



FREEDOM OF EXPRESSION in 2018



An assessment of the state
of the freedom of expression in
Council of Europe member states,
based on the findings of the
Council of Europe monitoring
mechanisms and bodies

Report by the Information
Society Department

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REPORT PREPARED BY THE
INFORMATION SOCIETY DEPARTMENT

EXECUTIVE SUMMARY AND PROPOSALS FOR ACTION	3
I. LEGAL GUARANTEES FOR FREEDOM OF EXPRESSION	6
II. SAFETY OF JOURNALISTS AND OTHER MEDIA ACTORS	9
III. MEDIA INDEPENDENCE	13
IV. MEDIA PLURALISM AND DIVERSITY	15
V. FREEDOM OF EXPRESSION ON THE INTERNET	17

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EXECUTIVE SUMMARY AND PROPOSALS FOR ACTION

The Council of Europe is celebrating 70 years of its existence in 2019. Throughout this time, the freedom of expression, as enshrined in Article 10 of the European Convention, has been of central importance to our organisation, across its three pillars. Article 10 protects the right of individuals to form, hold and express their opinions without undue interference. This is crucial for the realisation of all other human rights. Along with its corollaries of freedom of information and media freedom, the freedom of expression enables citizens to make informed choices, to participate actively in democratic processes, and to help ensure that powerful interests are held to account in line with the rule of law.

Freedom of expression, therefore, is an essential precondition for democratic security and deserves the highest attention of member states, today as ever. Consecutive assessments of the state of the freedom of expression in Europe over the past five years have shown that threats to this anchor of democratic societies are growing across the continent.

At least two assassinations of journalists in Europe for reasons related to their work highlighted the price that media professionals continued to pay for investigating corruption and organised crime in 2018. A high-level Council of Europe Conference in October 2018 drew attention to the crucial role played by investigative journalists in shedding light on grand corruption cases and called on law enforcement to follow up journalists' work conscientiously and to respect their professional confidentiality obligations.¹ Smear campaigns and inflammatory rhetoric by senior politicians are also on the rise: followed often by social media campaigns against their targets, they undermine the ability of journalists and other media actors and whistleblowers to do their job of keeping power holders accountable. They therefore need to be more forcefully condemned.

Non-governmental organisations and other civil society actors play a similar, and often complementary, role to that of the media in holding powerful interests to account. As such, they also increasingly face verbal attacks and are subjected to restrictive legislation that undermines their freedom of expression and association. In June, the Parliamentary Assembly of the Council of Europe (hereinafter 'PACE') adopted a resolution and recommendation on new restrictions on NGO activities, calling for the establishment of a mechanism for receiving alerts on restrictions imposed on NGOs.²

The spread of disinformation through the media and online channels, sometimes driven by foreign government actors, continues to be of significant concern to Council of Europe democracies. The PACE adopted a resolution on the protection of editorial integrity,³ expressing alarm that some media have turned into propaganda tools and are used to incite hatred against minorities and vulnerable groups. The important debate on the responsibilities of online platforms – for preventing violations of the rights of others, for containing the spread of disinformation and terrorist propaganda, and for protecting user privacy and other interests – remains a priority for governments and civil society, as the institution of a clear legislative and regulatory (including co- and self-regulatory) framework

¹ See <https://www.coe.int/en/web/greco/go-for-zero-corruption-sibenik-croatia-15-16-october-2018>.

² See Resolution 2226 (2018) at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24943&lang=en>.

³ See Resolution 2212 (2018) at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=24734&lang=en>.

for balancing freedom of expression with national security and law enforcement interests remains a challenge in most member states.

The adverse impacts of the digital revolution on the financial viability of quality journalism, and on local and investigative reporting in particular, are beginning to capture the attention of governments. Large parts of the media sector are still struggling to adapt to the draining of their advertising-based revenue streams, while the top beneficiaries of this shift are doing little to support quality journalism. This transformation calls for new approaches and policies aimed at ensuring the financial viability and diversity of a sector that is vital to democracy. A number of states are considering direct and indirect forms of state support, novel tax policies and new notions of corporate social responsibility. Improving the working conditions of professional journalists is vital if this dangerous trade is to remain attractive for next generation talents.

At the same time, long-standing threats to media freedom and independence persisted in 2018 with shutdowns of media outlets and criminal prosecutions of journalists, often in the name of anti-terrorism operations. Public service media have to fight for their editorial and financial independence in the face of initiatives to slash their budgets, abolish license fees, or interfere with their internal operations. And yet, there is ample evidence, as the recent Swiss referendum shows that the public continues to value their distinct contributions despite the major technological and cultural changes of recent decades.

Oversight by the European Court of Human Rights (the Court) remains a critical tool for ensuring that national laws and practices are consistent with the standards set out in the European Convention on Human Rights (the Convention). The Court issued more than 70 judgments in Article 10 related cases in the course of 2018, finding violations in about two thirds of them. The legal issues before the Court covered a wide range, including the protection of symbolic speech, the state duty to investigate the masterminds of attacks on journalists, and the balancing of media freedom with the rehabilitation rights of persons with a prior criminal record. The Court also highlighted the growing threats to the protection of journalists' confidential sources and materials from arbitrary searches and mass state surveillance. In early 2019, the Court reiterated its standing jurisprudence that the effective exercise of the freedom of expression is not dependent merely on the state's duty not to interfere, but may call for positive measures of protection. "In particular, the positive obligations under Article 10 of the Convention require states to create, while establishing an effective system of protection of journalists, a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear, even if they run counter to those defended by the official authorities or by a significant part of public opinion, or even irritating or shocking to the latter".⁴

The Council of Europe inter-governmental work continued to engage actively with the above raised trends and threats, notably through the elaboration and adoption of important guidance instruments for member states, such as on media pluralism and transparency of media ownership,⁵ on the roles and responsibilities of internet intermediaries,⁶ on the financial sustainability of quality journalism,⁷ and on the manipulative capabilities of

⁴ *Khadija Ismayilova v. Azerbaijan*, 65286/13 and 57270/15, 10 January 2019.

