Thematic factsheet[1]
June 2016

OTHER ACTS HAVING CHILLING EFFECTS ON THE MEDIA FREEDOM OF JOURNALISTS

I. Relevant case law of the European Court of Human Rights

1. Restrictive legal framework limiting media freedom

Virtually automatic conviction of media professionals for publishing written material of banned organisations

Gözel and Özer v. Turkey - 43453/04 and 31098/05
Judgment 6.7.2010

The applicants, who were respectively the owner and editor, and publisher and editor, of two periodicals, were fined on the ground that they had published three articles that the domestic courts characterised as statements by a terrorist organisation. In addition, the first magazine was suspended for a week and the second closed for a fortnight.

The grounds given by the domestic courts for the conviction of the applicants, whilst pertinent, were not sufficient in the eyes of the Court to justify the interference in question. The lack of reasoning of their decisions simply stemmed from the very wording of the Law no. 3713, which provided for conviction of "anyone who printed or published statements or leaflets by terrorist organisations" and contained no obligation for the domestic courts to carry out a textual or contextual examination of the writings. Such a practice could have the effect of partly censoring the work of media professionals and reducing their ability to put forward in public views which had their place in a public debate, provided that they did not directly or indirectly advocate the commission of terrorist offences. For the Court, such automatic repression, without taking into account the objectives of media professionals or the right of the public to be informed of another view of a conflictory situation, could not be reconciled with the freedom to receive or impart information or ideas.

Conclusion:violation

[1] This note presents a non-exhaustive selection of the CoE instruments and of the ECHR relevant case law. This information is not a legal assessment of the alerts and should not be treated or used as such

Administrative bans on the dissemination of publications of foreign origin or written in a foreign language

Association Ekin against France no. 39288/98
Judgment 17.7. 2001

At the time of the facts of the case, the Minister of the Interior was granted powers by the French Law of 1881 on the press to impose general and absolute bans throughout France on the circulation, distribution or sale of any document written in a foreign language or of any document regarded as being of foreign origin, even if written in French.

Although Article 10 does not prohibits prior restraints on publication as such, a legal framework ensuring both tight control over the scope of bans and effective judicial review to prevent any abuse of power is dully required since news is a perishable commodity and delaying its publication, even for a short period, may well deprive it of all its value and interest.

The Court noted that the French press law at that time was couched in very wide terms and confered wide-ranging powers on the Minister of the Interior to issue administrative bans on the dissemination of publications of foreign origin or written in a foreign language. Such legislation appeared to be in direct conflict with the actual wording of Article 10 of the Convention, which provides that the rights set forth in that Article are secured "regardless of frontiers". Although the exceptional circumstances in 1939, on the eve of the Second World War, might have justified tight control over foreign publications, the argument that a system discriminating against publications of that sort should continue to remain in force appear currently to be untenable.

As regards the judicial review of administrative bans, the Court noted the procedures in place in France provided then insufficient guarantees against abuse. Such review was not automatic and the administrative courts only carried out a limited review. In practice, the applicant had to wait more than nine years before obtaining a final judicial decision.

Conclusion: violation

See, for other examples of case law on deficient legislation limiting media freedom,

- ***Gawaeda v. Poland*** no. 26229/95, Judgement 14.3.2002 [Ambiguous legislation allowing an arbitrary refusal to register the title of a publication]: violation
- ***Pravoye Delo and Shtekel v. Ukraine*** - 33014/05, Judgment 5.5.2011 [Absence of safeguards in domestic law for journalists using publishing materials obtained from the Internet]: violation
- ***Cumhuriyet Vakfı and Others v. Turkey*** - 28255/07, Judgment 8.10.2013 [Lack of procedural safeguards when issuing blocking orders against national newspaper]: violation
- ***Sanoma Uitgevers B.V. v. the Netherlands*** [GC] - 38224/03, Judgment 14.9.2010, [Deficient legislation allowing compulsory surrender of journalistic material that could have led to identification of journalistic sources]: violation

2. Censorship

Obstacles in gathering information and courts' monopoly of information amounting to a form of indirect censorship

