⁸² Thus, criminal proceedings are clearly given priority. However, under Regulation 9 of the IPSO, complaints may be allowed, at its discretion, 'notwithstanding that legal proceedings (whether civil or criminal) may later be brought concerning the subject matter of the complaint' (the subject matter potentially being the disclosure of journalistic sources).⁸³

5. In the Respective National Legislation, are the Limits of Non-disclosure of the Information in Line with the Principles of the Recommendation No R (2000) 7? What are the Procedures Applied? Is the Disclosure Limited to Exceptional Circumstances, Taking into Consideration Vital Public or Individual Interests at Stake? Do the Authorities First Search for and apply Alternative Measures, which Adequately Protect their Respective Rights and Interests and at the Same Time are Less Intrusive with Regard to the Right of Journalists not to Disclose Information

Fairness demands flexibility in the law, a fundamental principle which subjects every rule to its exceptions. Unsurprisingly, protection of journalistic sources does not remain unqualified. Recommendation No R (2000) 7⁸⁴ lays down the European standards for the circumstances in which an order for disclosure could be successfully pursued. While it affords a significant margin of appreciation to Member States, it also emphasizes that the margin should go hand in hand with the supervision of the ECtHR and subjects qualifications to Article 10(2) ECHR. Limits of non-disclosure should, thus, be prescribed by law and be necessary in the democratic society. In the United Kingdom, limits on the protection of journalists against disclosing their confidential sources are found in Section 10 COCA 1981.

5.1 UK limits and the Principles of Recommendation No R (2000)7

5.1.1 Limits should be prescribed by law

Qualifications to the protection of journalistic sources in the UK are clearly prescribed by law as they are expressly embedded in a statutory provision. In fact, in *Goodwin v United Kingdom*,⁸⁵ the

⁸² Independent Press Standards Organisation, 'What kinds of complaints can IPSO consider?' <<https://www.ipso.co.uk/IPSO/makeacomplaint/whatkindsofcomplaintsdoesipso.html>> accessed April 30 2016.

⁸³ Media Standards Trust, 'The Independent Press Standards Organisation (IPSO): An Assessment' (2013) <<http://mediastandardstrust.org/wp-content/uploads/downloads/2013/11/MST-IPSO-Analysis-15-11-13.pdf>> accessed April 30 2016, 37; Independent Press Standards Organisation, 'Regulations' (2013) <https://www.ipso.co.uk/assets/1/REGULATIONS__PDF_.PDF> accessed April 30 2016, 3.

⁸⁴ 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.

⁸⁵ *Goodwin v United Kingdom* [1996] 22 EHRR 123.

Strasbourg court highlighted that s.10 COCA satisfies the European standard of foreseeability, being sufficiently clear, specific and widely accessible.

5.1.2 Necessity

Following Principle 3 of the Recommendation⁸⁶, necessity would be established if an overriding legitimate public interest is proved and is regarded as outweighing the public interest in non-disclosure. *Prima facie*, s.10 COCA appears to be compatible with the principles of the Recommendation.⁸⁷ Firstly, necessity is expressly incorporated in the provision as a condition for the circumstances in which disclosure would be ordered. Secondly, the limits are founded on an exhaustive list of vital public interests; 'interests of justice,' 'national security,' 'prevention of disorder,' and 'prevention of crime.' Most importantly, the wording of s.10 imposes a presumption that courts are not to order disclosure 'unless' necessity is established. The presumption is in line with the Recommendation which allows limitations only in exceptional cases; that is in circumstances of sufficiently 'vital and serious nature' and 'responding to a pressing social need.'⁸⁸

However, substantial compatibility of s.10 COCA with the Recommendation would depend primarily on how the courts have interpreted and applied it. As it will be discussed below, the UK courts have been criticized for adopting a wide interpretation of the aforementioned public interest exceptions. 'Crime', for example, has not been restricted to 'serious' crimes but was even extended to cover cases of financial dishonesty.⁸⁹ On the other hand, it could be argued that following the introduction of the HRA 1998, there has been a movement towards a more robust protection of free press, restricting the scope of application of the limitations in s.10 COCA.⁹⁰

This movement was evident in *Interbrew SA v Financial Times*,⁹¹ a case concerning the leakage of market sensitive information for a takeover bid. The case is significant because the judges both in first instance and in the Court of Appeal followed s.3 (1) HRA 1998, accepting their obligation to interpret national law in accordance with the Convention, explicitly subjecting the application of s.10 COCA to Article 10 ECHR. The reasoning in the Court of Appeal provided a promising ground for the robust protection of journalistic sources. Lord Justice Sedley acknowledged that subjecting s.10 COCA to Article 10(2) ECHR imports a proportionality test in the inquiry as to whether a restriction is necessary in a democratic society and sets a high

⁸⁶ 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.

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ *Re An Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] A.C. 660.

⁹⁰ Steve Foster, 'The disclosure of journalistic sources, press freedom and the confidentiality of medical records' [2007] Coventry Law Journal 50.

⁹¹ *Interbrew SA v Financial Times* [2002] EWCA Civ 274; [2002] EMLR 446; [2002] 2 Lloyd's Rep 229.

necessity threshold to be achieved only in circumstances 'where disclosure meets a pressing social need and is the only practical way of doing so'⁹². The reasoning reflects Principle 3 of the Recommendation⁹³. This was appreciated by the Strasbourg court (*Financial Times v United Kingdom*)⁹⁴ where it was confirmed that an order for disclosure is *prima facie* an infringement of Article 10. The ECtHR subsequently found an infringement of Article 10 under the circumstances, criticizing the way the proportionality exercise was carried out by the Court of Appeal which placed emphasis on the maleficent motif of the particular source. The shortcomings in the Court of Appeal's decision were arguably the result of a misunderstanding on the weight that should be afforded to the importance of protecting journalistic sources in a free press society,⁹⁵ rather than incompatibility of the UK legislative framework with the Convention standards.

5.2 The Procedure: Norwich Pharmacal Order

The traditional method of forcing disclosure of a source in UK courts is a Norwich Pharmacal order.⁹⁶ A Norwich Pharmacal order is made on the basis of discovering the identity of a wrongdoer and is available to anyone against whom the plaintiff has a cause of action in relation to the same wrong. The respondent of such an action is in an intermediate position, as he is not likely to be party in any subsequent claim or incur personal liability, but he was either voluntarily or involuntarily mixed up in the wrongdoing of others. Therefore, he carries the duty to assist the person who has been wronged by giving him full information and disclosing the identity of wrongdoers.

The application of a Norwich Pharmacal order has 'taken wings'⁹⁷ since its revival in 1974. Although the case itself related to an action for the infringement of a patent, a Norwich Pharmacal order is no longer limited to a tortious act. Subsequent cases encompassed equitable wrongs, such as the breach of confidence (*Ashworth v MGN*),⁹⁸ as well as criminal offences, so long as the person seeking the order was the victim of the crime (*Interbrew v Financial Times*).⁹⁹ In addition, while earlier authorities made the order conditional upon the proof of a seriously arguable case against the wrongdoer (*RCA Corp v Reddingtons Rare Records*),¹⁰⁰ it was then established that there is no need to satisfy such a high threshold (*P v T*).¹⁰¹ Journalists often find

⁹² *ibid.*

⁹³ 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.

⁹⁴ *Financial Times Ltd v United Kingdom* (821/03) [2010] E.M.L.R. 21.

⁹⁵ Steve Foster (n 90).

⁹⁶ *Norwich Pharmacal Co. v Customs and Excise Commissioners* [1973] UKHL 6.

⁹⁷ Charles Hollander, 'Norwich Pharmacal takes wings' [2009] Civil Justice Quarterly 458.

⁹⁸ *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29; [2002] 1 W.L.R. 2033; [2002] 4 All E.R. 193.

⁹⁹ *Interbrew v Financial Times Ltd* [2002] EWCA Civ 274; [2002] 2 Lloyd's Rep. 229.

¹⁰⁰ *RCA Corp v Reddingtons Rare Records* [1974] 1 W.L.R. 1445.

¹⁰¹ *P v T Ltd* [1997] 1 W.L.R. 1309.

themselves in this intermediary position. The inevitable result of extending the scope of application of Norwich Pharmacal orders is that more and more journalists can now be required to disclose their sources. The interpretation of s.10 COCA, therefore, becomes crucial.

5.3 Order for Disclosure: Vital Public and Individual Interests

The wording of s.10 provides for an exhaustive list of potentially overriding interests which all relate to vital public interests. The English courts, however, have chosen a broad interpretation for the meaning of 'interests of justice,' contrary to the earlier confinement of the provision to the 'technical sense of interests in the administration of justice in the course of proceedings in a court' (*Secretary of State for Defence v Guardian Newspapers*).¹⁰² In *X Ltd v Morgan Grampian (Publishers) Ltd*¹⁰³, it was established that 'interests of justice' include the exercise of legal rights and self-protection. Confirming *Morgan Grampian*,¹⁰⁴ the House of Lords in *Ashworth Hospital Authority v MGN*,¹⁰⁵ deemed s.10 wide enough to be applied in cases where the injured party sought any form of legal redress, beyond litigation.

The wide scope of the limitations in s.10 means that disclosure can be sought for the protection of commercial interests, which are not in reality vital public interests. For example, commercial interests were at the heart of *X v Morgan Grampian*,¹⁰⁶ where disclosure was ordered against a trainee journalist who received information regarding the financial status of a computer software company. When a complaint was filed in Strasbourg (*Goodwin v UK*),¹⁰⁷ the ECtHR found the order to be disproportionate, highlighting that the commercial interests of the company were not simply balanced against another public interest but assessed against 'one of the basic conditions for press freedom.'¹⁰⁸ While Strasbourg guidance seemed to suggest that commercial interests should rarely reflect exceptional circumstances for ordering disclosure, the English courts continued to attach weight on commercial considerations in the post *Goodwin* era; in *Camelot Group plc v Centaur*¹⁰⁹ the overriding interest of a company to ensure the loyalty of its employees was the basis for ordering disclosure; and protecting a company's market share was the basis of *Interbrew v Financial Times*.¹¹⁰

More recently, the UK courts have used Pharmacal orders and s.10 to protect vital public interests.¹¹¹ In *Ashworth Security Hospital v MGN Ltd*,¹¹² an order for disclosure was available to identify the employee who leaked a patient's medical information. The basis of the order was the

¹⁰² *Secretary of State for Defence v Guardian Newspapers* [1985] AC 339, [1984] 3 All ER 601, [1984] 3 WLR 986.

¹⁰³ *X Ltd v Morgan Grampian (Publishers) Ltd* [1991] 1 AC 1; [1990] 2 All ER 1; [1990] 2 WLR 1000.

¹⁰⁴ *ibid.*

¹⁰⁵ *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29; [2002] 1 W.L.R. 2033; [2002] 4 All E.R. 193.

¹⁰⁶ *X Ltd v Morgan Grampian (Publishers) Ltd* [1991] 1 AC 1; [1990] 2 All ER 1; [1990] 2 WLR 1000.

¹⁰⁷ *Goodwin v United Kingdom* (1996) 22 EHRR 123.

¹⁰⁸ *ibid.*

¹⁰⁹ *Camelot Group plc v Centaur* [1997] EWCA Civ 2554; [1999] QB 124.

¹¹⁰ *Interbrew v Financial Times Ltd* [2002] EWCA Civ 274; [2002] 2 Lloyd's Rep. 229.

¹¹¹ Steve Foster (n 90).

¹¹² *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29; [2002] 1 W.L.R. 2033; [2002] 4 All E.R. 193.

general public interest of maintaining confidential medical records. It is important to note that five years later the Court of Appeal refused to order disclosure of the source leaking medical information regarding the same patient (*Mersey Care NHS Trust v Ackroyd*).¹¹³ Article 10 was, indeed, found to be of higher order in the circumstances, especially as the patient had already made widely available information about his medical records. The success of the Court of Appeal in this judgment lies in taking an independent assessment of the context and the facts of the case in order to determine 'necessity' or 'truly exceptional circumstances' which could limit protection of journalistic sources.