⁵ See CM/Rec(2018)1 at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13.

⁶ See CM/Rec(2018)2 at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e14.

⁷ See Decl(13/02/2019)2 at https://search.coe.int/cm/pages/result_details.aspx?objectid=090000168092dd4d.

algorithmic processes.⁸ The Court's recent case-law on balancing freedom of expression and privacy rights was integrated in the 2018 Guidelines on safeguarding privacy in the media, an instrument of practical advice to journalists.⁹

In view of this year's findings, the Council of Europe, with its member states, should pay special attention to the following proposals for action:

- Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors should be rigorously implemented. An Implementation Guide for member states with best practices is being developed and should be applied;
- Counter-terrorism measures should be adopted only following scrupulous human rights impacts assessments, as they may be counter-productive if poorly implemented or overly Draconian. Anti-terror and security laws should not unduly interfere with the right of the media to impart information of public interest and the right of people to receive it;
- Enhanced efforts are required to develop a clear framework with respect to the growing responsibilities and duties of intermediaries related to content moderation. Guidance should be developed on how effectively to counter offensive and undesirable speech that is not criminally punishable, including through effective self-regulatory and co-regulatory measures as a means of balancing rights and responsibilities;
- Public service media must be effectively shielded from the growing pressure exerted by political and economic interests. Enhanced efforts are required, including by member states, to increase the sustainability of media and to support quality independent and investigative journalism, while fully respecting the editorial and operational autonomy of the media.
- The extensive jurisprudence of the European Court of Human Rights related to Article 10 ought to be consistently integrated into national judicial and regulatory systems.

⁸ See Decl(13/02/2019)1 at https://search.coe.int/cm/pages/result_details.aspx?ObjectId=090000168092dd4b.

⁹ See <https://www.coe.int/en/web/freedom-expression/-/guidelines-on-safeguarding-privacy-in-the-med-1>.

I. LEGAL GUARANTEES FOR FREEDOM OF EXPRESSION

An enabling legal and regulatory environment is essential for guaranteeing freedom of expression and, in particular, media freedom. Laws on defamation, hate speech and other areas, that restrict free speech rights, must be drafted as narrow exceptions to the cardinal principle of the free flow of information and ideas.

In addition, any laws providing for sanctions against speech, especially those of a criminal nature, must be applied by national authorities with due regard for the principles of necessity and proportionality. The extensive jurisprudence of the European Court of Human Rights serves as important guidance for national courts and regulators.

Two recent judgments of the Court highlight its fundamental approach to protection of political expression. In March 2018, the Court decided against criminal fines imposed on two individuals for setting fire to an upside-down photograph of the Spanish royal couple during a public rally. The Court held that the actions at stake constituted acts of political protest that did not amount to incitement to hatred or violence, the convictions for “insult of the Crown”, hence, were not necessary in a democratic society.¹⁰ In a case involving the conviction of the members of an all-girl punk band by the Russian authorities for attempting to sing in an Orthodox cathedral, coupled with a ban on online recordings of the performance, the Court similarly found that the band’s actions were protected by the right to engage in symbolic acts of political protest.¹¹

A new expert committee set up by the Committee of Ministers in 2018 advanced a study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member states.¹²

Measurement criteria

There is no criminal prosecution in defamation cases except where the rights of others have been seriously impaired.

Defamation laws and practices explicitly allow for legitimate criticism and are not misused to influence the debate on issues of public interest.

Awards of damages or legal costs in defamation proceedings are proportionate to the injury to reputation.

Political or public officials do not enjoy a higher level of protection against criticism and insult than ordinary people.

Blasphemy is not a criminal offence. Religious insult is not a criminal offence except where incitement to hatred is an essential component.

Criminal laws aimed at combatting hate speech are clear and precise so as to enable individuals to regulate their conduct, and include adequate safeguards for freedom of expression, in compliance with Article 10(2) of the Convention.

¹⁰ Stern Taulats and Roura Capellera v. Spain, 51168/15, 13 March 2018.

¹¹ Mariya Alekhina and Others v. Russia, 38004/12, 17 July 2018.

¹² See <https://www.coe.int/en/web/freedom-expression/msi-aut>.

Laws restricting the right to receive and impart information on grounds of public order or national security are clear and precise so as to enable individuals to regulate their conduct, and have adequate safeguards for freedom of expression, in compliance with Article 10(2).

There are effective self-regulatory measures as a means of balancing media rights and responsibilities.

A normative, institutional and judicial framework is in place to protect whistle-blowers.

Findings

Criminal convictions under defamation laws, excessively broad hate speech legislation and other ill-defined infractions served as reminders that such laws continue to cast long shadows over free expression. In Slovakia, a journalist for the Plus 7 weekly was given a suspended three-year prison sentence in relation to an article alleging corruption by a former speaker of parliament; the journalist had refused to reveal the identity of a key confidential source.¹³ In Poland, a controversial law that entered into force in March made it an offense to accuse the Polish nation or state for complicity with the crimes of the Nazi regime. Following an international outcry, the criminal provisions were replaced with civil sanctions.¹⁴

The Venice Commission issued recommendations to Armenia, Malta and the Republic of North Macedonia to amend or repeal vague or overly broad hate speech laws or draft legislation under consideration.¹⁵ These included problematic provisions aimed at criminalising, among others, “indirect calls for discrimination”, “preaching of religious fanaticism”, or forms of incitement that did not sufficiently distinguish between hate speech and merely offensive expression.¹⁶

