



# Journalism and media privilege

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Murat Önok, Julián Rodríguez Pardo, Gábor Polyák, Loreta Poro, Karl N. Renner,  
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# Foreword

While calling for the organisation of an international conference on freedom of information at its very first session in 1946, the UN General Assembly opened its Resolution No. 59 by stating that “freedom of information is a fundamental human right and is a touchstone of all the freedoms to which the United Nations is consecrated” and that it “implies the right to gather, transmit, and publish news anywhere and everywhere without fetters. As such it is an essential factor to promote the peace and progress in the world”. This concept was then explicitly enshrined two years later in Article 19 of the Universal Declaration of Human Rights, which states that the fundamental right of freedom of expression encompasses the freedom to “seek, receive and impart information and ideas through any media and regardless of frontiers”.

This definition entrusts the media with a special role in order to give substance to the right to seek information. The latter namely implies the need for a special set of guarantees aimed at ensuring that journalists can fulfil their function. Such guarantees are known as “media privilege” and will be explored in this report, produced by the European Audiovisual Observatory in coordination with the Institute of European Media Law (EMR) based in Saarbrücken (Germany).

The report provides an overview of the most recent rules, case law and policies across Europe with regard to the privileges that are given to journalists when exercising their activities. As a rule, when identifying the relevant legal aspects, three features are taken into account: the corresponding provisions shall a) be aimed at guaranteeing through special information rights that media are able to fulfil their opinion-shaping function, b) ensure through special procedural mechanisms that freedom of the media is safe from state interference, and/or c) prevent people affected by media reporting from being in a position to suppress it under civil or criminal law without taking into account the freedom of the media.

The structure of the report adopts a bird’s-eye perspective and is divided into three main sections.

Firstly, Part 1 contains an overview of the topic, and explores the general framework for journalism and media privilege. Both the historical development of the norms concerning journalism and their definition at international level are analysed, before delving into the legal, political, and economic aspects of the concept of media privilege. Particular attention is devoted to the crossroads between two particularly relevant regulatory sets, namely the new data protection regulation and the exceptions provided by copyright rules.

Secondly, Part 2 contains a number of country reports whose purpose is to explore the treatment of media privilege under public law, with particular reference to data protection law and issues linked to the safeguarding of journalists. The country reports are not exhaustive, and only represent a sample of Council of Europe member states that appear particularly significant for the examples they provide, namely Germany, Spain, France, the United Kingdom, Hungary, Italy, Poland, the Russian Federation, and Turkey.

Each national report covers the dimensions of media privilege under current legislation, as well as recent and emergent issues.

Lastly, Part 3 provides both an overview and an analysis of the results from the country reports, and attempts to identify some main trends, such as the role of national constitutional law and self-regulation, and the increased inclusion of new forms of journalism, such as blogging, within the scope of certain media privileges. This chapter finally provides some prospects for future challenges to media privilege, notably linked to the use of artificial intelligence and the risk of the development of filter bubbles.

All of the above issues are discussed in this IRIS Special, which collects contributions from different national experts. I would like to thank (in alphabetical order): Dominic Broy, Dominika Bychawska-Siniarska, Christina Etteldorf, Pascal Kamina, Murat Önok, Gábor Polyák, Loreta Poro, Karl N. Renner, Andrei Richter, Julián Rodríguez Pardo, Konrad Siemaszko, Jörg Ukrow, and Lorna Woods.

Special recognition goes to Professor Mark Cole, Director for Academic Affairs at the EMR, for the coordination behind the research.

Strasbourg, December 2017

Maja Cappello  
IRIS Coordinator  
Head of the Department for Legal Information  
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# 1. Basis and general framework for journalism and media privilege

## 1.1. Introductory remarks: understanding the concept of media privilege

*Jörg Ukrow, Institute for European Media Law*

The recent success of populist parties<sup>1</sup> in European elections<sup>2</sup> has a media aspect to it: political parties not only frequently criticise journalists in traditional media for tendentious reporting that fails to take account of their point of view but also use new social networks to convey their message to interested groups, which are in turn developing more and more into “filter bubbles”. Moreover, in certain cases the media face regulatory action, whose compatibility with media independence is the subject of debate within both the EU and the Council of Europe.<sup>3</sup> All these developments not only have an impact on the self-image and public perception of journalists but also affect the traditional protection of independent journalism via media privilege.

In the following, the term “media privilege” is understood to mean all provisions that (1) guarantee through special information rights that media are able to fulfil their opinion-shaping function, (2) ensure through special protective instruments of a procedural nature that freedom of the media is safe from state interference and/or (3) prevent people affected by media reporting from being able to suppress it by reference to general provisions of civil or criminal law without any consideration of the media’s freedom to communicate.<sup>4</sup>

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<sup>1</sup> The term “populist parties” is to be understood to refer to those parties that, usually with reference to actual or perceived ills, focus on protest issues that (also) lead to emotional responses. They rely on a simplistic style of politics that fabricates a direct connection with “the people” and agitate against “elites” and “the establishment”. See Hirschmann, *Der Aufstieg des Nationalpopulismus*, 2017, p. 21.

<sup>2</sup> See Ukrow, “Wächst Europa an seinen rechtspopulistischen Feinden? Europäische wehrhafte Demokratie und Schutz der Grundwerte in der EU”, in *vorgänge* NO. 216 (4/2016), pp. 47 ff.

<sup>3</sup> See, for example, Katharina Waldoch, “Novum des Europarechts: EU-Prüfverfahren zur Rechtsstaatlichkeit am Beispiel der Gesetzesänderungen in Polen, 2016”, [https://www2.duisburg.de/micro2/europe\\_direct/medien/bindata/EU-Pruefverfahren\\_Rechtsstaatlichkeit.pdf](https://www2.duisburg.de/micro2/europe_direct/medien/bindata/EU-Pruefverfahren_Rechtsstaatlichkeit.pdf) and <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19933&lang=en>.

<sup>4</sup> This broad understanding of the term includes (but goes beyond) individual aspects such as media privilege under data protection law. On media privilege from the point of view of data protection law, see, for example, Fechner, *Medienrecht*, 17th ed. 2016, p. 179 f.

The development of “media privilege” is affected by digitisation, Europeanisation and globalisation.<sup>5</sup> One result of these processes is that models of state sovereignty (including within the context of regulating media players and media business models) are becoming more and more obsolete. Moreover, questions arise concerning the scope of, and limits to, media privilege and its beneficiaries within in a digital environment. The starting point of the discussion is the constitutional recognition that, even in the digital age, freedom of the media is a constituent element of the free democratic basic order of states and associations of states<sup>6</sup> and that new forms of mass communication must therefore also be included. On the one hand, protection is afforded in particular to keeping sources of information secret, to the relationship of trust between the media and informants and to the confidentiality of editorial work.<sup>7</sup> On the other hand, the media have a duty of care, which also serves to protect the personality rights of those affected by their research and reporting, and these duties have an objective connection, as it were, with the media’s public information remit, which in turn has a connection to democracy.

Accordingly, “media privilege” is not only a one-sided prerogative of the media but also a duty incumbent upon them in order to ensure the protection of third parties’ personality rights in a particular way in their journalistic/editorial work. The interests of those affected by the results of media research should also be taken into account by an efficient complaints management system, which should be set up regardless of (a) the judicial assertion of rights and (b) the self-regulation of media or the government monitoring of media to ensure their compliance with the law.

The debate surrounding “media privilege” has recently been rekindled as a result of the EU’s General Data Protection Regulation (GDPR),<sup>8</sup> Article 99 (2) of which states that it will apply from 25 May 2018. Under Article 85 GDPR, reconciling under data protection law the protection of the personality with freedom of communication essentially remains a matter for the member states, thus enabling them to take account in particular of their different constitutional traditions when striking this balance.

On the one hand, Article 85(1) of the GDPR<sup>9</sup> contains a general instruction to the member states to strike a balance in their legislation between the right to data protection and freedom of expression and information, but it makes no mention of the concept of media privilege. However, when data protection legislation is drawn up within the scope

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<sup>5</sup> See on this Ukrow, “Das Medienrecht auf dem Weg von technischer zu regulatorischer Konvergenz bei Wahrung kultureller Vielfalt”, in Bröhmer et al. (eds.), *Internationale Gemeinschaft und Menschenrechte*, 2005, pp. 1305 ff.; Ukrow, “Entwicklung des europäischen Medienrechts zwischen Verfassungsrecht, Völkerrecht und Europarecht”, in Bröhmer (ed.), *Europa und die Welt*, 2016, pp. 197 ff.

<sup>6</sup> See, for example, in respect of German Federal Constitutional Court decisions BVerfGE 7, 198 <208>; 77, 65 <74>; settled case law.

<sup>7</sup> See Kühling, in Heselhaus/Nowak (eds.), *Handbuch der Europäischen Grundrechte*, 2006, para. 24, marginal no. 18

<sup>8</sup> Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR), OJ EU 2016 L 119/1, corrigendum OJ EU 2016 L 314/72

<sup>9</sup> Under Article 85(1) of the General Data Protection Regulation (GDPR), the EU member states “shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the *purposes of academic, artistic or literary expression*”.

allowed by the Regulation it would be in breach of fundamental rights to disregard the importance of the provision of information by the media, including the necessary preliminary work carried out by journalists. Article 85 of the GDPR, in conjunction with Recital 153, provides national authorities and courts with sufficient criteria to come up with compliant solution to anticipated conflicts of fundamental rights in accordance with the requirements of the Charter of Fundamental Rights of the European Union (CFR).<sup>10</sup> It is therefore not the case that in May 2018 a situation would arise in which either the personality rights of those affected or freedom of the media would suffer. Failing to hold a more fundamental debate would therefore not be due to a lack of time.<sup>11</sup>

This publication makes a contribution to this more fundamental debate on the basis of European and comparative law. It discusses the role of journalists today, with a brief introduction to the historical evolution of norms of journalism and their current state of development from the legal and journalistic point of view. It then goes on to examine the international and national legal bases of media privilege and its political significance and economic relevance. A role is played here not least by the interaction of media privilege and media independence on the one hand and political and economic decision-making, as well as the regulatory requirements involved, on the other. Building on these considerations, the main part of this publication undertakes a comparative-law study of dimensions and developments of media privilege in Germany, France, Italy, Poland, the Russian Federation, Spain, Turkey, Hungary and the United Kingdom. This leads on to a discussion of current trends in connection with media privilege, before the whole is rounded off with a glance into the future.

## 1.2. The historical development of norms of journalism

*Karl N. Renner, University of Mainz*

The norms that distinguish journalism, as an “institutionalised form of macro-communication”,<sup>12</sup> from other forms of communication do not constitute discretionary rules (“*dezisionistischen Setzungen*”) that could easily be dispensed with; rather, they are the result of a centuries-old historical process during which journalism has found its social role. They have developed with the history of journalism, which is in turn closely interwoven with the history of the newspaper as a mass medium. This is evidenced not least by the etymology of the word journalism, which derives from the French “journal”. When radio and television were then invented in the twentieth century, journalism exploited these new media for its own purposes by making use of the new communication opportunities they provided to produce radio and television content,

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<sup>10</sup> As rightly pointed out by Selmayr/Ehman in *Datenschutz-Grundverordnung, Kommentar*, 2017, introduction, marginal no. 88.

<sup>11</sup> See EMR, “Zur Konsultation der Länder betreffend die Spezifizierung des Art. 85 DS-GVO”, 2017, p. 10 f. (available at [https://ds2018.de/anl/170731\\_04.pdf](https://ds2018.de/anl/170731_04.pdf)).

<sup>12</sup> Siegfried J. Schmidt and Guido Zurstiege, *Orientierung Kommunikationswissenschaft. Was sie kann, was sie will*. Reinbek: Rowohlt, 2000, p. 177.

while at the same time adhering to its established rules. There is actually no alternative either when it comes to the journalistic exploitation of the Internet.

From the outset, journalism has seen its main task as providing people with new and correct information. The forerunners of today's newspapers, the pamphlets that reported on sensational events in the sixteenth century, conspicuously often used the word "true" or "truth" in their titles.<sup>13</sup> The paratextual claim to be writing the truth emphasised that these reports were neither invented stories nor rumours. The reports in those "new newspapers" laid the same claim to the truth as reports by historians, from which they differed, however, in their topicality value. With the advent of regular newspapers, the publication of which began in 1605 with the Strasbourg-based book printer Johann Carolus, mass communication became institutionalised.<sup>14</sup> In addition to economic stabilisation and professionalisation, readers began to have expectations, which in turn led to the development of a media audience. However, the establishment of public interest by the newspapers as a mass medium created the need to regulate journalism, which no longer only had to guarantee the truth of the information reported but now also had to justify its selection of content beyond its mere news value. The crucial question was now no longer whether newspapers reported the truth but whether they reported the *whole* truth.

The development of these norms was mainly the work of Anglo-Saxon journalism. This is no doubt bound up with the fact that censorship was abolished in the United Kingdom with the Bill of Rights in 1689 and the expiry of the Licensing Act in 1695, and that freedom of the press was established in 1791 with the First Amendment to the American Constitution. In Germany, on the other hand, it took until 1874 for the concept of freedom of the press to be introduced. Nonetheless, it was a long time before journalism saw itself as a neutral observer, despite the fact that this norm was explicitly mentioned as early as 1712 in the editorial to the *Holsteinischer* (later the *Hamburgischer*) *Unpartheyischer Correspondent* newspaper.<sup>15</sup> "Partisan journalism", with newspapers understanding themselves as mouthpieces of political factions and parties, dominated everywhere, with the consequent bias of reporting and selection of information.<sup>16</sup> In Germany, this opinion journalism bore its share of responsibility for the failure of the Weimar Republic, and dominated until the end of National Socialism. This form of journalism is still a characteristic of all states with a one-party system, where journalism is not an independent observer but a party mouthpiece.

Journalism was able to emancipate itself from opinion journalism when at the end of the nineteenth century the American newspaper publishers developed new business models that involved street sales and sales of advertising and were no longer tailored to party supporters as their target readership. A new form of journalism thus began to prevail and, according to Joseph Pulitzer in 1880, would "serve no party but the people

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<sup>13</sup> See Jürgen Wilke, "Von der Wahrhaftigkeit zur Gerechtigkeit. Die historische Herausbildung von Normen des journalistischen Handelns", *Jahrbuch für Kommunikationsgeschichte* 18 (2016), 2016, pp. 25–33.

<sup>14</sup> See Jürgen Wilke, *Grundzüge der Medien- und Kommunikationsgeschichte. Von den Anfängen bis ins 20. Jahrhundert*, Köln: Böhlau, 2000, pp. 41–45, 53.

<sup>15</sup> See Wilke 2016, p. 31.

<sup>16</sup> See Klaus Meier, *Journalistik*, Konstanz: UVK, 2007, p. 184.

(and be) the organ of truth”.<sup>17</sup> This new information-based journalism determines modern journalism’s self-image. Its central principle is the separation of information and opinion. In their news and reports, journalists must limit themselves to describing the facts. If they want to comment on them, they must publish their views in separate articles explicitly identified as expressions of opinion.<sup>18</sup> This rule ensures that the formation of public opinion takes place in a rational way in two successive steps: the establishment of the facts, followed by arguments concerning their assessment.

It is therefore clear that the system of norms that journalism has developed in the course of its history refers to the two key dimensions of truth and public interest. The importance of truth for journalism is the more obvious of the two because research – that is to say checking the truth of information – accounts for a much bigger proportion of a journalist’s daily work than the selection of topics for publication. The very first academic work on newspapers of 1690 discussed the two methods by which today’s journalists check the truth of their information: eyewitnessing and comparing credible sources.<sup>19</sup> Journalism has thus adopted two procedures that have their origins in the judicial system. Eyewitnessing forms the basis of reportage, the aim of which is to enable the audience to find out about what is happening on the spot. Information from credible sources is the raw material for news and reports, the communicative function of which lies in keeping the audience informed.

Various scientific approaches focus either on the obligation of journalism to tell the truth, which has an impact on journalists’ actions,<sup>20</sup> or on the functional performance of journalism in diverse modern societies, in which it acts as an intermediate entity linking together the individual subsystems – politics, the economy, the law, culture, etc. – as well as their social strata and backgrounds. This public-education role encompasses a “scrutiny function” as both a manifestation of its public remit and of the provision of the information thus brought to the attention of all groups and areas of society.<sup>21</sup> A key prerequisite for the ability of journalism to accomplish these tasks is the truth of the information provided. Another precondition is that it should not select the information it publishes according to strategic considerations but on the basis of its social relevance. Opinion journalism fails in this respect, and that distinguishes modern information journalism fundamentally from the public relations exercises of parties, associations and companies, which aim to influence the public in accordance with their own specific

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<sup>17</sup> See Michael Emery and Edwin Emery, *The Press and America. An Interpretative History of the Mass Media*. Seventh Edition, Englewood Cliffs: Prentice Hall, 1992, p. 171

<sup>18</sup> “Comment is free, but facts are sacred” is the time-honoured way in which the then editor of the *Manchester Guardian* C.P. Scott referred to this separation rule. See Charles Prestwich Scott, *Comment is free*, [1921] 2002, <https://www.theguardian.com/commentisfree/2002/nov/29/1> (9. October 2017).

<sup>19</sup> Tobias Peucer, *De Relationibus Novellis*, Leipzig 1690, new publication of the German translation in: *Die frühesten Schriften für und wider die Zeitung*: Christophorus Besold (1629), Ahasver Fritsch (1676), Christian Weise (1676), Tobias Peucer (1690), Johann Ludwig Hartmann (1679), Daniel Hartnack (1688). Edited by Jürgen Wilke, Baden-Baden, Nomos 2015, p. 113.

<sup>20</sup> See Bill Kovach and Tom Rosenstiel, *The Elements of Journalism. What Newspeople Should Know and the Public Should Expect*, New York, Crown Publishers, 2001, pp.12–13.

<sup>21</sup> See Matthias Kohring, “Vertrauen in Medien – Vertrauen in Technologie”, Arbeitsbericht, Stuttgart: Akademie für Technikfolgenabschätzung in Baden Württemberg, 2001, p. 79.

interests.<sup>22</sup> At the end of the day, the aim is to ensure confidence in the journalists' credibility and in their selection of the information published. Confidence in the functional efforts of others is a key element when describing and explaining the functioning of modern societies.<sup>23</sup> It is presently at risk due to current developments in the digital media because it can no longer be taken for granted that the historical shaping of norms of journalism will continue as before.

### 1.3. The development of norms of journalism at the international level

*Dominic Broy and Christina Etteldorf, Institute for European Media Law*

A free press is an essential part of a democratic system in almost all legal orders; thus, the need to protect it is common to the vast majority of states. The freedoms granted in the catalogues of fundamental rights in the European Convention on Human Rights (ECHR)<sup>24</sup> and the Charter of Fundamental Rights of the European Union (CFR)<sup>25</sup> and the establishment of journalistic standards that apply across national borders are a result of the considerable importance attached to a free press at the international level.<sup>26</sup> These standards are important elements of an international framework for journalism and make it possible to determine the current state of development. In this function, the resulting principles must be regarded as forming the basis for all special and statutory media privileges, since they lay down the relevant requirements, provide a framework and, finally, influence the question of interpretation at the national level.

#### 1.3.1. The fundamental-rights dimension

Article 10 of the ECHR guarantees the “freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”, although it is possible to impose legal restrictions for reasons set out in Article

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<sup>22</sup> See Meier 2007, pp. 198–202.

<sup>23</sup> See Kohring 2001, 11, 53.

<sup>24</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms of 04.11.1950, last amended by Protocol No. 14 of 13.5.2004 (entry into force 1.6.2010), [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>25</sup> Charter of Fundamental Rights of the European Union, OJ C 326 of 26.10.2012, p. 391, [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2012.326.01.0391.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2012.326.01.0391.01.ENG).

<sup>26</sup> For the sake of completeness, brief reference should be made to the global standard of protection principally afforded by the United Nations International Covenant on Civil and Political Rights (ICCPR) of 19 December 1966, available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=en), with ratification status. For a detailed discussion of the guarantee and interpretation of the right to freedom of expression under the ICCPR, see Eckart Klein, *Meinungsfreiheit und Persönlichkeitsschutz nach dem Internationalen Pakt über bürgerliche und politische Rechte*, [https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/3450/file/mrm13\\_01\\_online\\_2009\\_24\\_09.pdf](https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/3450/file/mrm13_01_online_2009_24_09.pdf).

