

## ***Steering Committee on Media and Information Society***

*Council of Europe*

Estonian Ministry of Culture

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### **LIST OF QUESTIONS FOR CDMSI MEMBERS ON THE IMPLEMENTATION OF COUNCIL OF EUROPE STANDARDS RELATED TO SAFETY OF JOURNALISTS AND OTHER MEDIA ACTORS**

#### **1. Which are the existing mechanisms to ensure investigation and prosecution of attacks against journalists and other media actors?**

There are no statutory provisions which ensure investigation and prosecution of attacks specifically targeted against journalists but there are general provisions in penal law which safeguard all people against physical and mental abuse.

For example, pursuant to § 120 of the Penal Code, any natural person threatening to kill or cause health damage or cause significant damage or destruction of property may be punished with a pecuniary punishment or up to one year of imprisonment. Legal persons may be punished for the same offence with a pecuniary punishment. § 121 of the Penal Code provides that causing damage to the health of another person and physical abuse which causes pain is punishable by a pecuniary punishment or up to one year of imprisonment. However, if a person causes more serious injuries, such person may be liable for causing serious health damage (§ 118 of the Penal Code) for which the punishments extend from four to up to twelve years of imprisonment.

The punishable acts depend on the exact form of the “attack” (as referred in the question) and may include murder, unlawful deprivation of liberty, abduction etc.

One of the functions of the police is prevention of offences against persons, which includes all violence-related offences against bodily integrity of a person.<sup>1</sup> In addition, the police are obligated to process offences, which include investigation thereof. Thus, the law ensures investigation of attacks against journalists and other media actors.

The prosecutor's office must direct pre-trial criminal procedure and ensure the legality and efficiency thereof, and represent public prosecution in court.<sup>2</sup> Therefore, the prosecutor's office must ensure prosecution of attacks against journalists and other media actors, just as against any other people.

**2. Are there any non-judicial mechanisms, such as parliamentary or other public inquiries, ombudspersons, independent commissions, as useful complementary procedures to the domestic judicial remedies guaranteed under the ECHR, specifically dealing with threats and crimes targeting journalists and other media actors?**

There are some non-judicial means to deal with threats and crimes targeting journalists and other media actors but the general attitude in Estonia has leaned towards emphasizing the role of traditional judicial mechanisms and making them efficient in their proceedings, instead of creating numerous other bodies or institutions which could fulfill the same purposes. However, some examples are provided below on complementary procedures to the domestic judicial remedies, which could specifically deal with threats and crimes targeting journalists and other media actors.

**Parliamentary or other public inquiries** - The Estonian Parliament (*Riigikogu*) has standing committees, select committees, committees of investigation and study committees.<sup>3</sup> Currently there are no parliamentary inquiries or committees specifically dealing with threats and crimes targeting journalists and other media actors but the Parliament has a right to form them.

**Ombudspersons** - The Chancellor of Justice is a public official who scrutinizes legislative instruments of the legislative and executive branch of government and of local authorities for conformity with the Constitution and the laws, and who is independent in discharging her duties.

The Chancellor of Justice has a right to institute proceedings before the constitutional chamber of the Supreme Court, which is the body conducting judicial supervision over following the Constitution. The Constitution provides that the Chancellor of Justice is independent in her proceedings and only observes the Constitution and his conscience.

Everyone has a right of recourse to the Chancellor of Justice to review the conformity of an act or other legislation of general application with the Constitution or the law. The Constitution protects freedom of expression<sup>4</sup> and thus, the Chancellor of Justice has the right to investigate the threats and crimes targeting journalists and other media actors if

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<sup>1</sup> Clause 1 of subsection 1 of § 3 of the [Police and Border Guard Act](#)

<sup>2</sup> Subsection 1 of § 1 of the [Prosecutor's Office Act](#)

<sup>3</sup> § 17 of the [Riigikogu Rules of Procedure and Internal Rules Act](#)

<sup>4</sup> § 45 of the [Estonian Constitution](#)

such activities contradict with the Constitution. Out of 305 inquiries within year 2015, there were none which concerned violations of freedom of expression.