Társaság a Szabadságjogokért v. Hungary - 37374/05
Judgment 14.4.2009

The applicant is a non-governmental organisation which aims to promote fundamental rights as well as to strengthen civil society and the rule of law in Hungary. Given the nature of its activities involving human-rights litigation in the field of protection of freedom of information, the Court characterised the applicant as a social "watchdog", whose activities warranted similar Convention protection to that afforded to the press. It emphasised that the State's obligations under Article 10 included the breaking down of barriers to the press exercising its right to freedom of expression on matters of public interest, especially when such barriers existed solely because of an information monopoly held by the authorities. The State had had an obligation not to impede the flow of information sought, especially where the information sought had been ready and available and had not required the collection of any data by the Government. For the Court, if public figures were allowed to censor the press and public debate in the name of their own personal rights, it would be disastrous for freedom of expression in the sphere of politics.

Therefore, in this case, the obstacles that had been created in order to hinder access to information of public interest had been capable of discouraging those working in the media or related fields from pursuing such a matter. The Court held accordingly that the applicant organisation had been prevented from exercising its role of a public watchdog, and from providing accurate and reliable information to the public.

Conclusion: violation

See, for other examples of case law related to (self)censorship,

- ***Youth Initiative for Human Rights v. Serbia*** no. 48135/06, Judgment 25.6.2013 [Refusal to allow access to intelligence information despite a binding decision directing disclosure]: violation
- ***Shapovalov v. Ukraine***, no. 45835/05, Judgment 31.10.2012 [Obstacles allegedly hindering the access to information for journalists during their coverage of elections]: no violation
- ***Dilipak v. Turkey*** - 29680/05, Judgement 15.9.2015 [Threats brandished on journalists to face criminal proceedings and harsh sentences likely to amount to self-censorship]: violation.

3. Interference with the editorial freedom

Insufficient statutory guarantees of independence of public broadcaster

Manole and Others v. Moldova - 13936/02
Judgment 17.9.2009

According to the applicants, all employed by Teleradio-Moldova (TRM), the only national television and radio station in Moldova at that time, TRM was subjected to political control. This worsened after February 2001 when the Communist Party won a large majority in the Parliament. In particular, senior TRM management was replaced by those loyal to the Government and only a trusted group of journalists were used for reports of a political nature, which were edited to present the ruling party in a favourable light. Journalists were reprimanded for using expressions which reflected negatively on the Soviet period or suggested cultural and linguistic links with Romania. Interviews were cut and programmes were taken off the air for similar reasons. Journalists transgressing these policies were subjected to disciplinary measures and even interrogated by the police.

The Court first noted that the Government did not deny the specific examples cited by the applicants of TV or radio programmes that had been banned from air because of the language used or their subject-matter. Further, having accepted that TRM maintained a list of prohibited words and phrases, the Government had not provided any justification for it. In addition, given that the authorities had not monitored TRM's compliance with their legal obligation to give balanced air-time to ruling and opposition parties alike, the Court found the relevant data provided by non-governmental organisations significant. The Court thus concluded that in the relevant period TRM's programming had substantially favoured the President and ruling Government and had provided scarce access to the air to the opposition.

The Court further found that during most of the period in question TRM had enjoyed a virtual monopoly over audiovisual broadcasting in Moldova. Consequently, it had been of vital importance for the functioning of democracy in the country that TRM transmit accurate and balanced information reflecting the full range of political opinion and debate. The State authorities were under a duty to ensure a pluralistic audiovisual service by adopting laws ensuring TRM's independence from political interference and control. However, during the period considered by the Court, from February 2001-September 2006, when one political party controlled the Parliament, Presidency and Government, domestic law did not provide a sufficient guarantee of political balance in the composition of TRM's senior management and supervisory body nor any safeguard against interference from the ruling political party in these bodies' decision-making and functioning.

Conclusion: violation

See, also, in the context of media coverage of elections, ***Communist Party of Russia and Others v. Russia*** - 29400/05, Judgment 19.6.2012 [Allegations of biased media coverage of parliamentary elections]: no violation

4. Threats to the confidentiality of journalists' sources

Judicial order requiring news media to disclose a leaked document liable to lead to the identification of their source

Financial Times Ltd and Others v. the United Kingdom - 821/03
Judgment 15.12.2009

The case concerned a complaint by the applicants – four newspapers and a news agency – that they had been ordered by the domestic courts to disclose to Interbrew, a Belgian brewing company, a confidential document about a takeover bid, document which could lead to the identification of their journalistic sources.