Disproportionate civil sanctions are not less likely to silence critical voices. In the Russian Federation, the late 2017 extension of the “foreign agent” laws to media entities subjected the latter to obligations to report their foreign funding sources and undergo regular auditing, at the pain of exorbitant fines. In October, a Moscow court imposed a 300,000 Euro fine on *The New Times* for late disclosure of foreign funding, placing the online outlet’s financial survival in doubt; the fine was upheld on appeal.¹⁷ In July 2018, the State Duma considered amendments that would allow the government to designate even individual journalists working for such media as “foreign agents.”¹⁸ The SG called on Russian authorities to respect the principle of proportionality in *The New Times* case and to re-examine the foreign agent laws, which had been previously criticised by the Council of Europe.¹⁹

¹³ Alert on the Council of Europe Platform to promote the protection of journalism and safety of journalists, “Slovak journalist gets a suspended sentence for defamation”, 4 April 2018.

¹⁴ European Audiovisual Observatory, IRIS Legal Observations: “Poland controversial Holocaust act enters into force” (IRIS 2018-5:1/26).

¹⁵ Venice Commission Opinions No. 909/2017, 20 March 2018; No. 920/2018, 23 June 2018; and No. 915/2018, 19 March 2018.

¹⁶ Ibid.

¹⁷ Platform alert, “Heavy fine against independent news website The New Times,” 29 October 2018.

¹⁸ Platform alert, “Duma Committee approves legislation to label individual journalists ‘foreign agents’”, 6 July 2018.

¹⁹ See Statement of the SG, 29 October 2018 at <https://www.coe.int/en/web/portal/-/excessive-fine-for-the-new-times-endangers-media-pluralism-and-press-freedom-in-russia>.

There were other examples of problematic laws that took insufficient account of their adverse impact on media freedom and editorial autonomy. In the Republic of North Macedonia, Parliament passed a law that provides for fines of up to 4,000 Euros against media that are found to have engaged in “unbalanced or impartial reporting” during electoral periods.²⁰ In France, a bill under consideration in Parliament on the protection of corporate secrets was heavily criticized by the national media for adopting an overbroad definition of company secrets, which could undermine public debate on corporate practices and therefore go against the public interest.²¹

The Court continued to subject civil sanctions against the media and other public watchdogs to close scrutiny. In a case involving Croatia, it held a domestic court decision, finding defamatory a satirical press article that criticised a judge and issuing a 6000 EUR fine, was a violation of Article 10.²² The Court also held in favour of an anti-racism organisation that had been ordered to pay damages and to remove online references to a politician whom it had called a “verbal racist” in the context of debates on a Swiss referendum on banning minarets.²³

In April 2018, the European Commission published a proposed directive on the protection of whistleblowers reporting on potential breaches of European Union law. The draft directive draws inspiration from, among other sources, the Committee of Ministers’ Recommendation CM/Rec(2014)7 on the protection of whistleblowers,²⁴ and it explicitly recognises the connection between investigative journalism and the legal protection of whistleblowers as important sources of information for journalists.

In June, a new draft law on protection of whistleblowers was adopted in Kosovo²⁵, with Council of Europe assistance, which represents a significant improvement over existing legislation.²⁶ Iceland is also in the process of drafting a new law on whistleblowers.

In practice, however, whistleblowers continue to face significant challenges. In January 2018, Cyprus issued a European arrest warrant against Maria Efimova, a former employee of a Cypriot bank, who had provided information to Daphne Caruana Galizia, the late Maltese journalist who was killed in a car bomb attack in 2017. Efimova left Malta in August 2017, reportedly fearing for her life after giving evidence on allegations involving supposed business dealings of the Maltese Prime Minister’s wife. Efimova has applied for asylum in Greece, where courts have so far denied Malta’s extradition requests.²⁷

²⁰ Platform alert, “Amendments to the Electoral Code empower State Election Commission to issue fines to media for ‘unbalanced reporting’”, 9 August 2018.

²¹ Platform alert, “Corporate secrets bill threatens right to information”, 26 April 2018.

²² See *Narodni List D.D. v. Croatia*, 2782/12, 8 November 2018.

²³ GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland, 18597/13, 9 January 2018.

²⁴ See CM/Rec(2014)7 at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c5ea5.

²⁵ All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

²⁶ Press statement, “PECK II supports Ministry of Justice in drafting and finalising the law on protection of whistleblowers”, 8 June 2018.

²⁷ Platform alert, “Russian whistleblower, Daphne Caruana Galizia’s source, faces arrest warrant in Cyprus after complaint from former employer,” 25 January 2018. Update on 14 June 2018.

II. SAFETY OF JOURNALISTS AND OTHER MEDIA ACTORS

The press plays a fundamental role in holding governments and other powerful actors to account and facilitating effective access to the right to information. Therefore, the free flow of information and ideas suffers greatly in an environment in which media professionals are subjected to physical attacks, intimidation and arbitrary or selective prosecution. Protection of confidential sources and unhindered access to public records are essential tools of journalism that must be guaranteed in law and practice.

In July, the Court expounded on the state duty to fully investigate attacks on media workers in a case involving the 2006 contract killing of Russian investigative journalist Anna Politkovskaya. Following nine years of investigation and court proceedings at the national level, five individuals were eventually convicted; however, those who commissioned the murder remain at large. The Court found that the investigation had not been effective as it had failed to look properly into the intellectual authors of the attack.²⁸

It is now widely recognised that “other media actors” – including bloggers, online reporters or other contributors who may not meet legal definitions of mainstream journalism – play an increasingly important role in public debate and are entitled to similar protections in law and practice.²⁹ In June 2018, the Council of Europe Steering Committee on Media and Information Society approved an Implementation Strategy for Recommendation [CM/Rec\(2016\)4](#) on the protection of journalism and safety of journalists and other media actors.³⁰ It is further in the process of developing an Implementation Guide to CM/Rec(2016)4, which will be informed by best practices developed in member states to enhance the protection of journalists, including by effectively prosecuting alleged crimes against them.