10(2) of the ECHR. Corresponding guarantees are also provided by Article 11 of the CFR, under paragraph 1 of which “(e)veryone has the right to freedom of expression (including) freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”. Article 11(2) of the CFR also states that “freedom and pluralism of the media shall be respected”. Article 11 of the CFR is closely modelled on Article 10 of the ECHR and is identical with regard to the scope of protection afforded. Only the limiting provision contained in Article 10(2) of the ECHR has not been adopted as a specific limit to the basic right, so that in the case of Article 11 of the CFR extensive recourse can be had to the ECtHR’s case law on Article 10 of the ECHR, which the European Court of Justice (ECJ) is increasingly doing, especially as it has hardly issued any decisions of its own on the interpretation of media freedoms.<sup>27</sup> The European Court of Human Rights (ECtHR) infers from Article 10 of the ECHR a large number of press rights that can be put down to their considerable need for protection as factors and facilitators for shaping opinions within a democratic society. According to the Court’s broad understanding, any communication exercise is protected, irrespective of whether it constitutes an individual expression of opinion or the dissemination of information by the mass media, from its procurement to its actual distribution. Here, the decisive factor is not the medium via which the information is disseminated but, rather, the aim of informing the public about socially relevant issues<sup>28</sup> and therefore acting as a “public watchdog.”<sup>29</sup> Accordingly, this protection cannot only be invoked by all individuals involved in the production and dissemination of press products (such as journalists, publishers and editors, as well as those working in their distribution), but also everyone whose basic rights are typically threatened, such as non-journalist authors and non-professional journalists. The same applies to the online archives of press companies as important sources for education and historical research.<sup>30</sup>

Against the background of this level of protection, which is dynamic and open to development, the ECtHR has over time inferred from the concept of the freedom of the press a number of specific guidelines or even rights that impose limits on states in their dealings with the media or require specific action from them or a particular interpretation of the law. This applies in particular to the protection of journalistic research, to rights to information under press legislation, and to requirements in the event of a clash between press publications and third parties’ personality rights.

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<sup>27</sup> See ECJ judgment of 26 July 1997, C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, available at <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30d6f72b173302ad46eebdf8a66b706aa8a6.e34KaxiLc3qMb40Rch0SaxyNa390?text=&docid=43677&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=29691>. With regard to the general limiting provision in the Charter, which also applies to Article 11 of the CFR, attention is drawn to Article 52 of the CFR.

<sup>28</sup> ECtHR judgment of 6 January 2015, application no. 70287/11, *Weber v. Germany*, available at <http://hudoc.echr.coe.int/eng?i=001-150811>; ECtHR judgment of 17 July 2001, application no. 39288/98, *Ekin v. France*: “The Court considers that these principles also apply to the publication of books in general or written texts other than the periodical press”, available at <http://hudoc.echr.coe.int/eng?i=001-59603>.

<sup>29</sup> ECtHR judgment of 20 May 1999, application no. 21980/93, *Bladet Tromsø v. Norway*, available at <http://hudoc.echr.coe.int/eng?i=001-58369>.

<sup>30</sup> ECtHR judgment of 19 October 2017, application no. 71233/13, *Fuchsmann v. Germany*, available at [https://hudoc.echr.coe.int/eng#{"itemid":\["001-177697"\]}](https://hudoc.echr.coe.int/eng#{).

In view of the crucial importance for the principle of press freedom that attaches to the protection of journalists' sources and the information that could lead to their being identified, the statutory procedural guarantees need to be brought in line with that principle. With regard to seizures by holders of state authority, the ECtHR demands a "guarantee of review by a judge or other independent and impartial decision-making body separate from the executive and other interested parties".<sup>31</sup> There must be clear criteria for an interference with Article 10 ECHR, including the possibility of less stringent measures. Moreover, according to the Court the protection granted to information providers by Article 10 ECHR is more important than the question of the lawfulness of the source of information, so that the state is required to show the utmost restraint in this area.<sup>32</sup> These principles also apply overall to searches of editorial offices or the private homes of journalists<sup>33</sup>, as well as to any targeted monitoring of journalists by means of special investigative measures (for example in the form of telephone surveillance).<sup>34</sup> The quality of the information – and especially whether it has been obtained lawfully, relates to sensitive or confidential issues or is provisional or final in nature – is immaterial because investigative journalism is also protected.<sup>35</sup>

With its judgment in the case of *Magyar Helsinki Bizottság v. Hungary*,<sup>36</sup> the Court recognised the right to access to information under Article 10 of the ECHR, which can arise when the access is instrumental for the freedom to receive and impart information and where its denial may constitute an interference with that right. A further prerequisite for such a right to information is that the person claiming it is pursuing the aim of exercising their freedom to receive and impart information, that the information requested concerns matters of public interest, and that it must be generally ready and available<sup>37</sup> to the informant. Finally, the nature of the person making the request plays a role, as the right to access to information is, according to the Court, ultimately a manifestation of the role of "public watchdog" and thus mainly applies to the media, NGOs and academic researchers. However, the Court does not overlook the important function of the Internet with regard to access to news, so that "the function of bloggers and popular users of the social media may be also assimilated to that of 'public watchdogs'".<sup>38</sup>

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<sup>31</sup> ECtHR judgment of 14 September 2010, application no. 38224/03, *Sanoma Uitgevers B.V. v. the Netherlands*, para. 90.

<sup>32</sup> ECtHR judgment of 16 July 2013, 73469/10, *Nagla v. Latvia*, available at <http://hudoc.echr.coe.int/eng?i=001-122374>.

<sup>33</sup> See above.

<sup>34</sup> See the extensive discussion, with references to other judgments, in ECtHR judgment of 22 November 2012, application no. 39315/06, *Telegraaf Media Nederland v. the Netherlands*, available at <http://hudoc.echr.coe.int/eng?i=001-114439>.

<sup>35</sup> ECtHR judgment of 12 April 2012, application no. 30002/08, *Martin v. France*, available (in French) at <http://hudoc.echr.coe.int/fre?i=001-110306>. On investigative journalism, See also Ukrow/Iacino, *Comparative Study on Investigative Journalism*, 2016, pp. 21 ff.

<sup>36</sup> ECtHR judgment of 8 November 2016, application no. 18030/11, *Magyar Helsinki Bizottság v. Hungary*, available at <http://hudoc.echr.coe.int/eng?i=001-167828>.

<sup>37</sup> See on this also the further clarification in ECtHR judgment of 7 February 2017, application no. 63898/09, *Bubon v. Russia*, available at <http://hudoc.echr.coe.int/eng?i=001-170858>.

<sup>38</sup> ECtHR, *Magyar Helsinki Bizottság v. Hungary*, para. 168.



On the other hand, this special position as a public watchdog also results in duties and responsibilities, which clearly take precedence in the case of a clash with rights of third parties. This applies in particular when there is an infringement of the general personality right, protected by Article 8 of the ECHR, of a person affected by a report. In such cases, this right must be weighed against the right enshrined in Article 10 § 1 of the ECHR. Owing to the wide variety of possible cases, a differentiated body of ECtHR case law, from which can be inferred numerous factors that play a role when striking a balance between these conflicting rights, has been developed over the years.<sup>39</sup> These factors include the question of whether a contribution is made to a debate of general interest, the role or function of the person concerned, his/her earlier conduct and the nature of the activity reported on, as well as how the information has been obtained and whether it is true. With regard to the latter point, truthful assertions must normally not be prohibited, and the weighing of objectively false or not demonstrably true statements depends on the degree of public interest<sup>40</sup> and on the exercise of the due diligence required by press laws (compliance with professional ethics<sup>41</sup>). Lastly, a key role is also played by the content, form and impact of the publication, as well as the severity of the sanction imposed on the press. Sanctions, such as a criminal conviction or the obligation to print a rebuttal, may have a chilling effect<sup>42</sup> on the (further) exercise of press freedom, which would be incompatible with the nature of a free press and should accordingly be avoided wherever possible.

### 1.3.2. The journalistic-guidelines dimension

In addition to (and also partly on the basis of) these fundamental rights requirements, journalistic norms have also evolved at the transnational level, and compliance with them is binding in respect of journalistic activities in various ways. In simple terms, the rules on these activities can be divided into three different areas. Firstly, it is possible to distinguish between the demands made on the content of journalistic products; secondly, there are also demands regarding journalistic activities themselves – that is to say the question of whether and how journalists can carry out their task; thirdly, the “normal” aspects of each field of work must not be neglected. If the journalistic activity in question is of a professional nature, the usual national and international rules apply. At first glance, two possible bodies have the authority to regulate these three areas: firstly, the state (or

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<sup>39</sup> See on this and the following, as one example among many, ECtHR judgment of 7 February 2012, application no. 39954/08, *Axel Springer AG v. Germany*, available at <http://hudoc.echr.coe.int/eng?i=001-109034>.

<sup>40</sup> ECtHR judgment of 2 October 2008, application no. 36109/03, *Leroy v. France*, available (in French) at <http://hudoc.echr.coe.int/fre?i=001-88657>.

<sup>41</sup> ECtHR judgment of 21 January 1999, application no. 29183/95, *Fressoz and Roire v. France*, available at <http://hudoc.echr.coe.int/eng?i=001-58906>: Article 10 “protects journalists’ right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide ‘reliable and precise’ information in accordance with the ethics of journalism”.

<sup>42</sup> See, for example, ECtHR judgment of 4 April 2013, application no. 4977/05, *Reznik v. Russia*, available at <http://hudoc.echr.coe.int/eng?i=001-118040>.

association of states) introducing special guarantees and freedoms for journalists, as well as obligations; and secondly, the journalists' associations and other organisations of journalists and media companies that, via their members, have journalists enter into voluntary commitments on standards of content delivery. A closer look at the demands made on journalistic activities quickly reveals the different ethical guidelines that have been established by various bodies with the aim of ensuring a uniform standard of journalism through voluntary commitments. Examples are Germany's Press Code,<sup>43</sup> Austria's Code of Honour for the Austrian Press<sup>44</sup> and Switzerland's Journalists' Code of Practice.<sup>45</sup> These ethical guidelines have in common the fact that they regulate many different aspects of diligent and responsible journalism. The international basis for the wording of the national codes was the 1954 Declaration of the World Congress of the International Federation of Journalists,<sup>46</sup> which is regarded as setting the standards for professional journalists. At the same time, its nine short, albeit fundamental, principles are worded in very abstract terms.

To summarise, many states have their own version of a body of rules of journalistic ethics; these are continuously adapted to current situations. The view is therefore expressed that it is actually not media law that basically both lays down limits and issues instructions for meeting journalistic standards but, rather, cross-sectoral "media ethics",<sup>47</sup> which are mainly supported by non-governmental organisations (NGOs) through voluntary self-regulation. As one example of the many national subgroups, mention may be made here of the International Federation of Journalists (IFJ), which sees its mission<sup>48</sup> *inter alia* as the promotion of international action to defend press freedom and social justice through strong, free and independent trade unions, as well as in fostering human rights, democracy and pluralism. The impact of such ethical guidelines should not be underestimated. The standard thus defined determines the journalistic diligence that may sometimes constitute the benchmark for journalists to adhere to if they are to avoid liability.<sup>49</sup>

However, the reach of journalistic standards generally can be unlimited in the sense of being effective across national borders. This is clear from the nature of things: different languages, systems of training and national rules and regulations create a different framework in each case.<sup>50</sup> An international scope can at least be confirmed for matters covered by self-regulation, but this regulation cannot be extended to the media in all states because self-regulatory approaches are voluntary and, as such, non-binding.

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<sup>43</sup> See [www.presserat.de/pressekodex/pressekodex](http://www.presserat.de/pressekodex/pressekodex).

<sup>44</sup> See

[http://presserat.at/rte/upload/pdfs/grundsaeetze\\_fuer\\_die\\_publizistische\\_arbeit\\_ehrenkodex\\_fuer\\_die\\_oesterreichische\\_presse\\_idf\\_vom\\_02.12.2013.pdf](http://presserat.at/rte/upload/pdfs/grundsaeetze_fuer_die_publizistische_arbeit_ehrenkodex_fuer_die_oesterreichische_presse_idf_vom_02.12.2013.pdf).

<sup>45</sup> See <https://presserat.ch/journalistenkodex>.

<sup>46</sup> Declaration of Principles on the Conduct of Journalists. See [www.ifj.org/en/about-ifj/ifj-code-of-principles](http://www.ifj.org/en/about-ifj/ifj-code-of-principles).

<sup>47</sup> Tillmanns/Gerhardt: "Journalismus zwischen Medienethik und Medienrecht", *ZRP* 2015, p. 29.

<sup>48</sup> See [www.ifj.org/en/about-ifj/mission-statement](http://www.ifj.org/en/about-ifj/mission-statement).

<sup>49</sup> Bamberger in *BeckOK BGB*, Bamberger/Roth/Hau/Poseck, 43rd edition 15.06.2017, § 12 BGB, marginal nos. 303 ff.

<sup>50</sup> Offerhaus, *Die Professionalisierung des deutschen EU-Journalismus: Expertisierung, Inszenierung und Institutionalisierung der europäischen Dimension im deutschen Journalismus*, 2010, p. 137.

The monitoring of compliance with these standards is the responsibility of international and national media industry organisations and political (and politically relevant) entities.<sup>51</sup>

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<sup>51</sup> As examples, mention may be made of the European Centre for Press and Media Freedom (ECPMF, <https://ecpmf.eu>), the European Journalism Centre (EJC, <http://ejc.net/>), or the Council of Europe with its Committee of experts on protection of journalism and safety of journalists (MSI-JO), its Committee on Culture, Science, Education and Media, and its Commissioner for Human Rights ([www.rcmediafreedom.eu/Tools/Stakeholders/Council-of-Europe](http://www.rcmediafreedom.eu/Tools/Stakeholders/Council-of-Europe)).



## 2. Media privilege

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### 2.1. Legal foundations

There is no single, separate legal basis for “media privilege”, either in international or domestic law. Rather, certain areas of law require special rules to be established for media companies since generally applicable provisions would be incompatible with the specific operational tasks of the media as information providers. As already made clear in chapter 2 many rights enjoyed by the media are derived from the fundamental rights enshrined at the European level. Moreover, European legislatures are somewhat cautious when it comes to adopting media legislation. Very few provisions provide for explicit rules that grant the media privileges that accrue to them from their role as public watchdogs.<sup>52</sup> Rather, there is provision at the EU regulatory level for only a limited number of exceptions in individual areas, which – insofar as they have been considered absolutely necessary – generally take the form of flexibility clauses in what is otherwise a harmonised legal instrument in order not to interfere in an area that remains subject to the jurisdiction of the member states. On the other hand, the regulatory density with regard to special rules for the media sector is very high and, in particular, diverse. Above all, it extends to various areas of the law and is not limited to the use of flexibility clauses in EU law.

#### 2.1.1. European legal bases

Although provisions such as the liability privilege deriving from Articles 12 ff. of the E-Commerce Directive<sup>53</sup> do not target the legally protected position of the media in their role as a means of, and factor for, shaping opinions but rather lay down special requirements for a specific method of disseminating information, there are special rules governing press activities that serve to protect this position, particularly in respect of data

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<sup>52</sup> See chapter 2.

<sup>53</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce, E-commerce Directive), <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32000L0031>.

protection and copyright law. These rules arise in particular from the traditional factors that (must) lead to the establishment of media privilege. The first of these factors is the fact that the media are dependent in the fulfilment of their public service remit on the legality of specific action – in this case, the processing of personal data or the use of third-party content for reporting purposes. The second is the fact that for other companies there must be prohibitions or at least restrictions owing to the interests of third parties – in this case the right of the individuals affected to determine the use of the data processed (“informational self-determination”) or authors’ right to self-determination and their right to exploit the data concerned.

Media privilege under data protection legislation is currently still enshrined at the European level in Directive 95/46/EC<sup>54</sup> (“the Data Protection Directive” – DPD), which will be replaced from May 2018 by Regulation 2016/679<sup>55</sup> (“the General Data Protection Regulation” – GDPR). The media – whether broadcasters, the press, the film industry or telemedia<sup>56</sup> services – are dependent on the processing of personal data in the context of journalistic work in order to fulfil their public service remit to provide information, so that traditional data protection rules cannot automatically be applied to them or media employees. This applies both to research work and to the publication of personal content, in contrast to other activities involving the storage and processing of personal data, such as for subscription management purposes. In comparison to the legal situation that has pertained up until now, the GDPR contains new provisions that maintain the standard of the previous rules contained in Article 9 of the DPD but go beyond it with regard to the degree of protection afforded the media. The individual changes can be seen in the following synopsis:

Article 9 DPD	Article 85 GDPR
	<p><b>1.</b> Member states shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.</p>

<sup>54</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31995L0046>.

<sup>55</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0679>.

<sup>56</sup> According to Art 2 (1) of Germany’s Interstate Treaty on Broadcasting and Telemedia, “Telemedia” means “all electronic information and communications services, as far as they are not telecommunications services pursuant to Article 3 no. 24 of the Telecommunications Act, which consist entirely in the conveyance of signals across telecommunications networks or telecommunications-supported services pursuant to Article 3 no. 25 of the Telecommunications Act, or broadcasting pursuant to sentences (1) and (2).” See *Staatsvertrag für Rundfunk und Telemedien (Rundfunkstaatsvertrag – RStV)* (Interstate Broadcasting Treaty), in the version of the 18th Amendment to the Interstate Broadcasting Treaties, available at: [http://www.kjm-online.de/fileadmin/Download\\_KJM/Recht/18\\_RAendStV\\_01-01-2016.pdf](http://www.kjm-online.de/fileadmin/Download_KJM/Recht/18_RAendStV_01-01-2016.pdf).

<p><b>Member states shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.</b></p>	<ol style="list-style-type: none"> <li><b>2. For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member states shall provide for exemptions or derogations from Chapter II (principles), Chapter III (rights of the data subject), Chapter IV (controller and processor), Chapter V (transfer of personal data to third countries or international organisations), Chapter VI (independent supervisory authorities), Chapter VII (cooperation and consistency) and Chapter IX (specific data processing situations) if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information.</b></li> <li><b>3. Each member state shall notify to the Commission the provisions of the law that it has enacted pursuant to paragraph 2 and, without delay, any subsequent amendment law or amendment affecting them.</b></li> </ol>
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Correspondingly, Article 17(3)(a) of the GDPR also contains a media-relevant exception to the basic right of erasure (“the right to be forgotten”): it lays down that the right of erasure pursuant to Article 17(1) of the GDPR does not apply when the processing of data is necessary for the exercising of the right of freedom of expression and information. Put simply, the regulation already lays down the need to strike a balance between (i) the data subject’s interest in the protection of his/her data and (ii) the interest, based on freedom of the media and freedom of information, in the dissemination of certain data as a component of the relevant information.

Initially, the GDPR does not distinguish either between various types of data (personal, usage and content data)<sup>57</sup> or between different media, so that the same requirements will have to be laid down in future for all regulatory areas within the sphere of application of the GDPR. At first glance, Article 85 of the GDPR makes no concrete stipulations regarding these future provisions on the processing of data by the media. It basically only requires that the legitimate interests of individuals affected by the processing of their data (especially their general personality rights) must be reconciled with the right to freedom of expression and freedom of information (paragraph 1), for which special provisions outside the GDPR are needed when this is necessary to accomplish the purpose of the Regulation (paragraph 2). The requirement to draw up such provisions is directed at the EU member states, which must stipulate the relevant rules in domestic law.

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<sup>57</sup> Bräutigam/Rücker, *E-Commerce*, paras. 60 ff., with further references.

It should always be up to the member states to decide when that necessity actually exists and what criteria are to be applied.<sup>58</sup> However, it also follows from Article 85 of the GDPR that these provisions of the Regulation can and must only apply where data are processed for journalistic purposes or the purposes of academic, artistic or literary expression and that states can and must only establish their own rules in that connection. Recital 121 of the draft of the GDPR of 25 January 2012<sup>59</sup> defined when the processing of data is for journalistic purposes,<sup>60</sup> but that definition was deleted from the final version. Recital 153 merely states that the concept should be given a broad interpretation. Consequently, given the deliberately broadly worded opening clause, the scope of the “media privilege” that arises from Article 85 GDPR is still uncertain and debatable.<sup>61</sup>

It should, however, be pointed out that Article 85 of the GDPR replaces Article 9 of the DPD, which had been in force since 1995, although no significant changes have been made either to the wording or to the recitals to the GDPR.<sup>62</sup> The only difference is that for the first time with respect to the media reference is made in the GDPR to the right to freedom of information, and therefore also the right to freedom of expression. Accordingly, the ECJ’s case law on Article 9 of the DPD continues to be relevant for the interpretation of the GDPR, as nothing has been said to the contrary,<sup>63</sup> and the mention of freedom of information at least means that no restrictions on the scope of protection to *the detriment* of the media can be discerned.

As regards the interpretation of the principles laid down in Article 9 DPD, the ECJ has already made it clear that, in view of the importance of freedom of expression in any democratic society, the concepts relating to this freedom, such as that of journalism, must be given a broad interpretation.<sup>64</sup> Moreover, according to the ECJ, the exemptions provided for in Article 9 of the DPD “apply not only to media undertakings but also to every person engaged in journalism”.<sup>65</sup> Article 85 of the GDPR can therefore also only be understood to mean that a regulatory instruction issued to the national legislature to enact provisions does not refer only to the “traditional press” and “traditional press work”. This accordingly means there is a need for the comprehensive regulation of all activities aimed at the disclosure to the public of information, opinions and ideas – as already

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<sup>58</sup> See also Feldmann/Piltz, *Anwaltsblatt* 2014, 679, 682.

<sup>59</sup> Com(2012)11 final, available at [http://ec.europa.eu/justice/data-protection/document/review2012/com\\_2012\\_11\\_en.pdf](http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf).