The Court noted that disclosure orders had a detrimental impact not only on the source, but also on the newspaper, whose reputation could be negatively affected in the eyes of future potential sources, and on members of the public, who had an interest in receiving information through anonymous sources and were also potential sources themselves. As to whether the conduct of the source could override the principle of non-disclosure, the Court explained that domestic courts should be slow to assume, in the absence of compelling evidence, that a source was clearly acting in bad faith with a harmful purpose and had disclosed intentionally falsified information.

In carrying out the requisite balancing exercise, the Court focused on the following aspects: the purpose of the leak, the authenticity of the leaked document and the interests in identifying the source, and, lastly, the effect of the disclosure order. Emphasising the chilling effect on journalists being seen to assist in the identification of anonymous sources, the Court found that Interbrew's interests in eliminating the threat of damage through future dissemination of confidential information and in obtaining damages for past breaches of confidence by bringing judicial proceedings against the source had been insufficient to outweigh the public interest in the protection of journalists' sources.

Conclusion: violation

Urgent search at journalist's home involving the seizure of data storage devices containing her sources of information

Nagla v. Latvia - 73469/10
Judgment 16.7.2013

The applicant worked for the national television broadcaster where she produced and hosted a weekly investigative news program "De Facto". In February 2010 she was contacted by an

anonymous source who revealed that there were serious security flaws in a database maintained by the State Revenue Service (VID). She informed the VID of a possible security breach and then publicly announced the data leak during a broadcast of De Facto. The applicant's home was searched by police, and a laptop, an external hard drive, a memory card, and four flash drives were seized after a search warrant was drawn up by the investigator and authorised by a public prosecutor.

The Court noted that the seized data storage devices contained not only information capable of identifying the journalist's source of information but also information capable of identifying her other sources of information. The search warrant was drafted in such vague terms as to allow the seizure of "any information" pertaining to the offence allegedly committed by the journalist's source and was issued under the urgent procedure by an investigator faced with the task of classifying the crime allegedly committed by the source. These reasons were not, however, "relevant" and "sufficient" and did not correspond to a "pressing social need".

The subject-matter on which the applicant reported and in connection with which her home was searched made a twofold contribution to a public debate: keeping the public informed about the salaries paid in the public sector at a time of economic crisis and about the database of the VID which had been discovered by her source. Although it was true that the actions of her source were subject to a pending criminal investigation, the right of journalists not to disclose their sources could not be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but was part and parcel of the right to information, to be treated with the utmost caution.

When, three months after the broadcast, the investigating authorities decided that a search of the applicant's home was necessary, they proceeded under the urgent procedure without any judicial authority having properly examined the proportionality between the public interest in the investigation and the protection of the journalist's freedom of expression.

Although the investigating judge's involvement in an immediate post factum review was provided for in the law, he failed to establish that the interests of the investigation in securing evidence were sufficient to override the public interest in the protection of the journalist's freedom of expression, including source protection and protection against the handover of the research material. The domestic court's reasoning concerning the perishable nature of evidence linked to cybercrimes in general could not be considered sufficient, given the investigating authorities' delay in carrying out the search and the lack of any indication of the impending destruction of evidence. Nor was there any suggestion that the applicant was responsible for disseminating personal data or implicated in the events other than in her capacity as a journalist; she remained "a witness" for the purposes of these criminal proceedings.

Conclusion: violation

See, for more examples of case law on threats to the confidentiality of journalists' sources,