Measurement Criteria

There are no killings, physical attacks, disappearances or other forms of violence against journalists.

Journalists are provided with police protection when requested because of threats.

Journalists are not arrested, detained, imprisoned or harassed because of critical reporting. There are no selective prosecutions, sanctions, inspections or other arbitrary interferences against journalists and other media actors.

Journalists are not subjected to verbal intimidation that is instigated or condoned by authorities, or to harmful rhetoric in political discourse.

There is no impunity for crimes against journalists. There are independent, prompt and effective investigations of all crimes against journalists committed either by state or non-state actors.

Journalists are not subjected to state surveillance in the exercise of their profession.

²⁸ *Mazepa and Others v. Russia*, 15086/07, 17 July 2018.

²⁹ Committee of Ministers Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors, 13 April 2016.

³⁰ See <https://www.coe.int/en/web/freedom-expression/implementation-of-recommendation-cm/rec-2016-4>.

The confidentiality of journalists' sources is protected in law and in practice, subject to clear and narrow exceptions.

Access to information and documents held by public authorities is guaranteed in law and in practice.

Journalists are not subjected to undue requirements before they can work. Foreign journalists are not refused entry or work visas because of their potentially critical reports.

Findings

The Platform to promote the protection of journalism and safety of journalists reported an upward trend in 2018 in the number of attacks on the physical safety and integrity of journalists across the Council of Europe area. A majority of the most serious incidents of violence were allegedly committed by unknown or non-state actors. Impunity for attacks on the life and limb of media professionals in recent years remains a major concern.

On the positive side, France and Ukraine have put in place dedicated mechanisms for taking action on the alerts submitted on the Platform from their respective jurisdictions. Dutch authorities implemented special protection measures for the editorial staff of *De Telegraaf* and other outlets, following two suspected organised crime attacks against media premises.³¹

There was some progress in the investigations into the recent mafia-style assassinations of two investigative reporters. In December 2017, Maltese authorities charged three suspects in the car bomb attack against Daphne Caruana Galizia, an investigative reporter. PACE is preparing a report on the investigation of the case and the rule of law in Malta. In September, Slovak police detained and charged four persons with the murder of Ján Kuciak and his partner, who were shot dead in February 2018 in their home outside Bratislava. Kuciak was investigating alleged tax fraud linked to cross-border organised crime.³²

Criminal prosecutions launched against scores of Turkish journalists in the period since the July 2016 coup attempt continue to tarnish the country's media freedom record. More than a hundred journalists remained in detention by the end of 2018, by far the highest number in the Council of Europe area.

In March 2018, the Court issued two judgments holding that the pre-trial detention, on terrorism charges, of two Turkish journalists had violated their rights to liberty and freedom of expression and generated significant chilling effects for society at large. The Court emphasised that even a "public emergency threatening the life of the nation" cannot serve as a pretext for undermining the freedom of political debate, which is essential to restoring and safeguarding democracy. The Court further found a lack of reasonable suspicion that the two journalists had committed the offenses they were charged with, and noted the general problem in Turkey with loose interpretations of anti-terrorism legislation and failure to comply with the decisions of the country's own constitutional court.³³

Following visits to Serbia and Slovakia, the Council of Europe Commissioner for Human Rights (the Commissioner) highlighted the dangers arising from the growing use of smear

³¹ Platform alert, "Dutch biggest daily *De Telegraaf* attacked in latest incident targeting media", 27 June 2018.

³² Platform alert, "Slovak investigative journalist killed at home", 26 February 2018.

³³ *Mehmet Hasan Altan v. Turkey*, 13237/17, 20 March 2018; and *Sahin Alpay v. Turkey*, 16538/17, 20 March 2018.

campaigns and inflammatory remarks against the media and individual reporters. Such statements create an insecure environment for journalism, especially when made by public officials as part of deliberate attempts to intimidate critical voices.³⁴ In one such case, derogatory statements by the then president of Republika Srpska against a Serbian journalist triggered death threats and a pro-government media campaign against the latter. The comments were in response to the publication of a journalistic database of records of real estate owned by Bosnian politicians.³⁵

With respect to the rights of civil activists and human rights defenders, the Venice Commission expressed strong criticism of a Hungarian legislative package that introduced the new offence of “facilitating irregular migration” and criminalised thus far protected NGO activities, such as distributing informational materials or processing asylum requests. The government also sought to impose a 25 per cent tax on financial contributions to organisations active in the field of migration.³⁶ In addition, the Venice Commission urged the Romanian authorities to repeal a burdensome financial disclosure regime imposed on all non-profit entities; and recommended to the Ukrainian government not to compel anti-corruption activists to provide personal asset declarations.³⁷ In a positive development in August 2018, an Azerbaijani court of appeal ordered the release of a prominent human rights defender after more than five years in prison, which was welcomed by the SG.³⁸

A number of incidents highlighted the growing threats faced by journalists seeking to protect their confidential sources, in part as a result of vulnerabilities created by the use of new technologies, as well as due to aggressive actions of police and prosecution authorities. In May, Slovak police questioned a leading Czech investigative reporter, ostensibly in connection with the murder of her colleague Ján Kuciak. However, the police proceeded to question the journalist on unrelated matters pertaining to her journalistic work and seized her mobile phone without prior warning.³⁹ In November 2018, during a visit to Romania, the Commissioner expressed serious concerns about the national data protection authority’s order to an investigative outlet to disclose the sources of their investigation into alleged fraud involving European Union funds, or face a 20 million Euro fine.⁴⁰

Such practices go against the established jurisprudence of the Court which requires that searches of confidential journalistic material be carried out only on the basis of a court order and in compliance with other substantive and procedural safeguards.⁴¹ In line with this case law, in September 2018, the Court issued an interim injunction (known as a Rule 39 order) to the Ukrainian authorities to abstain from accessing any data on the mobile phone of an investigative reporter. A Kyiv court had earlier authorised prosecutors to access text

³⁴ Statements of Council of Europe Commissioner for Human Rights, 22 February and 16 March 2018.