**Independent commissions** – There are no independent commissions specifically dealing with threats and crimes targeting journalists and other media actors. However, Estonian Newspaper Association's Press Council (*Pressinõukogu*) and Estonian Press Council (*Avaliku Sõna Nõukogu*) hear cases concerning possible violations of press freedom. These institutions hear cases from both sides and thus, also protect persons against violations of the press freedom by the press and therefore, they do not specifically deal with threats and crimes targeting journalists and other media actors.

### **3. Is the confidentiality of journalists' sources of information protected in both law and practice?**

The confidentiality of journalists' sources of information is mainly protected under § 15 of the Media Services Act. According to that provision, a person who is processing information for journalistic purposes shall have the right not to disclose the information that would enable identification of the source of information.<sup>5</sup> Such person is also not allowed, without the consent of the source of information, to disclose the information that would enable identification of the source of information.<sup>6</sup>

The aforementioned obligation does not apply if the source of information has knowingly provided false information to the person processing information for journalistic purposes.<sup>7</sup>

The right not to disclose the information that would enable identification of the source of information applies also to a person who is professionally exposed to information that enables identification of the source of information of a person who is processing information for journalistic purposes.<sup>8</sup>

It is prohibited to use direct or indirect influence, to identify the source of information, on a person who is processing information for journalistic purposes or a person who is professionally exposed to information that enables identification of the source of information of the person who is processing information for journalistic purposes.<sup>9</sup>

A person processing information for journalistic purposes and a person who is professionally exposed to information that enables identification of the source of information of a person who is processing information for journalistic purposes are obliged to submit this information pursuant to the conditions and in the procedure provided for in the Code of Criminal Procedure.<sup>10</sup>

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<sup>5</sup> Subsection 1 of § 15 of the [Media Services Act](#)

<sup>6</sup> Subsection 2 of § 15 of the [Media Services Act](#)

<sup>7</sup> Subsection 3 of § 15 of the [Media Services Act](#)

<sup>8</sup> Subsection 4 of § 15 of the [Media Services Act](#)

<sup>9</sup> Subsection 5 of § 15 of the [Media Services Act](#)

<sup>10</sup> Subsection 6 of § 15 of the [Media Services Act](#)

In **criminal procedure**, there are specific safeguards which protect the journalists and their sources. Pursuant to clause 3<sup>1</sup> of subsection 1 of § 72 of the Code of Criminal Procedure, journalists have the right to refuse to give testimony as witnesses concerning the circumstances which have become known to them in their professional or other activities.

More specifically, such right extends to persons processing information for journalistic purposes regarding information which enables identification of the person who provided the information, except in the case when gathering evidence through other procedural measures is precluded or especially complicated. In addition, such right may only be used if the object of the criminal proceeding is a criminal offence for which at least up to eight years' imprisonment is prescribed as punishment, there is predominant public interest for giving testimony and the person is required to give testimony at the request of a prosecutor's office based on a ruling of a preliminary investigation judge or court ruling.

In comparison, a natural person may be punished with a pecuniary punishment or up to one year of imprisonment and a legal person with a pecuniary punishment (up to 16 000 000 euros) for threatening to kill, cause health damage or cause significant damage or destruction of property to a person.<sup>11</sup> Direct physical abuse is punishable by a pecuniary punishment or up to one year of imprisonment.<sup>12</sup> However, if a person causes more serious injuries, he might be liable for causing serious health damage for which the punishments extend from four to up to twelve years of imprisonment.<sup>13</sup> Manslaughter is punishable by eight to twenty years' imprisonment or life imprisonment<sup>14</sup> but killing another person through negligence is punishable by up to three years' imprisonment<sup>15</sup>.

In respect of political crimes, only three provisions provide punishments of eight years of imprisonment or more. These crimes are acts of terrorism; organising or preparing a disorder involving a large number of persons or incitement to participation in such disorder, if such disorder results in desecration, destruction, arson or other similar acts; and attack against life or health of higher state public servants.<sup>16</sup>

Therefore, imprisonment of eight years is sentenced only for severe crimes in the Estonian legal system.

The term "predominant public interest" is not defined by law and must be interpreted separately in each case.

