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**Discussion paper on possible modifications of the “public watchdog”
term in the new media environment**

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Background

Media’s “public watchdog”- function

1. The European Court of Human Rights has repeatedly emphasised that freedom of expression (Art. 10 European Convention on Human Rights) constitutes one of the essential foundations of a democratic society; it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Freedom of expression, as enshrined in Article 10 of the Convention, is subject to a number of exceptions which must be carefully examined and the necessity for any restrictions must be convincingly established. These principles are of particular importance as far as the press is concerned.¹

2. Although it must not overstep certain boundaries, in particular in respect of the reputation and rights of others, the duty of the press in its role as „public watchdog“ is to impart information and ideas on all matters of public interest. The press helps shape an informed public opinion and stimulates critical open debate on issues of general public interest. The role of investigative journalists is to inform and alert the public about undesirable phenomena in society. As “public watchdogs”, the press and investigative journalists guarantee the duly operation of democracy, exposing policy decisions to close public scrutiny and facilitating the public’s participation in the decision-making process. Just as the press has the task of imparting information and ideas, the public has a right to receive them. Although formulated primarily with regard to the print media, these principles undoubtedly apply to audiovisual media.²

¹ Case of Sunday Times v. The United Kingdom, judgement of 26 April 1979, p. 65.

² Case of Jersild v. Denmark, judgement of 23 September 1994, p. 31.

Basic conditions for media freedom

3. Protection of journalists' 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. The public-watchdog role of the press would be undermined and its ability to provide accurate and reliable information be adversely affected. Should journalists be required to disclose their sources then this would have a "chilling effect" on freedom of expression of the press; such a measure is not compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.³

4. Furthermore, the Court has stressed that a careful distinction needs to be made between facts and value-judgments as regards protection against insult (burden of proof). Facts can be proven, whereas the truth of value-judgments cannot and requesting proof of the latter would infringe upon the freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention.⁴ In this context, when contributing to public debate on matters of legitimate concern, the press should be entitled to rely on the content of official reports without having to undertake independent research. Otherwise, the vital public-watchdog role of the press may be undermined.⁵

A new notion of media

5. On 21 September 2011, the Committee of Ministers adopted a Recommendation on a new notion of media (CM/Rec [2011]7).⁶ Significant changes in the "media ecosystem" prompted the need for a re-examination of existing media policy. The recommendation states that all actors – whether new or traditional – who operate within the media ecosystem should be offered a policy framework which guarantees an appropriate level of protection and provides a clear indication of their duties and responsibilities in line with Council of Europe standards. They should be classified and distinguished according to the part that the media services play in content production and dissemination processes. The recommendation advocates that Member States adopt a new, broad notion of media encompassing all relevant actors and that they review regulatory needs in respect of all actors.

Necessity in a democratic society

6. The test of "necessity in a democratic society" requires the Court to determine whether the intrusion subject of complaint corresponds to a pressing social need. In respect of freedom of expression and controversial statements (defamation), the Court regularly examines:

- who made the statement,
- who was affected by the statement,
- the context in which the statement was made.

³ Case of Goodwin v. the United Kingdom, judgement of 27 March 1996, p. 39.

⁴ Case of Lingens v. Austria, judgement of 8 July 1986, p. 46.

⁵ Case of Colombani and Others v. France, judgement of 25 June 2002, p. 65.

⁶ [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec\(2011\)7&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec(2011)7&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383).

7. The Court applies a particular rigorous approach to restrictions on the freedom of expression of two particular groups: representatives of the media and people taking part in the public debate.

8. Due to the media essential function in a democratic society, namely to fulfil the role of a “public watchdog” and to impart information and ideas on all matters of public interest, the discretionary power of the state is very limited when it concerns intervention in the freedom of the media.