³⁵ Platform alert, “Republika Srpska president accuses journalist of ‘destroying regional political structures’”, 24 August 2018.

³⁶ Venice Commission Opinion No. 919/2018, 25 June 2018.

³⁷ Venice Commission Opinions No. 914/2017, 16 March 2018; and No. 912/2018, 16 March 2018.

³⁸ See Statement of the SG at <https://www.coe.int/nl/web/portal/-/statement-by-council-of-europe-secretary-general-thorbj-rn-jagland-on-the-release-of-human-rights-defender-ilgar-mammadov-in-azerbaijan>.

³⁹ Platform alert, “Slovak police seize mobile phone of Czech investigative reporter”, 16 May 2018.

⁴⁰ Commissioner statement, 16 November 2018.

⁴¹ See, among other authorities, *Sanoma Uitgevers B.V. v. the Netherlands* (GC), 38224/03, 14 September 2010.

messages, call and location data on the reporter's phone, as well as those of a second journalist, over a 17-month period.⁴²

In a case involving the Russian Federation, the Court found that custom officials' seizure and copying of a journalist's computer data in order to check for "extremist materials", in the absence of any reasonable suspicion of illegality violated Article 10 of the Convention. The Court further noted that Russian legislation on customs searches did not provide sufficient safeguards for journalistic privileges.⁴³ The Court also found in favour of a Romanian journalist convicted for disclosing military secrets.⁴⁴

The Russian Federation and Ukraine continued to pose challenges for foreign journalists, including by retaliating against their respective media workers. A Ukrainian decree banned several Russian media organisations for three years and denied entry to a number of Russian journalists.⁴⁵ The Russian Ministry of Foreign Affairs published a list of individuals, including foreign journalists, who are banned from entering Russia for reasons of alleged Russophobia.⁴⁶ Latvia deported a Russian journalist on national security grounds.⁴⁷

Mass state surveillance and bulk interception of telecommunications which pose a similar set of risks for journalists' confidential sources were the subject of two major judgments of the Court in the course of the year. In the first case, the Court found that Sweden's legal framework on bulk interceptions, while improvable, was in accordance with the Convention.⁴⁸

In the second judgment, the Court held that the United Kingdom's legal framework in force at the relevant time was not sufficiently protective of privacy rights in certain respects related to bulk interceptions and requests for access to data held by telecommunications providers. In addition, both the bulk surveillance and request for access regimes did not provide sufficient protection for journalistic sources or confidential journalistic material, in violation of Article 10 of the Convention.⁴⁹ It is worth noting that in the period following the filing of these applications with the Court, the United Kingdom updated its surveillance rules under new legislation (the Investigatory Powers Act 2016), which was not subject to the Court's judgment.

The Council of Europe trained more than a thousand magistrates and law enforcement officials throughout Ukraine on good practices in investigating crimes against journalists and other media actors. At the request of a parliamentary committee, Council of Europe experts provided advice on improving Ukrainian criminal provisions on offenses against journalism.

⁴² Platform alert, "Ukraine court allows prosecutors access to investigative journalist's phone records", 5 September 2018.

⁴³ *Ivashchenko v. Russia*, 61064/10, 13 February 2018.

⁴⁴ *Girleanu v. Romania*, 50376/09, 26 June 2018.

⁴⁵ Platform alert, "Russian media organisations banned for three years in Ukraine", 25 May 2018.

⁴⁶ Platform alert, "Russia bans Estonian journalists over 'Russophobia' allegations, 25 July 2018.

⁴⁷ Platform alert, "Expulsion of two Russian journalists from Latvia", 5 January 2018.

⁴⁸ *Centrum för Rättvisa v. Sweden*, 35252/08, 19 June 2018.

⁴⁹ *Big Brother Watch and Others v. the United Kingdom*, 58170/13, 62322/14 and 24960/15, 13 September 2018.

III. MEDIA INDEPENDENCE

Guaranteeing a favourable environment for independent media is a major challenge for all democracies. Government influence and powerful commercial interests must be constrained for the media to be able to fend off attempts to control them.

PACE has repeatedly called on states to “improve the legal provisions concerning transparency of formal and beneficial ownership, as well as of funding mechanisms and organisational and managerial structures of the media, including online media.”⁵⁰ Broadcast media, which continue to be major sources of information and which the general public uses to form its opinions, must be effectively insulated from abuse of regulatory powers.

Public service media have a particularly important role to play in our democracies. The ability of public service media to fulfil their remit and watchdog role will ultimately depend on continued guarantees of institutional autonomy and independence, and sufficient resources.

Measurement criteria

Regulatory frameworks safeguard the editorial independence of media outlets from government, media owners, and political or commercial interests and are respected in practice.

Information about media ownership and economic influence over media is easily accessible to the public.

Print, broadcast and internet-based media are not subject to direct or indirect censorship. There is no indication of self-censorship in either private or state-owned media.

Broadcasters are subject to licensing procedures which are open, transparent, impartial, and decisions are made public. Print and online media are not required to hold a license which goes beyond mere business or tax registration.

Media, including public service media, have fair and equal access to state advertising and state subsidies.

The independence of the media regulatory bodies is guaranteed in law and in practice.

Public service broadcasting has institutional autonomy, secure funding and adequate technical resources to be protected from political or economic interference.