<sup>60</sup> “Therefore, Member States should classify activities as “journalistic” for the purpose of the exemptions and derogations to be laid down under this Regulation if the object of these activities is the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them. They should not be limited to media undertakings and may be undertaken for profit-making or for non-profit making purposes.”

<sup>61</sup> Härting, CR 2013, 715, 720; Grages in: Kai-Uwe Plath (ed.) *Kommentar zum BDSG und zur DS-GVO sowie den Datenschutzbestimmungen von TMG und TKG*, 2nd edition 2016, Article 85 GDPR, paragraph 2.

<sup>62</sup> See, for example, Härting in *Betriebsberater* 2012, 459, 464.

<sup>63</sup> The same conclusion was reached by Albrecht and Janson, CR 2016 Heft 8, 500–509, 508.

<sup>64</sup> ECJ, judgment of 16 December 2008 – C-73/07, *Tietosuoja- ja valtuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, para. 56. See on this also the parallel judgment of the ECtHR of 27 June 2017, application no. 931/13, <http://hudoc.echr.coe.int/eng?i=001-175121>.

<sup>65</sup> ECJ, judgment of 16. December 2008 – C-73/07, para. 58.



provided for in Recital 121 of the draft Regulation (see above).<sup>66</sup> The processing of data should always be considered “solely for journalistic purposes” within the meaning of this rule when it is only aimed at disseminating information, opinions or ideas to the public, irrespective of the medium used to transmit them.<sup>67</sup> This is consistent with the level of protection inferred by the ECJ and the ECtHR from fundamental rights and described in chapter 2.

However, in its *Google Spain* decision the ECJ<sup>68</sup> assumed there to be a clear dividing line between the traditional media (together with their Internet sites), which it regarded as subject to media privilege, and the operators of search engines, which it did not recognise as performing any journalistic activity of their own that is worthy of protection.<sup>69</sup> In this decision, the ECJ held that Article 9 of the DPD does not apply to operators of search engines, as no processing of data solely for journalistic purposes takes place. This suggests that the ECJ at least wants to make only journalistic/editorial telemedia services subject to other regulations – that is to say its intention is to leave it to the member states to formulate the actual substance of provisions to meet its requirements based on its interpretation of the provisions of Article 85 of the GDPR.

It should be asked at this point whether this narrower interpretation of media privilege is compatible with the essential content of the basic rights enshrined in Article 10 of the ECHR and Article 11 of the CFR, which have already been discussed in detail in chapter 2 above. After all, the aim of media privilege under data protection legislation is to reconcile that content with the provisions of that legislation, which are, incidentally, more stringent. As shown in chapter 2, the protection afforded the media must not be measured in absolute terms or in accordance with a fixed limit but requires a weighing of interests based on considerations of necessity. It is basically also compatible with these principles to limit privileges under data protection legislation to the core area of journalistic work – namely the provision of information through research and publication – as it is there in particular that work with personal data is necessarily linked to the nature of the media.

In addition to the question of the scope for member states to establish media privilege in their domestic legal systems, it will be necessary to ask in future whether domestic courts – especially constitutional and administrative courts – have jurisdiction to monitor provisions enacted in accordance with Article 85 of the GDPR, with the ECJ then responsible for ensuring compliance with the GDPR in the field of non-media-relevant (editorial) work.<sup>70</sup> However, the *Google Spain* decision shows that the ECJ is to continue to be responsible for determining whether the DPD is applicable and, therefore, whether the processing of data is for journalistic purposes. This must apply all the more to the GDPR, given its character as a Regulation with direct application in the member

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<sup>66</sup> The same conclusion was reached by Grages in Plath (ed.), *BDSG/DSGVO*, on Article 85 GDPR, para. 5.

<sup>67</sup> ECJ, judgment of 16 December 2008 – C-73/07, para.61.

<sup>68</sup> ECJ, judgment of 13 May 014, C-131/12, *Google Spain and Google*.

<sup>69</sup> See also Schiedermaier, *JM* 2015, 334, 336.

<sup>70</sup> Feldmann/Piltz, *AnwBl* 2014, 679, 682, also argue in this direction, as does Härting, CR 2013, 715, 720, who also proceeds on the assumption that the GDPR does not contain any criteria of its own for balancing individual interests.

states. Moreover, the provision in Article 85(3) of the GDPR suggests that the European legislators do not want to leave this classification entirely up to the member states. This means in effect that individual questions on the applicability of national transposition rules continue to be a matter for the domestic courts to decide – that is to say, they must rule on whether the relevant criteria exist in a given case. However, fundamental questions – such as whether the domestic provisions actually comply with the requirements of Article 85 of the GDPR – will still have to be answered by the ECJ through the preliminary ruling procedure.

On the other hand, the special media-specific provisions of European copyright law give the member states much less room for manoeuvre. Article 5 of the Copyright Directive (EUCD)<sup>71</sup> provides for a large number of possible exceptions to authors' rights harmonised by the Directive. Article 5(1) of the EUCD mentions compulsory exceptions that the member states must provide for when transposing the Directive. However, these exceptions have almost no relevance for journalistic activities as they only deal with temporary acts of reproduction that enable works to be transmitted or lawfully used. Article 5(3) of the EUCD, on the other hand, provides for media-relevant exceptions that are optional for member states. This rule lays down that member states can provide for limitations to copyright in the case of current events (paragraph 3(c)) or administrative, parliamentary or judicial proceedings (paragraph 3(e)). Exceptions not specially directed at the media, such as the right to quote (paragraph 3(d)), are crucially important for activities involving the provision of information.

The list of exceptions in Article 5 of the EUCD is exhaustive, so the member states may not provide for any additional exceptions or limitations in their domestic legal systems. Furthermore, the interpretation of the individual provisions continues to be a matter for the ECJ, which thus has to rule on questions of importance and scope.<sup>72</sup> On the one hand, these provisions accordingly document the European legislators' aim of finding a balance between the conflicting interests of authors and reporters in order to foster the free democratic decision-making process. On the other hand, however, their wording as non-binding flexibility clauses shows that in this case the EU recognises a different level of protection in terms of copyright and press law and accepts this because of the lack of full harmonisation.

## 2.1.2. Domestic legal bases

At the domestic level too, the legal position of media professionals is not regulated across all areas in a single media law, which is a reflection of the cross-sectoral character of

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<sup>71</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Copyright Directive), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001L0029>.

<sup>72</sup> See for example ECJ judgment of 11 September 2014, C 117/13, ECLI:EU:C:2014:2196, Technische Universität Darmstadt v. Eugen Ulmer KG, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=157511&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=376910>.

media and press law. At the highest level, alongside the basic rights discussed in chapter 2, is in many cases domestic constitutional law and its guarantees of freedom of expression, the press and the media.<sup>73</sup> Owing to national peculiarities and divergent case law, this protection differs from one state to another and varies in intensity.<sup>74</sup> Media privileges are either derived directly from constitutionally enshrined rights or serve as limits to other rights or have led indirectly to the establishment of rules of ordinary law, which in turn extend to various areas of law with which the media naturally come into contact in connection with their journalistic activities. In the area of public law, rights include access to public events and court proceedings or the right to information from state authorities, while in civil law the main focus is on aspects of journalistic diligence and, connected with it, legal liability. At the level of domestic criminal law and procedural criminal law, a crucial role is played by the protection of journalists' sources, which is enhanced by their right to refuse to testify and special rules on carrying out searches and seizing editorial material as evidence in investigation proceedings. The establishment of media privileges in statute law also forms part of the national transposition of requirements under European legislation. For example, the regulatory instruction issued by the European legislators to the member states on the basis of Article 9 of the DPD has up to now been transposed in different ways into domestic law, with provisions having to extend to various areas of the media, such as the press, broadcasting and telemedia services.<sup>75</sup> Divergent national solutions are also to be expected in the future in the sphere of the application of the GDPR, since the broad terms of Article 85, especially paragraph 2, definitely provide a certain amount of scope and, consequently, permit many possible mechanisms.<sup>76</sup> However, a common feature of the different ways of transposing it into national law is that they basically acknowledge and foster the need for data to be processed for editorial purposes.

## 2.2. Political significance

The overall aim of the aforementioned media privileges is to protect and facilitate the provision of information, which is an overriding requirement for the democratic opinion-forming process in a society. However, the actual aims pursued differ. For example, the right to information and the right of access guarantee, among other things, the transparency and verifiability of government action, and the process begins with the

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<sup>73</sup> On the question of whether and where the position of journalists is protected by the constitution, see also Ukrow/lacino, *Comparative Study on Investigative Journalism*, 2016, p. 53 ff.

<sup>74</sup> A detailed description of national regulatory regimes, taking Germany, Spain, France, the United Kingdom, Hungary, Italy, Poland, Turkey and Russia as examples, can be found in chapter 6.

<sup>75</sup> In German law, the requirement of Article 9 of the DPD to draft exemptions or derogations leads, for example, to various rules in many different laws, which also has to do with the legislative powers of the individual *Länder*. See on this the detailed discussion by Stephan Ory, "Recherche, redaktionelle Daten und Datenschutz", in: *AfP* 2012, 109 ff. and the Statement by the EMR (in German) on consulting the *Länder* on specifying the terms of Article 85 GDPR, [https://www.privatfunk.de/anl/17\\_10159\\_01.pdf](https://www.privatfunk.de/anl/17_10159_01.pdf).

<sup>76</sup> See Plath (ed.), *BDSG/DSGVO*, on Article 85 GDPR, para. 2, also on whether the current provisions of Article 9 DPD can be maintained in the member states with the application of the GDPR.

procurement of information. At the same time, special copyright and data protection rules facilitate the work of journalists at an entirely different but no less important level. As is also, and in particular, shown by the legislative endeavours regarding the protection of sources, a key role is played by protection from state interference and by media independence – two elements for which states act as guarantors, as also pointed out by the ECtHR.<sup>77</sup> Not only “press freedom” as a right but also “freedom of the press” as an element of independence is an indicator, keystone and feature of democracy, as it is only through protection from political instrumentalisation that the independent forming of public opinion can be guaranteed. This has also been reflected not least in the debates surrounding social bots and fake news in online services, especially in the field of election reporting,<sup>78</sup> in the recent past.

The above observations are supported by the fact that the level of protection is lower in states where the media are granted fewer privileges or, indeed, the state exerts influence or carries out reprisals. Moreover, free journalism as an element of democracy faces greater dangers (or at least this is the perception of members of the press). This is shown for example by the annual ranking published by the NGO Reporters Without Borders (RSF), which assesses the situation of freedom of the press and freedom of information in 180 countries.<sup>79</sup> This ranking is based on a questionnaire on all aspects of independent journalism and on figures ascertained by RSF on abuses and violence against journalists and on prison sentences imposed.

### 2.3. Economic importance

The economic importance of guaranteeing media privileges is huge as they directly influence the work of the media and, in turn, their very existence. This must at least apply to the part of the media industry that is not only limited to entertainment and is the focus of this publication. Without being able to exploit their special rights – for example, the free use without penalty of personal data for research and publication purposes or the possibility of quoting content without previously acquiring usage rights, or even the possibility of not disclosing sources of information – the media can supply recipients with less information or none at all, which would then result in a considerable loss of audience, make them unattractive as potential advertising platforms and lead to problems in financing company operations. Such problems may in turn influence the job market for journalists and thus have an overall impact on employment disparities.

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<sup>77</sup> ECtHR judgment of 10 May 2012, application no. 25329/03, op. cit.

<sup>78</sup> See the detailed discussion on election reporting and current developments in states in “Media coverage of elections – the legal framework in Europe”, European Audiovisual Observatory, IRIS Special 2017-1, <http://www.obs.coe.int/documents/205595/8714633/IRIS+Special+2017-1+Media+coverage+of+elections+-+the+legal+framework+in+Europe.pdf/b9df6209-651b-456a-bdf5-1c911d6768cc>.

<sup>79</sup> World Press Freedom Index and further information available at <https://rsf.org/en/ranking>.

## 2.4. The tension involving the rights of third parties

Freedom of the press and its exercise by the media in the form of reporting inevitably clashes with a number of third-party rights, so an appropriate balance must be struck between the different rights involved.

This mainly concerns the right to respect for private and family life, pursuant to Article 8 of the ECHR and Article 7 of the CFR, which is also granted as a fundamental right in national constitutions. Over the years, the ECtHR and the ECJ have developed a number of criteria in their case law for striking a balance between freedom of the press/freedom of information and strictly personal rights, which impose more or less strict limits on the media.<sup>80</sup> Generally speaking, the following factors are important: the contribution to a debate of general interest, the position and prominence of the person reported on, the subject matter of the report, the previous conduct of the person concerned and the content, form and impact of the publication.<sup>81</sup> While the public interest in information and, associated with it, the media interest in reporting facts (such as the announcement that a prince has fathered a child and the possible impact of this on the budget and the dynastic succession)<sup>82</sup> should be paramount, priority should be given to the protection of privacy over the publication of photographs showing a princess who holds no public office engaging in purely private leisure activities<sup>83</sup>.

Although the right to the protection of personal data is enshrined as a separate basic right in Article 8 of the CFR, for example, it generally only comes into conflict with the freedom of the press as part of the right to private and family life; thus, the above observations apply here *mutatis mutandis*.<sup>84</sup>

In copyright law, on the other hand, there is generally little scope for such a balancing of interests, as the level of and limits to the protection afforded are laid down in very precise terms. Nonetheless, there are individual situations that enable press freedom considerations to be weighed against copyright interests outside established

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<sup>80</sup> See chapter 2.

<sup>81</sup> ECtHR judgment of 19 February 2015, application no. 53495/09, para. 49.

<sup>82</sup> ECtHR judgment of 10 November 2015, application no. 40454/07, *Couderc and Hachette Filipacchi Associés v. France*, <http://hudoc.echr.coe.int/eng?i=001-158861>.

<sup>83</sup> ECtHR judgement of 24 June 2004, application no 59320/00, *von Hannover v Germany*, <http://hudoc.echr.coe.int/eng?i=001-139253>.

<sup>84</sup> This could, however, change in the future as a result of the ECtHR's judgment of 27 June 2017 (application no. 931/13) in *Satakunnan Markkinapörssi Oy und Satamedia Oy v. Finland* (<http://hudoc.echr.coe.int/eng?i=001-175121>). In that case, which involved data-driven journalism and the protection of personal data in a conflict between the fundamental right to private and family life and the right to freedom of expression, the Court ruled in favour of data protection. It held that the ban imposed by the Finnish data protection authority on two media companies prohibiting them from publishing personal data in the manner and to the extent that they had published them in the past constituted legitimate interference with the right to freedom of expression and information. See on the conclusions to be drawn from this Dirk Voorhoof, "Case Law, Strasbourg: Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, No journalism exception for massive exposure of personal taxation data", <https://inforrm.org/2017/07/06/case-law-strasbourg-satakunnan-markkinaporssi-oy-and-satamedia-oy-v-finland-no-journalism-exception-for-massive-exposure-of-personal-taxation-data-dirk-voorhoof/>.

legal provisions. This has also been confirmed in principle by the ECtHR,<sup>85</sup> which has established that copyright does not enjoy unlimited protection under the ECHR and must be applied restrictively in conjunction with freedom of speech and freedom of the press. Interference with the freedom of the press is accordingly only possible when this is prescribed by law, when it serves the purpose of the legitimate protection of intellectual property or the protection of a work, and when this is necessary in a democratic society, pursuant to Article 10(2) ECHR. The ECJ will now also be asked to consider the relationship between freedom of the press and copyright on the basis of an order for reference from Germany<sup>86</sup> in the case of the so-called “Afghanistan Papers”. Essentially<sup>87</sup> this case concerns the publication of reports that were kept confidential by the state but were published by a German newspaper. However, in taking this action the Federal Government does not rely, for example, to secrecy rules but to the copyright in respect of the reports, which were not published only in the form of extracts but also in their entirety.

The above observations show that media privileges – even if they are subject to explicit legal conditions – are always subject to the need to strike a balance with the rights of third parties, with the focus on the importance of providing information to the public. This applies in particular to all publications aimed at providing society with information, irrespective of whether they are based on freedom of expression or freedom of information.

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<sup>85</sup> ECtHR judgment of 10 January 2013, application no. 36769/08, *Ashby Donald and Others v France*.

<sup>86</sup> See Decision of the Federal Constitutional Court of 1 June 2017, Case I ZR 139/15, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2017&Sort=3&nr=78497&pos=0&anz=87>.

<sup>87</sup> This case is about the publication by the *Westdeutsche Allgemeine Zeitung* newspaper of military situation reports dating from 2012 on the foreign deployments of the Bundeswehr. These reports are produced weekly by the German government, collected and sent under the title “Information for Parliament” (Unterrichtung des Parlaments) with the classification “Restricted – For internal use only” to selected members of the Bundestag, departments of the Federal Ministry of Defence and other federal ministries, as well as agencies subordinate to the Federal Ministry of Defence.

## 3. Comparison between developments in selected European countries

### 3.1. Scope of comparison

The following national reports focus on the treatment of media privilege under public law, with particular reference to data protection law. Criminal and civil law aspects of media privilege are also considered from both substantive and, in particular, procedural law perspectives. Particular prominence is given to issues linked to the safeguarding of journalistic work through the protection of sources, including whistle-blowers, as well as seizure and search exemptions.

### 3.2. DE – Germany

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#### 3.2.1. Introduction – with particular reference to constitutional law aspects

In Germany, free media are obliged to use personal data in order to fulfil their public remit to contribute to the formation of individual and public opinion. If they were as closely bound by basic data protection laws as other companies, they would no longer be able to do their job properly.<sup>88</sup> This is especially true when it comes to their use of investigative journalism.<sup>89</sup> Transparency is as fundamentally important in the data protection field as it is as a general principle of (constitutional) law<sup>90</sup>. However, investigative journalism, which can uncover political, economic and social irregularities and promote democratic discourse on the elimination of such irregularities, often relies on a certain lack of transparency in relation to the investigation of individuals. Unrestricted disclosure obligations required by data protection law would trigger a

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<sup>88</sup> See, for example, *Schulz/Heilmann*, in: Löffler (ed.), *Presserecht*, 6th ed. 2015, BT Mediendatenschutz, para. 1

<sup>89</sup> See *Ukrow/Iacino*, *Comparative Study on Investigative Journalism*, 2016

<sup>90</sup> See, for example, *Bröhmer*, *Transparenz als Verfassungsprinzip*, 2004

chilling effect<sup>91</sup> in terms of people's willingness to investigate or take part in investigations – a chilling effect that would undermine the protection of pluralism.

This constitutional principle must also be taken into consideration when interpreting media privilege regulations. Media privilege must not only be applied and interpreted in accordance with European law (i.e. both the ECHR and EU data protection law<sup>92</sup>) but also in the light of the tension between media freedoms and personality rights, which itself has a constitutional basis.<sup>93</sup>

As far as the personality rights of data subjects are concerned, the right to informational self-determination, which has been developed by the Bundesverfassungsgericht (Federal Constitutional Court) is key. In the context of modern data processing, it protects the “power of the individual to control the disclosure and use of his personal data”.<sup>94</sup> This right not only provides protection from state interference in data autonomy, but also implies a duty<sup>95</sup> to protect the right to self-determination from private threats, including from the media.<sup>96</sup>

Media privilege is “justified and limited” under constitutional law provisions on the protection of the mass media system.<sup>97</sup> In Germany, on account of the distribution of legislative powers between the federal government and the *Länder* on the one hand, and the regulatory needs of different types of media on the other, the legal principles on which media privilege is based are not contained in a single instrument, but spread across a variety of legislative texts. Furthermore, as part of a so-called “two-pillar model” these regulatory standards are supplemented by provisions that shape constitutional and administrative law through media self-regulation, ensuring the effective protection of data subjects while, at the same time, protecting the media from state interference.<sup>98</sup>

Moreover, in the age of digitisation, media privilege in Germany faces new challenges with regard to its personal and material scope of application. Although recent legislative changes have taken this into account, they have failed to produce a mutually satisfactory regulatory framework for the media's public remit.

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<sup>91</sup> See *Staben*, *Der Abschreckungseffekt auf die Grundrechtsausübung*, 2016 and, for example, *Ress/Ukrow*, in: *Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union*, 2017, Art. 63 TFEU, para. 168

<sup>92</sup> Regarding this method of interpretation, see, for example, *Gänswein*, *Der Grundsatz unionsrechtskonformer Auslegung nationalen Rechts*, 2009

<sup>93</sup> Regarding the requirement to interpret law in accordance with the constitution, see, for example, BVerfGE 54, 277 <299 f.>; 71, 81 <105>; 86, 288 <320>; 90, 263 <275>

<sup>94</sup> BVerfGE 65, 1 <43> (established case law)

<sup>95</sup> See *Di Fabio*, in: *Maunz/Dürig, Grundgesetz. Kommentar*, 2017, Art. 2 para. 189 f.