- ***Voskuil v. the Netherlands*** - 64752/01, Judgment 22.11.2007, [Detention of a journalist with a view to compelling him to disclose his source of information]: violation
- ***Sanoma Uitgevers B.V. v. the Netherlands*** [GC] - 38224/03, Judgment 14.9.2010, [Deficient legislation providing for compulsory surrender of journalistic material that could have led to identification of journalistic sources]: violation
- ***Ivaschenko v. Russia*** no. 61064/10 [Custom authorities allowed to examine the data contained on a journalist laptop and to copy that data - Alleged deficient legislation]: pending
- ***Ernst and others v. Belgium***, no. 33400/96, Judgment 15.7.2003 [Massive searches of journalists' places of work, homes and, in some instances, cars in order to identify magistrates having leaked information about pending criminal cases]: violation
- ***Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*** - 39315/06, Judgment 22.11.2012 [Surveillance of journalists and order for them to surrender documents capable of identifying their sources]: violation
- ***Nordisk Film & TV A/S v. Denmark*** (dec.) - 40485/02, Decision 8.12.2005 [Television company ordered to hand over to the police unedited footage involving suspected paedophile]: inadmissible
- ***Ressiot and Others v. France*** no. 15054/07, Judgement 28.6.2012 [Searches carried out at the premises of *L'Equipe* and *Le Point* newspapers and at the homes of journalists accused of breaching the confidentiality of a judicial investigation by reproducing passages from records of transcripts of tapped telephone conversation]: violation
- ***Saint-Paul Luxembourg S.A. v. Luxembourg*** - 26419/10, Judgment 18.4.2013 [Search and seizure operation at newspaper to confirm identity of article author – Inadequate search warrant, insufficiently defined to avoid the possibility of abuse]: violation
- ***Goodwin v. the United Kingdom*** - 17488/90, Judgment 27.3.1996 [Disclosure order granted to private company requiring a journalist to disclose the identity of his source and justified by a threat of severe damage to its business and to the livelihood of its employees]: violation

5. Abusive or unjustified blocking of media-related websites or social media platforms

Blocking without a legal basis of access to YouTube infringed the users' right to receive and impart information

Cengiz and Others v. Turkey - 48226/10 and 1402/11
1 December 2015

Pursuant to a Law regulating Internet publications and combating Internet offences, the Ankara Criminal Court of First Instance ordered the blocking of access to YouTube on the ground that the website contained some ten videos which, under the legislation, were insulting to the memory of Atatürk. Arguing that this restriction interfered with their right to freedom to receive or impart information and ideas, Mr Cengiz, Mr Akdeniz and Mr Altıparmak, in their capacity as users, applied to have the decision

set aside and the blocking order lifted. They also alleged that the measure had had an impact on their professional academic activities and that there was a public interest in having access to YouTube. They further specified that six of the ten pages concerned had been deleted and that the other four could no longer be accessed from Turkey. The Ankara Criminal Court of First Instance rejected their application on the ground that the blocking order had been imposed in accordance with the law and that the applicants did not have standing to challenge such decisions. It observed that the videos in question could no longer be accessed from Turkey but had not been deleted from the website's database and could therefore still be accessed by users worldwide.

Noting that the platform permitted the emergence of citizen journalism which could impart political information not conveyed by traditional media, the Court accepted that in the present case YouTube had been an important means by which Mr Cengiz, Mr Akdeniz and Mr Altıparmak could exercise their right to receive and impart information or ideas and that they could legitimately claim to have been affected by the blocking order even though they had not been directly targeted by it.

The Court went on to observe that the blocking order had been imposed under section 8(1) of Law no. 5651, which did not authorise the blocking of access to an entire Internet site on account of one of its contents. Under section 8(1), a blocking order could only be imposed on a specific publication where there were grounds for suspecting an offence. It therefore emerged that in the present case there had been no legislative provision allowing the Ankara Criminal Court of First Instance to impose a blanket blocking order on access to YouTube. The Court accordingly concluded that the interference had not satisfied the condition of lawfulness required by the Convention and that Mr Cengiz, Mr Akdeniz and Mr Altıparmak had not enjoyed a sufficient degree of protection.

Conclusion: violation

Interim court order incidentally blocking access to host and third-party websites in addition to website concerned by proceedings

Ahmet Yıldırım v. Turkey - 3111/10
Judgment 18.12.2012

Following the blocking of another website as a preventive measure, a domestic court had subsequently, further to a request by the Telecommunications Directorate, ordered the blocking of all access to Google Sites, which also hosted the applicant's site. This had entailed a restriction amounting to interference with the applicant's right to freedom of expression.

The Court noted that the blocking of the offending site had a basis in law but it was clear that neither the applicant's site nor Google Sites fell within the scope of the relevant law since there was insufficient reason to suspect that their content might be illegal. No judicial proceedings had been brought against either of them. Furthermore, although Google Sites was held responsible for the content of a site it hosted, the law made no provision for the wholesale blocking of access to the service. Nor was there any indication that Google Sites had been informed that it was hosting illegal content or that it had refused to comply with an interim measure concerning a site that was the subject of pending criminal proceedings. Furthermore, the law had conferred extensive powers on an administrative body, the Telecommunications Directorate, in implementing a blocking order since it had been able to request an extension of the scope of the order even though no proceedings had been brought in respect of the site or domain concerned and no real need for wholesale blocking had been established.