Furthermore, the state authorities may not search the building, room, vehicle or enclosed area in the course of criminal proceedings of a person who processes information for journalistic purposes.<sup>17</sup>

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<sup>11</sup> § 120 of the [Penal Code](#)

<sup>12</sup> § 121 of the [Penal Code](#)

<sup>13</sup> § 118 of the [Penal Code](#)

<sup>14</sup> § 114 of the [Penal Code](#)

<sup>15</sup> § 117 of the [Penal Code](#)

<sup>16</sup> § 237, § 238 and § 244 of the [Penal Code](#)

<sup>17</sup> Section 2<sup>1</sup> of § 91 of the [Code of Criminal Proceedings](#)

The Supreme Court has analysed the aforementioned provisions in a case, which concerned an alleged journalist whose house was searched for drugs and where a large quantity of marijuana was found from.<sup>18</sup> The Supreme Court agreed with courts of lower instances that clause 3<sup>1</sup> of subsection 1 of § 72 of the Code of Criminal Procedure, together with § 15 of the Media Services Act, is aimed to protect the source of the journalistic information and information obtained while working for journalistic purposes, not journalists as people. Section 2<sup>1</sup> of § 91 of the Code of Criminal Proceedings is aimed to protect any rooms where journalists work, not just the offices of journalists. However, the court claimed that the law does not define who is considered a journalist and merely proving proof that one works for a journalistic institution (television network), does not prove that his job had a journalistic purpose. Thus, the alleged journalist was found guilty for possessing large quantities of drugs.

There is no court practice in any instances of the Estonian courts concerning specifically violation of § 15 of the Media Services Act.

Therefore, one can conclude that journalists' sources of information are protected in both law and in practice.

**4. Does the domestic legislation in your country regarding defamation/libel include criminal law provisions?**

Yes, but only towards representative of a state authority protecting public order in connection with performance of his or her official duties.

See answer to question 6.

**5. What are the procedural guarantees (the right to defence, the periods of limitation applicable to defamation suits, *exceptio veritatis* (defence of truth) and the burden of proof, presumption of good faith etc.) included in the civil and/or criminal legislation related to defamation?**

Procedural guarantees are extensively provided in Code of Civil Proceedings and Code of Criminal proceedings in civil and criminal proceedings respectively. It is not feasible to list them all but to answer the questions in a comprehensive manner a general overview shall be provided below.

Civil proceedings

- **General** – there are no specific procedural exceptions to defamation claims, apart from when calculating the state levies in respect of immaterial damages.

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<sup>18</sup> Case [3-1-1-100-13](#) of the Criminal Chamber of the Supreme Court, 25 November 2013

- **The right to defense** – After the plaintiff submits an action, the defendant is obliged to respond. If the defendant does not respond, the court may, with the consent of plaintiff, satisfy the action by making a judgment by default. The latter means that the position of the defendant will not be heard and the court will rule merely based on the facts and evidence provided by the plaintiff. The court must still weigh the case on its merits.

If the defendant responds, the parties will continue with proceedings. In civil proceedings both parties are equal and must prove their statements themselves (i.e. the court will not provide any assistance).

- **The periods of limitation** – The period of limitation for a claim arising from unlawfully caused damage (which includes defamation) is three years as of the moment when the entitled person became or should have become aware of the damage and of the person obligated to compensate for the damage.

A claim arising from unlawfully caused damage expires no later than ten years after the performance of the act or occurrence of the event which caused the damage.

- **Exceptio veritatis (defence of truth)** – In Estonia, defense of truth is not a procedural guarantee but one arising from material law.

Disclosure of defamatory facts concerning a person or facts which may adversely affect the economic situation of a person is deemed to be unlawful unless the person who discloses such facts proves that the facts are true.<sup>19</sup> However, the disclosure of information or facts is not deemed to be unlawful if the person who discloses the information or facts or the person to whom such facts are disclosed has legitimate interest in the disclosure and if the person who discloses the information has checked the information or facts with a thoroughness which corresponds to the gravity of the potential violation<sup>20</sup>.