<sup>96</sup> Conversely, media privilege is supported by the fundamental right to the confidentiality and integrity of information technology systems, which can be interpreted as the digital equivalent of general personality rights and is known as the fundamental right to digital privacy; BVerfGE 120, 274 <306> (established case law)

<sup>97</sup> *Schulz/Heilmann*, in: *Löffler* (ed.), *Presserecht*, 6th ed. 2015, BT Mediendatenschutz, para. 5

<sup>98</sup> See *Tillmanns*, *Journalistische Recherche zwischen Betriebsgeheimnis und Medienprivileg*, 2017, [http://www.europaeisches-medienrecht.eu/tl\\_files/EMR-SB/content/PDF/Veranstaltung/Veranstaltung%20Datenschutz/Tillmanns%20res.pdf](http://www.europaeisches-medienrecht.eu/tl_files/EMR-SB/content/PDF/Veranstaltung/Veranstaltung%20Datenschutz/Tillmanns%20res.pdf).



### 3.2.2. Dimensions of media privilege

The following texts contain regulatory provisions on media privilege:

- concerning the press: Article 41(1) of the Bundesdatenschutzgesetz (Federal Data Protection Act – BDSG)<sup>99</sup>, and the press laws of the Länder, which are largely identical<sup>100</sup>;
- concerning journalistic and editorial data processing by private broadcasters: Article 47 of the Rundfunkstaatsvertrag (Inter-State Agreement on Broadcasting and Telemedia – RStV) of the Länder<sup>101</sup>;
- concerning journalistic and editorial data processing by private telemedia providers: Article 57 of the RStV.

In addition, the *Land* media laws contain provisions on data processing in relation to the offer of telemedia and on the privileged status of private broadcasters under data protection law.

Data processing by public service broadcasters is regulated partly in *Land* data protection laws and partly in the laws and inter-state agreements establishing the relevant broadcasting authorities.

The entry into force of the BDSG in 2001 brought with it, as part of media self-regulation overseen by the Presserat (Press Council), the gradual introduction of voluntary self-monitoring in relation to editorial data protection. The Pressekodex (Press Code),<sup>102</sup> which already contained regulations on personality rights (mainly in sections 3 and 8), was expanded. Section 3, for example, now regulates the documentation of corrections, as well as the corrections themselves. Although informants are specifically protected, a person referred to in a press report can request information about their personal data stored by the publisher concerned, as specified in section 8.10. Section 8 states that the press shall “respect the privacy and informational self-determination of the individual and guarantee editorial data protection.” Section 5.3 emphasises that data transfer for journalistic and editorial purposes is permissible. This substantive rule is protected procedurally by a special complaints procedure operated by the Press Council, whose data protection committee handles complaints about editors.<sup>103</sup>

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<sup>99</sup> In the version promulgated on 14 January 2003 (Federal Law Gazette I p. 66), last amended by the Act of 30 June 2017 (Federal Law Gazette I p. 2097), [https://www.gesetze-im-internet.de/bdsg\\_1990/](https://www.gesetze-im-internet.de/bdsg_1990/).

<sup>100</sup> Available at [http://www.presserecht.de/index.php?option=com\\_content&view=category&id=14&Itemid=27](http://www.presserecht.de/index.php?option=com_content&view=category&id=14&Itemid=27)

<sup>101</sup> Inter-State Agreement on Broadcasting and Telemedia (RStV) of 31 August 1991, amended by the Twentieth Inter-State Agreement amending Inter-State Broadcasting Agreements, available at [https://www.die-medienanstalten.de/fileadmin/user\\_upload/Rechtsgrundlagen/Rundfunkstaatsvertrag\\_RStV.pdf](https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Rundfunkstaatsvertrag_RStV.pdf)

<sup>102</sup> Available at <http://www.presserat.de/pressekodex/pressekodex/>

<sup>103</sup> See *Presserat*, Redaktionsdatenschutz im Pressekodex, [http://www.presserat.de/fileadmin/user\\_upload/Downloads\\_Dateien/Datenschutz\\_Pressekodex2017.pdf](http://www.presserat.de/fileadmin/user_upload/Downloads_Dateien/Datenschutz_Pressekodex2017.pdf).

### 3.2.2.1. Personal scope of application of media privilege

The exemption from large sections of data protection law granted under Article 41(1) of the BDSG, *Land* laws and Article 57(1) of the RStV only applies to “enterprises or auxiliary enterprises in the press”. However, this concept of “enterprise” is broadly interpreted under constitutional and European law: individual journalists, for example, can benefit from media privilege even if they are not part of an editorial team,<sup>104</sup> and it covers all “bodies” involved in the production of (print) media.<sup>105</sup> If such “bodies” are clearly involved in the production of printed works within a company that is not inherently part of the press sector, they can also fall under the scope of Article 41(1) of BDSG and the aforementioned parallel regulations.<sup>106</sup>

Under a 2015 decision of the Bundesverwaltungsgericht (Federal Administrative Court), the media privilege granted under national law only applies to “independent, self-contained organisational units that are separate from other (company) bodies and involved in editorial activities”. Germany’s highest administrative court ruled that, in order for media privilege to be applicable, a “publications department as an enterprise within an enterprise” was “to some extent” necessary.<sup>107</sup>

“Auxiliary enterprises” carry out journalistic and editorial work on behalf of the press. Their work for the press should not be of an occasional nature and must itself serve journalistic and editorial purposes, as is the case where press correspondents or news agencies are concerned, for example.<sup>108</sup>

As regards the media privilege of (private) broadcasters, Article 47(2) RStV refers to the concept of broadcaster, as defined earlier in the agreement: under Article 2(2)(14) of the RStV, a broadcaster “offers a broadcast programme and is responsible for its content”, while a broadcast programme is defined in Article 2(2)(1) of the RStV as “a sequence of content shown in accordance with a transmission schedule”. Under Article 2(1) of the RStV, broadcasting is “a linear information and communication service”; “it is the organisation and distribution of moving images or sound intended for simultaneous reception by the general public according to a transmission schedule using electromagnetic oscillations. The definition includes services that are transmitted in encrypted form or available in return for specific remuneration.”

However, the Bayerische Verwaltungsgerichtshof (Bavarian Administrative Court), in a 2015 decision<sup>109</sup> that was confirmed by the Bundesverwaltungsgericht,<sup>110</sup> ruled that not “every political party, every commercial enterprise or every private individual can be

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<sup>104</sup> See Federal Administrative Court, decision of 29 October 2015, 1 B 32.15, ECLI:DE:BVerwG:2015:291015B1B32.15.0.

<sup>105</sup> See *Dix*, in: Simitis (ed.), Bundesdatenschutzgesetz. Kommentar, 8th ed. 2014 Art. 41 BDSG para. 11; *Schulz/Heilmann*, in: Löffler, Presserecht, 6th ed. 2015, BT Mediendatenschutz para. 28.

<sup>106</sup> See *Dix*, in Simitis (ed.), Bundesdatenschutzgesetz. Kommentar, 8th ed. 2014 Art. 41 BDSG para. 11 with further references; *Schulz/Heilmann*, in: Löffler, Presserecht, 6th ed. 2015, BT Mediendatenschutz para. 28

<sup>107</sup> See BVerwG, decision of 29 October 2015, 1 B 32.15, ECLI:DE:BVerwG:2015:291015B1B32.15.0.

<sup>108</sup> See *Bergmann/Möhrle/Herb*, Datenschutzrecht, 2017, Art. 41 BDSG para. 17.

<sup>109</sup> See BayVG, decision of 25 March 2015 – 5 B 14.2164, <http://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2015-N-45031?hl=true&AspxAutoDetectCookieSupport=1>

<sup>110</sup> See BVerwG, decision of 29 October 2015, 1 B 32.15, ECLI:DE:BVerwG:2015:291015B1B32.15.0.

considered a press enterprise simply because it provides the public with information about its activities via a website”. If the publication of opinions is completely subordinate to the website owner’s primary purpose and the reporting of its own activities on its website is “not the purpose, but only the means of achieving the purpose” of a politically active entity, then media privilege does not apply.

An objective way of determining whether media privilege applies under the court’s definition (i.e. one that is not solely based on the primary purpose of the entity concerned) could be achieved, for example, by stating that political parties, associations or companies that produce publications for their members, customers or other purposes can only claim media privilege if the department responsible for the publications is organisationally independent.<sup>111</sup>

### 3.2.2.2. Material scope of the application of media privilege

Under media privilege, only a limited number of data protection rules apply when personal data is collected, processed and used by enterprises and auxiliary enterprises in the press exclusively for their own journalistic and editorial (or literary) purposes.

Media workers should be protected and privileged if their work is geared towards the specific functions of journalism and editorial activity. This is dependent on the fulfilment of a minimum number of criteria that are particularly relevant for the continuous formation of public opinion. In particular, the work must have strong elements of “periodicity” (in the sense of regular publication), publicity (in the sense of wide reach), “factuality” (as opposed to fictional content), and a journalistic structure. In addition to these journalistic criteria, there must be editorial or similar quality control structures that can counterbalance the loss or limitation of legal protection of personal data.<sup>112</sup>

Regarding the material scope of application, the Bundesgerichtshof (Federal Supreme Court – BGH) ruled as follows in 2011 in its so-called “Sedlmayr” decision: “Data is processed for journalistic-editorial purposes if the objective is to publish something for an unspecified group of people.” Therefore, the data protection privilege does not apply, for example, to data stored in relation to the collection of the broadcasting fee for the financing of public service broadcasting, the acquisition of subscribers or (commercial) transfer to third parties. On the other hand, the BGH stated that “the collection, editing, publication, documentation and archiving of personal data for journalistic purposes is fully protected”.<sup>113</sup>

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<sup>111</sup> See, for example, *Buchner*, in: Wolff/Brink, Datenschutzrecht in Bund und Ländern, 2013, Art. 41 BDSG, para. 20; *Führ*, in: Auernhammer, BDSG, 4th ed. 2014, Art. 41 para. 12; *Gola/Schomerus*, BDSG, 12th ed. 2015, Art. 41 para. 7 f.

<sup>112</sup> See *Schulz/Heilmann*, in: Löffler (ed.), Presserecht, 6th ed. 2015, BT Mediendatenschutz, para. 34, where the required criteria of topicality and universality do not take sufficient account of the importance of historical journalistic research or special-interest publications.

<sup>113</sup> BGH, judgment of 1 February 2011, VI ZR 345/09, <https://openjur.de/u/163666.html>.

### 3.2.2.3. The protective effects of media privilege

Under Article 41(1) BDSG and the corresponding *Land* press laws, privileged enterprises are exempt from key parts of the BDSG. In particular, the fundamental ban on processing any data without consent enshrined in Article 4(1) of the BDSG and the comprehensive rights of data subjects to information and correction (Articles 33-35 of the BDSG) do not apply (apart from in Hamburg) to data that is processed for journalistic and editorial purposes. On the other hand, privileged enterprises are obliged to guarantee confidentiality (Article 5 of the BDSG) and to take technical and organisational data protection measures (Article 9 of the BDSG).<sup>114</sup>

Article 47(2)(1) of the RStV provides a special right to information for people whose data is processed by private broadcasters for journalistic and editorial purposes. However, under the second sentence of the provision, access to such information can – contrary to the general data protection provisions of Articles 34(1) and (7) and 33(2) of the BDSG, under which the obligation to disclose information does not apply in a very limited number of cases – be refused after a weighing-up of interests that takes particular account of the broadcaster’s “journalistic remit” and the protection of sources. In addition, the data subject can, under Article 47(2)(3) of the RStV, demand that inaccurate data be corrected or that data be added within reason.

Media privilege is not a general privilege covering all opinions expressed on the Internet. The relevant rules therefore do not apply to all expressions of opinion, forums or review sites on the Internet.<sup>115</sup> In particular, the Bundesverwaltungsgericht (Federal Administrative Court, BVerwG) concluded that the fact that journalistic activities were not carried out exclusively by media enterprises did not mean, conversely, that any public dissemination of information, opinions or ideas took place “for journalistic purposes alone” in the sense of media privilege.<sup>116</sup>

When weighing personality rights against the media’s reporting rights, the Constitutional Court has suggested that individuals cannot decide independently how they should be portrayed in public reporting, but that the act of publication should, in principle, be determined by the media in accordance with its own logic.<sup>117</sup>

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<sup>114</sup> See, for example, *Schulz/Heilmann*, in: Löffler (ed.), *Presserecht*, 6th ed. 2015, BT Mediendatenschutz, para. 41 f.

<sup>115</sup> See *Dix*, in: Simitis (ed.), *Bundesdatenschutzgesetz*, 8th ed. 2014, Art. 41 BDSG para. 11

<sup>116</sup> See BVerwG, decision of 29 October 2015, 1 B 32.15, ECLI:DE:BVerwG:2015:291015B1B32.15.0

<sup>117</sup> BVerfGE 101, 361 <380>. A very clear definition of the rights concerned – including the actual weighing-up process in relation to the reporting of criminal offences – is contained in the Federal Supreme Court’s 2011 decision on the media privilege of an online archive in relation to a report from which the data subject could be identified; BGH, judgment of 1 February 2011, VI ZR 345/09, <https://openjur.de/u/163666.html>

### 3.2.3. Privileged treatment of journalists in civil proceedings

Journalistic work is protected by the right to refuse to testify in civil proceedings: under Article 383(1)(5) of the Zivilprozessordnung (Code of Civil Procedure – ZPO)<sup>118</sup>, persons who collaborate or have collaborated as professionals in preparing, making or distributing printed periodicals or radio or television broadcasts are entitled to refuse to testify concerning the person of the author or contributor of articles or broadcasts and documents, or the source thereof, as well as the information they have been given with regard to these persons' activities, provided that this concerns articles or broadcasts, documents and information published in the editorial part of the periodical or broadcast. Article 383(3) ZPO states that even if they do not refuse to testify, the examination of such journalists must not be aimed at facts regarding which it is apparent that no testimony can be made without breaching the confidentiality obligation.

### 3.2.4. Criminal law view of the role of the media

#### 3.2.4.1. Safeguarding of legitimate interests by media professionals and criminal defamation offences

Under Article 193 of the Strafgesetzbuch (Criminal Code – StGB),<sup>119</sup> critical opinions about scientific, artistic or commercial achievements, and utterances made in order to exercise or protect rights or to safeguard legitimate interests only entail liability to the extent that the existence of an insult results from the form of the utterance or the circumstances under which it was made.

Safeguarded interests are justified in the sense of Article 193 of the StGB if they are considered worthy of protection by the legal system and, for this reason, must also be respected by the victim. This is the case where the interest in safeguarding the public remit of the media is concerned. The decisive point is whether the utterance made in order to safeguard legitimate interests was proportionate (i.e. appropriate, necessary and reasonable). If, after weighing up all the circumstances in an individual case, the interest in the defamatory utterance – in particular the freedom of expression, freedom of the press and freedom of broadcasting enshrined in Article 5(1) of the Basic Law (GG) – outweighs the interest in the protection of honour, the utterance is considered reasonable. In this connection, the so-called right to retaliate should particularly be considered, since it means that strong words can be reasonable if the perpetrator himself was previously subjected to defamatory comments or excessive criticism.

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<sup>118</sup> In the version promulgated on 5 December 2005 (Federal Law Gazette I p. 3202, ber. 2006 p. 431, 2007 p. 1781), last amended by the Act of 18 July 2017 (Federal Law Gazette I p. 2745), <https://www.gesetze-im-internet.de/zpo>.

<sup>119</sup> In the version promulgated on 13 November 1998 (Federal Law Gazette I p. 3322), last amended by the Act of 30 September 2017 (Federal Law Gazette I p. 3532), <https://www.gesetze-im-internet.de/stgb>.

### 3.2.4.2. Privileged treatment of journalists in criminal proceedings

Journalistic work is protected by a ban on seizure and searches as well as the right to refuse to testify in criminal proceedings.

Under Article 53(1)(1)(5) of the Strafprozessordnung (Code of Criminal Procedure – StPO)<sup>120</sup>, individuals who are or have been professionally involved in the preparation, production or dissemination of printed matter, broadcasts, film documentaries or the information and communication services involved in instruction or in the formation of opinion, can refuse to testify. Sentence 2 of this provision states that such individuals may refuse to testify in respect of the author or contributor of comments and documents, or concerning any other informant or the information communicated to them in their professional capacity, including its content, as well as concerning the content of materials which they have produced themselves and matters which have received their professional attention. However, under sentence 3, this applies only in so far as it concerns contributions, documentation, information and material for the editorial element of their activity, or information and communication services which have been editorially reviewed.

Article 97(5)(1) of the StPO stipulates that, as far as the persons who are entitled not to testify under Article 53(1)(1)(5) StPO are concerned, the seizure of documents, sound, image and data media, illustrations and other images in their custody or in that of the editorial office, publishing house, printing works or broadcasting company, is inadmissible. Under sentences 2 and 3 of this provision, in conjunction with Article 97(2)(3) StPO, the restrictions on seizure do not apply if certain facts substantiate the suspicion that the person entitled to refuse to testify participated in the criminal offence, or in the handling of stolen data, preferential treatment, obstruction of justice or handling of stolen goods, or where the objects concerned have been obtained by means of a criminal offence or have been used or are intended for use in perpetrating a criminal offence, or where they emanate from a criminal offence; however, in these cases too, seizure is only admissible where it is not disproportionate to the importance of the case, having regard to the basic rights arising out of Article 5(1)(2) of the Basic Law, and where the investigation of the factual circumstances or the establishment of the whereabouts of the perpetrator would otherwise offer no prospect of success or be much more difficult.

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<sup>120</sup> In the version promulgated on 7 April 1987 (Federal Law Gazette I p. 1074, ber. p. 1319), last amended by the Act of 27 August 2017 (Federal Law Gazette I p. 3295), <https://www.gesetze-im-internet.de/stpo/>.

## 3.2.5. Recent developments and trends

### 3.2.5.1. Political and social debate

In 2015 the publication of confidential information from the Bundesamt für Verfassungsschutz (Federal Office for the Protection of the Constitution)<sup>121</sup> by bloggers from Netzpolitik.org caused a huge public scandal. The federal authority accused the bloggers of treason, and the chief federal prosecutor at the time launched an investigation, which he later claimed the Ministry of Justice had tried to influence. He had commissioned an external report in order to determine whether the leaked information could be considered to constitute state secrets. He claimed that the ministry had demanded that the report be blocked, whereupon the Federal Minister of Justice forced him into retirement. The case triggered a public debate about what, if anything should remain secret in a free country governed by the rule of law, for how long it should be kept secret and who should decide. The Deutsche Journalisten-Verband (German Journalists' Union – DJV) demanded a review of treason laws and that journalists be immune from criminal prosecution. The case was temporarily stalled when the federal prosecutor's investigation was shut down.<sup>122</sup>

The Internet in particular, with its search capabilities and communication reach, raises questions about the relationship between media freedom and personality rights. Search engine providers play a crucial role in Internet-based communication. They process data available on the Internet in such a way that anyone can find information on any subject in a matter of seconds. This is a blessing in that it gives every individual access to information. At the same time, however, it is also a curse for those whose personal data can be found on websites against their will. Many experts believe that this clash of interests calls for legislative regulation.<sup>123</sup>

At least some *Land* data protection officers are convinced that the data protection officers of the media authorities (and churches) should, in future, be more closely involved in the exchange of information with the European data protection authorities and that German data protection officers should agree among themselves how to approach the European Data Protection Board.<sup>124</sup>

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<sup>121</sup> The Bundesamt für Verfassungsschutz (Federal Office for the Protection of the Constitution, BfV) is a German intelligence service operating on the national territory, whose main task is to monitor activities contrary to the constitution of the Federal Republic of Germany.

<sup>122</sup> See, for example, <http://www.spiegel.de/politik/deutschland/netzpolitik-affeare-gut-dass-der-spuk-nun-zu-ende-ist-reaktionen-a-1047495.html>

<sup>123</sup> See, for example, *Schumacher/Spindler*, Suchmaschinen und das datenschutzrechtliche Medienprivileg, DuD 39 (2015), 606 (608 ff.)

<sup>124</sup> See, for example, <https://mmm.verdi.de/medienpolitik/datenschutzaufsicht-medienprivileg-faellt-45261>

### 3.2.5.2. Legislation

At their annual conference held in Saarbrücken from 18 to 20 October 2017, the heads of government of the Bundesländer adopted a draft amendment to the RStV with a view to aligning it with the EU General Data Protection Regulation (GDPR). The new agreement should be signed by mid-December 2017 and will then need to be ratified by the *Land* parliaments. This process will need to be completed by 25 May 2018 in order to ensure there are no gaps in legislation relating to media privilege.<sup>125</sup>

The proposed rules on media privilege provide for the creation of a uniform media privilege for public service and private broadcasters at RStV level in Article 9c of the RStV, replacing the existing media privilege provisions in the broadcasting and media laws of the Bundesländer. Furthermore, media privilege in respect of press telemedia, which is already enshrined in the RStV, would be extended to include broadcasters' telemedia (Article 57(1) of the RStV). This proposal is supported by the fact that, within a member state, it may be "necessary" in the sense of the GDPR for similar institutions to be covered by the same data protection regulations governing journalistic activities.

Since the GDPR does not contain any rules on data secrecy, it is proposed that broadcasters as well as the press, as telemedia providers, should also be expressly made subject to data secrecy obligations under the RStV. The rights of data subjects inherent in media privilege should also be standardised.

Since the regulatory scope of the RStV does not include all journalistic activities (e.g. certain on-demand services, the telemedia services of professional bloggers or the online press), it will still be necessary, under Land law, to create data collection privileges for data processed for journalistic purposes.