9. Furthermore, statements of persons taking part in the public debate enjoy a special level of protection in the light of Article 10 of the Convention, therefore hampering restrictions on political speech or debates on questions of public interest⁷ and interferences calls for closest scrutiny. Those concerned comprise not only elected politicians and journalists but also representatives of non-governmental organisations⁸, ecology groups⁹ or trade unions (which act on behalf of a company’s workers to protect their occupational and employment-related interests).¹⁰ The Court has repeatedly recognised civil society’s important contribution to the discussion of public affairs. Such representatives may therefore be characterised, like the press, as social “watchdogs”; their activities warrant similar Convention protection to that of the press.¹¹

10. The exceptional position of the two described groups in the context of Article 10 of the Convention depends on the role and the function of the “author” of the public debate.

11. In the case of controversial statements against an individual, the Court distinguishes between politicians or other persons of public interest (“public figures”) and private individuals. Greater limits of criticism are accorded to public figures than to private persons.

12. Regarding the context of a statement, the Court examines if such a statement was made in connection with a public debate of general interest. This is the case where the exchange of political ideas before or after elections is concerned. But a political topic is no a prerequisite for the acknowledgement of a general public interest. Basically the Court examines whether there is an issue affected that may evoke interest in a larger part of the population.

Elements for discussion

13. Against this background, the “public watchdog” function of the new media environment and the role and position of new media actors need further examination. There should be no doubt that not only “traditional” journalists but also other creators of online-content contributing to the public debate may need specific protection as regards their freedom of expression. The Arab Spring impressively showed that citizen-journalists can play a vital role in providing accurate information, especially when the traditional media are censored.

14. The above mentioned “necessity test” jurisdiction of the Court and controversial statements may indicate the relevant criteria for certain actors (persons and institutions) who enjoy special protection in the light of Article 10 of

⁷ Case of *Wingrove v. the United Kingdom*, judgement of 25 November 1996, p. 58.

⁸ Case of *Társaság a Szabadságjogokért v. Hungary*, judgement of 14 April 2009.

⁹ Case of *Vides Aizsardzības Klubs v. Latvia*, judgement of 27 May 2004.

¹⁰ Case of *Palomo Sanchez and others v. Spain*, judgement of 12 September 2011.

¹¹ Case of *Társaság a Szabadságjogokért v. Hungary*, judgement of 14 April 2009, p. 27.

the Convention due to their "watchdog" function. Essential requirements in this context are:

- the function of the person expressing an opinion and
- the connection with a public debate of general interest

15. An important indicator and vital starting point for discussion should be the Committee of Ministers' Recommendation on a new notion of media. The Appendix to the Recommendation sets out a number of key criteria and accompanying indicators for media and prepares an overview on standards applied to media in the new media ecosystem.

- The significance and (possible) implementation on this recommendation in the Member States of the Council of Europe could be explored and analysed for the upcoming Ministerial Conference. There could be an exchange of ideas on how the criteria set out in the recommendation (intention to act as media, purpose and underlying objectives of media, editorial control, professional standards, outreach and dissemination, public expectation) could be assessed by the Member States.

16. Another core question: How and to what extent are the principles for traditional media (protection of journalistic sources and whistleblowers¹²; burden of proof) applicable to new media actors? Aspects that could be discussed inter alia:

- Regarding the level of protection and responsibilities and in line with the Recommendation on a new notion of media, there should be a classified and distinguished approach to the part played by relevant actors in content production and dissemination processes.
- What does this mean in practice?
- What are the conditions for "part time"/"casual"/"one time" bloggers to refer to the specific protection of journalistic sources?

17. Finally, it is important that the right to protection according to Article 10 of the Convention correlates to the special responsibilities to be displayed (e.g. reliability of sources, accurate research and compliance with other principles of journalistic ethics).

Recommended further action

18. The focus for the next Council of Europe Conference of Ministers responsible for media and information society and its preparation could be an instrument (e.g. recommendation) outlining the level of protection needed for public and social watchdogs in the electronic media ecosystem.

¹² Cf. Case of Heinisch v. Germany, judgement of 21 July 2011.