- **Burden of proof** – In the administration of justice in civil matters, the parties and other persons are equal before the law and the court.<sup>21</sup> Each party shall prove the facts on which the claims and objections of the party are based, unless otherwise provided by law. Unless otherwise prescribed by law, the parties may agree on a division of the burden of proof different from that which is provided by law and agree on the nature of the evidence whereby a certain fact may be proved.
- **Presumption of good faith** – There is a general obligation to act in good faith in relation to one another.<sup>22</sup> The latter extends to defamation claims.

### Criminal proceedings

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<sup>19</sup> Subsection 2 of § 1047 of the [Law of Obligations Act](#)

<sup>20</sup> Subsection 3 of § 1047 of the [Law of Obligations Act](#)

<sup>21</sup> § 7 of the [Code of Civil Procedure](#)

<sup>22</sup> Subsection 1 of § 6 of the [Law of Obligations Act](#)

- **General** – There are no criminal punishments for defamation, apart from insult and defamation of a representative of a state authority protecting public order in connection with performance of his or her official duties (see answer to question 6).
- **The right to defense** – A suspect and an accused have the right to the assistance of a counsel and be interrogated with the presence of a counsel.<sup>23</sup> If the suspect or accused wishes it, the investigative authority, prosecutor's office or the court must provide the suspect and accused with a real opportunity to defend themselves and ensure the assistance of a counsel to the suspect and accused if such assistance is requested by the suspect or accused or if provided by the law.
- **The periods of limitation** – No one can be convicted or punished of a defamation of a representative of state authority if five years has passed from its completion before the entry into force of the corresponding court judgment.<sup>24</sup> A misdemeanour (i.e. insult of a representative of a state authority) expires after two years have passed between the completion thereof and the entry into force of a judgment or decision, unless the law prescribes a limitation period of three years.<sup>25</sup>
- **Burden of proof** – In criminal proceedings the burden of proof is higher than in civil proceedings. No one is required to prove his or her innocence in a criminal proceeding.<sup>26</sup> A suspicion of guilt regarding a suspect or accused which has not been eliminated in a criminal proceeding shall be interpreted to the benefit of the suspect or accused.<sup>27</sup>
- **Presumption of good faith** – No one shall be presumed guilty of a criminal offence before a judgment of conviction has entered into force with regard to him or her.<sup>28</sup> A court judgment or ruling enters into force when it no longer can be contested in any other manner except by review procedure.<sup>29</sup> Review procedure means hearing of a petition for review by the Supreme Court in order to decide on the resumption of proceedings in a criminal matter in which the decision has entered into force.<sup>30</sup> The grounds for review are limited by law and are rarely fulfilled in practice (e.g. ground for review is a criminal offence which is committed by a judge in the hearing of the criminal matter subject to review and which is established by a court judgment).

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<sup>23</sup> Clause 3 of subsection 1 of § 34 of the [Code of Criminal Procedure](#)

<sup>24</sup> Clause 2 of subsection 1 of § 81 of the [Penal Code](#)

<sup>25</sup> Subsection 3 of § 81 of the [Penal Code](#)

<sup>26</sup> Subsection 2 of § 7 of the [Code of Criminal Procedure](#)

<sup>27</sup> § 7 (3) of the [Code of Criminal Procedure](#)

<sup>28</sup> § 7 (1) of the [Code of Criminal Procedure](#)

<sup>29</sup> § 401 (1) of the [Code of Criminal Procedure](#)

<sup>30</sup> § 365 (1) of the [Code of Criminal Procedure](#)



**6. In the domestic legal framework, are state officials protected against criticism and insult at a higher level than ordinary people, for instance through penal laws that carry a higher penalty?**

Yes.

Insult of a representative of a state authority protecting public order in connection with performance of his or her official duties is punishable by a fine of up to 300 fine units or by detention. One fine unit is 4 euros. The same act, if committed by a legal person, is punishable by a fine of up to 3200 euros<sup>31</sup>. The subjects of protection are mainly law enforcement agencies within the meaning of § 6 of the Law Enforcement Act but not judges, who are protected by another provision.<sup>32</sup> This offence is qualified as a misdemeanor, not a crime.

Defamation of a representative of state authority in connection with performance of his or her official duties is punishable by a pecuniary punishment or up to two years' imprisonment. The same act, if committed by a legal person, is punishable by a pecuniary punishment.