5.4 The Less Intrusive Alternatives: Injunctions and Internal Inquiries

One of the criticisms made regarding the *Financial Times* case was that even the Strasbourg Court failed to highlight that the interests of *Interbrew* could have been protected by an injunction that would have prohibited the media from reporting further on the takeover bid.¹¹⁴ Although an injunction would still be an infringement to the right to freedom of speech, it would have been 'far less intrusive than a disclosure which carries with it the chilling broader effect on press freedom.'¹¹⁵

However, in line with the more recent robust free press approach, the Court of Appeal reversed the decision in *John v Express Newspapers*¹¹⁶, emphasizing that the first instance judge attached insufficient significance to the failure of the law firm to first conduct an internal inquiry in order to find out who made the draft opinion in question available. This reflects a new approach towards forcing private individuals and authorities in the UK to first search for the less intrusive alternatives before resorting to a disclosure application.

In conclusion, the UK legislative framework, interpreted and applied in accordance with the guidance provided by Strasbourg, meets the European standard afforded to the limits of the protection of journalistic sources following Recommendation No R (2000)7. Orders for disclosure and breaches of confidentiality thus remain the exception rather than the norm.

¹¹³ *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101; [2008] EMLR 1; [2007] 94 BMLR 84; [2007] HRLR 19.

¹¹⁴ Ashley Savage and Paul David Mora 'Case Comment; The protection of journalistic sources, Norwich Pharmacia orders and Article 10 ECHR' [2007] Entertainment Law Review 137.

¹¹⁵ *ibid.*

¹¹⁶ *John v Express Newspapers* [2000] EWCA Civ 135, [2000] 1 WLR 1931.

6. In the Recommendation No R (2000) 7, the Following Principles Should be Respected when the Necessity of Disclosure is Stated: Absence of Reasonable Alternative Measures, Outweighing Legitimate Interest (Protection of Human Life, Prevention of Major Crime, Defence of a Person Accused or Convicted of Having Committed a Major Crime). Under Which Criteria can the Interest in the Disclosure Outweigh the Interest in the Non-disclosure?

When the necessity of disclosure is stated, there should be subsequent measures that follows. In the United Kingdom, the principles of the Recommendation No R (2000) 7 are illustrated rather patchy and in a number of legislations. COCA 1981 presumes in favor of those journalists that are ordered to disclose a source and establishes conditions which will outweigh the legitimate interest in non-disclosure.

6. 1 The Contempt of the Court Act 1981

The COCA 1981¹¹⁷ acts as shield law to those who wish to obtain the information about the source and it includes the weighing of the legitimate interests. However, it does not provide for the principle of exercising other reasonable alternative measures.

Section 10 starts with the presumption that a court may not require a person to disclose a source unless it is satisfied that the disclosure is necessary for one or more legitimate interest listed. Therefore, COCA 1981 satisfies the principle 3.b.ii of the Recommendation as it respects that the disclosure is balanced on the basis of pursuing a legitimate interest that outweighs the right to confidentiality of journalists' sources.

Accordingly, the Recommendation's guidelines laid down some non-exhaustive examples of when the public interest in the non-disclosure could be outweighed where the disclosure is necessary for 'the protection of human life', the prevention of major crime', or 'the defense in the course of legal proceedings of a person who is accused or convicted of having committed a serious crime'.¹¹⁸ Clearly, the recommended interests are not entirely similar like in the s.10 of the COCA. We could, however, endorse the recommended interest under some of the categories, such as the protection of human life can be parallel to 'national security', where there is a probability of a terrorist attack, similarly the 'prevention of disorder or crime' in s.10 can be

¹¹⁷ The Contempt of the Court Act 1981. The Act was introduced in response to the ECtHR case *Sunday Times v UK* ECtHR 26 April 1979, Case No. 6538/74, where the court held that the common law norm of a 'contempt of the court' is vague and uncertain and cannot be regarded as being 'prescribed by the law' in order to demand a disclosure of a source. See para 46-47 of the judgment.

¹¹⁸ 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, para 38.

equivalent to the prevention of major crime in the recommended interest. However, this category in COCA 1981 seems to cover all crimes ranging from minor crimes to major and serious crimes. Also, the national security is mentioned in the Recommendation's guidelines as one of the possibility to justify disclosure under the heading of 'prevention of major crime'.¹¹⁹ Nevertheless, the listed categories under s.10 are far stretched to those established under Article 10 of the ECHR and the Recommendation. While COCA 1981 seems to go beyond the Recommendation of Council of Europe it may naturally lead to a less favorable judgment for the journalists.

6.1.1. Legitimate Interests

6.1.1.1. *Interest of Justice*

The UK courts tended to give a wider definition for the term 'interest of justice' and it was first introduced 'where the disclosure was vital "for the administration of justice" ',¹²⁰ such as to allow the complainant to make their case. However, instead of limiting the exception the drafter used a rather vague and undefined term which was remarked by Lord Hailsham as 'What are the interests of justice? I suggest they are as long as the judge's foot.' This exception has been widely criticised and used against the journalists due to its wide scope, attempts to limit its scope has been made in *Secretary of State for Defence v Guardian Newspapers*¹²¹ to only include justice in the course of legal proceedings but it was later subsequently ignored in *Morgan Grampian case*¹²² where the House of Lords affirmed that the 'interest of justice' included the exercise of legal rights and protection from legal wrongs known as Norwich Pharmacal Order. Such broader approach was latter sustained in *Ashworth Hospital Authority*¹²³ where it included cases of lawful redress other than litigation.

This exception of mere 'interests of justice' is not prescribed or not even referenced in any way by the ECtHR or the ECHR and *Goodwin* has confirmed it. It is without a doubt that the judiciary adopted an approach unpropitious to the media which as stated by Stockdale was invented to limit the judiciary's discretion, however, through the cause of rather original interpretation and implementation the judiciary was left rather with more discretion than it was ever envisioned.¹²⁴ A number of academics argue that the implementation of the necessity test in the name of 'interests of justice' has been one of the most problematic issues,¹²⁵ and such exception was 'the greatest flaw in the legislation'.¹²⁶ Yet, at the beginning the term was a strong

¹¹⁹ *ibid* para 40.

¹²⁰ Angel Fahy, 'Confidential Sources and Contempt of Court: An Argument for Change' (DIT, July 2 2009) <<http://arrow.dit.ie/cgi/viewcontent.cgi?article=1016&context=aaschssldis>> accessed February 10 2016, 21-22.

¹²¹ *Secretary of State for Defence v Guardian Newspapers* [1985] A.C. 339.

¹²² *X Ltd v Morgan Grampian* [1991] 1 AC 1; *Camelot Group Plc v Centaur Communications Ltd* [1998] IRLR 80.

¹²³ *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033.

¹²⁴ Michael Stockdale and Rebecca Mitchell, 'Company Confidentiality and the Freedom of Press: Striking Balance' (2003) *Company Lawyer* 170-172.

¹²⁵ Ruth Costigan, 'Protection of Journalists' Sources' [2007] *Public Law* 471.

¹²⁶ Angel Fahy, (n 120) 21.

prima facie protection as it is illustrated by *AG v Lundin*¹²⁷ where the court held that a disclosure of the source could not assist the prosecution's case and was not necessary in the interests of justice. However, as pointed out by *Granada* and *Goodwin* this section has been given a rather wider interpretation in later cases. It is evident that the UK courts rely on the 'interest of justice' without any clear guidelines of what is actually established and what can be referred as the 'interest of justice'.

6.1.1.2. National Security

In cases where the legitimate interest is one of the national security the necessity for disclosure of the source is almost obligatory as it far outweighs the right to confidentiality of the source.¹²⁸ The rationale behind it is that a public servant should not disclose information that is of a confidential nature or may be a threat to the government as these are to be protected under the Official Secrets Act 1911 and hence there is a limited protection for the source as the Act does not offer them any public interest defence.

The case of Former Foreign Office clerk Sarah Tisdal¹²⁹, *Secretary of State for Defence v Guardian Newspapers*, is an example of how thin the ice is if a journalist is considering publishing a document revealing anything slightest to do with national security. Ms Tisdall has leaked a classified document revealing arrival of cruise nuclear missiles to the Guardian newspaper. The Ministry of Defence argued that the document showed parliamentary tactics as it told how the missiles would go in to Greenham Common and the arguments that the then defense minister would use in the house. According to Preston, it was more to do with politics than with national security or disorder or crime.¹³⁰ The Guardian has lost its case even though the judges admitted it was protected by s.10 and otherwise harmless, however, it came to the conclusion that an unreliable public servant who had leaked classified documents may leak something of larger importance in the future therefore the source must be exposed¹³¹. Ms Tisdall was sentenced to six months imprisonment, a punishment that demonstrates other whistleblowers to think twice before revealing any documents of 'secret nature'.¹³²

It is clear that the definition of national security in the UK is undermined by the lack of clear statutory guidelines for examining what national security covers; it is left undefined by the UK

¹²⁷ *AG v Lundin* (1982) 75 CR APP R 90, 101 (DC).

¹²⁸ 'Journalism – Protection of the Sources' (InBrief) <<http://www.inbrief.co.uk/media-law/journalists-sources.htm#>> accessed January 2 2015.

¹²⁹ *Secretary of State for Defence v Guardian Newspapers* [1985] A.C. 339 para 166.

¹³⁰ Peter Preston, 'A Source of Great Regret' (The Guardian, 5 September 2005) <<http://www.theguardian.com/media/2005/sep/05/pressandpublishing.politicsandthemedia>> accessed January 2 2015.

¹³¹ *Secretary of State for Defence v Guardian Newspapers* [1985] A.C. 339 para 166.

¹³² ARTICLE 19, 'SECRETS, SPIES AND WHISTLEBLOWERS, Freedom of Expression and National Security in the United Kingdom, (Article 19 and Liberty, November 2000) <<https://www.article19.org/data/files/pdfs/publications/secrets-spies-and-whistleblowers.pdf>> accessed February 20 2016, ch 3.

legislation and the ECHR. It has been portrayed as 'a protean idea'¹³³ and 'an ambulatory concept',¹³⁴ the exception of national security is used as *carte blanche* to define the national security for convenience of the government.¹³⁵

6.1.1.3. *Prevention of Disorder or Crime*

This legitimate interest is evidently going beyond the Recommendation as it includes also minor crimes by definition. In this criteria, the same applies as to the national security interest, it is understood that a criminal offence or a public disorder will outweigh the interest of non-disclosure.

In the UK, there seems to be no case that provides for the meaning of 'disorder' under s.10 but a few judgments had discussed 'the prevention of a crime'. A leading authority is *Insider Dealing*¹³⁶ where a financial journalist refused to answer questions in the course of an inquiry as it could provide the identification of the source who leaked price-sensitive information. The House of Lords stated that the prevention of a crime could be used in a 'broadest general sense of deterrence and containment',¹³⁷ and eventually the inspectors satisfied the court that they should know the source of a leak in order to prevent this type of financial dishonesty. This case shows how 'the prevention of disorder or crime' in the UK is laid down far away from what was envisioned under the Recommendation and that the spectrum of crime applicable by the UK judges is so wide that there is diminutive protection for the source.

6.2. The Police and Criminal Evidence Act 1984

6.2.1. Absence of Reasonable Alternative Measures

The Police and Criminal Evidence Act 1984 contains a provision similar to s.10 of COCA 1981 from preventing the police from having access to journalistic materials without authorization obtained by application to the court. It is the only legislation that provides for the principle of subsidiarity, that is that the reasonable alternatives do not exist or have been exhausted. However, the only legitimate interest that needs to be fulfilled is the public interest.

In conclusion, there is limited transposition for the principles enacted in the Recommendation and if there are somehow reflected in the UK legislation they are mutually exclusive. COCA

¹³³ Secretary of State for the Home Department v Shafiq Ur Rehman, May 23 2000, No.1999/1268/C, para 35.

¹³⁴ Nicholas Wilkinson, 'National Security, Secrecy and the Media – A British View' in S.Maret (ed), Government Secrecy, Research in Social Problems and Public Policy vol 19, (1st edn, Emerald Group Publishing Limited 2011) 137.

¹³⁵ ARTICLE 19 (n 132) ch 2.

¹³⁶ Re An Inquire under the Company Securities (Insider Dealing) Act 1985 [1988] A.C. 660.

¹³⁷ The Leveson Inquiry, 'An Inquiry into the Culture, Practices and Ethics of the Press' (November 2012)

<<http://leveson.robertsharp.co.uk/appendices/appendix4/#footnoteref85>> accessed January 10 2016, vol 4 Appendix 4; Re An Inquire under the Company Securities (Insider Dealing) Act 1985 [1988] A.C. 660 para 704.