Journalists have satisfactory working conditions with adequate social protection.

Findings

Government shutdowns of media outlets are among the most severe forms of curtailment of media freedom and independence. More than two years after the July 2016 failed coup, the Turkish government continued to issue decrees ordering media closures: in July, it closed and confiscated the assets of three newspapers and one TV station as well as 12 associations. About 200 academics and some 18,000 civil servants were dismissed in that

⁵⁰ PACE Resolution 2179 (2017) on political influence over independent media and journalists, 29 June 2017, paragraph 7.3. See also PACE Resolution 2065 (2015) on increasing transparency of media ownership, 24 June 2015.

same period for allegedly having ties to terrorist groups.⁵¹ Scores of media outlets have been liquidated in Turkey under state of emergency powers.⁵²

Financial pressures, favouritism and other forms of indirect manipulation of the media can be equally insidious muzzles and are increasingly used by politicians of all stripes. Following a visit to Serbia, the Commissioner noted problems with the state financial support scheme for media projects of public interest, including lack of transparency, politically motivated allocations, and funding awarded to non-professional media.⁵³ In Italy, deputy prime minister and leader of the Five-Star Movement called on state-owned companies to stop advertising in newspapers, and announced plans for “a reduction of indirect public contributions” to the media in the 2019 budget.⁵⁴ In November 2018, he published a social media post containing insulting language against Italian journalists and calling for new legal restrictions on publishers.⁵⁵

The political and economic dynamics of recent years that have threatened the funding and public standing of public service broadcasters have not abated. In Denmark, a new media agreement negotiated by the government included a 20 per cent reduction in the budget of national public service media (PSM). In addition, the licence fee, which tends to promote the independence and financial integrity of PSMs, will be replaced with a regular line in the state budget. In September, the Danish public broadcaster DR announced that it will dismiss up to 400 staffers and close down six TV and radio stations.⁵⁶

The independence of PSMs is also threatened by regulatory changes and personnel decisions. In Lithuania, there was concern that amendments proposed by a parliamentary inquiry, which included changes to the appointment process of its board members, would undermine the independence of the public broadcaster LRT.⁵⁷ In Bosnia and Herzegovina and in Montenegro, chief executives of the respective PSMs were fired for reasons that appeared to be politically motivated.⁵⁸

However, not all news was bad for public service media in 2018. In a March referendum in Switzerland, a two-thirds majority of voters rejected a proposal to abolish the license fee for public radio and television (SRG) services. According to an official post-referendum survey, a similar majority expressed high confidence in the SRG.⁵⁹ In Croatia and Germany, the national constitutional courts rejected challenges to the license fee system for public broadcasters, finding them to be largely constitutional.⁶⁰ Such popular and judicial verdicts underscore the continued relevance of PSMs and their remits, despite the deep cultural and technological changes of recent decades.

⁵¹ Platform alert, “Three newspapers and one TV station closed by decree-law”, 9 July 2018.

⁵² See PACE ‘Turkey monitors express ‘serious concerns’ ahead of 2019 elections’, 5 April 2018 <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=7013&lang=2>.

⁵³ Commissioner statement, 12 February 2018.

⁵⁴ Platform alert, “Minister Di Maio threatens to reduce indirect public funding to the press,” 18 September 2018.

⁵⁵ Platform alert, “Deputy Prime Minister Di Maio and former MP Battista insulted journalists,” 12 November 2018.

⁵⁶ Platform alert, “Danish Government plans to strongly reduce funding for public service media”, 19 March 2018.

⁵⁷ Platform alert, “Threats to the independence of the Lithuanian LRT”, 14 November 2018.

⁵⁸ Platform alerts, “Director and management team of RTV USK dismissed for undisclosed reasons”, 23 July 2018; and “Head of public broadcaster sacked”, 27 June 2018.

⁵⁹ Audiovisual Observatory, “Switzerland: Majority want a strong public radio and television service”, (IRIS 2018-6:1/11).

⁶⁰ Audiovisual Observatory, “Federal Constitutional Court finds broadcasting fee broadly compatible with German Constitution” (IRIS 2018-8:1/15); and “Croatia: Constitutional Court decision on CRTA's conformity with the Constitution” (IRIS 2018-9:1/22).

IV. MEDIA PLURALISM AND DIVERSITY

Pluralism and diversity of the media ensure that the public has access to a wide range of political and social viewpoints, including the perspectives of minorities and under-represented communities. To guarantee media diversity states should adopt positive measures, including in relation to structural aspects of the media sector, content diversity and ownership transparency.

In March 2018, the Committee of Ministers adopted Recommendation [CM/Rec\(2018\)1](#) on media pluralism and transparency of media ownership, which endorses a comprehensive framework for creating a pluralist, transparent and participatory media environment, both offline and online. The recommendation calls on states to develop strategies for increasing the sustainability of a variety of media, and to support quality independent and investigative journalism, while fully respecting the editorial and operational autonomy of the media.

The financial strains of many media companies, and difficulties in implementing new business models, have led to a significant worsening of the working conditions of journalists. In particular, the number of journalists forced to work as freelancers with few social protections has increased significantly and across the board. This, in turn, is making it more difficult for media outlets to attract and keep new and diverse talent, with potentially serious ramifications for the future of the profession.

In April 2018, PACE adopted a resolution on improving working conditions for journalists, which urges states to update the legal status of journalists, taking recent technological and economic developments into account, and to explore avenues for alternative funding in a new media ecosystem. In addition, the resolution invites trade unions and journalists' organisations to represent all journalists, including freelancers, in their collective bargaining for basic rights, such as working hours, wages, social security and unemployment.⁶¹

Measurement criteria

The public has access to a variety of print, broadcast and online media that represent a wide range of political and social viewpoints, including foreign or international resources.