If insult of a representative of a state authority protecting public order is usually spontaneous and not pre-planned then defamation is knowledgeable and purposeful planned activity with the aim of undermining the state authority's credibility and hinder him from fulfilling his duties. This offence is a crime.<sup>33</sup>

**7. Do laws on the protection of public order, national security or anti-terrorism have safeguards for the right to freedom of expression? What are these safeguards?**

Estonian Constitution provides that everyone has the right to freely disseminate ideas, opinions, beliefs and other information by word, print, picture or other means. This right may be circumscribed by law to protect public order, public morality, and the rights and freedoms, health, honour and good name of others. This right may also be circumscribed by law in respect of public servants employed by the national government and local authorities, or in order to protect a state secret, trade secret or information received in confidence which has become known to the public servant by reason of his or her office, and to protect the family and private life of others, as well as in the interests of the administration of justice. There is no censorship.<sup>34</sup>

Pursuant to the Constitution, it is allowed to limit the freedom of expression merely to protect public order, public morality, and the rights and freedoms, health, honour and good name of others. Therefore, public order is expressly mentioned but the right to limit freedom of expression for the purposes of national security or anti-terrorism may be derived from the right to protect the rights and freedoms of others.

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<sup>31</sup> § 275 of the [Penal Code](#)

<sup>32</sup> Penal Code, Commentaries, *Jaan Sootak, Priit Pikamäe*, 2015, p 705, § 275, 3

<sup>33</sup> Penal Code, Commentaries, *Jaan Sootak, Priit Pikamäe*, 2015, p 705, § 275<sup>1</sup>, 1

<sup>34</sup> § 45 of the [Estonian Constitution](#)



The rules for the protection of public order, national security or anti-terrorism are most strictly provided in the Penal Code (under division of offences against public order, division of offences against public security and division of offences against state power respectively). Any investigation and prosecution of offences pursuant to the Penal Code must be conducted in compliance with the Code of Criminal Procedure or Code of Misdemeanour Procedure. Code of Criminal Procedure includes provisions which protect the right to freedom of expression through provisions regarding prohibition to search the building, room, vehicle or enclosed area in the course of criminal proceedings of a person who processes information for journalistic purposes, and the right to refuse to give testimony as witnesses concerning the circumstances which have become known to a person in his professional or other activities as a journalist.

Lastly, one of the strongest limitations to freedom of expression is provided in the National Defence Act. The latter provides that in case of the state of war, the Government of the Republic, the Prime Minister and a minister responsible for internal security may, until the end of a state of war, prohibit communication of data with certain contents in a mass medium, if the disclosure thereof may pose a threat to the military defense of the state or otherwise endanger the security of the state.<sup>35</sup> Furthermore, the same parties may, until the end of a state of war, suspend the provision of media services and publication of a periodical for the same reasons as provided in the previous sentence.<sup>36</sup>

**8. Are the following instruments translated into the national language and disseminated widely, in particular brought to the attention of judicial authorities and police services? Are these made available to representative organisations of lawyers and media professionals?**

- **Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, 21 September 2011**
- **Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations (2011)**
- **Recommendation 1876 (2009) of the Parliamentary Assembly on the state of human rights in Europe: the need to eradicate impunity**
- **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**
- **Recommendation CM/Rec(2004)16 of the Committee of Ministers to member States on the right to reply in the new media environment**
- **Recommendation CM/Rec(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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<sup>35</sup> Subsection 6 of § 20 of the [National Defence Act](#)

<sup>36</sup> Subsection 7 of § 20 of the [National Defence Act](#)

- **Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns**
- **Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content**
- **Recommendation No. R (2003) 13 on the provision of information through the**
- **Belgrade Conference of Ministers Resolution n° 3 Safety of Journalists**

The recent practice of the past three years has been to disseminate materials adopted by the European Council with the representative organizations of media professionals. However, such dissemination has not included previous instruments adopted by the European Council.

None of the instruments provided above have been translated into Estonian. Furthermore, according to the knowledge currently available to the Estonian Ministry of Culture, unfortunately none of these instruments have been brought to the attention of judicial authorities, police services, nor made available to representative organisations of lawyers and media professionals.

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