1981 provides for the principle of proportionality but it does not provide for the test of subsidiarity. While, an order for a disclosure made under the Police and Criminal Evidence Act 1984 is subject to the test of subsidiarity, it includes almost none of the legitimate interest stated in the Recommendation. It is clear, that the legitimate interests are limited in the UK legislation and the judges considering the disclosure should reflect upon the case law of the ECHR in order to respect the protection of journalistic sources.

7. In the Light of the Case Law of the European Court of Human Rights, How do National Courts Apply the Respective Laws with Regard to the Right to protect sources? In Particular, How do they Balance the Different Interests at Stake?

7.1 Statutory Protection Before the Human Rights Act

The UK legislature has afforded a privilege against disclosure to the press long before explicitly defining a right to freedom of expression. Section 10 of COCA 1981 provides that a court will not require a person to disclose their sources unless the 'disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime'.¹³⁸ In a glance, the statute confers protection, even though qualified, to journalists. Simultaneously, as Palmer suggests, there is an implicit recognition that protection of journalistic sources acts in favour of the overall public interest.¹³⁹ However, the application of section 10 in the subsequent case law reveals a rather controversial understanding of the four exceptions by the judiciary.

One of the first instances that the House of Lords had to address the question of disclosure under section 10 was in the case of *Secretary of State for Defence v Guardian Newspapers Ltd.*¹⁴⁰ The newspaper published a memorandum of the Ministry of Defence which was classified as secret, after anonymously receiving a photocopy of it. The State sought the recovery of the photocopy by relying on the national security exception. Their Lordships held that although the information was not of military value, the exception could be established. They accepted the arguments of the government that the informant could potentially reveal classified information in the future and therefore, there could be assumed that national security was at stake.

Another discussion regarding the exceptions of section 10 arose in the case of *X Ltd. v Morgan Grampian (Publishers) Ltd.*¹⁴¹ In this case, a company, arguing on the basis of the interests of justice exception, was able to obtain an injunction in relation to confidential information on their financial structure and plans. The journalist, Williams Goodwin, was also ordered to reveal the name of his source. After refusing to do so, a fine was imposed upon him and the newspaper. In

¹³⁸ Contempt of Court Act 1981, s 10.

¹³⁹ Stephanie Palmer, 'Protecting Journalists' Sources: Section 10, Contempt of Court Act 1981' [1992] Public Law 61, 65.

¹⁴⁰ [1985] AC 339.

¹⁴¹ [1991] 1 AC 1.

their judgments, the Law Lords emphasised that the manner by which the information was obtained was paramount and concluded that the identity of the 'disloyal' informant could not be protected, taking into account the gross breach of confidentiality committed.¹⁴² Therefore, it is evident that the court seems to be more sympathetic towards companies or the government and places considerable weight on the possibility of damage or financial loss to them.

7.2 The Enactment of the Human Rights Act and its Aftermath

Although the ruling of *Goodwin* was precise and clear, a complete and comprehensive appreciation of the obligations it produced did not come until the introduction of the HRA 1998 in the UK legal system. Since the Act duplicates the rights found in the ECHR, it was apparent that a right to freedom of expression, which includes imparting 'information and ideas without interference',¹⁴³ was given effect and could be applied equally in domestic law. Additionally, section 3 provides that UK law must be interpreted, so far as possible, in a way that is compatible with ECHR rights, while section 2 provides that English courts 'must take into account' Strasbourg's jurisprudence.¹⁴⁴ Consequently, in theory, additional responsibilities were placed upon the UK judiciary to protect the interests of journalists and formally recognise the importance of defending journalistic sources.

Nonetheless, in practise, the case of *Interbrew SA v Financial Times Ltd and Others* indicates that even after the HRA 1998 came into force, reluctance was shown by the courts to find in favour of journalists.¹⁴⁵ The case involved the disclosure of partly falsified confidential material about Interbrew SA. The court held that the journalist had to hand over his documents so that the company would ascertain the identity of the informant and the decision was justified as 'prescribed by law' under Article 10(2). An application for an appeal to the House of Lords on behalf of Financial Times was rejected and the newspaper decided to take the case to the ECtHR.

Before the case of Financial Times was heard by the Strasbourg court, domestic courts were requested to rule on another similar case regarding disclosure. However, on that instance, the issue related to stolen medical records that were associated with the notorious murderer Ian Brady and other patients. Accordingly, in *Ashworth Hospital Authority v MNG Ltd.*, the House of Lords recognised that there was an overriding obligation and a legitimate aim to protect health data and subsequently, private life.¹⁴⁶ That obligation necessitated disclosure of the identity of the source. In their judgments, their Lordships concluded that article 8 and the protection of private life took priority over article 10.¹⁴⁷ Nevertheless, it was recognised that disclosure of the source of information would only be justified in exceptional scenarios.¹⁴⁸

¹⁴² *ibid* 54 (Lord Bridge).

¹⁴³ Article 10(1) ECHR.

¹⁴⁴ Human Rights Act 1998, s 2.

¹⁴⁵ [2002] EWCA Civ 274.

¹⁴⁶ [2002] 1 WLR 2033.

¹⁴⁷ *ibid* 62.

One of the most recent cases on the matter of disclosure that makes apparent a shift in the approach adopted by UK courts is *Mersey Care NHS Trust v Ackroyd (No.2)*.¹⁴⁹ The issue at stake was an investigation, conducted by a journalist, which concerned the mismanagement of a publicly run hospital. Following the decision in *Ashworth*, the judges indicated that an overriding interest, which would allow the hospital to obtain information on the identity of the informants, would only exist in the confidentiality of medical records that might have revealed personal information. Thus, the two cases were distinguished, as the leaked records did not contain any details or information relating to the hospital staff. The Court of Appeal judges recognised that, on the facts of the case, it was not necessary and proportionate to order Mr Ackroyd to reveal his sources. No overriding interest or pressing social need existed to justify disclosure and thus, the journalist won the case. As Brabyn argues, the reasoning in this case is revolutionary as the judiciary explicitly accepted that the right of the journalist to freedom of expression and its protection took priority over other competing values such as the right of the hospital to know the identity of the informant for breach of confidence.¹⁵⁰

7.3 The Financial Times in the European Court of Human Rights¹⁵¹

Although the case of *Interbrew SA v Financial Times Ltd* was decided before *Ackroyd*, which presented a change in the attitude of the judiciary and might have provided a different outcome, the complainants were still able to take their case to the Strasbourg court. The Court held that there had been a substantial interference and violation of article 10 and disclosure could not be justified as there was no overriding public interest that could outweigh protection of the journalists.¹⁵² In addition, it was recognised that there is a potential of a 'chilling effect' as the flow of information might be hindered if protection to is not afforded.¹⁵³

7.4 Concluding Remarks

It could be argued that the influence of the ECHR, the persuasive nature of the judgments of the ECtHR and subsequently, the effect of the HRA 1998 have had a great impact on the United Kingdom in regards to the protection of journalistic sources. While the case law before the enactment of the HRA 1998 reveals that UK courts were unenthusiastic in affording a privilege to the press, their position was reversed and a more positive outlook has been cultivated. The current position seems to embrace the freedom of the press to publish and impart information of public interest freely.

¹⁴⁸ *ibid* 66.

¹⁴⁹ [2003] EWCA Civ 663.

¹⁵⁰ Janice Brabyn, 'Protection Against Judicially Compelled Disclosure of the Identity of News Gatherers' Confidential Sources in Common Law Jurisdictions' [2006] *The Modern Law Review* 69,921.

¹⁵¹ *Financial Times Ltd. and Others v United Kingdom*, Application no. 821/03.

¹⁵² *ibid* 65.

¹⁵³ *ibid* 59.

8. What are the Criteria for Using Electronic Surveillance and Anti-terrorism Laws, which may Include Measures such as Interceptions of Communications, Surveillance Actions and Search or Seizure Actions in Order to Identify Journalists' Sources of Information? Are the National Law Provisions Accessible, Precise, Foreseeable and Include Clear Legislative Norms in the Context of Surveillance and Anti-terrorism Provisions?

8.1 Protection of Journalistic Sources

Through the development of the ECtHR's jurisprudence and in raising the standards of protection for journalists, the ECtHR has clarified that states must ensure that procedures with adequate legal safeguards are available for the protection of journalist sources.¹⁵⁴ In the context of electronic surveillance and intelligence gathering, it has been acknowledged that 'clear, detailed rules governing the scope and application of measures, as well as minimum safeguards...for preserving the integrity and confidentiality of data' are essential in order for state actions to avoid the risk of abuse and arbitrariness and ensure compliance with the ECHR rights.¹⁵⁵

8.2 Grounds for Interfering with Journalists' Rights

As it has been demonstrated in this report, the free exercise of journalism is protected, on a European level, within the general framework of the right to freedom of expression and information, guaranteed by Article 10 of the ECHR. Since Article 10 of the ECHR is not an absolute right, any restrictions on the exercise of the freedom of expression and information will constitute violations of the ECHR right unless the state can prove that the restriction falls under the exceptions of Article 10(2) and it is, thus, justified. Essentially, restrictions imposed upon freedom of expression must meet the standard of 'legality', meaning that there must be a basis in law for the restriction to be justified.¹⁵⁶ Additionally, exceptions under Article 10(2) require any interference with freedom of expression to be made only for legitimate purposes, such as 'the interests of national security',¹⁵⁷ 'territorial integrity and public safety',¹⁵⁸ 'the prevention of disorder or crime' and the 'protection of morals' of the Contracting Party. No less important is the final requirement provided for in the second paragraph of Article 10 as state authorities must also show that the restriction in place is 'necessary in a democratic society'¹⁵⁹ and that there is a 'pressing social need' for such a limitation to be imposed.¹⁶⁰ As the ECtHR has been prepared to

¹⁵⁴ *Sanoma Uitgevers BV v. Netherlands* [2011] EMLR 4.

¹⁵⁵ *S. and Marper v. United Kingdom* (2009) 48 EHRR 50, para 99.

¹⁵⁶ See *Sunday Times v. United Kingdom* (1979-80) 2 EHRR 245; *Gavenda v Poland* (2004) 39 EHRR 4.

¹⁵⁷ See *Ministry of Defence v. Griffin* [2008] EWHC 1542.

¹⁵⁸ In the context of anti-terrorism laws, see *Süreç v Turkey* (No 4) *App* 24762/94, paras 46-49.

¹⁵⁹ See *R v Shayler* [2002] UKHL 11, paras 54-61.

¹⁶⁰ *Handyside v. United Kingdom*, *App* No 5493/72, para 48.

interpret this provision so as to allow a wide margin of appreciation to the domestic authorities, where they are called upon to strike the correct balance between the competing interests at stake, the requirement of necessity has been decisive in most Article 10 cases.

In the aftermath of the recent mass surveillance revelations, it has become known that government officials had authorised interception of communications of journalists. There was no judicial oversight of eavesdropping conducted by the British intelligence agencies, while revelations have shown that a large degree of personal discretion was involved in the process of who was going to be targeted.¹⁶¹ Declassified GCHQ document confirmed that this practice of targeting communications required 'reasonable grounds to believe...[that individuals concerned]...are participating in or planning activity that is against the interests of national security, [or] the economic well-being of the UK...'.¹⁶² In this occasion, it is again evident that any interference with individual human rights to enable surveillance practices is brought on the basis of 'national security' and the 'interests' of the state.

8.3 Security and Intelligence Agencies and the Preservation of Journalists' Rights

Terms such as domestic spying and mass surveillance have become very common within the daily discourse of many governments' national security strategies in relation to security and risk prevention. In the post-9/11 era, and with the emergence of the 'war on terror', governments, mainly the US and the UK, passed laws authorising their security and intelligence agencies to secretly eavesdrop their citizens, including journalists, without the ordinary court-approved warrants for the purpose of dealing with the new threat, hiding any violation of the rights to privacy and the protection of journalists' sources of information behind the 'national security' justification.¹⁶³ As far as the UK is concerned, the state's intelligence and security organisation GCHQ had been using a dragnet style data collection program, the Optic Nerve, for the creation of database with webcam imagery to be used for suspected or known criminals' identification. The agency database has intercepted and stored imagery from more than 1.8 million Yahoo user accounts globally in one six-month period in 2008 alone, regardless of whether individual users were an intelligence target or not.¹⁶⁴

In the light of these events, the ECtHR has strengthened its position regarding the protection of journalists' right not to disclose their information sources. In *Youth Initiative for Human Rights v. Serbia*,¹⁶⁵ it was emphasised anew that security and intelligence agencies need to respect human

¹⁶¹ Ryan Gallagher, 'British Spies are Free to Target Lawyers and Journalists' (The Intercept, 6 November 2014) <<https://theintercept.com/2014/11/06/uk-surveillance-of-lawyers-journalists-gchq/>> accessed April 26 2016.