Data protection monitoring of the Land regional authorities that make up the ARD and of private broadcasters will also continue to be regulated through Land law, in accordance with Article 9c(4)(1) of the RStV, and is therefore not covered by the amendments to the inter-state agreements.<sup>126</sup>

### 3.2.5.3. Case law

A constitutional complaint is currently pending before the Bundesverfassungsgericht (Federal Constitutional Court) against civil court decisions rejecting the complainant's claim against a news magazine for an injunction concerning the reporting of crimes committed by the complainant several decades ago.<sup>127</sup> This case is expected to produce a landmark decision on the scope of the right to be forgotten in the Federal Republic of

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<sup>125</sup> See, for example, *Nünning*, Die Datenschutzgrundverordnung der EU und ihre Problematik für den Journalismus, MedienKorrespondenz, 28 April 2017, <http://www.medienkorrespondenz.de/leitartikel/artikel/sicherung-der-pressefreiheit.html>

<sup>126</sup> See *Bayerische Staatskanzlei*, Anpassung an die Datenschutzgrundverordnung: Zusammenfassende Übersicht der Änderungen in den rundfunkrechtlichen Staatsverträgen, June 2017, <http://www.bayern.de/wp-content/uploads/2017/06/zusammenfassende-uebersicht.pdf>

<sup>127</sup> BVerfG 1 BvR 16/13



Germany. It concerns, in particular, the extent to which and the means by which Internet portals such as the *Spiegel* online archive are able to influence the results found and displayed by search engines, and how and at what cost access to personal data can be subsequently impeded or, where online access is concerned, blocked.<sup>128</sup>

### 3.3. ES – Spain

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#### 3.3.1. Introduction

On 27 April 2016, the European Parliament and the Council adopted Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data.<sup>129</sup> The Regulation legally supports journalistic activity in an attempt to reconcile the right to the protection of personal data and the rights to freedom of expression and information.

According to this legal foundation, the exercise of journalism cannot be carried out by professionals without measuring the consequences that the dissemination to the public of current affairs news and reports entails, and without considering the procedures and tools followed to obtain its primary material. The question goes beyond so-called “investigative journalism” and deals with both specific journalism practices and journalistic work in general.

Article 20 of the 1978 Spanish Constitution addresses the rights to freedom of expression and information, stating the limits to their protection and stipulating a balance with other fundamental rights such as reputation, privacy, self-image and the special protection of minors.<sup>130</sup> Moreover, the right to informational self-determination – *habeas data*, or the fundamental right to dispose of one’s own personal data (as defined by the Spanish Constitutional Court in 2000)<sup>131</sup> – has to be placed in this balancing of rights, not only regarding the exercise of freedom of expression and information by journalists, but also regarding the right of access to information held by public bodies, as stated in Article 105b of the Constitution.

The achievement of a break-even point between the protection of personal data and freedom of expression and information goes beyond the final journalistic texts

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<sup>128</sup> See [http://www.dgri.eu/index.php/fuseaction/download/lrn\\_file/dgri\\_stellungnahme\\_apollonia-fall-exec-.pdf](http://www.dgri.eu/index.php/fuseaction/download/lrn_file/dgri_stellungnahme_apollonia-fall-exec-.pdf).

<sup>129</sup> Regulation 2016/679, 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, Official Journal of the European Union, L119/1, 4 May 2016, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=EN>.

<sup>130</sup> Spanish Constitution, [www.congreso.es/constitucion/ficheros/c78/cons\\_ingl.pdf](http://www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf).

<sup>131</sup> Constitutional Court, STC 292/2000, 30 November 2000, [www.boe.es/buscar/doc.php?id=BOE-T-2001-332](http://www.boe.es/buscar/doc.php?id=BOE-T-2001-332).

published by media, and covers working routines in newsrooms, especially in respect of professional journalists' lists of contacts and other professional sources of information – that is to say, names, telephone numbers and other identifying data. The implementation of “media privilege” measures by member states under EU Regulation 2016/679 must comprise, at the very least, both issues, along with the maintenance of personal data in the audiovisual field, newspaper archives and the right to be forgotten in the digital world.<sup>132</sup>

### 3.3.2. Legal foundations of “media privilege” in Spain: freedoms of expression and information, privacy, and informational self-determination

#### 3.3.2.1. Constitutional Law

Article 20 of the 1978 Spanish Constitution addresses the right to freedom of expression and information under its section on fundamental rights and public freedoms; and as mentioned above, it establishes limits, in line with the need to strike a balance with other fundamental and personal rights:

*Article 20*

*“1. The following rights are recognised and protected:*

*a) the right to freely express and spread thoughts, ideas and opinions through words, in writing or by any other means of reproduction. ...*

*d) the right to freely communicate or receive truthful information by any means of dissemination whatsoever. The law shall regulate the right to the clause of conscience and professional secrecy in the exercise of these freedoms. ...*

*4. These freedoms are limited by respect for the rights recognised in this Title, by the legal provisions implementing it, and especially by the right to honour, to privacy, to one's own image and to the protection of youth and childhood. ...”.*

Article 20 is the only part of the Constitution that specifically addresses the activity of mass media and public communication; it must be understood in the light of the 1948 Universal Declaration on Human Rights, as Spain is a member of the United Nations. Thus, the Spanish Constitution recognises and protects the right to freedom of information; this extends to its reception, dissemination and investigation. This last action refers to investigative journalistic activities, and includes the special relationship established between journalists and their sources. Furthermore, the so-called “reporter's privilege” – professional secrecy – has been constitutionally recognised as a requisite for the exercise of the right of freedom of information (under Article 20) and the right and duty of

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<sup>132</sup> Regulation 2016/679, Recitals 4, 65 and 153; and article 85.

journalists to preserve the anonymity of their sources, as also recognised by the Constitutional Court in 1993.<sup>133</sup>

Article 18 of the Spanish Constitution addresses the protection of the rights to honour (reputation), privacy and self-image, without including them in the above-mentioned rights to freedom of expression and freedom of information; that is to say, they are accorded their own legal autonomy and existence.

*“Article 18*

- 1. The right to honour, to personal and family privacy and to one’s own image is guaranteed.*
- 2. The home is inviolable. No entry or search may be made without the consent of the householder or a legal warrant, except in cases of flagrante delicto.*
- 3. Secrecy of communications is guaranteed, particularly regarding postal, telegraphic and telephonic communications, except in the event of a court order.*
- 4. The law shall restrict the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights.”*

This constitutional perspective of the right to privacy was understood for many years as the legal foundation for the protection of personal data and their treatment and maintenance in databases, whether offline or online. However, the Spanish Constitutional Court, in its 292/2000 ruling, defined the scope of the *habeas data* right and left it aside of Article 18 of the Constitution, without according it an explicit place in the text of the main law of the State, but instead giving it the same standard of protection as given to any other fundamental right: “[T]he object ... of the fundamental right to data protection is not limited to private data, but to any kind of personal data, whether or not intimate, whose knowledge or employment by third parties could harm the holder of those rights ..., because their object does not only concern individual privacy, as granted by Article 18 of the Spanish Constitution, but any personal data.” Therefore, the right to informational self-determination can go beyond intimacy and privacy, without any concerns as to any direct consequences that it might have for human beings.

Finally, section b) of Article 105 of the Spanish Constitution recognises “the access of citizens to administrative files and records, except to the extent that they may concern the security and defense of the State, the investigation of crimes and the privacy of persons”.

Despite of its lack of categorisation as a fundamental right, access to information kept in files or records held by public bodies concerns any citizen affected by or involved in any administrative procedure; moreover, it is a general right possessed by any citizen with an interest in the dissemination of public information, in accordance with openness and transparency under the rule of law. Privacy and data protection constitute limitations on this right, even when it is exercised by private individuals or by professional journalists going about their reporting work.

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<sup>133</sup> Constitutional Court, STC 15/1993, 18 January, 1993, <http://hj.tribunalconstitucional.es/ca/Resolucion/Show/2144>.

### 3.3.2.2. Civil Law

According to this constitutional structure, the current civil legislation has developed the protection of the fundamental right to personal and family privacy from the two above-mentioned perspectives: within the scope of its search for a balance of rights with news reporting by journalists and mass media; and within the scope of its autonomous consideration, linked to the right to the protection of personal data.

Act 1/1982<sup>134</sup> on the civil protection of the rights to honour, personal and family privacy, and self-image was the first national rule to outline the object of the right to privacy. Its text focuses on the use of technological devices to capture, reproduce and communicate aspects of people's privacy, as well as the relationship between the public revelation of privacy and its consequences over personal reputation. However, it only comprises a reference to personal data (Article 7.4 of the Act) where it concerns the categorisation of "the disclosure of private data" obtained "through the professional or official activity of the revealer" as illegal.

Act 15/1999<sup>135</sup> on the Protection of Personal Data is the current law regulating *habeas data* and implementing the European Union regulation on the issue, as stated by Directive 95/46/EC<sup>136</sup> on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

There is neither any specific reference to "media privilege" in this Act nor any reference to freedom of expression and information from a journalistic point of view; Article 1 only briefly mentions the link between data protection and the right to privacy, in so far as the public disclosure of information could affect it.

The Act excludes from the scope of its application (article 2) those files and records for purely personal or private use whose holder is a natural person; it also excludes those files related to information classified as secret by the Government and those files related to the investigation of terrorism and cases of delinquency. As a consequence, any other file or record established for professional purposes falls within the scope of the law and is subject to secondary legislation. And as Article 25 stipulates, even privately-owned files may be created with a professional purpose, containing personal data inevitably necessary to achieve the aim of the person, company or entity who created them. However, the law obliges the owner of such a database to inform the Spanish Agency of Data Protection of its creation and existence (Article 26).

This legislative absence of "media privilege" leaves journalists under the obligation to fully comply with the 1999 Data Protection Act. Accordingly, some of the most common journalistic routines, such as the simple inclusion of sources' names or

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<sup>134</sup> Act 1/1982, of 5 May, on civil protection of the rights to honor, personal and family privacy, and self-image, Boletín Oficial del Estado, 14 May 1982, <https://www.boe.es/buscar/doc.php?id=BOE-A-1982-11196>.

<sup>135</sup> Act 15/1999, of 13 December, on the Protection of Personal Data, <https://www.boe.es/buscar/doc.php?id=BOE-A-1999-23750>.

<sup>136</sup> Directive 95/46/EC of the European Parliament and the Council, 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data; <http://eur-lex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32016R0679&from=EN>.

telephone numbers in journalists' contact books, collide with some aspects of the law in force:

1. The relevance, quality, adequacy and purpose of the collected data (Article 4).
2. The right to information of the data subject (Article 5) – that is to say, the right to be informed in an instant, precise and unequivocal manner of the purpose, responsibility and exercise of personal rights related to the data collection in question, as well as their possible communication to third parties – and the legal need for unequivocal acceptance by the subject (Article 6).
3. An unequivocal and written expression of prior acceptance/consent is needed when data refer to "ideology, trade union affiliation, religion and beliefs", either for its collection or its communication to third parties (Article 7) And although such data, within the routine practice of journalism, tend to be part of draft notes for the writing of a story, eventually some of them could crop up in the journalist's writing. Furthermore, the exchange of such data between journalists legally requires the unequivocal and written consent of the subject (Article 11).
4. The data subject must be informed of his/her rights, at the moment of the collection: the right of consultation at the General Registry for the Protection of Data (article 14); the right of access to the data in question (Article 15); the right to demand the rectification and erasure of the data (Article 16); and the right of compensation for any failure to fulfill the law (Article 19).

Act 19/2013<sup>137</sup> on Transparency, Access to Information and Good Governance has implemented Article 105 of the Spanish Constitution regarding citizens' right to access information held by public bodies, thus fulfilling the State's duty to abide by the principles of publicity and transparency. Furthermore, Act 39/2015<sup>138</sup> on the Common Administrative Procedure of Public Administrations completes the 2013 regulation establishing the procedure for communication between State, regional and local administrations and their citizens.

Under the 2013 Act, the right of "public access to information, files and records" (Article 13) held by public bodies and entities (such as political parties, trade unions, and private organisations receiving concrete State financial aid) is not only a legal entitlement of those affected by administrative decisions, but a recognition of every citizen's right to know. Those files and records constitute a journalistic source of information with infinite value.

This right of access finds its limits, *inter alia*, in the protection of data belonging to individuals and institutions whenever such disclosure entails a lack of protection of a fundamental right, in the supposed interests of journalism, which finally does not meet the prerequisite of it being in the public interest for such data to be published. Under Article 14, "the application of limits" to this right of access, "shall be justified and

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<sup>137</sup> Act 19/2013, of 9 December, on Transparency, Access to Information and Good Governance, <https://www.boe.es/buscar/act.php?id=BOE-A-2013-12887>.

<sup>138</sup> Act 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations, <https://www.boe.es/buscar/act.php?id=BOE-A-2015-10565>.

proportionate to the object and purpose of its protection, and shall reflect the circumstances of the particular case, and especially the concurrence of a superior public or private interest which justifies this access”.

Furthermore, the underlying idea of proportionality in this balance of rights also attaches to the rights of privacy and data protection, in so far as Article 15 of the Act merely allows, as a general rule, the disclosure of identifying data pertaining to their subjects.

### 3.3.2.3. Criminal Law

Articles 197 to 204 of the Criminal Code of 1995,<sup>139</sup> which has undergone several modifications to date address crimes against the rights of privacy, self-image and the inviolability of the home. However, like the civil law, it refers neither to “media privilege” nor to the balance between the rights to privacy and self-image and the rights to freedom of expression and information.

The civil perspective for the protection of privacy and personal data is here completed by the criminal approach, which formally places data protection as an aspect of the right to privacy, as opposed to the distinction made by the Constitutional Court and followed by the civil laws.

The starting point appears in Article 197.2, which punishes the behavior of those who “without authorisation, seized, used or modified, to the detriment of third parties, personal or family data, or any other data, kept in computer files, electronic or telematic devices, or in any other type of public or private file or record”.

Judges tend to apply the maximum penalties whenever: such data are disseminated, disclosed or ceded to third parties without the consent of the data subject (Article 197.3); those who commit the crime are legally in charge of the files (Article 197.4); those data fall under the category of specially protected or sensitive data (Article 197.5); those data refer to a minor or a disabled person (Article 197.5); or the criminal actions in question are carried out with the aim of making a profit (Article 197.6).

### 3.3.3. Recent and emergent issues

Despite the absence of a specific national regulation on exceptions and exemptions in respect of the right to data protection with a view to ensuring the practices and routines of professional journalists, some related facts can be pointed out in respect the future regulation of media privilege at the national level.

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<sup>139</sup> 1995 Criminal Code,  
<https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>.

### 3.3.3.1. Jurisprudence

There is no constitutional jurisprudence that specifically addresses the collision between the right to freedom of information and the right to data protection from the media privilege perspective. However, some principles (set out by the Constitutional Court) can be taken into account – specifically, those in respect of the dissemination of news and journalists’ list of contacts and sources.

Regarding the employer’s control over the institutional/business emails of his employees, the judgment of the Constitutional Court of 7 October 2013<sup>140</sup> considers that given the conflict between a worker’s right to the confidentiality of his communications and the power of the management over the employee, the latter is “essential for the smooth running of the productive organisation”; that is to say, the employer is able to adopt any measures he deems as appropriate “to verify the compliance the worker’s with his duties”, with due regard to collective agreements and private contracts.

Regarding the use of personal data in current affairs news and reports, the judgment of the Constitutional Court of 25 February 2002,<sup>141</sup> protected the public dissemination of the criminal record of a protagonist in a story, even if cancelled, whenever such a breach of the right to the protection of personal data is justified by the need to provide readers with a context to the story in question.

### 3.3.3.2. The “right to be forgotten” in the digital age

In 2016, the Spanish Data Protection Agency defined the right to digital oblivion as “the manifestation of the traditional rights of cancellation and opposition applied to Internet search engines”<sup>142</sup> whenever those data are no longer considered accurate or relevant and, therefore, do not correspond to the current situation of the data subject.

As a result of the Spanish Agency for Data Protection’s case against Google Spain-Google Inc.<sup>143</sup> the European Court of Justice stated that “the organisation and aggregation of information published on the Internet that are effected by search engines with the aim of facilitating their users’ access to that information may, when users carry out their search on the basis of an individual’s name, result in them obtaining through the list of results a structured overview of the information relating to that individual that can be found on the Internet enabling them to establish a more or less detailed profile of the data subject”.

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<sup>140</sup> Constitutional Court, STC 170/2013, 7 October 2013, <http://hj.tribunalconstitucional.es/es/Resolucion/Show/23616>.

<sup>141</sup> Constitutional Court, STC 46/2002, 25 February 2002, <http://hj.tribunalconstitucional.es/it/Resolucion/Show/4582>.

<sup>142</sup> Spanish Agency for Data Protection, Informative document on the right to be forgotten in the digital age, [http://www.agpd.es/portalwebAGPD/CanalDelCiudadano/derecho\\_olvido/index-ides-idphp.php](http://www.agpd.es/portalwebAGPD/CanalDelCiudadano/derecho_olvido/index-ides-idphp.php).

<sup>143</sup> EUROPEAN COURT OF JUSTICE, Spanish Agency for Data Protection versus Google Spain-Google Inc., case C 131/12, 13 May 2014, <http://curia.europa.eu/juris/document/document.jsf?docid=152065&doclang=en>.

In respect of the procedures of the exercise of this right, in a national ruling of 2015, the Supreme Court declared that webpage editors are also responsible for the processing of such personal data, in so as far as they can get the search engines on the Internet “to exclude specific information totally or partially from the automatic indexes of their engines, by using exclusion protocols such as robot.txt, or codes such as noindex or noarchive”.<sup>144</sup>

Furthermore, in Judgment 2843/2017 of 13 July the same court went on the responsibility of online newspapers in respect of the indexing of news made by search engines (like Google) and the possibility for any Internet user of retrieving the personal data (name and surname, as an example) contained in those news. The court ruled in favor of newspapers, endorsing the legal responsibility to the search engines in respect of the deletion of those personal data; excepting those cases in which, after a certain amount of time has elapsed since the publishing of journalistic information, the newspaper still makes those data available to those search engines.<sup>145</sup>

### 3.3.3.3. Draft for a new Data Protection Act

Following the forthcoming implementation of Regulation 2016/679 of the European Parliament and of the Council, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, the Spanish Ministry of Justice opened a consultation process in respect of the draft for a new Act on Data Protection, in July 2017.<sup>146</sup> Despite the fact that the recitals of the upcoming Act refer to the need for the implementation of the new European Union Regulation 2016/679, the text makes no reference at all to “media privilege”, and ignores the EU call to reconcile the protection of personal data with the rights to freedom of expression and information. The draft was finally approved by the Government on 10 November 2017, and introduced into Parliament for discussion and final approval.

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<sup>144</sup> SPANISH SUPREME COURT, STS 4132/2015, 15 October 2015, available in Spanish at: [www.poderjudicial.es/stfls/.../TS%20Civil%20Pleno%2015-10-2015.pdf](http://www.poderjudicial.es/stfls/.../TS%20Civil%20Pleno%2015-10-2015.pdf).

<sup>145</sup> SPANISH SUPREME COURT, STS 2843/2017, 13 July 2017, available in Spanish at: [www.poderjudicial.es/search/documento/TS/8106476/proteccion%20de%20datos%20de%20caracter%20personal/20170724](http://www.poderjudicial.es/search/documento/TS/8106476/proteccion%20de%20datos%20de%20caracter%20personal/20170724).

<sup>146</sup> MINISTRY OF JUSTICE, Draft for a new Act on Personal Data Protection, 17 July 2017, available in Spanish at: <http://transparencia.gob.es/servicios-buscador/contenido/normaelaboracion.htm?id=NormaEV08L0-20172401&fcAct=2017-07-17T14:01:17.880Z&lang=ca>.



## 3.4. FR – France

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### 3.4.1. Introduction

#### 3.4.1.1. Summary

French law does not contain legal provisions in the form of a general “media privilege” that would give the media and journalists certain exemptions from strict data protection standards in their investigation and publication activities.

However, certain legal provisions or procedural rules aimed at protecting the press and more generally freedom of expression have the effect of limiting, and sometimes excluding liability in respect of published content or of investigation practices.

In addition, certain legal provisions protect the work of the media and journalists by limiting the power of the State in the context of criminal investigations or within the context of the provisions concerning the fight against terrorism and threats against national interests (homeland security, intelligence)<sup>147</sup>. These do not constitute limitations on liability *per se*, but rather establish certain privileges for the press and journalists.

Lastly, the activities of the media benefit quite naturally from the principle of freedom of expression, which may result in practice in the limitation or exclusion of liability in certain cases.

As a result of the foregoing, as far as French law is concerned, it would seem more correct to substitute the plural for the expression “media privilege”.

In what follows we will not address the limited liability of intermediaries over digital networks. However, it is important to note that online media may benefit from the regime of limited liability applicable to hosting services (under the e-commerce directive and the corresponding French implementation provisions) as regards content contributed by third parties, to the extent that they comply with the conditions set by the EU and national case law. However, this limitation of liability does not extend to editorial content.