Media concentration is addressed through effective regulation and monitored by state authorities vested with powers to act against concentration.

All types of media (public service, private, and community) have fair and equal access to technical and commercial distribution channels and electronic communication networks.

Media outlets represent diverse interests and groups within society, including local communities, minorities and those with specific needs. Media outlets actively promote the representation of minorities and diversity in their internal organisation, including in media governing boards and self-regulatory mechanisms.

Public service media play an active role in promoting social cohesion and integration through proactive outreach to diverse sectors and age groups of the population, including minorities and those with special needs.

⁶¹ PACE Resolution 2213 (2018) on the status of journalists in Europe.

The operating environment for independent and community media is favourable and media literacy and critical understanding are promoted through formal and informal education systems.

Political parties and candidates have fair and equal access to the media. Coverage of elections by broadcast media is balanced and impartial.

Findings

There is growing awareness that states have been slow to respond to the adverse impacts of the digital revolution on the financial viability of both traditional and new forms of journalism. While some media have been successful in experimenting with new business models, large parts of the sector are struggling to cope with the loss of advertising revenue to major online players; investigative journalism and local reporting are especially threatened by the new market and social dynamics. This situation calls for new approaches and policies aimed at ensuring the financial viability and diversity of a sector that is vital to democracy, with a number of states considering direct and indirect forms of state support, novel tax policies and new notions of corporate social responsibility.

In response to these concerns, an expert committee set up by the Committee of Ministers made progress in drafting a recommendation on promoting a favourable environment for quality journalism in the digital age; a declaration on the financial sustainability of quality journalism; and a study on media and information literacy in the digital environment.⁶²

Similar processes are underway at the national level. In March 2018, the UK government launched a review on the sustainability of quality journalism in the country. The review will investigate the overall state of the media market, the role and impact of search engines and social media platforms, how content and data flows are operated and managed, and the role of digital advertising.⁶³ The government is also considering setting up a pilot funding scheme to increase diversity of content in public service programming.

At the same time, long-standing threats to media pluralism and diversity, such as excessive concentration or government co-optation, still exist. In November 2018, the owners of several pro-government media outlets in Hungary announced plans to transfer ownership of their companies to the “Central European Press and Media Foundation”. This new conglomerate will control cable news channels, online news portals, all of Hungary’s regional newspapers, several radio stations and numerous magazines. According to media reports, several of the publications to be controlled by the Foundation receive generous amounts of government advertising. The national federation of journalists has requested an anti-trust investigation into the potentially dominant position of the new entity in many areas of the media sector.⁶⁴

⁶² See <https://www.coe.int/en/web/freedom-expression/msi-jog>.

⁶³ See <https://www.gov.uk/government/news/chair-appointed-to-lead-review-of-press-sustainability-in-the-uk>.

⁶⁴ Platform alert, “New pro-government media conglomerate threatens media pluralism”, 29 November 2018.

V. FREEDOM OF EXPRESSION ON THE INTERNET

The development of the internet has had a profound effect on human communication, granting people around the world access to an unprecedented amount and diversity of news, information and ideas, regardless of frontiers.

Internet-based expression is entitled to all the protections of Article 10 of the Convention: restrictions of online content must be prescribed by law, and be necessary in a democratic society to secure a legitimate aim recognised by the Convention. A majority of member states tend to apply general legal rules also to online expression, while some countries have adopted internet-specific legislation to regulate aspects such as the ability to block the dissemination of unlawful speech.

In March 2018, the Committee of Ministers adopted Recommendation [CM/Rec\(2018\)2](#) on the roles and responsibilities of internet intermediaries, which calls on states to provide a human rights and rule of law-based framework in this context. Such frameworks should create a safe and enabling online environment, encourage the development of appropriate self- and co-regulation, and ensure the availability of redress mechanisms for all claims of violations of human rights in the digital environment.

A new expert committee set up by the Committee of Ministers advanced on drafting a recommendation on human rights impacts of algorithmic systems; a declaration on the manipulative capabilities of algorithmic processes; and a study of the implications of advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework.⁶⁵

The Court continued to expand its internet-related jurisprudence, recognising the broad application of online freedoms to new technologies and the many shapes they take. For example, Article 10 of the Convention was clearly engaged in a case involving a mobile phone application, developed by a political party, which allowed voters to comment on and share anonymous photos of the ballots they had cast in a referendum.⁶⁶ The Court found violations of Article 10 in two cases involving Russian bloggers sentenced, respectively, for promoting extremism and insulting police officers; and it underscored that national authorities must meet a high threshold when charging online speakers with incitement to hatred or violence, or overbroad “extremism” offenses.⁶⁷

Measurement criteria

The internet is available, accessible and affordable to everyone without discrimination.

Restrictions of internet content are prescribed by law, pursue the legitimate aims set out in Article 10 of the Convention, and are necessary in a democratic society. The law provides for sufficient safeguards against abuse, including control over the scope of restriction, and effective judicial review.

The state does not restrict access to social media or other internet platforms.

⁶⁵ See <https://www.coe.int/en/web/freedom-expression/msi-aut>.

⁶⁶ *Magyar Kétfarkú Kutya Párt v. Hungary*, 201/17, 23 January 2018 (CURRENTLY PENDING BEFORE THE GRAND CHAMBER).

⁶⁷ *Stomakhin v. Russia*, 52273/07, 9 May 2018; and *Savva Terentyev v. Russia*, 10692/09, 28 August 2018.

Effective remedies and complaints mechanisms are in place for violations of human rights online to be addressed and prosecuted.

Internet intermediaries do not generally monitor or censor content generated or transmitted by their users, whether for commercial, political or other purposes.

Internet intermediaries are not held responsible for the content that is disseminated via the technology they supply except when they have knowledge of illegal activity and content and do not act expeditiously to remove it.