¹⁶² *ibid.*

¹⁶³ J. Risen and E. Lichtblau, 'Bush Lets U.S. Spy on Callers Without Courts', (*The New York Times* 16 December 2005) <http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&_r=1&_>, accessed March 2 2016.

¹⁶⁴ S. Ackerman and J. Ball, 'Optic Nerve: millions of Yahoo webcam images intercepted by GCHQ', (*The Guardian*, 28 February 2014) <<http://www.theguardian.com/world/2014/feb/27/gchq-nsa-webcam-images-internet-yahoo>> accessed March 2 2016.

¹⁶⁵ Application No. 48135/06, judgment of 25 September 2013.

rights and fundamental freedoms, while profoundly stressing that '[T]here can be no robust democracy without transparency, which should be served and used by all citizens'.¹⁶⁶ Following its previous judgment in *Telegraaf Media*,¹⁶⁷ the ECtHR reaffirmed that states are under the obligation to take appropriate steps to provide protection against an unlawful interference with the ECHR rights and, therefore, this means that security and intelligence agencies need to also act in compliance with the ECHR. In the latter case, the ECtHR reaffirmed that for any interference with Article 10 to be justified, the requirements of legitimate aim and 'necessity in a democratic society' need to be satisfied first. Additionally, the domestic legislation must provide safeguards appropriate to the use of powers of surveillance against journalists, so that their right of non-disclosure is maintained.¹⁶⁸

Despite the strong stance of the ECtHR to protect rights under Article 10 and the rights of journalists and their material more specifically, the UK national legislation does not seem to comply with these principles. In the recent high-profile case of *R. (on the application of Miranda) v Secretary of State for the Home Department*, the Court of Appeal held that the powers conferred to law enforcement agents by the Terrorism Act 2000¹⁶⁹ to stop and question a person at a port or border area was incompatible with freedom of expression under the ECHR.¹⁷⁰ This judgment was delivered in relation to journalistic material, and the non-compliance of the national legislation with the ECHR was based on the lack of adequate legal safeguards against its arbitrary exercise, and therefore, the national legislation did not afford effective protection of journalists' Article 10 rights.¹⁷¹ The domestic court ruled that the term 'terrorism' needs to be strictly construed and be interpreted within its literal meaning, so that a mere publication could not constitute an act of terrorism.¹⁷² Although the detention of the journalist by the state agents was regarded lawful under the Terrorist Act 2000, because his human rights were outweighed by 'compelling national security interests', it was ruled that the 'stop power' provided for under Schedule 7 of the 2000 Act was incompatible with the Convention right relating to journalism information or material.¹⁷³ The Court of Appeal, without setting the national legislation aside, and, instead, by issuing a statement of incompatibility, reached the conclusion that it would be for the national parliament to adopt the necessary legal safeguards to ensure protection of the confidentiality of journalistic material, where in so doing, the right balance between the individual rights of the journalist and the national interests of the state needs to be struck.¹⁷⁴

In commending the high threshold that the ECtHR has set through its jurisprudence for justifying an interference with freedom of expression, the Parliamentary Assembly of the Council

¹⁶⁶ *ibid*, joint concurring opinion of judges Sajó and Vučinić.

¹⁶⁷ *Telegraaf Media Nederland Landelijke Media B.V. and others v. The Netherlands* (App No. 39315/06), judgment of February 222013.

¹⁶⁸ *ibid* paras 98-102, 122-132.

¹⁶⁹ Sch 7, para 2(1).

¹⁷⁰ [2016] EWCA Civ 6, paras 25-31.

¹⁷¹ *ibid* paras 98-119.

¹⁷² *ibid* paras 51-55.

¹⁷³ *ibid* paras 82-84.

¹⁷⁴ *ibid* para 119.

of Europe has recently acknowledged that the protection of journalists' sources of information is one of the cornerstones of freedom of the Press.¹⁷⁵ It was also emphasised that this right constitutes 'the foundation of a democratic society' and reaffirmed that it is a 'basic condition for both the full exercise of journalistic work and the right of the public to be informed on matters of public concern'.¹⁷⁶ Furthermore, it went as far as to remark that the disclosure of journalistic sources should be limited to 'exceptional circumstances where vital public or individual interests are at stake'¹⁷⁷. In regards to the technological advances of the last years and the ease in which transmission of information is nowadays being conducted, the Assembly highlighted that the confidentiality of journalists' sources 'must not be compromised' by the technological means the public authorities have in their hands 'to control the use by journalists of mobile telecommunication and internet media'¹⁷⁸. As these powerful statements come from the legislative body of the Council of Europe and they are in accordance with the jurisprudence of the ECtHR, they should possibly act as guidelines for national parliaments and influence them in bringing domestic legislation in compliance with the ECHR.

8.4 Identifying the Legal Boundaries

Although national legislation in the UK provides for judicial and procedural safeguards for protection against interferences with the individual human rights of journalists, the overbroad discretionary powers enjoyed by the State should be treated with scepticism. The adoption of a vague and excessively broad definition of 'terrorism'¹⁷⁹ by the government to justify the enactment of a wide-range of anti-terrorism laws should be seen as a matter of serious concern. Additionally, the fact that recent laws and policies prohibit not only acts of terrorism or direct participation in such activities, but also the 'indirect encouragement' and 'other inducement' of terrorism' including its 'glorification', shows the wide-ranging degree of prohibition.¹⁸⁰ These broadly defined terms impose a greater authority upon the state and it makes it easier to justify almost every prohibition under the justification of 'national security'. While it could be accepted that activities falling under these terms would require a public order response, one could very plausibly argue that an anti-terrorism response is disproportionate as to the aim to be achieved. Consequently, this state practise negatively affects the precision of the relevant legal framework and it makes it less foreseeable for the individual to protect himself/herself against any arbitrary interference.¹⁸¹ Arguably, the justification that the anti-terrorism laws are 'prescribed by law' finds application only in theory since, in practice, the relevant law does not meet the necessary standards of sufficient clarity and accessibility to enable the individual to identify the boundaries of the law and regulate his/her conduct accordingly.¹⁸²

¹⁷⁵ 'The Protection of Journalists' sources' (2010) Committee on Culture, Science and Education Report Doc. 12443.

¹⁷⁶ *ibid* s A paras 1,2.

¹⁷⁷ *ibid* s A, para 5.

¹⁷⁸ *ibid* s A, para 11.

¹⁷⁹ Terrorism Act 2000, s 1.

¹⁸⁰ Terrorism Act 2006, s 1.

¹⁸¹ *Wingrove v. United Kingdom*, App No. 17419/90 (ECtHR) para 40.

¹⁸² *Sunday Times v. United Kingdom* (1979-80) 2 EHRR 245, para 49.

9. Can Journalists Rely on Encryption and Anonymity Online to Protect Themselves and Their Sources Against Surveillance?

9.1 The Essence of Encryption and Online Anonymity

Encryption is a mathematical process of “converting messages, information, or data into a form unreadable by anyone except the intended recipient”¹⁸³. It protects the confidentiality and integrity of content against third-party access or manipulation. It is a key instrument to ensure that digital communications – ranging from online financial transactions to personal phone conversation and emails – are protected from unwarranted interference. Encryption relies on the process of merging a message (“plaintext” –the content of the message) with a passphrase or other arbitrary data such as a file (commonly referred to as an “encryption key”) in order to produce a “ciphertext” that is indecipherable to users who do not have the encryption key¹⁸⁴. Without encryption, forming a secure channel for exchanging private information digitally is nearly impossible.

9.2 The Importance of Encryption and Online Anonymity for Journalists

Journalists and their journalistic sources is one of the groups around the world that are most at risk when their communications are intercepted¹⁸⁵. Journalists’ role as watchdogs on matters of public interest would be severely impeded if there is not a genuine promise of confidentiality in the process of obtaining and transferring information.

9.3 Evaluation of the Restrictions on Encryption and Anonymity in the United Kingdom

As of present, there are no general legal restrictions on the online anonymity in the UK¹⁸⁶. However, targeted measures to circumvent encryption in certain cases are currently in force under UK legislation. The Regulation of Investigatory Powers Act 2000 (RIPA)¹⁸⁷ provides a legal framework for the interception of communications, the acquisition and use of data, surveillance and covert intelligence sources. RIPA regulations allow authorities to obtain notices that require individuals to disclose encryption keys or decrypt specific information in the context of criminal investigation. Those provisions weaken the privacy guaranteed by encryption use as

¹⁸³SANS Institute, ‘History of encryption’ (2001) <<http://www.sans.org/reading-room/whitepapers/vpns/history-encryption-730>> accessed June 2 2016.

¹⁸⁴ Privacy International, ‘Securing Safe Spaces Online’ (2015) <https://www.privacyinternational.org/sites/default/files/Securing%20Safe%20Spaces%20Online_0.pdf> accessed June 2 2016.

¹⁸⁵ Joint Submission of World Wide Web Foundation/Centre for Internet and Human Rights at European University.

¹⁸⁶ The Human Development Index country rankings <<http://hdr.undp.org/en/countries>> accessed June 2 2016.

¹⁸⁷ Regulation of Investigatory Powers Act 2000.

the grounds for issuing notices for encryption key disclosure are broad and vague¹⁸⁸ and an investigating officer just needs an approval from a senior officer rather than the formal approval of a court hearing; disclosure must be necessary in the interest of national security, crime and prevention or detection, the UK's economic well-being or 'for the purpose of securing the effective exercise or proper performance by any public authority of any statutory power or statutory duty'¹⁸⁹.

Many journalists and media lawyers¹⁹⁰ have argued that RIPA gives the British police powers to snoop on journalists. Following the implementation of the Act, John Battle, head of compliance at ITV News, argued that the UK legal safeguards that allowed journalists to protect sources now amounted to nothing because police and others could circumvent them through the RIPA, "the back door", to identify sources or obtain information without going through the usual judicial processes. Alan Rusbridger, the editor-in-chief of The Guardian, noted that there were insufficient safeguards to ensure a free press following the enactment of RIPA and journalists must fight for better protection, do a better job of protecting sources and understand technology better. Gill Phillips, director of editorial legal services at Guardian News & Media, warned that in the present legislative environment, journalists should minimise the use of electronic forms of communication. Barrister Gavin Millar QC has filed a case with the European Court of Human Rights on behalf of the Bureau of Investigative Journalism arguing that RIPA was incompatible with section 10 of the Human Rights Act. He has also further added that 'if the application was successful, the Regulation of Investigatory Powers Act 2000 (RIPA) should be torn up'¹⁹¹.

Recent developments and the Government's aim to consolidate and expand on existing laws governing the use of investigatory powers so as to bring them into the digital age, as well as to guarantee "no safe spaces for terrorists"¹⁹² resulted in publication of the Draft Investigatory Powers Bill by the Home Secretary on November 4 2015.

The 'Miscellaneous and General Provisions' part contains some of the most intrusive provisions in the Bill that have attracted criticism. Aside from defining key terms in the Bill, this part broadly relates to the Government's powers to issue national security notices and technical capability notices to telecommunications operators (and possibly platform providers) requiring them to take specified steps for the purposes of national security or the maintenance of technical capability. Law practitioners have indicated that:

¹⁸⁸ *ibid* 3.

¹⁸⁹ *ibid* section 49(2)(b)(i)(ii).

¹⁹⁰ Chris Johnson, 'Journalist Must Fight for Better Legal Protection' (The Guardian, 16 October 2014) <<http://www.theguardian.com/media/2014/oct/16/journalists-legal-protection-itn-guardian-ripa>> accessed June 2 2016.

¹⁹¹ Lisa O'Carroll, 'European Court to investigate laws allowing GCHQ to snoop on journalist' (The Guardian, 15 September 2014) <<http://www.theguardian.com/media/2014/sep/15/human-rights-snoop-on-journalists-gchq-echr>> accessed June 2 2016.