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<sup>147</sup> A major reform of French Law occurred with the introduction, in 2015, of the Code of Homeland Security (*code de la sécurité intérieure*), and for the first time, of a comprehensive legal framework governing, *inter alia*, the use by intelligence services of “intelligence techniques” (*techniques de renseignement*).

### 3.4.1.2. Legal definitions

The Law of 29 July 1881 on the Freedom of the Press<sup>148</sup> (*loi du 29 juillet 1881 sur la liberté de la presse*), which contains many specific provisions on liability, refers variously to “journals”, “writing” or “publications”. These concepts (and especially “publications”) are broad, and cover all media, including (subject sometimes to specific rules and adaptations) the audiovisual and online media.

Some important provisions only concern journalists.<sup>149</sup> It is therefore necessary to define the term “journalist”. French law contains several broad definitions of “journalist”, which are used for the purpose of specific labour law, or administrative or intellectual property regulations.

Article L.7111-3 of the Labour Code (*code du travail*)<sup>150</sup> defines a “professional journalist” as “any person who [has] as [his or her] principal, regular and paid activity, the exercise of [his or her] profession within one or several press businesses, daily and periodical publications or a press agency, and who derives the main part of [his or her] income from it.”<sup>151</sup>

There is substantial case law on the definition of professional journalists under the provisions of the Labour Code, mainly regarding (i) the possibility to claim the protective status applicable to journalists under employment law and (ii) the professional identity card. The professional identity card, which is regulated by the Labour Code,<sup>152</sup> is not a condition for access to the profession, and is only associated with the ascertainment, by a commission, of the conditions of exercise of the profession of journalist.

Another definition of the journalist, more relevant to our purpose, is found in Article 2 of the Law of 29 July 1881 on the Freedom of the Press, relating to the protection of journalists’ sources. For this purpose, journalists are defined as: “any person who, while exercising his/her profession in one or more press undertakings, online communication to the public, audiovisual communication or one or more news agencies, regularly and for remuneration practices the collection of information and its dissemination to the public.”<sup>153</sup>

This last definition would be the one adopted in the context of the construction of the specific provisions described hereunder.

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<sup>148</sup> <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722>.

<sup>149</sup> Of course, the employers of these journalists may, in certain cases, benefit indirectly from these provisions.

<sup>150</sup> <https://www.legifrance.gouv.fr>.

<sup>151</sup> Our translation. Under Article L.7111-5 of the same Code, journalists exercising their profession within one or several business of electronic communication to the public are professional journalists.

<sup>152</sup> Art. L. 7111-6 and R. 7111-1 to R. 7111-35. The card does not mean the holder thereof is a journalist, and a journalist may be considered so under the applicable regulations even if he does not have this card.

<sup>153</sup> Our translation.

## 3.4.2. Dimensions of media privilege

### 3.4.2.1. Public law (including homeland security legislation)

As regards personal data and the investigative and publication activities of journalists, Article 67 of the French Data Protection Act, the Law of 6 January 1978 (as modified by a Law of 7 2016)<sup>154</sup> (*loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés*) sets a specific regime for the treatment of personal data for the purposes of journalism. Under this provision, the processing of personal data carried out for the exercise of the profession of journalist is exempted from several obligations under the Act, provided that it complies with the deontological rules of the profession. More specifically, such processing is exempted from the obligations relating to the rights of information and access, from the prohibition relating to sensitive data, from the obligation to limit the duration of conservation of the personal data, and from the obligation to declare such processing (subject to the existence of a data protection officer nominated by the person in charge of the treatment).

In the context of anti-terrorism laws (extended, as the case may be to other crimes or risks covered by the Code of Homeland Security), Article L. 821-7 of the Code of Homeland Security<sup>155</sup> (*code de la sécurité intérieure*) provides that a journalist cannot be subject to a request for the implementation of a surveillance measure “by reason of the exercise of its profession”, without further specification. Beyond this restriction, requests relating to journalists are subject to a formal opinion by the National Commission of Control of Intelligence Techniques (in plenary session).<sup>156</sup> Transcripts of the intelligence gathered must be transferred to the Commission, which checks the necessity and proportionality of the measures.<sup>157</sup> The emergency procedure provided for in the code, which allows the bypassing of certain procedural safeguards in the event of emergency, is not applicable to surveillance techniques applied to a journalist.<sup>158</sup>

In addition, the most recently adopted Law against terrorism (*loi n° 2017-1510 du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme*<sup>159</sup>), excludes, in the context of the prevention of terrorism, the possibility of inspections by the relevant authorities of premises used for the professional activity of journalists and of their domicile.<sup>160</sup>

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<sup>154</sup> <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000886460>.

<sup>155</sup> <https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000025503132&idArticle=LEGIARTI000030935060>.

<sup>156</sup> Some provision.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> Which amends on point the Code of homeland security.

<sup>160</sup> Code of homeland security, new art L. 229-1.

### 3.4.2.2. Civil and criminal liability

#### 3.4.2.2.1. Chain of liability (press offences, civil and criminal)

The Law of 29 July 1881 “on Freedom of the Press”, which sets out the list of offences applicable to the press and other means of publication,<sup>161</sup> contains specific provisions on the chain of liability in the case of press offences. These, however, do not exclude the liability of the employed journalist.

Article 42 of the Law stipulates an order in the chain of liability, by providing that the main authors of press offences are, in the following order: 1° the director of publication or the publisher, 2° the authors and the printers, and 3° the sellers and distributors.

However, under Article 43, when the directors of a publication or the publisher have an action brought against them, the authors are prosecuted as accomplices.

Outside the scope of the Law of 29 July 1881, general liability rules (including vicarious liability) apply.

#### 3.4.2.2.2. Use/Publication of illegal content

Under French law, subject to the specific protection of the sources of journalists and to certain procedural rules, journalists are subject to the generally applicable rules regarding the use of illegally/improperly-obtained information (such as secret State papers, business/trade secrets, using a hidden camera or through a breach of confidence) or the infringement of certain rights of third parties (privacy, publicity, personal data, defamation, etc.). These may entitle to liability (including criminal liability) under the relevant regulations.

However, the French Court of Cassation has held that a journalist, when sued for defamation, may use in court documents covered by procedural secrets (*secret de l'enquête ou de l'instruction*) in order to establish his good faith or the truth of the information in question (the so-called “exception of truth”, which constitutes a defence against defamation actions).<sup>162</sup> This possibility has been consecrated by the French legislature and extended to all “professional secrets” in Article 35 of the Law of 29 July 1881 on defamation.<sup>163</sup> This provision, however, is not restricted to the media and journalists.

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<sup>161</sup> These include acts of public incitement to crime or violence (art. 23 and 24), denial of certain crimes against humanity (art. 24bis), propagation of false news (art. 27), defamation (art. 29 to 35) and the publication of certain restricted images, documents or information (mainly in order to protect privacy and the presumption of innocence).

<sup>162</sup> Cass. crim., 11 juin 2002, n° 01-85.237 : Bull. crim. 2002, n° 132 ; JCP G 2003, II, 10061, note E. Dreyer ; Dr. pén. 2002, comm. 135, obs. M. Véron ; Rev. sc. crim. 2002, p. 881, obs. J.-F. Renucci. – Cass. crim. 11 févr. 2003, n° 01-86.696, 01-86.685 ?

<sup>163</sup> “The defendant can produce for the needs for his defence, without this production giving rise to proceedings for concealment, the elements arising from a violation of the secrecy of the investigation or

French law does provide for limited protection for "whistleblowers", reinforced by Law 2016-1691 of 9 December 2016 (loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique).<sup>164</sup> Article L.122-9 of the Criminal Code (code pénal), as created by the Law of 9 December 2016, excludes criminal liability for persons who disclose a secret protected by the law when this disclosure is necessary and proportionate to the need to safeguard the interests in question, and when it takes place in compliance with the procedures defined<sup>165</sup> and is undertaken by the whistleblowers provided for in the above-mentioned Law.

As of this date, France has not implemented the provisions of the Trade Secrets Directive of 8 June 2011,<sup>166</sup> and in particular the exception contained in Article 5 of the Directive relating to "acts undertaken in exercising the right to freedom of expression and information, as set out in the Charter, including respect for the freedom and pluralism of the media". Pending its formal implementation, this exception is covered by the general principles derived from the application of Article 10 of the European Convention on Human Rights (ECHR).

#### 3.4.2.2.3. Protection of the confidentiality of sources

A limit to the application of these principles and to associated enforcement rules is found in the regulation of the protection of the confidentiality of journalists' sources.

The protection of sources of journalists has been reinforced to the standard of the ECHR by Law n°2010-1 of January 4, 2010 (*loi 2010-1 du 4 janvier 2010 relative à la protection du secret des sources des journalistes*), which amends the Law of 29 July 1881 on

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instruction or any other professional secret if they are likely to establish his good faith or the truth of the defamatory facts".

<sup>164</sup> [www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&categorieLien=id](http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&categorieLien=id).

A whistleblower is defined in Article 6 of the Act as "a natural person who reveals or announces, of his/her free will and in good faith, a crime or an offence, a serious violation of an international agreement ... or a serious threat or damage in respect of the general interest, of which he/she was informed personally". The regime does not apply to national defence secrets, medical secrets or attorney-client communications. Another regime is provided by Law n°2013-316 of 16 April 2013 relating to the independence and expertise in matters of health and environment and to the protection of whistleblowers, which provides in its Article 1 that "Any natural or legal person has the right to make public or to disseminate in good faith information concerning a fact, data or an action, if the ignorance of this data or this action appears to him to create a serious risk to public health or the environment." The same Article provides that such information, when made public, must not contain any defamatory or abusive charge. This principle is not repeated in relation to other classes of information.

<sup>165</sup> Except in the case of serious and imminent danger, or prior information held by the hierarchical superior or his delegate for this purpose, or by the judicial authorities if no action is taken by the former. Divulging can only take place if these recipients do not act within three months (again, except in the case of serious and imminent danger).

<sup>166</sup> Directive 2016/943 "on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure".

<http://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A32016L0943>

the Freedom of the Press. This Law protects the confidentiality of the sources of journalists and restricts the legally admissible limitations on this confidentiality.<sup>167</sup>

The principle of the protection of the confidentiality of journalists' sources is enshrined in Article 2 of the Law of 29 July 1881, which provides:

*“The confidentiality of the sources of journalists is protected in the exercise of their mission of information of the public.*

...

*Direct or indirect attempts to limit the confidentiality of sources can be carried out only if one dominating requirement of public interest justifies it and if the considered measures are strictly necessary and are proportional to the legitimate end pursued. This attempt cannot consist of an obligation for the journalist in question to reveal his sources.*

“An indirect attack on the confidentiality of sources (within the meaning of the third subparagraph) shall be seen in any attempt to discover the sources of a journalist by means of investigations relating to any person who, because of his or her routine relations with a journalist, may hold information allowing the identification of those sources.”<sup>168</sup> This Article first establishes the right for a journalist to remain silent regarding his or her sources. This right is applicable to all stages of the criminal proceedings (investigations, pre-trial, trial, etc.). The journalist can also choose to remain silent even when the law provides for the possibility to identify the source.

The law provides for two limitations on the protection of the confidentiality of sources, which are carefully defined, in conformity with the requirements of the ECHR.<sup>169</sup>

The first limitation concerns investigations in the context of legal proceedings, and is included in the fifth paragraph of Article 2 of the Law of 1881, which provides:

*“During a criminal procedure, in order to assess the need for the attempt it is necessary to take into account the gravity of the crime or of the offence, the importance of the information sought for the repression or the prevention of this infringement, and the fact that the measures of investigation considered are essential to the manifestation of the truth.”<sup>170</sup>*

Although the text mentions criminal proceedings, the principles are certainly applicable to civil or administrative proceedings as well.

The second limitation derives from Law of n°2010-1 of 4 January 2010, and concerns transcriptions of correspondence with a journalist. Article 100-5 of the Code of Criminal Procedure prohibits such transcriptions when they allow the identification of a source in violation of Article 2 of the Law of 29 July 1881.

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<sup>167</sup> This reform follows Law n°93-2 of 4 January 1993, which amended the Criminal Code so as to include elements of protection of the sources of journalists, in order to comply with the requirement of the Council of Europe.

<sup>168</sup> Our translation.

<sup>169</sup> ECHR 27 March 1996, Goodwin v. United Kingdom.

<sup>170</sup> Our translation.

#### 3.4.2.2.4. Right to refuse to undertake acts contrary to journalistic ethics

The Law of 29 July 1881 has a new Article 2bis, which was introduced by a Law of 14 November 2016 “aiming at reinforcing the freedom, the independence and the pluralism of media”. The new provision stipulates that:

*“Any journalist, within the meaning of the 1° of the I of Article 2, has the right to refuse any pressure, to refuse to reveal his sources and to refuse to sign an article, programme or contribution whose form or contents has been modified without his or her knowledge or against his or her will. He or she cannot be constrained to accept an act that goes against his or her professional convictions formed in compliance with the code of ethics of his or her company or his or her publishing company.”<sup>171</sup>*

#### 3.4.2.2.5. Procedural rules: limitation of searches and seizures

French criminal law<sup>172</sup> – included Article 56-2 of the Code of Criminal Procedure<sup>173</sup> (*code de procédure pénale*) – contains specific rules concerning searches that are similar to those applicable to attorneys (*avocats*). These formally codify the case law developed under the previously-applicable law and include a specific objection procedure. Article 56-2 provides:

*“Searches of the premises of a press company, an audiovisual communications company, an online public communication company, a press agency, the business vehicles of such companies or agencies – or a journalist’s home when the investigations are related to his or her professional activity – may only be carried out by a magistrate.*

*Such searches shall be carried out upon the issuance of a written and reasoned decision of the magistrate, indicating the nature of the offense (s) investigated, as well as the reasons for the search and its purpose. The contents of this decision shall be notified to the person present, pursuant to Article 57 [i.e. the journalist when the search is made at his residence, or his representative or two independent witnesses] at the beginning of the search.*

*Only the magistrate and the person present pursuant to Article 57 have the right to consult the documents or the objects discovered during the search prior to their possible seizure. No seizure may concern documents or objects relating to offenses other than those mentioned in this decision.*

*These provisions shall be enacted upon penalty of nullity of the search.*

*The magistrate who carries out the search shall ensure that the investigations conducted respect the free exercise of the profession of journalist, do not violate the secrecy of sources (in violation of Article 2 of the Law of July 29th, 1881 on freedom of the press),*

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<sup>171</sup> Our translation.

<sup>172</sup> For the case of administrative measures (surveillance, administrative searches and visits) against terrorism, see above, at 6.2.2.1.

<sup>173</sup> <https://www.legifrance.gouv.fr>.

[https://www.legifrance.gouv.fr/affichCode.do?sessionId=B3F806192023B95E5CE5F09BA32EE5B9.tp1qfr33s\\_3?idSectionTA=LEGISCTA000006151876&cidTexte=LEGITEXT000006071154&dateTexte=20171204](https://www.legifrance.gouv.fr/affichCode.do?sessionId=B3F806192023B95E5CE5F09BA32EE5B9.tp1qfr33s_3?idSectionTA=LEGISCTA000006151876&cidTexte=LEGITEXT000006071154&dateTexte=20171204).

*and do not constitute an obstacle or cause an unjustified delay in the dissemination of information.*

*The person present during the search pursuant to Article 57 of this Code may oppose the seizure of a document or any object if he or she considers that such seizure would be unlawful with regard to the preceding paragraph. The document or object must then be sealed closed. Such transactions shall be the subject of a record of the person's objections, which shall not be attached to the record of the proceedings. If other documents or objects were seized in the course of the search without prompting protest, this official report shall be separate from that provided for in Article 57. This official report, as well as the document or the object placed under a closed seal, shall be transmitted without delay to the judge of freedoms and detention ("juge des libertés et de la détention"), together with the original or a copy of the record of the proceedings.*

*Within five days of receipt of these documents, the judge of freedoms and detention shall rule on the dispute by motivated, non-appealable, order. (...)"*

In addition, the general right granted to police officers to require communication of documents of interest to an investigation (including elements stored in a computer) despite these being covered by professional secrecy can be exercised only with the agreement of the journalist in question.<sup>174</sup>

#### 3.4.2.2.6. Procedural rules: Surveillance of communications

Journalists and media do not benefit from a special regime when it comes to the interception of communications (and equivalent techniques) for judicial (criminal) purposes.<sup>175</sup> As already mentioned, they are protected to a certain extent from administrative surveillance under the Code of Homeland Security<sup>176</sup>.

### 3.4.3. Recent and emerging issues

Over the past year the social debate over media privilege has focused on the protection of journalistic sources and on the protection of whistleblowers. The first issue was addressed by the Law of 4 January 2010, as described above. The second is still debated, within the context of the implementation/application of the above-mentioned Law of 9 December 2016. In addition, as already noted, France has not implemented the provisions of the Trade Secrets Directive, and no bill to that effect has been brought before the Parliament. This debate is likely to resurface in the coming months when this legal instrument is scheduled to be discussed.

The question of the protection of the media from surveillance by the State was also discussed during debates on France's various anti-terrorists acts, and is still being

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<sup>174</sup> Code of Criminal procedure, articles 60-1, 77-1-21 and 93-3.

<sup>175</sup> The general regime, which involves an authorization by a judge and other safeguards, applies.

<sup>176</sup> See 6.2.2.1 above.



debated within the context of several appeals (including by journalists and their representatives) against decrees or legislative provisions in this area (before national courts and the ECHR).

## 3.5. GB – United Kingdom

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### 3.5.1. Introduction

The United Kingdom has no specific constitutional guarantees for journalism, perhaps as a result of its unwritten constitution. Consequently, provisions relating to journalism are found piecemeal throughout legislation and in many instances are subsumed into a general conception of the “public interest”, which could then also benefit others beyond journalists. The difficulty with the use of the idea of “public interest” is that its conception may vary according to statute, or the viability of such a defence may depend on how the offence is characterised (i.e. which piece of legislation is used). One advantage of this approach is that the system is flexible, and in principle those who are carrying out a journalistic function should be able to argue a public interest defence in the same way that journalists and media organisations can.

### 3.5.2. Public Law

The starting point is the Human Rights Act (HRA),<sup>177</sup> which incorporates the European Convention of Human Rights into domestic law. Section 12 of the HRA makes provision in respect of freedom of expression, specifically directing the courts to have regard to the extent to which the material has, or is about to, become available to the public; or it is, or would be, in the public interest for the material to be published. This then applies in relation to anyone’s speech, but in their approach to “taking into account” freedom of expression, the courts have taken into account the approach from the Strasbourg court regarding different types of speech, with some – particularly political speech – being worthy of greater protection than others.<sup>178</sup> This approach could give greater protection to investigative journalism.<sup>179</sup> Furthermore, as regards applications for injunctive relief,

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<sup>177</sup> Human Rights Act, 9th November 1998, <http://www.legislation.gov.uk/ukpga/1998/42/contents>.

<sup>178</sup> *Campbell v. MGN Ltd.* [2004] UKHL 22, [2004] 2 A.C. 457, 499, <https://publications.parliament.uk/pa/ld200304/ldjudgmt/jd040506/campbe-1.htm>.

<sup>179</sup> *Jameel (Mohammed) v. Wall Street Journal Europe* [2006] UKHL 44, [2007] 1 A.C. 359.

the courts are directed to have regard to “any privacy code”, which is more likely to benefit journalists who are part of a self-regulatory scheme.<sup>180</sup>

All (professional) journalistic activities in the UK are subject to some form of regulation, though in the case of the press that regulatory scheme is self-regulatory. These schemes set down ethical codes. All claim to operate in the public interest, claim to protect accuracy (if not truth) and to have regard to the vulnerable in society (children, but also, for example, victims of sexual assaults). Beyond this base level (which to a large extent is based on legal requirements)<sup>181</sup> there is variation across the codes. Notably, broadcast media are subject to impartiality requirements<sup>182</sup> in their reporting of news and current affairs, though the issue of what impartiality means has always been the subject of contention.

Likewise, there is an exception<sup>183</sup> to some of the data processing rules in relation to the media, though it is not an exemption in respect of all data protection rules (for example, security of data remains in place and a data subject would still have the right to compensation). Note that it is not journalism alone that benefits from this “special purpose” exemption, but also art and literature. The exemption has four elements, namely that data shall be processed only:

- For journalism (or art or literature);
- With a view to publication;
- With a reasonable belief that publication is in the public interest; and
- With a reasonable belief that compliance with the relevant data protection rule is incompatible with journalism.<sup>184</sup>

The Government’s intention is to carry the journalistic exception over to the rules implementing the General Data Protection Regulation; at the time of writing, the terms of the legislation are before Parliament. The Information Commissioner’s Office (ICO)<sup>185</sup> has commented – basing its view on the *Satamedia* case<sup>186</sup> – that the field of “journalism” is

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<sup>180</sup> For a discussion of the approach see, for example, Barendt, E., “Freedom of Expression in the United Kingdom under the Human Rights Act 1998” (2009) 84 *Indiana Law Journal* 851.