Such prior restraints were not, in principle, incompatible with the Convention, but they had to be part of a legal framework ensuring both tight control over the scope of bans and effective judicial review to prevent possible abuses. However, in ordering the blocking of all access to Google Sites, the Criminal Court of First Instance had simply referred to the Telecommunications Directorate's opinion that this was the only possible way of blocking the offending site, without ascertaining whether a less severe measure could be taken. In addition, there was no indication that the judges considering his application had sought to weigh up the various interests at stake. This shortcoming was merely a consequence of the wording of the law itself, which did not lay down any obligation for the domestic courts to examine whether the wholesale blocking of Google Sites was necessary, having regard to the criteria established and applied by the Court under Article 10 of the Convention.

Such wholesale blocking had rendered large amounts of information inaccessible, thus substantially restricting the rights of Internet users and having a significant collateral effect. The interference had therefore not been foreseeable and had not afforded the applicant the degree of protection to which he was entitled by the rule of law in a democratic society. The measure in issue had had arbitrary effects and could not be said to have been designed solely to block access to the offending site. Furthermore, the judicial-review procedures concerning the blocking of Internet sites were insufficient to meet the criteria for avoiding abuses; domestic law did not provide for any safeguards to ensure that a blocking order concerning a specified site was not used as a means of blocking access in general.

Conclusion: violation

See also, for other examples,

- ***Ashby Donald and others v. France***, no 36769/08, § 39, Judgment 10.01.2013 [Conviction of photographers for copyright infringement through publication on the Internet of photographs of fashion show]: no violation
- ***Akdeniz v. Turkey*** no. 20877/10, Decision 11.3.2014 [Measure blocking access to the websites "myspace.com" and "last.fm" on the ground that these sites were disseminating musical works in breach of copyright]: inadmissible

II. Other relevant Council of Europe regulations

Protection of journalistic sources

- 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 *(Adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministers' Deputies)*
- Recommendation 1950 (2011) of the Parliamentary Assembly on the protection of journalists' sources, 25 January 2011
- Declaration of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors, adopted by the Committee of Ministers on 30 April 2014 at the 1198th meeting of the Ministers' Deputies

- Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis, adopted on 26 September 2007
- Declaration by the Committee of Ministers on the protection and promotion of investigative journalism, adopted on 26 September 2007

On the decriminalisation of defamation

- Resolution 1577 (2007) and Recommendation 1814 (2007) of the Parliamentary Assembly "Towards decriminalisation of defamation"
- Doc. 11305 Report 2007 of the Committee on Culture, Science, Education and Media of the Parliamentary Assembly: Towards decriminalisation of defamation

Media and terrorism

- Declaration on freedom of expression and information in the media in the context of the fight against terrorism, adopted by the Committee of Ministers on 2 March 2005
- Recommendation 1706 (2005) of the Parliamentary Assembly "Media and terrorism"

Protection of whistleblowers

- Recommendation 2073 (2015) of the Parliamentary Assembly on 'Improving the protection of whistle-blowers', 23 June 2015
- Resolution 1729 (2010) of the Parliamentary Assembly and Doc. 12006_Report 2009 (P. OMTZIGT) on the protection of whistle-blowers

Internet and online media

- Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, adopted on 21 September 2011
- Resolution 1877 (2012) and Recommendation 1998 (2012) of the Parliamentary Assembly on The protection of freedom of expression and information on the Internet and online media, 25 April 2012
- Report Doc. 12874 and addendum (2012) on The protection of freedom of expression and information on the Internet and online media, presented to the Committee on Culture, Science, Education and Media of the Parliamentary Assembly, 12 April 2012
- The Commissioner - CommDH/IssuePaper(2014)1 08 December 2014 : "The rule of law on the Internet and in the wider digital world. Issue Paper published by the Council of Europe Commissioner for Human Rights"

Secret surveillance/Mass surveillance : see specific **Thematic factsheet.**