¹⁹² 'David Cameron says new online data laws needed' (BBC News, 12 January 2015) <<http://www.bbc.co.uk/news/uk-politics-30778424>> accessed June 2 2016.

While these powers come with some procedural safeguards regarding prior consultation, reasonableness and consideration of the technical feasibility and costs of complying with a notice, these provisions may leave scope for abuse as a result of being drafted so broadly.¹⁹³

The Secretary of State has the power to issue technical capability notices imposing, among other things, 'obligations relating to the removal of electronic protection applied by a relevant operator to any communications data'¹⁹⁴. This is the first of this kind of obligations proposed in the UK and it has the potential to have aversive consequences for individuals and companies alike. Even though the Government has made much noise over the fact that the Bill does not ban end-to-end encryption, this provision may lead to a similar outcome. For example, telecoms companies and platform providers could be forced to bypass their own security systems in order to enable security services to hack into their systems and services, allowing them to read people's communications. Consequently, this poses unprecedented threat to users, some of which could also be journalists or journalistic sources who will no longer be guaranteed strong encryption in the information transfer without unwarranted third-party interference. Apple CEO, Tim Cook, expressed that very strong encryption is necessary and 'any back door is a back door for everyone... Opening a backdoor can have very dire consequences'. Indeed, the Information Commissioner's Office has warned that the removal of encryption could have "detrimental consequences to the security of data and safeguards which are essential to the public's continued confidence in the handling and use of their personal information".

Further changes to the Bill prior to its enactment are expressed to be desirable. The Parliament Joint Committee recommends that the Government needs to make explicit that providers which offer end-to-end encryption or other un-decryptable communications services will not be expected to provide decrypted information if it is not practicable. A draft code of practice is also recommended to accompany the Bill for consideration.

10. Are Whistle-blowers Explicitly Protected Under Law Protecting Journalistic Sources? Is there Another Practice Protecting Whistle-blowers? Is the Legislation Prohibiting Authorities and Companies from Identifying Whistle-blowers?

10.1 Protection of Whistle-blowers in the UK

In the United Kingdom, whistle-blowers are protected under employment law, not laws protecting journalistic sources. The primary legislation which offers this protection is the Public Interest Disclosure Act (PIDA) 1998.¹⁹⁵ The main purpose of this Act is to prevent the unfair

¹⁹³ Nadia Banno, Sarah West and Lereesa Easterbrook, 'Draft Investigatory Powers Bill 2015: a long way to go to achieve adequate protection for the media and communications industry' (Baker and McKenzie, February 2016) <<http://bakerxchange.com/rv/ff0025aeb510dba37933fb82104c950e9227a515/p=3878691>> accessed June 2 2016.

¹⁹⁴ Draft Investigatory Powers Bill 2015, cl 189(4).

¹⁹⁵ Public Interest Disclosure Act 1998.

dismissal or treatment of workers if they had made a disclosure in the public interest. Additionally, the Act applies to workers who have not received promotions — the Act covers all workers, temporary agency staff, trainees and NHS workers. It does cover volunteers: in *Sims v MASH*, the Act was held not to extend to an unpaid secondee at a charity.¹⁹⁶ The burden of proof for whistle-blowing cases is on the employer. As held in *Pipes v Bridgeford*, once the claimant brings the case against the employer, it is the employer who must discharge the burden.¹⁹⁷

The UK government website defines a whistle-blower as a worker who reports certain types of wrongdoing, usually something seen at work.¹⁹⁸ It emphasises that the wrongdoing disclosed must be in the public interest. The government advises that if a whistle-blower reports their concern anonymously, they may find it harder to argue that any unfair treatment was a result of the whistle-blowing.¹⁹⁹ Whistle-blowers must raise any claim of unfair dismissal within three months of the event happening.²⁰⁰ Though logical, it is easy to see how this may open the system up for abuse by employers.

Section 1 of PIDA 1998 lists several requirements that whistle-blowers must satisfy for a successful claim. Firstly, the whistle-blower must have made the disclosure in good faith. For example, it is not enough that the whistle-blower knew about illegal practices for some time and then decided to disclose after a disagreement with his or her line manager. Secondly, the whistle-blower must believe that the information is substantially true. Thirdly, the disclosure cannot be a trivial matter. There must have been a serious miscarriage of justice, illegal activity, threats, or damage to the environment. Fourthly, the whistle-blower must believe that he or she is making the disclosure to the right person. In *Everett v Mijano Care Services*, an application for interim relief failed because this requirement had not been satisfied.²⁰¹

External disclosures, i.e. to the media, should only be made in exceptional circumstances. These circumstances may be if the complaint was not dealt with by the appropriate channel or if the disclosure about an exceptionally serious matter. In *Kay v Northumberland Healthcare NHS Trust*, it was held to be reasonable for the claimant to go to the media with her concern.²⁰² The tribunal considered the freedom of expression provision in the HRA 1998.²⁰³ In addition, the claimant did not know of the Trust's whistle-blowing policy and the tribunal took account of the fact that there was no reasonable expectation of action following earlier concerns. Finally, the concern was of a serious nature.

¹⁹⁶ *Sim v Manchester Action on Street Health* [2002] EAT/0085/01.

¹⁹⁷ *Pipes v Bridgeford* [2002] (unreported).

¹⁹⁸ GOV.UK, 'Whistleblowing for Employees' <<https://www.gov.uk/whistleblowing/what-is-a-whistleblower>> accessed June 2 2016.

¹⁹⁹ *ibid.*

²⁰⁰ Employment Rights Act 1996, s 111.

²⁰¹ [2000] EAT/3101180/00.

²⁰² Employment Tribunal case no. 6405617/00, 29 November 2001.

²⁰³ Human Rights Act 1998.

According to s 1 PIDA 1998, lodging a complaint with the correct channel is an important aspect of UK law protecting whistle-blowers. Jeanette Ashton has written that requiring employees to use their employer's whistle-blowing procedure could be problematic.²⁰⁴ She adds that many employees will be unfamiliar with the procedure and will be in fear of personal detriment. Imposing these restrictions on the way the complaint is made means that the public is not necessarily made aware of the complaint until it has been investigated internally. This could be seen as a way to protect the reputations of companies and businesses, not individuals.

Peter Yeoh has found in a recent UK survey that just 15% of whistle-blowers raised their concerns externally.²⁰⁵ Additionally, 75% of the whistle-blowers surveyed claimed nothing was done about the wrongdoing. Crucially, the most likely response to the whistle-blowing was found to be demotion and dismissal. Yeoh notes these results are aggravated by 'pressures on whistle-blowers to withhold consent for the information to be passed on to the regulators concerned'. Again, these observations suggest that the law – or at least its result – is failing to protect whistle-blowers sufficiently. The report will now go on to discuss whether these concerns are in compliance with the ECHR.

10.2 Does this Protection Comply with ECHR Case Law?

Article 10 ECHR protects individuals' rights of freedom of expression. In a recent case, *Goodwin v UK*, the Court in Strasbourg emphasised that "protection of journalistic sources is one of the basic conditions for press freedom."²⁰⁶ Without this protection, the Court says, "sources may be deterred from assisting the press in informing the public on matters of public interest." Thus, freedom of expression continues to be closely guarded by the ECtHR. The leading case on the protection of whistle-blowers is *Heinisch v Germany*.²⁰⁷ In this case, a German nurse was employed by a company which specialised in healthcare for elderly people. She made multiple complaints about the company, and even fell ill due to overworking. Eventually, she was dismissed. She brought a case before the ECtHR, arguing that her dismissal interfered with her right to freedom of expression under Art 10 ECHR.²⁰⁸ The ECtHR held that the information disclosed by the claimant was "undeniably of public interest" and that her external reporting of the event by making a criminal complaint was justified by the seriousness of the information.

The Court set out six factors which should be taken into account in cases considering whistle-blowers.²⁰⁹ Firstly, the whistle-blower must have acted in good faith. Secondly, the information disclosed by the whistle-blower must be in the public interest. Thirdly, the Court will consider

²⁰⁴ Jeanette Ashton, '15 years of whistleblowing protection under the Public Disclosure Act 1998: are we still shooting the messenger' (2015) 44(1) *Industrial Law Journal* 29-52.

²⁰⁵ Peter Yeoh, 'Whistleblowing: motivations, corporate self-regulation and the law' (2014) 56(6) *International Journal of Law & Management* 459-474.

²⁰⁶ *Goodwin v UK* (1996) 22 EHRR 123.

²⁰⁷ (2014) 58 EHRR 31.

²⁰⁸ John Tingle and Alan Cribb, *Nursing Law and Ethics* (2nd edn Blackwell Academy 2002) 121.

²⁰⁹ *Heinisch v Germany* (2014) 58 EHRR 31.

the authenticity of the information disclosed and fourthly, whether there was an alternative way the whistle-blower could have used to make his complaint known. Fifthly, the damage suffered by the employer will be considered and, finally, the penalty that the employer imposed on the whistle-blower.

It can be seen that section 1(43C) of the Public Interest Disclosure Act 1998 matches up with the good faith required by the Court in *Heinisch v Germany*. The Act also provides a definition of 'disclosure in the public interest' as required by the Court. The Act specifies that a whistle-blower must reasonably believe the information is true and also dictates that the person must make the disclosure to his employer, unless he believes the evidence will be concealed or destroyed if he does so. The Act is less vociferous about the proportionality of the penalty. In general, it would seem that the 1998 Act is compliant with the ECHR case law.

Jean Paul Jacqué has raised concerns about the EU application of *Heinisch v Germany*.²¹⁰ In his report, he draws attention to the CJEU's failure to apply all six of the European Court of Human Rights' requirements in recent cases. Since all decisions of the Court of Justice are binding on member states, this judgment may have a negative effect on the protection of whistle-blowers in the UK. It follows that this is an area which requires further investigation to ensure that UK law is fully compatible with the ECHR and its subsequent case law.

10.3 Recommendation CM/Rec(2014) 7 of the Committee of Ministers to Member States

As with the case law of the Convention, UK law largely complies with the Recommendation. However, one particular area gives cause for concern. The Person Scope section of the Recommendation specifies that all individuals working 'in either the public or private sector, irrespective of the nature of their working relationship and whether they are paid or not', should be protected. As mentioned briefly above, UK law has excluded volunteers from being able to access the protection offered by the 1998 Act. More specifically, *Sims v Mash* prevented an unpaid secondee at a charity from making out a successful claim. From this, it would seem that in this respect, UK laws protecting whistle-blowers are not fully compatible with all policies and laws of the Council of Europe.

10.4 Concluding Remarks

While UK law is generally compatible with the Convention and Recommendation CM/Rec(2014) 7, there are two major concerns. Firstly, the results of the HRA 1998 suggest that it is too often the focus of authorities to protect companies rather than whistle-blowers.

²¹⁰ Jean-Paul Jacqué, 'Review of the EULEX Kosovo Mission's Implementation of the Mandate with a Particular Focus on the Handling of the Recent Allegations' (*Report to the Vice President of the European Commission Federica Mogherini*, 21 November 2014) < http://www.eeas.europa.eu/statements-eeas/docs/150331_jacque-report_en.pdf > accessed June 2 2016.

Secondly, volunteers and unpaid workers tend not to be protected under UK law, contrary to the Recommendation made by the Committee of Ministers.

11. Conclusion

It becomes evident from the preceding analysis that the main statutory provision, found in s.10 of the Contempt of Court Act 1981 does not provide an absolute protection to journalists to not disclose their sources. Instead, the provision is to be regarded as a presumption in favor of non-disclosure that can be rebutted under the four grounds of the provision. Indeed, the interest in the disclosure may outweigh the interest in the non-disclosure if it is necessary in the interests of justice or national security or for the prevention of disorder or crime. However, it is worth noting that courts have adopted a more favorable approach to the protection of journalistic sources as 'one of the basic conditions for press freedom' following the seminal judgment of the ECtHR in *Goodwin v. United Kingdom*, given the United Kingdom's obligation to do so under s.2 of the Human Rights Act 1998.

Furthermore, a direct positive obligation to safeguard the anonymity of a journalistic source does not exist in UK legislation or common law. If, however, the details were published in breach of a court's order, then the journalist may face financial penalty and criminal conviction.