<sup>181</sup> Sections 39 and 49 Children and Young Persons Act 1933 – prohibition on publication of a name, address or school calculated to identify a child; s. 5 Sexual Offences (Amendment) Act 1992 - prohibits publication of details that identify a victim of rape or other serious sexual offence who has anonymity, <http://www.legislation.gov.uk/ukpga/Geo5/23-24/12>.

<sup>182</sup> Ofcom Content Code, section 5, available at: [www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-five-due-impartiality-accuracy](http://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-five-due-impartiality-accuracy). For reports on the BBC and impartiality see, for example, the BBC Trust, available at: [www.bbc.co.uk/bbctrust/our\\_work/editorial\\_standards/impartiality.html](http://www.bbc.co.uk/bbctrust/our_work/editorial_standards/impartiality.html).

<sup>183</sup> S. 32 Data Protection Act 1998, <http://www.legislation.gov.uk/ukpga/1998/29/contents>; a similar clause is contained in the Data Protection Bill 2017, <https://www.gov.uk/government/collections/data-protection-bill-2017>.

<sup>184</sup> There were concerns expressed at the time that the DPA was enacted that s. 32 DPA did not reflect the test of objective necessity found in the Data Protection Directive: e.g. Lord Herne Hansard, HL Deb 24 March 1998 vol 587 cc1094-136, cc 1111-1112, <http://hansard.millbanksystems.com/lords/1998/mar/24/data-protection-bill-hl>.

<sup>185</sup> <https://ico.org.uk/about-the-ico/>.

<sup>186</sup> Case C-73/07 *Satamedia*, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-73/07>.

broad enough in principle to cover activities such as blogging, as well as civil society groups. It would seem to exclude advertising and public relations activities.

Domestic jurisprudence matches this broad approach. The Supreme Court held in the case of *Sugar* that the phrase “journalism, art or literature” would cover the entire output of the BBC.<sup>187</sup> While this statement was handed down in the context of the Freedom of Information Act, the phrase is the same and there is no reason to suggest that it would be interpreted differently as regards the Data Protection Act (DPA). In *Sugar*, the Supreme Court further elaborated that “journalism” covers all stages of the journalistic process, from production to broadcast and including staff training, management and supervision. As regards “citizen journalism”, the High Court held in *Kordowski*<sup>188</sup> that:

*Journalism that is protected by section 32 involves communication of information or ideas to the public at large in the public interest. Today anyone with access to the Internet can engage in journalism at no cost. If what the Defendant communicated to the public at large had the necessary public interest, he could invoke the protection for journalism and Article 10.*

It is however unclear where the boundary between citizen journalism and social use of the Internet lies.

When interpreting the rules in the Data Protection Act of 1998 (DPA), the ICO is bound by the HRA, taking into account both Articles 8 and 10 of the European Convention on Human Rights (ECHR), but in doing so will take into account journalistic compliance with industry codes of practice. This still leaves media organisations with significant room to decide for themselves what is in the public interest, although the ICO still expects that there will still be some audit trail that will allow the data controller to show that the issue of the public interest was considered. So, in the recent case of *ZXC v Bloomberg*,<sup>189</sup> a case concerning the publication by the Bloomberg news agency of an article involving sensitive information, ZXC tried to argue that the publication had not been in the public interest. The Court held:

*[Bloomberg] rely on the witness statement of the author of the article. That statement ... makes it clear that the decision to refer to [ZXC] in the article was taken after careful consideration of the relevant circumstances, including the public interest in the disclosure of [ZXC's] involvement. In my judgment, it is clear that [Bloomberg] as data controller believed, and believed on reasonable grounds, that publication would be in the public interest.*

Furthermore, a data controller should be able to show it was impossible to both comply with a particular provision and to fulfil its journalistic purpose – and this must be on a case-by-case basis.

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<sup>187</sup> *Sugar (Deceased) v. BBC* [2012] UKSC 4, <https://www.supremecourt.uk/cases/docs/uksc-2010-0145-judgment.pdf>.

<sup>188</sup> *The Law Society & ors v. Kordowski* [2011] EWHC 3182 (QB), <https://inform.org/2011/12/20/case-law-law-society-v-kordowski-solicitors-from-hell-shut-down-eddie-craven/>.

<sup>189</sup> *ZXC v Bloomberg*[2017] EWHC 328 (QB), <http://www.bailii.org/ew/cases/EWHC/OB/2017/328.html>.

The Freedom of Information Act provides the right of everyone to request information held by public bodies; there is no media privilege here. Public media bodies (the BBC, Channel 4 and S4C), when receiving such a request, do not have to provide information about journalistic, literary or artistic activities. These media institutions are singled out because they are the only ones – as public bodies – which fall under the obligations imposed by the Freedom of Information Act in the first place.

One example of media institutions being given for specific protection under the law is in the context of the media merger regime. In addition to the usual competition law tests, in cases where a merger raises certain public interest issues – such as media plurality – the Secretary of State may also refer mergers to the Competition and Markets Authority. The public interest considerations set out in section 58(2C) of the Enterprise Act include: the need to ensure the plurality of the media; the need for a wide range of high-quality broadcasting that appeals to a wide range of tastes and interests; and the need for media companies to have a genuine commitment to the objectives of section 319 of the Communications Act (the negative standards with which broadcasters must comply and which apply to broadcasters rather than to the press). These considerations apply in the context of mergers involving broadcast media enterprises or cross-media mergers involving both broadcast media enterprises and newspaper enterprises, but not other bodies in the content distribution chain. The effect of these provisions is not to give journalists special advantages in their bringing of stories to public attention but rather to protect the public interest in there being a range of media outlets.

### 3.5.3. Civil Law

There is no general law regulating journalism, although broadcast journalism must comply with the relevant codes: the Ofcom Content Code and the BBC Editorial Guidelines. These cover both the acquisition and dissemination of information. As noted, the press is subject to a range of self-regulatory mechanisms.

Within the context of civil law actions, such as confidentiality<sup>190</sup>, privacy or misuse of private information, there is no formalised exception for journalists. Yet the practice of the courts has been to bear in mind the importance of freedom of expression, although it is important to note that as a matter of domestic law, neither Article 8 nor Article 10 has automatic priority.<sup>191</sup> Assuming the claimant has a reasonable expectation of privacy and Article 8 is engaged, a balance between privacy and freedom of expression is found through a proportionality analysis, which is conducted bearing in mind the obligations found in section 12 of the HRA. The wider public interest is taken into account. There is a “public interest” in exposing the truth and putting the record straight. The analysis is highly fact-specific, but compliance with a regulatory code is a factor to be taken into account.

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<sup>190</sup> See e.g. *Brevan Howard Asset Management LLP v Reuters Limited and others* [2017] EWHC 644 (QB).

<sup>191</sup> *Re S* [2004] UKHL 47.

One change of note arises in the context of the Defamation Act of 2013.<sup>192</sup> The act in general increased the hurdles for a successful defamation action as well as rephrasing existing defences. There is a new defence of publication in the public interest which replaces the common law defence of “*Reynolds qualified privilege*”/“journalistic qualified privilege”.<sup>193</sup> For the defence to succeed, the impugned statement (or part of it) must relate to a matter of public interest and the defendant must reasonably believe that publishing the statement would be in the public interest. The explanatory notes to the Defamation Act suggest that the new defence is intended to reflect the common law, as set out in the Supreme Court case of *Flood*.<sup>194</sup> There, the Court stated that it would seldom be in the public interest “... to publish material which has not been the subject of responsible journalistic enquiry and consideration”. Again it would seem that in principle the defence could be open to citizen journalists, but the emphasis on responsible journalism and the practicalities of carrying out the checking required likely means that this test will be easier for a professional journalist to satisfy. Nonetheless in *Economou v. de Freitas*<sup>195</sup> the defence was made out. Ms de Freitas accused Mr Economou of raping her in December 2012. The claimant was arrested, interviewed but never charged. He then brought an action against her, claiming she had perverted the course of justice by accusing him; the Crown Prosecution Service (CPS) then took the case up. Ms de Freitas killed herself. Her father, the defendant in this case, sought to bring the CPS’s action under review. This was rejected and Mr de Freitas therefore successfully sought media coverage of the matter. Mr Economou then brought a libel action against Mr de Freitas. The Court held that the public interest defence had been made out. The claims raised questions regarding the conduct of the CPS prosecution, whether there had been sufficient evidence to prosecute the defendant’s daughter and whether her vulnerable mental state had been properly considered by the CPS before proceeding. Crucially, the test is not whether there was public wrong-doing (the discovery of which is almost always in the public interest) but whether the defendant “reasonably believed that publication of the particular statement was in the public interest“. Belief is “reasonable” ...only if it is arrived at after conducting such enquiries and checks as it is reasonable to expect of the particular defendant”. Here Mr de Freitas was more a source than a journalist, and “it would be wrong to expect him to carry out the necessary checks and enquiries that the journalist is professionally expected to do prior to publication”. This by no means suggests that the citizen journalist would be treated in the same way.

Note that the Copyright Designs and Patents Act contains exceptions to permit news reporting and criticism or review, although there is no indication that these exceptions are only relevant to journalists/media organisations.

While most journalistic codes emphasise the importance of keeping sources confidential, there are processes (both in the civil and criminal context) where this principle is curtailed. As regards civil cases, the court has the power to make a “Norwich

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<sup>192</sup> Note that the Defamation Act 2013 does not apply to Scotland and Northern Ireland.

<sup>193</sup> *Reynolds v Times Newspapers* [1999] UKHL 45, <http://www.bailii.org/cgibin/markup.cgi?doc=/ew/cases/EWCA/Civ/1998/1172.html>.

<sup>194</sup> *Flood v Times Newspapers* [2012] UKSC 11, [http://www.5rb.com/wp-content/uploads/2012/03/FloodKSC\\_2010\\_0166\\_Judgment.pdf](http://www.5rb.com/wp-content/uploads/2012/03/FloodKSC_2010_0166_Judgment.pdf).

<sup>195</sup> [2016] EWHC 1853 (QB), <http://www.5rb.com/case/alexander-economou-v-david-de-freitas-2/>.

Pharmaceutical Order”, under which anyone – including journalists – may be placed under a duty to assist, by providing information – including the identification of an alleged wrongdoer – to a claimant.<sup>196</sup> The Contempt of Court Act does provide certain journalistic exceptions. Section 10 is a qualified rule that journalists’ sources and materials should be protected as a matter of law.<sup>197</sup> This approach has been strengthened by the introduction of the HRA and the Strasbourg court’s approach to Article 10 on this issue, notably in *Goodwin v UK*.<sup>198</sup> In *Ashworth Hospital Authority v MGN Ltd*,<sup>199</sup> sensitive information was leaked from a hospital to a journalist. There, Lord Woolf CJ stated that disclosure of a journalist’s source would not be ordered “in the interests of justice” under section 10 of the Contempt of Court Act of 1981 unless it was necessary and proportionate given the circumstances of the case, referring to Article 10 of the ECHR and *Goodwin*.

### 3.5.4. Criminal Law

The DPA defines the criminal offence of knowingly or recklessly obtaining, disclosing or procuring the disclosure of information about someone without the consent of the data controller responsible for that information,<sup>200</sup> for example, by “blagging” (obtaining information by deception) or hacking. There is a general public interest defence, but there is no specific journalistic public interest defence. While the Criminal Justice and Immigration Act 2008<sup>201</sup> provided for an enhanced public interest journalism defence, this provision was not brought into force – a fact perhaps linked to the phone hacking scandal.<sup>202</sup> Proceedings not instituted by the Information Commissioner require the consent of the Director of Public Prosecutions (DPP), taking into account either the general guidance on prosecuting the media, or the guidance specifically relating to the leaking of confidential information. Furthermore, the CPS guidance emphasises the significance of the confidentiality of journalistic sources, in the light of *Goodwin*, as a factor to be taken into account when deciding whether to prosecute.

The Official Secrets Act of 1989 (OSA)<sup>203</sup> has implications for journalism. Although principally directed at civil servants, section 5 OSA makes it an offence to disclose information covered by the act. There is no public interest or specific journalistic

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<sup>196</sup> *Various Claimants v News Group Newspapers* [2013] EWHC 2119 (Ch), <http://www.bailii.org/ew/cases/EWHC/Ch/2013/2119.html>.

<sup>197</sup> See, for example, *Secretary of State For Defence v. Guardian Newspapers Ltd* [1985] AC 339.

<sup>198</sup> *Goodwin v UK* (1996) 22 EHRR <http://www.5rb.com/wp-content/uploads/2013/10/Goodwin-v-United-Kingdom-ECHR-27-Mar-1996.pdf>.

<sup>199</sup> *Ashworth Hospital Authority v MGN Ltd*, [2002] 1 WLR 2003, <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/2002/29.html>, and *Mersey Care NHS Trust-v-Ackroyd*, [2007] EWCA Civ 101, <http://www.bailii.org/ew/cases/EWCA/Civ/2007/101.html>.

<sup>200</sup> Section 55 DPA.

<sup>201</sup> Criminal Justice and Immigration Act 2008 (c. 4), <https://www.legislation.gov.uk/ukpga/2008/4/contents>.

<sup>202</sup> The “phone hacking scandal” refers to one of the most expensive prosecutions and most lengthy police inquiries in criminal history. It related to the allegations that News International journalists were involved in hacking people’s phones for information and led to the closure of the 168-year-old News of the World tabloid in 2011 and a trial costing reportedly up to £100m.

<sup>203</sup> Official Secrets Act of 1989 (c.6), <https://www.legislation.gov.uk/ukpga/1989/6/contents>.

defence.<sup>204</sup> Nonetheless, the position of journalism is to some extent recognised. CPS guidance on prosecutions in this field recognises that while there is “a clear public interest in safeguarding confidential information”, equally “[f]reedom of the press is regarded as fundamental to a free and democratic society”. The ability of a journalist to protect a source of information is afforded significant protection by the law, even where the relevant information has been obtained in breach of confidence.<sup>205</sup> The OSA is currently under review by the Law Commission; despite strong submissions that there should be some recognition of the role of journalism, there is currently no suggestion that a public interest defence (whether general or applying just to the media) will be proposed.

There is guidance from the DPP on assessing the public interest in bringing prosecutions in media cases,<sup>206</sup> which supports the Code for Crown Prosecutors. The guidelines apply when prosecutors are considering whether to charge journalists – or those who interact with journalists – with criminal offences that may have been committed in the course of their work. The guidance emphasises that there are two separate questions affecting the public interest: that served by freedom of expression and the right to receive and impart information; and the question of whether the prosecution itself is in the public interest. Where there is no express public interest defence, or the courts have guidance on such issues, then the Guidance advises that prosecutors should assess whether *the public interest served by the conduct in question outweighs the overall criminality*. In so doing prosecutors should follow a three-stage process: (1) assessing the public interest served by the conduct in question; (2) assessing the overall criminality; and (3) weighing these two considerations.

As regards criminal process, under the Police and Criminal Evidence Act (PACE)<sup>207</sup> (as amended) journalists must be notified by the authorities of an application to access their material and sources and have the ability to object, the right to a hearing before a judge, and the possibility of an appeal. This is a higher standard than applies normally under the PACE, as journalists’ materials (such as a journalist’s notes, photographs, computer files or tapes) are classified as “Special Procedure Material”. The Metropolitan Police Force (commonly known as the “Met”), investigating a leak under the OSA, sought to obtain journalistic material from Sky Broadcasting under the PACE, but by relying on evidence presented to the court when Sky was not present. The PACE allows a magistrate to make such an order, but not in relation to journalistic material. The judge issued a production order and Sky sought judicial review of that decision. The Supreme Court upheld Sky’s challenge, noting the special position of journalism.<sup>208</sup> The PACE also provides that certain material should be excluded – namely, (confidential) source

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<sup>204</sup> R v Shayler [2002] UKHL 11.

<sup>205</sup> <https://www.cps.gov.uk/legal-guidance/prosecuting-cases-where-public-servants-have-disclosed-confidential-information>.

<sup>206</sup> [www.cps.gov.uk/legal/d-to-g/guidance-for-prosecutors-on-assessing-the-public-interest-in-cases-affecting-the-media](https://www.cps.gov.uk/legal/d-to-g/guidance-for-prosecutors-on-assessing-the-public-interest-in-cases-affecting-the-media).

<sup>207</sup> Police and Criminal Evidence Act of 1984 (c. 60), <https://www.legislation.gov.uk/ukpga/1984/60/contents>.

<sup>208</sup> R (on the application of British Sky Broadcasting Limited) v The Commissioner of Police of the Metropolis [2014] UKSC 17, [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0115\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0115_Judgment.pdf).

material. Note, however, that the protections of the PACE may be displaced in the context of certain statutes – for example the Terrorism Act of 2000.

The Investigatory Powers Act (IPA) of 2016<sup>209</sup> recognises the sensitivity of the content of journalists' communications but provides a lesser degree of protection in relation to communications data. This is problematic as the fact that communication has occurred can be as important as the content itself. A judicial warrant is not required; authorisation by an officer within the same police force at the level of superintendent or above suffices. In this, the IPA follows the position of previous legislation on this topic. More detailed rules relating to access to communications data are to be found in Codes of Conduct (to be developed as provided for under the IPA). A particular concern relates to the fact that under the Police and Criminal Evidence Act of 1984 and the Terrorism Act of 2000, when the police apply for orders for material in the possession of the journalist to be handed over (known as production orders) there must be a hearing before a judge at which the journalist is entitled to be heard; the IPA contains no equivalent requirement. Identifying who is in contact with a journalist effectively undermines the PACE protections. There have been ongoing concerns about police over-use of the communications data provision,<sup>210</sup> – specifically the use of the Regulation of Investigatory Powers Act (RIPA)<sup>211</sup> in relation to journalists and their sources (which, *inter alia*, led to the revision of the relevant Code of Conduct under the RIPA regime<sup>212</sup>). Specific issues arise from the IPA relating to the scope of the definitions relating to “journalism” and “journalistic activity”, which could be construed narrowly. At a general level, there are arguments that the ability of the security services to carry out blanket surveillance are peculiarly chilling to the practice of journalism.<sup>213</sup> It is worth mentioning that in the light of the *Watson*<sup>214</sup> ruling by the Court of Justice, the Government is now consulting on changes to the IPA in relation to communications data.<sup>215</sup>

The Contempt of Court Act<sup>216</sup> is the central piece of legislation for achieving compliance with rulings of the courts and in safeguarding fair trials. There are, for example, rules on reporting on trials, which makes it a contempt of court to publish anything that creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced, even if there is no intent to cause such

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<sup>209</sup> Investigatory Powers Act (IPA) 2016 (c. 25),

<http://www.legislation.gov.uk/ukpga/2016/25/contents/enacted>.

<sup>210</sup> See, for example, <https://publications.parliament.uk/pa/cm201415/cmselect/cmhaff/711/71103.htm>; and [www.iocco-](http://www.iocco-)

[uk.info/docs/IOCCO%20Communications%20Data%20Journalist%20Inquiry%20Report%204Feb15.pdf](http://uk.info/docs/IOCCO%20Communications%20Data%20Journalist%20Inquiry%20Report%204Feb15.pdf), p.29.

<sup>211</sup> Regulation of Investigatory Powers Act 2000 (c. 23),

<https://www.legislation.gov.uk/ukpga/2000/23/contents>.

<sup>212</sup> [www.gov.uk/government/publications/interception-of-communications-code-of-practice-2016](http://www.gov.uk/government/publications/interception-of-communications-code-of-practice-2016).

<sup>213</sup> Bureau of Investigative Journalism and Alice Ross v. UK, pending before the European Court of Human Rights.

<sup>214</sup> *Joined Cases C-203/15 and C-698/15 Tele2 Sverige AB (C-203/15) v Post- och telestyrelsen, and Secretary of State for the Home Department (C-698/15) v. Watson et al* judgment 21 December 2016 (Grand Chamber), ECLI:EU:C:2016:970

<sup>215</sup> Consultation documents and proposed codes of practice available here:

<https://www.gov.uk/government/consultations/investigatory-powers-act-2016>.

<sup>216</sup> Contempt of Court Act of 1981 (c. 49), <https://www.legislation.gov.uk/ukpga/1981/49>.



prejudice.<sup>217</sup> It applies to any publication, defined as “any speech, writing, programme included in a programme, service or other communication in whatever form, which is addressed to the public at large”. Non-compliance can give rise to a criminal offence (whether in relation to a civil or criminal action). There are exceptions relating to innocent publication and in respect of fair and accurate reporting. Moreover, “a publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest”<sup>218</sup> does not fall under the strict liability rule found in sections 1 and 2 of the Contempt of Court Act. Section 11 allows the Court to make directions regarding the withholding of information from reports (e.g. names). The media may make representations against the granting of an order and the media may appeal against an order (either under section 4(2) or section 11 under section 159 of the Criminal Justice Act of 1988), a provision enacted to comply with the requirements of the ECHR.<sup>219</sup> The Family Division of the High Court has a specific system for notifying the media of the intention to apply for an injunction on reporting.<sup>220</sup> The Attorney General recently issued a call for evidence<sup>221</sup> in relation to a commentary on criminal trials found in social media, which would fall within the definition of “publication”, some of which have disregarded the rules on contempt.<sup>222</sup> The outcome is not yet known.