Any surveillance of users' communication and activity online is in compliance with Article 8 of the Convention.

Educational policies are in place to further media and information literacy and improve users' skills, knowledge and critical understanding of content online.

Findings

Widespread blocking of access to online content remains relatively rare in the Council of Europe area. However, authorities in a number of countries resort to blocking and filtering with some regularity. In April 2018, a Moscow court ordered blocking of access to the secure messaging service Telegram due to the latter's refusal to grant Russian intelligence agencies access to its decryption keys. The blocking caused collateral disruption to a large number of unrelated websites and undermined the ability of users of Telegram to communicate, including that of journalistic users to communicate securely with their sources and publish legitimate material. The messaging service has reportedly filed an application against the blocking with the Court.⁶⁸

A number of legislative initiatives highlighted the need to balance carefully national security interests with freedom of expression on the internet. In Ukraine, Parliament was considering a bill that would enable prosecution and defence authorities to block, without a court order, access to online content that they deem to threaten national security.⁶⁹ Media freedom advocates in the United Kingdom also raised concerns about proposed counter-terrorism legislation that would criminalise the publication of online content (such as photographs or videos) that could be deemed to support a terrorist organisation, or simply the watching of content that may be helpful to terrorist groups. Media organisations argued that such provisions that do not require terrorist intent, may severely impede the work of investigative journalists.⁷⁰

National decision-makers continue to develop the contours of the right to request de-listing of search results, following the *Google Spain* ruling of the Court of Justice of the European Union.⁷¹ In the United Kingdom, the English High Court heard two separate actions seeking to force a search engine to remove search results referencing old criminal convictions related to the claimants' business activities. The High Court ordered delisting in one of the cases but rejected the request of the second claimant based on the nature of the offense, his

⁶⁸ Platform alert, "Russia: Blocking of Telegram and collateral temporary blocking of media sites, 30 April 2018.

⁶⁹ Platform alert, "Draft bill to allow blocking of internet sites without a court order", 6 July 2018.

⁷⁰ Platform alert, "Media freedom advocates raise alarm over UK counter-terror bill, 25 September 2018.

⁷¹ *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, 13 May 2014.

conduct following the conviction, and the on-going risks to his potential clients.⁷² In another case of this kind, the Irish High Court rejected the claim of a former election candidate for removing search results related to anonymous comments made on an online discussion forum at the time of his candidacy; the court ruling noted that the comment at stake amounted to an opinion about the candidate's political views, not a factual inaccuracy.⁷³

The Court heard a similar case brought by two convicted murderers who, after their release from prison, sought injunctions requesting that news stories about their trial in the archives of three media outlets be anonymised to protect their rehabilitation. The Court found that in the circumstances of the case the applicants' "right to be forgotten" online could not prevail over the interest in preserving the historical record. In addition, the applicants had made no effort to use remedies available to them toward search engine operators that could have limited the reach of the original publications.⁷⁴

Social networks, search engines and other online operators have come under increasing public and government pressure to monitor and take action against harmful speech generated by users or other third parties, including foreign government-sponsored actors.

The UK government announced plans to develop a "digital charter," which will explore various standard-setting measures, among other goals, to make the internet safer for users. Priorities include protecting people from harmful content and behaviour, ensuring that personal data are used in a safe and ethical way, reviewing the legal liabilities of social media companies for the content that is shared on their sites, and limiting the spread of disinformation.⁷⁵

National and international case law regarding the responsibilities of internet intermediaries for defamatory content they host is in constant evolution. In Italy, the Rome Court of Appeal rejected a defamation action brought by a former politician against Wikipedia's owner, based on statements contained in the claimant's page on the online encyclopaedia. In particular, the appeal court held that the politician's takedown request was not sufficient to trigger the website's civil liability in defamation proceedings.⁷⁶

In the same vein, the Court found a violation of Article 10 of the Convention in a case against Hungary where a news portal was held liable for defamation of a political party on the mere basis that it had posted a hyperlink to an online video that contained statements by a third party. The Court held that the national courts had applied strict liability for dissemination of third party content and had failed to balance free speech and reputational interests, or to consider relevant questions such as whether the media endorsed, repeated or merely linked to third-party content.⁷⁷

⁷² Audiovisual Observatory, "United Kingdom: First English "right to be forgotten" trial against Google LLC" (IRIS 2018-6:1/20).

⁷³ Audiovisual Observatory, "Ireland: Data Protection Commissioner and Google Ireland win High Court appeal on first 'right to be forgotten' case" (IRIS 2018-5:1/20).

⁷⁴ *M.L. and W.W. v. Germany*, 60798/10 and 65599/10, 28 June 2018.

⁷⁵ See <https://www.gov.uk/government/publications/digital-charter>.

⁷⁶ Audiovisual Observatory, "Italy: Landmark decision in *Wikimedia v. Cesare Previti* concerning ISPs' liability for online defamatory content" (IRIS 2018-6:1/26).

⁷⁷ *Magyar Jeti Zrt v. Hungary*, 11257/16, 4 December 2018.

The Council of Europe is celebrating 70 years of its existence in 2019. Throughout this time, the freedom of expression, as enshrined in Article 10 of the European Convention, has been of central importance to the organisation. Article 10 protects the right of individuals to form, hold and express their opinions without undue interference. This is crucial for the realisation of all other human rights. Along with its corollaries of freedom of information and media freedom, the freedom of expression enables citizens to make informed choices, to participate actively in democratic processes, and to help ensure that powerful interests are held to account in line with the rule of law.

Freedom of expression, therefore, is an essential precondition for democratic security and deserves the highest attention, today as ever. Consecutive yearly assessments of the state of the freedom of expression in Europe have shown that threats to this anchor of democratic societies are growing across the continent.



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