Legal safeguards for the protection of journalistic sources, combined with self-regulatory mechanisms in the form of professional codes of conduct, can be found within the Legal Safeguards in the Police and Criminal Evidence Act 1984 and the Regulation of Investigatory Powers Act 2000. The Draft Investigatory Powers Bill which will update and consolidate existing legislation governing the use of investigatory powers is currently under consultation.

With regard to the principles of Recommendation No R (2000)7, the UK legislative framework is currently being interpreted and applied in accordance with the guidance provided by the Court in Strasbourg and consequently meets the European standards. Indeed, orders for disclosure and breaches of confidentiality remain the exception rather than the norm.

In terms of legislative norms in the context of surveillance and anti-terrorism provisions, the UK currently provides for judicial and procedural safeguards for protection against interferences with the individual human rights of journalists. However, the adoption of a vague and excessively broad definition of 'terrorism' under the Terrorism Act 2000 by the executive branch to justify the subsequent enactment of a wide-range of discretionary anti-terrorism laws should be seen as a matter of serious concern.

As of present, there are no general legal restrictions on online anonymity in the UK. However, targeted measures to circumvent encryption in certain cases are currently in force under the Regulation of Investigatory Powers Act 2000 which provides a legal framework for the interception of communications, the acquisition and use of data, surveillance and covert intelligence sources.

Finally, whistle-blowers in the United Kingdom, are protected under the Public Interest Disclosure Act 1998 which is primarily legislation relating to employment. While UK law is

generally compatible with the Convention and Recommendation CM/Rec (2014) 7, there are two major concerns. Firstly, the results of the 1998 Act suggest that it is too often the focus of authorities to protect companies rather than whistle-blowers. Secondly, volunteers and unpaid workers tend not to be protected under UK law, contrary to the Recommendation made by the Committee of Ministers.

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13. Table of Provisions

Provisions in your native language	
Contempt of Court Act 1981	<p>Section 10: No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.</p>
Energy Act 2013	<p>c32 Schedule 9 Part 2: Offences relating to disclosure and use of protected information</p> <p>Prohibition on disclosing protected information</p> <p>(2) Protected information must not be disclosed—</p> <p>(a) by the original holder of the information, or</p> <p>(b) by any other person holding it who has received it directly or indirectly from the original holder by virtue of a disclosure, or disclosures, in accordance with this Schedule, except in accordance with Part 3 of this Schedule.</p> <p>Offence of disclosing protected information in contravention of paragraph 2</p> <p>(3) It is an offence for a person to disclose information in</p>

	<p>contravention of paragraph 2.</p> <p>Offence of using protected information in contravention of a restriction in Part 3</p> <p>4 It is an offence for a person to use protected information in contravention of a restriction under paragraph 10(3), 11(2), 12(2), 13(2), 14(2) or 15(2).</p> <p>Defence to offences under paragraphs 3 and 4</p> <p>(5) It is a defence for a person charged with an offence under paragraph 3 or 4 to prove—</p> <ol style="list-style-type: none">1. (a) that the person did not know and had no reason to suspect that the information was protected information, or2. (b) that the person took all reasonable precautions and exercised all due diligence to avoid committing the offence. <p>Penalty for offences under paragraphs 3 and 4</p> <p>(6) (1) A person who commits an offence under paragraph 3 or 4 is liable—</p> <ol style="list-style-type: none">1. (a) on summary conviction—<ol style="list-style-type: none">1. (i) to imprisonment for a term not exceeding 12 months (in England and Wales or Scotland) or 6 months (in Northern Ireland),2. (ii) to a fine (in England and Wales) or a fine not exceeding the statutory maximum (in Scotland or Northern Ireland), or3. (iii) to both;2. (b) on conviction on indictment—<ol style="list-style-type: none">1. (i) to imprisonment for a term not
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	<p>exceeding 2 years,</p> <p>2. (ii) to a fine, or</p> <p>3. (iii) to both.</p> <p>(2) In the application of sub-paragraph (1) to England and Wales in relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003 (general limit on magistrates' court's power to imprison), the reference in sub-paragraph (1)(a)(i) to 12 months is to be read as a reference to 6 months.</p>
<p>Constitutional Reform Act 2005</p>	<p>c4 Section 139 : Confidentiality</p> <p>(1) A person who obtains confidential information, or to whom confidential information is provided, under or for the purposes of a relevant provision must not disclose it except with lawful authority.</p> <p>(2) These are the relevant provisions—</p> <p>(a) sections 26 to 31;</p> <p>(b) Part 4;</p> <p>(c) regulations and rules under Part 4.</p> <p>(3) Information is confidential if it relates to an identified or identifiable individual (a “subject”).</p> <p>(4) Confidential information is disclosed with lawful authority only if and to the extent that any of the following applies—</p> <p>(a) the disclosure is with the consent of each person who is a subject of the information (but this is subject to subsection (5));</p> <p>(b) the disclosure is for (and is necessary for) the exercise by</p>

	<p>any person of functions under a relevant provision;</p> <p>(c)the disclosure is for (and is necessary for) the exercise of functions under section 11(3A) of the Supreme Court Act 1981 (c. 54) or a decision whether to exercise them;</p> <p>(d)the disclosure is for (and is necessary for) the exercise of powers to which section 108 applies, or a decision whether to exercise them;</p> <p>(e)the disclosure is required, under rules of court or a court order, for the purposes of legal proceedings of any description.</p> <p>(5) An opinion or other information given by one identified or identifiable individual (A) about another (B)—</p> <p>(a)is information that relates to both;</p> <p>(b)must not be disclosed to B without A's consent.</p> <p>(6) This section does not prevent the disclosure with the agreement of the Lord Chancellor and the Lord Chief Justice of information as to disciplinary action taken in accordance with a relevant provision.</p> <p>(7)This section does not prevent the disclosure of information which is already, or has previously been, available to the public from other sources.</p> <p>(8)A contravention of this section in respect of any information is actionable, subject to the defences and other incidents applying to actions for breach of statutory duty.</p> <p>(9)But it is actionable only at the suit of a person who is a subject of the information.</p>
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<p>Bank of England Act 1998</p>	<p>c11 Schedule 7: Restriction on disclosure of information</p> <p>1(1) Subject to sub-paragraph (2), information is restricted information for the purposes of this paragraph if –</p> <p>(a) it is obtained by the Bank by virtue of the power conferred by section 17(1) or paragraph 9 of Schedule 2 (whether or not it was obtained pursuant to a notice under that provision) and</p> <p>b) it relates to the business or other affairs of any person.</p> <p>(2) Information is not restricted information for the purposes of this paragraph if—</p> <p>(a) it has been made available to the public from other sources or</p> <p>(b) it is in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it.</p> <p>(3) Except as permitted by the following provisions of this Schedule, restricted information shall not be disclosed by—</p> <p>(a) the Bank or any officer or servant of the Bank, or</p> <p>(b) any person obtaining the information directly or indirectly from the Bank,</p> <p>without the consent of the person from whom the Bank obtained the information and if different the person to whom the information relates.</p> <p>(4) Any person who discloses information in contravention of this paragraph shall be guilty of an offence and liable—</p> <p>(a) on conviction on indictment, to imprisonment for a term not exceeding 2 years, or to a fine, or to both;</p>
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	<p>(b) on summary conviction, to imprisonment for a term not exceeding 3 months, or to a fine not exceeding the statutory maximum, or to both.</p>
<p>Police and Criminal Evidence Act 1984</p>	<p>c60 Section 13: Meaning of “journalistic material”</p> <p>(1) Subject to subsection (2) below, in this Act “journalistic material” means material acquired or created for the purposes of journalism.</p> <p>(2) Material is only journalistic material for the purposes of this Act if it is in the possession of a person who acquired or created it for the purposes of journalism.</p> <p>(3) A person who receives material from someone who intends that the recipient shall use it for the purposes of journalism is to be taken to have acquired it for those purposes.</p> <p>Section 8(1)(d): Power of justice of the peace to authorise entry and search of premises.</p> <p>(1) If on an application made by a constable a justice of the peace is satisfied that there are reasonable grounds for believing—</p> <p>(d) that it does not consist of or include items subject to legal privilege, excluded material or special procedure material;</p> <p>Section 9: Special provisions as to access.</p> <p>(1) A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 below and in accordance with that Schedule.</p> <p>(2) Any Act (including a local Act) passed before this Act under which a search of premises for the purposes of a</p>

	<p>criminal investigation could be authorised by the issue of a warrant to a constable shall cease to have effect so far as it relates to the authorisation of searches—</p> <p>(a)for items subject to legal privilege; or</p> <p>(b)for excluded material; or</p> <p>(c)for special procedure material consisting of documents or records other than documents.</p> <p>Schedule 1: Special Procedure</p> <p>Section 2: The first set of access conditions is fulfilled if—</p> <p>(a)there are reasonable grounds for believing—</p> <p>(i)that [an indictable offence] has been committed;</p> <p>(ii) that there is material which consists of special procedure material or includes special procedure material and does not also include excluded material on premises specified in the application [or on premises occupied or controlled by a person specified in the application (including all such premises on which there are reasonable grounds for believing that there is such material as it is reasonably practicable so to specify);]</p> <p>(iii)that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation in connection with which the application is made; and</p> <p>(iv)that the material is likely to be relevant evidence;</p> <p>(b)other methods of obtaining the material—</p> <p>(i)have been tried without success; or</p> <p>(ii)have not been tried because it appeared that they were bound to fail; and</p>
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	<p>(c) it is in the public interest, having regard—</p> <p>(i) to the benefit likely to accrue to the investigation if the material is obtained; and</p> <p>(ii) to the circumstances under which the person in possession of the material holds it,</p> <p>that the material should be produced or that access to it should be given.</p>
<p>Police Act 1997</p>	<p>c50 Section 100: Confidential journalistic material.</p> <p>(1) In section 97 “confidential journalistic material” means—</p> <p>(a) material acquired or created for the purposes of journalism which—</p> <p>(i) is in the possession of persons who acquired or created it for those purposes,</p> <p>(ii) is held subject to an undertaking, restriction or obligation of the kind mentioned in section 99(3), and</p> <p>(iii) has been continuously held (by one or more persons) subject to such an undertaking, restriction or obligation since it was first acquired or created for the purposes of journalism, and</p> <p>(b) communications as a result of which information is acquired for the purposes of journalism and held as mentioned in paragraph (a)(ii).</p> <p>(2) For the purposes of subsection (1), a person who receives material, or acquires information, from someone who intends that the recipient shall use it for the purposes of journalism is to be taken to have acquired it for those purposes.</p>

<p>Data Protection Act 1998</p>	<p>c29 s32(1): Journalism, literature and art.</p> <p>(1) Personal data which are processed only for the special purposes are exempt from any provision to which this subsection relates if—</p> <p>(a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material,</p> <p>(b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and</p> <p>(c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.</p>
<p>Regulation of Investigatory Powers Act RIPA 2000</p>	<p>Section 71: Issue and revision of codes of practice.</p> <p>(1) The Secretary of State shall issue one or more codes of practice relating to the exercise and performance of the powers and duties mentioned in subsection (2).</p> <p>(2) Those powers and duties are those (excluding any power to make subordinate legislation [F1 and subject to subsection (10)]) that are conferred or imposed otherwise than on the Surveillance Commissioners by or under—</p> <p>(a) Parts I to III of this Act;</p> <p>(b) section 5 of the M1 Intelligence Services Act 1994 (warrants for interference with property or wireless telegraphy for the purposes of the intelligence services); and</p> <p>(c) Part III of the M2 Police Act 1997 (authorisation by the police or [F2 Her Majesty's Revenue and Customs] of interference with property or wireless telegraphy).</p> <p>(3) Before issuing a code of practice under subsection (1),</p>

	<p>the Secretary of State shall—</p> <p>(a) prepare and publish a draft of that code; and</p> <p>(b) consider any representations made to him about the draft;</p> <p>and the Secretary of State may incorporate in the code finally issued any modifications made by him to the draft after its publication.</p> <p>(4) The Secretary of State shall lay before both Houses of Parliament every draft code of practice prepared and published by him under this section.</p> <p>(5) A code of practice issued by the Secretary of State under this section shall not be brought into force except in accordance with an order made by the Secretary of State.</p> <p>(6) An order under subsection (5) may contain such transitional provisions and savings as appear to the Secretary of State to be necessary or expedient in connection with the bringing into force of the code brought into force by that order.</p> <p>(7)</p> <p>The Secretary of State may from time to time—</p> <p>(a) revise the whole or any part of a code issued under this section; and</p> <p>(b) issue the revised code.</p> <p>(8) Subsections (3) to (6) shall apply (with appropriate modifications) in relation to the issue of any revised code under this section as they apply in relation to the first issue of such a code.</p> <p>(9) The Secretary of State shall not make an order containing provision for any of the purposes of this section unless a draft of the order has been laid before Parliament and</p>
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	<p>approved by a resolution of each House.</p> <p>(10)A code of practice under this section may not relate to any matter which is to be dealt with by guidance of the Interception of Communications Commissioner by virtue of paragraph 7 of Schedule A1.]</p> <p>s 49(2)(b)If any person with the appropriate permission under Schedule 2 believes, on reasonable grounds—</p> <p>(i)necessary on grounds falling within subsection (3), or</p> <p>(ii) necessary for the purpose of securing the effective exercise or proper performance by any public authority of any statutory power or statutory duty,</p>
<p>Data Retention and Investigatory Powers Act 2014</p>	<p>Section 7: Review of investigatory powers and their regulation</p> <p>(1)The Secretary of State must appoint the independent reviewer of terrorism legislation to review the operation and regulation of investigatory powers.</p> <p>(2)The independent reviewer must, in particular, consider—</p> <p>(a)current and future threats to the United Kingdom,</p> <p>(b)the capabilities needed to combat those threats,</p> <p>(c)safeguards to protect privacy,</p> <p>(d)the challenges of changing technologies,</p> <p>(e)issues relating to transparency and oversight,</p> <p>(f)the effectiveness of existing legislation (including its proportionality) and the case for new or amending</p>

	<p>legislation.</p> <p>(3)The independent reviewer must, so far as reasonably practicable, complete the review before 1 May 2015.</p> <p>(4)The independent reviewer must send to the Prime Minister a report on the outcome of the review as soon as reasonably practicable after completing the review.</p> <p>(5)On receiving a report under subsection (4), the Prime Minister must lay a copy of it before Parliament together with a statement as to whether any matter has been excluded from that copy under subsection (6).</p> <p>(6)If it appears to the Prime Minister that the publication of any matter in a report under subsection (4) would be contrary to the public interest or prejudicial to national security, the Prime Minister may exclude the matter from the copy of the report laid before Parliament.</p> <p>(7)The Secretary of State may pay to the independent reviewer—</p> <p>(a)expenses incurred in carrying out the functions of the independent reviewer under this section, and</p> <p>(b)such allowances as the Secretary of State determines.</p> <p>(8)In this section “the independent reviewer of terrorism legislation” means the person appointed under section 36(1) of the Terrorism Act 2006 (and “independent reviewer” is to be read accordingly).</p>
<p>Draft Investigatory Powers Bill 2015</p>	<p>Clause 61: Commissioner approval for authorisation to identify or confirm journalistic sources</p> <p>169 Clause 61 sets out the procedure for authorising communications data requests made by public authorities, in order to identify a journalist’s source. In these instances it is necessary to obtain the approval of a Judicial Commissioner before the data can be acquired.</p> <p>170 Subsections (1), (2) and (3) set out that an authorised</p>

communications data application made by certain public authorities for the purpose of identifying the source of journalistic information must not take effect until approved by a Judicial Commissioner. Prior Judicial Commissioner approval is not required in an imminent threat to life situation.

171 Subsection (4) sets out that in making an application for data to identify a journalistic source, the applicant is not required to notify either the person to whom the applications relates i.e. the journalistic source, nor that person's legal representative.

172 Subsections (5) and (6) sets out that a Judicial Commissioner should only approve an authorisation to acquire communications data to identify a journalistic source if satisfied that the conditions of the authorisation by the designated senior officer have been met.

173 Subsection (6) sets out that the Judicial Commissioner must quash any authorisation given by the designated senior officer, if the Judicial Commissioner refuses to approve it.

174 Subsection (7) sets out what is meant by the 'source of journalistic information'. It is defined as an individual (i.e. the source) who provides material intending the recipient (i.e. the journalist) to use it for the purpose of journalism or knowing that it is likely to be used for journalism.

Clause 167: Investigatory Powers Commissioner and other Judicial Commissioners [j760]

390 This clause establishes the office of the Investigatory Powers Commissioner, who will be supported in fulfilling their functions by other Judicial Commissioners. No-one will be appointed as the Investigatory Powers Commissioner or as a Judicial Commissioner unless they have held a judicial position at least as senior as a high court judge. To allow them to work effectively, the Investigatory Powers Commissioner will be able to delegate functions to the other Judicial Commissioners. The Investigatory Powers Commissioner is a Judicial Commissioner, so where the Bill or these Explanatory Notes refers to a Judicial Commissioner this includes the Investigatory Powers Commissioner.

	<p>Clause 168: Terms and conditions of employment</p> <p>391 The Judicial Commissioners will be appointed for fixed terms of three years and can be re-appointed. Subsections (2)-(5) ensure the independence of the Judicial Commissioners by limiting the circumstances in which they can be removed from office. The Investigatory Powers Commissioner can only be removed from office with the say so of both Houses of Parliament, unless some very limited circumstances apply, including the Commissioner being given a prison sentence or disqualified from being a company director. Other Judicial Commissioners can be removed from office in the same way, but they can also be removed from office by the Investigatory Powers Commissioner (subsection (6)).</p> <p>Clause 169: Main oversight functions</p> <p>392 This clause gives the Investigatory Powers Commissioner a very broad remit to keep under review the use of investigatory powers. The Investigatory Powers Commissioner must do so through audits, inspections and investigations. In particular the Investigatory Powers Commissioner will undertake, with the assistance of their office, the functions currently undertaken by the Intelligence Services Commissioner, the Interception of Communications Commissioner and the Surveillance Commissioner.</p> <p>393 However, subsection (4) explains that, to prevent inefficiency and duplication of oversight, the Investigatory Powers Commissioner will not oversee particular areas that are already subject to oversight by other individuals or bodies. The Investigatory Powers Commissioner will not oversee decisions by other judicial authorities or where information is obtained through a search warrant or production order issued by a judicial authority. The Investigatory Powers Commissioner will not oversee matters which are overseen by the Information Commissioner.</p> <p>394 Subsection (5) and (6) seek to ensure that the oversight activities do not have a negative effect upon the ability of law enforcement agencies and security and intelligence agencies to perform their statutory functions. These subsections do not apply to the judicial functions of the Commissioners – such as deciding whether to approve the</p>
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	<p>issuing, renewing or modification of a warrant.</p> <p>Clause 170: Additional directed oversight functions</p> <p>395 As the policies, capabilities and practices of the security and intelligence agencies change with time, subsections (1)-(3) allow the Prime Minister to direct the Investigatory Powers Commissioner to oversee new areas. This is important to ensure that independent oversight keeps pace with developments within the security and intelligence agencies.</p> <p>396 Subsection (5) sets out that the Prime Minister must publish any direction that he makes to the Investigatory Powers Commissioner to ensure that there is full transparency about their role. However, this will need to be balanced against a situation where saying too much about what is being overseen will give away details of the policy or capability to the extent that it damages</p> <p>These Explanatory Notes relate to the Investigatory Powers Bill as published in Draft on 4 November 2015 (Cm 9152)</p> <p>52 52</p> <p>281</p> <p>national security.</p> <p>Clause 171: Error reporting</p> <p>397 This clause provides for a process through which people can be informed of serious errors in the use of investigatory powers. An error means any error made by a public authority in complying with any requirement which the Investigatory Powers Commissioner has oversight of.</p> <p>398 When the Investigatory Powers Commissioner becomes aware of an error, the Commissioner must decide whether the error is serious. An error can only be considered serious if it has caused significant prejudice to the person concerned. If the Commissioner thinks that the error is serious the IPT must be informed. If the IPT agrees that the error is serious, the IPT must then decide whether it is in the public interest for the person concerned to be</p>
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informed. In doing so the IPT must balance on one hand the seriousness of the error and the impact on the person concerned, and on the other hand the extent to which disclosing the error would be contrary to the public interest or would be prejudicial to national security, the prevention and detection of serious crime, the economic well-being of the UK, or the ability of the intelligence agencies to carry out their functions.

399 If the IPT decides that the person should be informed, that person must also be informed of their right to bring a claim in the IPT. The person must also be provided with the details necessary to bring such a claim, to the extent that disclosing information is in the public interest.

400 The Investigatory Commissioner's annual report (see clause 172(1)) must include details regarding errors, including the number of errors the Commissioner becomes aware of, the number referred to the IPT and the number of times a person has been informed of an error.

Clause 172: Additional functions under this Part

401 This clause sets out that a Judicial Commissioners must give the IPT any assistance the IPT may ask for, including Commissioner's opinion on anything the IPT has to decide. This allows the IPT to take advantage of the Investigatory Powers Commissioner's expertise and the expertise of his office when reaching a decision or carrying out an investigation.

402 Subsection (2) allows the Investigatory Powers Commissioner to provide advice and information to both public authorities and the general public. If the Commissioner thinks that providing such information or advice might be contrary to the public interest or be damaging to one of the things listed, including national security, the Commissioner must consult with the Secretary of State first.

Clause 173: Functions under other enactments

403 This clause means that authorisations that are currently approved by the Surveillance Commissioner will instead be approved by the Investigatory Powers Commissioner.

	<p>Clause 174: Annual and other reports</p> <p>404 Subsection (1) means that the Investigatory Powers Commissioner must report to the Prime Minister on an annual basis about their work and subsection (2) lists matters which must be included in the report. The Prime Minister may require additional reports. The Investigatory Powers Commissioner may report at any time on any matter the Commissioner has oversight of. The Investigatory Powers Commissioner's reports can include any recommendations the Commissioner thinks are appropriate.</p> <p>405 Subsections (3) & (4) state that upon receipt of an annual report from the Investigatory Powers Commissioner the Prime Minister must publish that report and lay it before Parliament.</p> <p>These Explanatory Notes relate to the Investigatory Powers Bill as published in Draft on 4 November 2015 (Cm 9152)</p> <p>53 53</p> <p>282</p> <p>However, the Prime Minister may redact information from the report if that information would damage national security or damage operational effectiveness. The Prime Minister must consult with the Investigatory Powers Commissioner before deciding to redact anything from the report.</p> <p>406 Reports that are laid before Parliament must be sent to the Scottish Ministers and the First Minister and deputy First Minister to be laid before the Scottish Parliament and the Northern Irish Assembly.</p> <p>Clause 175: Information and inspection powers</p> <p>407 This clause ensures that the Investigatory Powers Commissioner has access to the information necessary to carry out the Commissioner's oversight role effectively. The clause does this by requiring people to provide the Investigatory Powers Commissioner with all the information and documents that the Commissioner may</p>
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need. They must also provide the Commissioner with any assistance the Commissioner may need when carrying out an inspection. The persons to whom these obligations apply includes public authorities and also telecommunications and postal operators who are subject to obligations under this Act.

Clause 176: Funding, staff and facilities

408 Subsection (1) explains that the Judicial Commissioners will be paid a salary and may be paid expenses. The amount will be decided by the Treasury.

409 Subsection (2) requires the Secretary of State to provide the Investigatory Powers Commissioner with the staff, accommodation, equipment and facilities that the Secretary of State thinks necessary. It is intended that the resources afforded to the Investigatory Powers Commissioner will ensure that the office is fully staffed with judicial, official, legal and technical support to ensure that the Commissioners are fully able to perform their oversight and authorisation functions and to hold those that use investigatory powers to account. In determining the resources that should be provided the Secretary of State will consult with the Investigatory Powers Commissioner. Treasury approval will be required as to the number of staff. Should the Investigatory Powers Commissioner believe that the resources afforded to them are insufficient then they may publicly report the fact in their Annual Report.

Clause 177: Power to modify functions

410 This clause allows the functions of the Investigatory Powers Commissioner to be changed. This would require the approval of both Houses of Parliament. The ability to change the function allows a level of flexibility about the role of the Commissioner to ensure that it can be modified and adapted to fit with the work that needs to be overseen.

Clause 178: Abolition of existing oversight bodies

411 This clause confirms that the Investigatory Powers Commissioner will replace the existing commissioners who provide oversight of investigatory powers: the Interception of Communications Commissioner, the Surveillance Commissioner (including Assistant Surveillance

	<p>Commissioners), the Intelligence Services Commisisoner and the Investigatory Powers Commissioner for Northern Ireland. The abolition of the Surveillance Commissioner and Assistant Surveillance Commissioner includes those appointed by Scottish Ministers for the purposes of the Regulation of Investigatory Powers (Scotland) Act 2000.</p> <p>Chapter 2: Other arrangements</p> <p>Clause 179: Codes of practice</p> <p>412 This clause provides for the Secretary of State to issue Codes of Practice covering the use of powers covered by the Bill, as outlined in Schedule 6.</p> <p>These Explanatory Notes relate to the Investigatory Powers Bill as published in Draft on 4 November 2015 (Cm 9152)</p> <p>54 54</p> <p>283</p> <p>Clause 180: Right of appeal from the Tribunal</p> <p>413 Currently there is no domestic route of appeal from decisions of the Investigatory Powers Tribunal, with Claimant's having to issue appeals to the European Court of Human Rights if they wish to challenge a decision. This clause introduces a domestic appeal route from decisions of the IPT on a point of law, to the Court of Appeal (for England and Wales) or its equivalent in Scotland or Northern Ireland (to be detailed in Regulations).</p> <p>414 Where there is a point of law, the decision on whether to grant permission to appeal will be taken by the Investigatory Powers Tribunal in the first instance. If the Tribunal refuses to grant permission to appeal then this decision may be reviewed by the appeal court.</p> <p>415 The Tribunal must only give permission to appeal on a point of law where the appeal would raise an important point of principle or practice or they consider that there are other compelling reasons to grant permission to appeal.</p>
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	<p>Clause 181: Functions of Tribunal in relation to Part 4</p> <p>416 This clause extends the functions of the Investigatory Powers Tribunal in relation to retention notices under Part 4.</p> <p>Clause 182: Oversight by Information Commissioner in relation to Part 4</p> <p>417 The Information Commissioner must audit requirements related to the retention of communications data, for example, to ensure the data is retained securely. This is distinct from the Investigatory Powers Commissioner's requirements in respect of the acquisition of communications data.</p> <p>Clause 183: Technical Advisory Board</p> <p>418 This Clause provides for the continued existence by order of a Technical Advisory Board. Its make-up will be prescribed by Secretary of State regulations and must include a balanced representation of the interests of communications service providers and of those people listed in subsection (2b).</p> <p>Clause 184: Combination of warrants and authorisations</p> <p>419 This clause explains that Schedule 7 (which is explained further below) allows for the combination of targeted interception and equipment interference warrants with other warrants or authorisations. This builds on the existing ability to combine certain warrants and authorisations (RIPA allows authorisations that combine Property interference (under the Intelligence Services Act 1994) and Intrusive Surveillance).</p> <p>Clause 185: Payments towards certain compliance costs</p> <p>420 This clause requires the Secretary of State to ensure that there are arrangements to secure that communications service providers receive a fair contribution towards their costs of complying with the provisions in the Act. Subsection (6) makes clear that the appropriate contribution must never be nil. Subsection (7) requires that a retention notice under Part 4 or national security notice under clause</p>
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	<p>188 must specify the level of contribution to be made.</p> <p>Clause 186: Power to develop compliance systems etc</p> <p>421 This clause enables the Secretary of State to develop, provide, maintain or improve equipment that can be used by the Secretary of State, another public authority or any other person to facilitate compliance with the provisions in the Act. The clauses also enables the Secretary of State to enter into financial arrangements with any other person to develop, provide, maintain</p> <p>Clause 187: Amendments of the Intelligence Services Act 1994</p> <p>422 Subsection (1) describes the act to be amended - the Intelligence Services Act 1994.</p> <p>423 Subsection (2)(a) adds in to subsection (1)(a) of the existing clause 3 of ISA, that GCHQ can ,make use of' as well as ,monitor or interfere with electromagnetic, acoustic and other emissions and any equipment producing such emissions and to obtain and provide information derived from or related to such emissions or equipment and from encrypted material'. This clarifies that GCHQ may, in the performance of its functions, make use of communications services in the manner in which it was intended they would be used. This could be used for public communications as well as for investigative purposes.</p> <p>424 Subsection (2)(b) amends ISA to allow GCHQ to provide advice and assistance on the protection of information to other organisations and members of the public as appropriate. This will enable GCHQ to provide information assurance advice to a wide audience on issues which impact not just HMG but also business and the public in general e.g. cyber security.</p> <p>425 Subsection (3) amends ISA to remove the restriction on GCHQ and SIS to take action in support of the prevention and detection of serious crime in the UK, as well as overseas. Currently ISA only permits such activity where it is in support of MI5. The security and intelligence agencies have a remit to support law enforcement to help prevent and detect serious crime.</p>
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	<p>Clause 189: Maintenance of technical capability</p> <p>Subsection (4) sets out the types of obligations that may be imposed for example in (a) providing communications facilities and capacity to support the implementation of warrants or (d) ensuring the security of facilities or staff who may be required to handle classified material.</p>
<p>Official Secrets Act 1911</p>	<p>Section 1: Penalties for spying.</p> <p>(1)If any person for any purpose prejudicial to the safety or interests of the State—</p> <p>(a)approaches, [inspects, passes over] or is in the neighbourhood of, or enters any prohibited place within the meaning of this Act; or</p> <p>(b)makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy; or</p> <p>(c)obtains, [F1collects, records, or publishes,] or communicates to any other person [F1any secret official code word, or pass word, or] any sketch, plan, model, article, or note, or other document or information which is calculated to be or might be or is intended to be directly or indirectly useful to an enemy;</p> <p>he shall be guilty of felony . . .</p> <p>(2)On a prosecution under this section, it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State; and if any sketch, plan, model, article, note, document, or information relating to or used in any prohibited place within the meaning of this Act, or anything in such a place [or any secret official code word or pass word], is made, obtained, [collected, recorded, published], or communicated</p>

	<p>by any person other than a person acting under lawful authority, it shall be deemed to have been made, obtained, [collected, recorded, published] or communicated for a purpose prejudicial to the safety or interests of the State unless the contrary is proved.</p>
<p>Human Rights Act 1998</p>	<p>Section 2: Interpretation of Convention rights.</p> <p>(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—</p> <p>(a)</p> <p>judgment, decision, declaration or advisory opinion of the European Court of Human Rights,</p> <p>(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,</p> <p>(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or</p> <p>(d) decision of the Committee of Ministers taken under Article 46 of the Convention,</p> <p>whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.</p> <p>(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.</p> <p>(3) In this section “rules” means rules of court or, in the case of proceedings before a tribunal, rules made for the</p>

	<p>purposes of this section—</p> <p>(a)[the Lord Chancellor or] the Secretary of State, in relation to any proceedings outside Scotland;</p> <p>(b)by the Secretary of State, in relation to proceedings in Scotland; or</p> <p>(c)by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland—</p> <p>(i)which deals with transferred matters; and</p> <p>(ii)for which no rules made under paragraph (a) are in force.</p> <p>Section 3: Interpretation of legislation.</p> <p>(1)So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.</p> <p>(2)This section—</p> <p>(a)applies to primary legislation and subordinate legislation whenever enacted;</p> <p>(b)does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and</p> <p>(c)does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.</p>
<p>Terrorism Act 2000</p>	<p>Section 1: Terrorism: interpretation.</p> <p>(1)In this Act “terrorism” means the use or threat of action where—</p>

	<p>(a) the action falls within subsection (2),</p> <p>(b) the use or threat is designed to influence the government [F1 or an international governmental organisation] or to intimidate the public or a section of the public, and</p> <p>(c) the use or threat is made for the purpose of advancing a political, religious [F2, racial] or ideological cause.</p> <p>(2) Action falls within this subsection if it—</p> <p>(a) involves serious violence against a person,</p> <p>(b) involves serious damage to property,</p> <p>(c) endangers a person's life, other than that of the person committing the action,</p> <p>(d) creates a serious risk to the health or safety of the public or a section of the public, or</p> <p>(e) is designed seriously to interfere with or seriously to disrupt an electronic system.</p> <p>(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.</p> <p>(4) In this section—</p> <p>(a) "action" includes action outside the United Kingdom,</p> <p>(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,</p> <p>(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and</p> <p>(d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.</p>
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	<p>(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.</p> <p>Schedule 7: Port and Border Controls</p> <p>2: Power to stop question and detain</p> <p>(1) An examining officer may question a person to whom this paragraph applies for the purpose of determining whether he appears to be a person falling within section 40(1)(b).</p>
<p>Public Interest Disclosure Act 1998</p>	<p>Section 1(43C): Disclosure to employer or other responsible person.</p> <p>(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith—</p> <p>(a) to his employer, or</p> <p>(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—</p> <p>(i) the conduct of a person other than his employer, or</p> <p>(ii) any other matter for which a person other than his employer has legal responsibility,</p> <p>to that other person.</p> <p>(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.</p>

Employment Rights Act 1996

Section 111: Complaints to [employment tribunal].

(1) A complaint may be presented to an [employment tribunal] against an employer by any person that he was unfairly dismissed by the employer.

(2) [Subject to the following provisions of this section], an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(2A) Section 207A(3) (extension because of mediation in certain European cross-border disputes) [and section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply] for the purposes of subsection (2)(a).]

(3) Where a dismissal is with notice, an [employment tribunal] shall consider a complaint under this section if it is presented after the notice is given but before the effective date of termination.

(4) In relation to a complaint which is presented as mentioned in subsection (3), the provisions of this Act, so far as they relate to unfair dismissal, have effect as if—

(a) references to a complaint by a person that he was unfairly dismissed by his employer included references to a complaint by a person that his employer has given him notice in such circumstances that he will be unfairly dismissed when the notice expires,

(b) references to reinstatement included references to the withdrawal of the notice by the employer,

(c) references to the effective date of termination included

	<p>references to the date which would be the effective date of termination on the expiry of the notice, and</p> <p>(d)references to an employee ceasing to be employed included references to an employee having been given notice of dismissal.</p> <p>(5)Where the dismissal is alleged to be unfair by virtue of section 104F (blacklists),</p> <p>(a)subsection (2)(b) does not apply, and</p> <p>(b)an employment tribunal may consider a complaint that is otherwise out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.]</p>
<p>Terrorism Act 2006</p>	<p>Section 1: Encouragement of terrorism</p> <p>(1)This section applies to a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences.</p> <p>(2)A person commits an offence if—</p> <p>(a)he publishes a statement to which this section applies or causes another to publish such a statement; and</p> <p>(b)at the time he publishes it or causes it to be published, he—</p> <p>(i)intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or</p> <p>(ii)is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or</p>

	<p>offences.</p> <p>(3)For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which—</p> <p>(a)glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and</p> <p>(b)is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.</p> <p>(4)For the purposes of this section the questions how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it must be determined having regard both—</p> <p>(a)to the contents of the statement as a whole; and</p> <p>(b)to the circumstances and manner of its publication.</p> <p>(5)It is irrelevant for the purposes of subsections (1) to (3)—</p> <p>(a)whether anything mentioned in those subsections relates to the commission, preparation or instigation of one or more particular acts of terrorism or Convention offences, of acts of terrorism or Convention offences of a particular description or of acts of terrorism or Convention offences generally; and,</p> <p>(b)whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence.</p> <p>(6)In proceedings for an offence under this section against a person in whose case it is not proved that he intended the statement directly or indirectly to encourage or otherwise induce the commission, preparation or instigation of acts of terrorism or Convention offences, it is a defence for him to</p>
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	<p>show—</p> <p>(a)that the statement neither expressed his views nor had his endorsement (whether by virtue of section 3 or otherwise); and</p> <p>(b)that it was clear, in all the circumstances of the statement's publication, that it did not express his views and (apart from the possibility of his having been given and failed to comply with a notice under subsection (3) of that section) did not have his endorsement.</p> <p>(7)A person guilty of an offence under this section shall be liable—</p> <p>(a)on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both;</p> <p>(b)on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both;</p> <p>(c)on summary conviction in Scotland or Northern Ireland, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both.</p> <p>(8)In relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003 (c. 44), the reference in subsection (7)(b) to 12 months is to be read as a reference to 6 months.</p>
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