For criminal contempt proceedings, the decision regarding whether to bring an action is made by the Attorney General and the Crown Prosecution Service. In deciding whether to bring a case, the Attorney-General will have regard to the public interest. The maximum penalty for contempt is two years’ imprisonment; fines may also be levied. Community orders are not available. Usually media organisations are fined; imprisonment has not been used for over sixty years. Third-party costs may be imposed on journalists/publishers where there has been serious misconduct but no such order has been made in respect of contempt by publication. There are a number of “practice directions” in this area, highlighting the concern to ensure the continuance of open justice as much as practicable.

### 3.5.5. Recent and emergent issues

The Digital Economy Act of 2017<sup>223</sup> has been described as a rag-bag of provisions affecting the digital environment, including the media. Specifically it contains provisions

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<sup>217</sup> Section 2 Contempt of Court Act.

<sup>218</sup> Section 5 Contempt Court Act.

<sup>219</sup> *Hodgson v UK* 11553/85, <https://eu.vlex.com/vid/g-hodgson-d-woolf-565073786>.

<sup>220</sup> See [www.medialawyer.press.net/courtapplications/practicenote.jsp](http://www.medialawyer.press.net/courtapplications/practicenote.jsp).

<sup>221</sup> The call is available here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/645032/Call\\_for\\_Evidence\\_Final.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/645032/Call_for_Evidence_Final.pdf).

<sup>222</sup> Guidance on the contempt rules and social media had been published on the Government website and on Twitter; instructions are routinely given to jurors yet there is a risk that a fair trial becomes impossible: see *ex parte British Broadcasting Corporation* and eight other media organisations [2016] EWCA Crim 12, <http://www.bailii.org/ew/cases/EWCA/Crim/2016/12.html>.

<sup>223</sup> Digital Economy Act 2017 (c.30), <http://www.legislation.gov.uk/ukpga/2017/30/contents/enacted>.

dealing with the regulation by Ofcom (the UK's communications regulator) of the BBC, as well as powers for Ofcom to suspend a licence which is used to incite crime or disorder. In this it reflects current concerns about the media (and the Internet). The topic of how the media should be regulated is an on-going one, with perennial questions covering the public service broadcasters (their nature and their role) and the regulation of the press – specifically the extent to which recommendations from the Leveson Inquiry<sup>224</sup> should be implemented, and whether the originally proposed Part II to the Leveson Inquiry should take place.<sup>225</sup> The Law Commission this year carried out a review of the Official Secrets Act – perhaps sparked by the Snowden revelations<sup>226</sup> – but there has been no firm recommendations as yet. One of the issues was the extent to which it would be desirable to include a public interest defence (either general or specific to the media). An inquiry into “fake news” was halted by the General Election; while the work has re-started, the inquiry has not yet concluded.<sup>227</sup> There is some concern about the quality of information available via the Internet – in addition to fake news, there are concerns about extremist content. This is unlikely to directly affect journalism. While the system set up in the light of the Leveson Report has recognised a regulator (IMPRESS), legal challenges by the mainstream press to this system are ongoing – they have yet to be successful.<sup>228</sup> The cases arising from the phone hacking scandal are still working their way through the legal system, though it seems that many are now being settled, with statements being made in open court.<sup>229</sup>

The Supreme Court has recently ruled on the ability of an individual named in court to claim an injunction to prevent reporting of that fact. *Khuja* (formerly known as “PNM”) v *Times Newspapers*<sup>230</sup> concerned the trial of nine men on charges involving organised child sex grooming and child prostitution in the Oxford area. Seven of the men were convicted. The appellant was also arrested, but subsequently released without charge. The newspapers successfully applied to lift an order preventing his identification on the ground that there were now no “pending or imminent” proceedings against the appellant that might be prejudiced by publication. The appellant sought to maintain the

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<sup>224</sup> The Leveson inquiry is a judicial public inquiry into the culture, practices and ethics of the British press following the News International phone hacking scandal, chaired by Lord Justice Leveson. See overview here: <https://www.theguardian.com/media/leveson-inquiry>.

<sup>225</sup> See documents from House of Lords Communications Select Committee, [www.parliament.uk/business/committees/committees-a-z/lords-select/communications-committee/inquiries/parliament-2010/press-regulation---where-are-we-now/](http://www.parliament.uk/business/committees/committees-a-z/lords-select/communications-committee/inquiries/parliament-2010/press-regulation---where-are-we-now/)

<sup>226</sup> For more, see <https://www.theguardian.com/commentisfree/2017/feb/12/the-guardian-view-on-official-secrets-new-proposals-threaten-democracy>.

<sup>227</sup> For an example of a defamation claim described as relating to fake news, see *Zahawi v Press TV* [2017] EWHC 695 (QB), <https://inform.files.wordpress.com/2017/05/hq15d05117-zahawi-v-press-tv-final-judgment-approved.pdf>.

<sup>228</sup> *R (NMA) v Press Recognition Panel* [2017] EWHC 2527 (Admin), <https://inform.files.wordpress.com/2017/09/nma-impress-judgment.pdf>.

<sup>229</sup> <https://inform.files.wordpress.com/2017/10/statement-in-open-court-coogan-v-mgn.pdf>; <https://inform.files.wordpress.com/2017/10/jamie-theakston-statement-in-open-court-signed-by-both-parties00104.pdf>; <https://inform.files.wordpress.com/2017/10/sienna-miller-statement-in-open-court-signed-by-both-parties0010080.pdf>; <https://inform.files.wordpress.com/2017/10/171006-ian-hurst-v-ngn-statement-in-open-court.pdf>.

<sup>230</sup> [2017] UKSC 49, <https://www.supremecourt.uk/cases/uksc-2014-0270.html>.

injunction to restrain publication. The newspapers won their case, but this case seemed to be more about the importance of the principle of open justice than the role of the media. The issue of reporting on those who have not been proven guilty has been an issue in another case. *ERY v Associated Newspapers Limited*<sup>231</sup> concerned the extent to which police investigations into individuals give rise to that individual having a reasonable expectation of privacy as to the investigation, with the consequence that the reporting of those investigations should be subject to legal restraint. The court granted the injunction, so even the fact of being interviewed by the police is a fact that potentially engages Article 8.

As regards developments in jurisprudence, cases involving the interpretation of the Defamation Act of 2013 are now being decided. The Defamation Act introduced a test of “serious harm” in order to bring an action for defamation. *Lachaux v Independent Print Ltd* came before the Court of Appeal, which had to decide the appropriate test to determine the issue of “serious harm”.<sup>232</sup> The Court of Appeal held that the effect of section .1(1) of the Defamation Act is to raise the threshold from “*substantial*” to “*serious*”. This does not affect the presumption of damage in libel cases, and when a publication bears a serious defamatory meaning then an inference of serious reputational harm should ordinarily be drawn. While this may have implications for media defendants, the role of the media and the importance of journalism was not central to the case.

A further issue concerns the funding of legal action and the chilling effects of costs. The Flood litigation<sup>233</sup> concerned success fees and After the Event (ATE) insurance premiums – ways in which applicants could fund legal action, including legal action against media defendants. Success fees take the form of a percentage uplift (up to 100%) on base costs provided for under a conditional fee agreement and are payable to a litigant’s lawyers in the event that s/he is successful. ATE insurance premiums are sums paid by litigants to insure themselves, *inter alia*, against potential liability for costs. In this Flood litigation, the media organisations challenged the recovery of additional liabilities (conditional fee agreement success fees and ATE insurance premiums) from defendants in “publication case” because of the impact on Article 10 of the European Convention on Human Rights (ECHR). They were unsuccessful. The Supreme Court held that, even assuming that orders to pay additional liabilities infringed the Article 10 rights of two of the appellants, denying these sums to the respondents would entail a greater interference with their rights and may undermine the rule of law. The law in this area remains uncertain but, while the case was brought by newspapers, the legal position is the same for all.

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<sup>231</sup> *ERY v Associated Newspapers Limited* [2016] EWHC 2760 (QB) <http://www.bailii.org/ew/cases/EWHC/OB/2016/2760.html>.

<sup>232</sup> *Lachaux v Independent Press* [2017] EWCA Civ 1334, <http://www.5rb.com/wp-content/uploads/2017/09/Lachaux-Section1.pdf>.

<sup>233</sup> *Flood v Times Newspapers* [2017] UKSC 33, <https://www.supremecourt.uk/cases/uksc-2015-0045.html>.

## 3.6. HU – Hungary

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### 3.6.1. Introduction

The regulatory framework and situation of journalism have been the subject of debate at both national and European levels since new Hungarian media laws<sup>234</sup> were adopted in 2010. The revised regulatory framework also had an impact on general provisions of civil law, criminal law, data protection law, etc. The new Civil Code of 2013<sup>235</sup>, for example, introduced compensation for victims of personality rights infringements, the new Criminal Code<sup>236</sup> provides for access to electronic data to be blocked in certain cases, while the new Freedom of Information Act<sup>237</sup> deals clearly with the legal status of journalists. In view of what, on the whole, appears to be an overall restriction of journalistic activity, the question arises as to whether journalists are still subject to more specific obligations than privileges.

### 3.6.2. Dimensions of media privilege

#### 3.6.2.1. Public law

##### 3.6.2.1.1. Informant protection

The key questions regarding the legal status of journalists were regulated in the Act on the Freedom of the Press and the Fundamental Rules on Media Content.<sup>238</sup> The Act also sets out the main elements of media privilege, in particular the conditions for the protection of informants.

One of the most heavily criticised aspects of the 2010 Act on the Freedom of the Press and the Fundamental Rules on Media Content (hereinafter the “Press Act”)<sup>239</sup> was its unsatisfactory protection of informants.<sup>240</sup> Although the protection of sources principle

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<sup>234</sup> Act No. CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content; Act No. CLXXXV of 2010 on Media Services and Mass Media

<sup>235</sup> Act No. V of 2013 on the Civil Code

<sup>236</sup> Act No. C of 2012 on the Criminal Code

<sup>237</sup> Act No. CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information

<sup>238</sup> Act No. CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content

<sup>239</sup> Act No. CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content; Act No. CLXXXV of 2010 on Media Services and Mass Media

<sup>240</sup> Concerning this criticism, see Krisztina Nagy – Gábor Polyák: Die neuen Mediengesetze in Ungarn. Kritische Betrachtung des Gesetzwortlauts und der Praxis, *Osteuropa-Recht* 2011/3. 262-274.

was laid down in law, extensive exemptions and a lack of procedural guarantees meant that the rules were ineffective. The original Act stated the following:

*“6. § (1) Media content providers and the persons they employ under contract of employment or some other form of employment relationship shall have the right not to reveal the identity of any person from whom they receive information (hereinafter referred to as “source of information”). The right to keep such data confidential shall not include the protection of sources of information disclosing qualified data unlawfully.”<sup>241</sup>*

*(2) Media content providers and the persons they employ under contract of employment or some other form of employment relationship shall also have the right to keep secret their sources of information in court and regulatory proceedings, unless there is a public interest in publishing the information that they provided.*

*(3) In exceptionally justified cases, courts or authorities may, in order to protect national security and public order or to uncover or prevent criminal acts, oblige media content providers and the persons they employ under contract of employment or some other form of employment relationship to reveal the identity of sources of information.”<sup>242</sup>*

The shortcomings of the Act immediately became clear in proceedings against an investigative online newspaper. A few months after the Act had entered into force, an online portal had reported that the customer data of a large securities trading company had fallen into the wrong hands.<sup>243</sup> The police had demanded that the editors reveal the informant’s identity, but they refused. Nevertheless, the police seized a database from the online newspaper. According to the police, the editors could not rely on the protection of sources enshrined in media law in criminal proceedings because the protection of sources was not mentioned in the Code of Criminal Procedure as providing an exemption from the obligation to testify.

Even though the police’s interpretation could not clearly be derived from the Act, it was upheld by the public prosecutor’s office and the court. After a failed appeal to the public prosecutor’s office and the court, the editors turned to the Constitutional Court, which examined the constitutional complaint as part of a broader decision relating to the new media laws.<sup>244</sup>

The Hungarian Constitutional Court ruled that the object of the protection of sources was not the information, the informant or a document alone, but that “the relationship of trust between the journalist and the informant, which guarantees the publication of facts and opinions in the public interest” was paramount.<sup>245</sup> It asked the legislator to pass a new regulation, which entered into force in 2012. The current wording is as follows:

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<sup>241</sup> This is data that would be considered a state secret in court proceedings.

<sup>242</sup> Unofficial translation

<sup>243</sup> For a summary of the case, see Marietta Le: MagyarLeaks: This Is A Test of the Hungarian Media Law, <https://advocacy.globalvoicesonline.org/2011/09/19/magyarleaks-this-is-a-test-of-the-hungarian-media-law/>

<sup>244</sup> See Krisztina Nagy – Gábor Polyák: Hungarian Constitutional Court: New Media Regulation partly under Constitutional Scrutiny. Ruling no. 165/2011 (XII. 20.) OJ, Vienna Journal on International Constitutional Law 1/2013 110-116.

<sup>245</sup> Constitutional Court ruling no. 165/2011 (XII. 20.) OJ.

*“(1) Media content providers and the persons they employ under contract of employment or some other form of employment relationship shall have the right, in accordance with the relevant legislation, not to reveal the identity of any person from whom they receive information relating to their activities in providing media content (hereinafter referred to as the “source of information”) in court and regulatory proceedings, and shall have the right to refuse to surrender any document, written instrument, article or data medium that may reveal the identity of the source of information.*

*(2) In justified cases specified by law, the court may – under exceptional circumstances – order media content providers and the persons they employ under contract of employment or some other form of employment relationship to reveal the identity of the source of information, or to surrender the document, written instrument, article or data medium that may potentially expose the source of information.”<sup>246</sup>*

One major change in the rules is that the right of journalists and informants to protection is not subject to the very broad and open concept of public interest. The new version also covers documents and other elements related to the protected informant. The act now makes clear that the protection of informants can only be restricted by a court, and only if the purpose of disclosure is to solve a crime. In addition to these direct amendments, the various procedural laws were adapted. The Code of Civil Procedure and the Code of Administrative Procedure now state that journalists – described in the Act as “media content providers and the persons they employ under contract of employment or some other form of employment relationship” – are entitled to refuse to testify.<sup>247</sup>

In criminal proceedings, only courts can order the disclosure of an informant’s identity, and only in connection with intentional crimes punishable by at least three years’ imprisonment. Furthermore, the crimes must not be solvable using information from other sources, and the interest in investigating the crime must significantly outweigh that in the protection of sources.<sup>248</sup>

#### 3.6.2.1.2. Exemption of journalists from the legal consequences of infringements

The Act on the Freedom of the Press and the Fundamental Rules on Media Content also contains further privileges for journalists. For example, it exempts them from the legal consequences of rights infringements committed for the purpose of obtaining information of public interest.<sup>249</sup> Other conditions of this exemption are that:

- the information could not, or only with unreasonable difficulty, have been obtained by other means;
- the infringement did not cause an unreasonable or serious impairment;

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<sup>246</sup> Unofficial translation

<sup>247</sup> Act No. III of 1952 on the Code of Civil Procedure, Art. 170; Act No. CXL of 2004 on the General Rules of Procedure and Activities of Administrative Authorities, Art. 53.

<sup>248</sup> Act No. XIX of 1998 on the Code of Criminal Procedure, Art. 82

<sup>249</sup> Act No. CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content, Art. 8

- the information was not obtained in violation of the Act on the Protection of Classified Information.<sup>250</sup>

The Act on the Freedom of the Press and the Fundamental Rules on Media Content also states that the exemption does not cover compensation claims for material damage resulting from the infringement.

The first court decision to be based on the application of this provision was issued in November 2016, although it is not yet final. In this case, a journalist masqueraded as a refugee and applied for refugee status. As a result, he was the only journalist able to report in detail about the situation of refugees in Hungary.<sup>251</sup> There was no lawful means of finding out about conditions in the refugee camp and the treatment of refugees. In order to obtain refugee status, he had to lie to the authorities about his identity and background, as well as sign an official document with a false name.

In its decision, however, the court concluded that the journalist could not rely on media privilege. It was true that there had been no other way of obtaining information on the situation of refugees, that no unreasonable damage had been caused by the infringement and that no classified information had been revealed so the conditions of media privilege had, in principle, been met. However, the court argued that there was no chronological connection between the infringement and the journalistic activity. It ruled that the infringement had not been committed until the administrative proceedings were already under way and that, at that time, the journalist would no longer have been able to obtain new information. The journalist countered that he had in fact obtained new information by committing the infringement. He added that it was impossible for a journalist to know whether an infringement demonstrably committed in order to obtain information would actually lead to new information being obtained. The journalist appealed against the court decision and the case is pending. However, if the first-instance ruling is upheld, the potential freedom created by the legislation will be significantly restricted.

#### 3.6.2.1.3. Professional independence

The Act also provides guarantees for the professional independence of journalists from the interests of media owners and advertisers. It states that:

*“Persons employed by media content providers under contract of employment or some other form of employment relationship shall have the right to professional independence from the owners of the media content provider, from the sponsors of the media content provider, and from natural and legal persons on whose behalf any commercial communication is made via any [form of] media content, and also to protection against*

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<sup>250</sup> Act No. CLV of 2009 on the Protection of Classified Information.

<sup>251</sup> Gergely Nyilas: Elfogattam magamat az ászotthalmi úton, Index.hu, 17 August 2015, [http://index.hu/belfold/2015/08/17/menekult\\_tabor\\_bentrol/](http://index.hu/belfold/2015/08/17/menekult_tabor_bentrol/)

*owners and sponsors applying pressure in an attempt to influence media content (editorial and journalistic freedom of expression)."*<sup>252</sup>

The Act also suggests that the exercise of editorial and journalistic freedom cannot influence journalists' employment relationship:

*"The sanctions prescribed in labour regulations, and those arising from other forms of employment relationship shall not apply to employees of media content providers engaged under contract of employment or some other form of employment relationship if they refused to carry out any instruction given in violation of editorial and journalistic freedom of expression."*<sup>253</sup>

To date, no complaints or procedures have been heard by the courts on the basis of these provisions. However, this does not necessarily mean that professional independence has never been breached. To exercise their independence, journalists need not only legal protection, but also a stable economic situation and livelihood. A high level of importance should also be attached to journalistic freedom in the framework of employment relationships. However, research suggests that these conditions are not currently met in Hungary.<sup>254</sup>

#### 3.6.2.1.4. Access to information

The Press Act contains another rule which, at first glance, appears to create privilege for journalists with regard to the obtaining of information of public interest. It states that *"bodies of the central and local governments, institutions, officers, persons entrusted with official and public functions, and the directors of business associations under the majority control of the State or municipal governments"* must support the information activities of media content providers.<sup>255</sup> They must provide them with the necessary information in due time, although only *"within the framework of regulations governing access to information of public interest and the freedom of information"*.

This restriction of the right of access to information makes it clear that this is not a special privilege for journalists. Indeed, the Act on the Right to Informational Self-Determination and Freedom of Information<sup>256</sup> entitles all citizens to apply for access to data of public interest. In other words, applications from journalists cannot be given preferential treatment. Their applications, just like those of any other citizen, must be answered within fifteen days, or thirty days if they are especially complicated. Journalists

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<sup>252</sup> Act No. CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content, Art. 7(1) (unofficial translation)

<sup>253</sup> Act No. CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content, Art. 7(2) (unofficial translation)

<sup>254</sup> Mérték Médiaelemző Műhely: Az újságírók sajtószabadság-képe 2016-ban Magyarországon, Mertek.eu, 16 June 2017, <http://mertek.eu/2017/06/16/az-ujsgirok-sajtoszabadsag-kepe-2016-ban-magyarorszagon/>

<sup>255</sup> Act No. CIV of 2010 on the Freedom of the Press and the Fundamental Rules on Media Content, Art. 7(2) (unofficial translation).

<sup>256</sup> Act No. CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information.



must also pay a fee for public information. Neither the deadlines nor the obligations to supply information nor the other procedural rules are favourable to journalists. The Press Act does nothing to change this.

Journalists encounter serious difficulty in accessing information and interviews with politicians and public officials, who are not obliged under the Press Act to answer journalists' questions. Some editorial offices even complain that the entire Government has expressly banned interviews with them.<sup>257</sup>

Although the EU Data Protection Directive allows national legislators to deviate from general data protection provisions in the interests of freedom of expression and journalistic activity, the Hungarian Data Protection Act contains only one minor difference: data processing by media content providers exclusively for their own information activities does not need to be recorded in the data protection register, which serves as a public directory of data processors and data processing.<sup>258</sup>

### 3.6.2.2. Civil law

The press, media and journalists are not mentioned in the Civil Code,<sup>259</sup> although journalists are the main beneficiaries of rules limiting the personality rights of people in public life. Under the Civil Code, the exercise of fundamental rights of free discussion of public matters can restrict the protection of the personality rights of people in public life to a necessary and reasonable extent, without infringing human dignity.<sup>260</sup> Therefore, journalists – as well as other people – can criticise people in public life without consequences under civil law.

### 3.6.2.3. Criminal law

The Criminal Code only mentions the words “media” and “press” in its definition of the “public at large”<sup>261</sup>, where it makes clear that the publication of information in the press or other media services is aimed at the “public at large”.<sup>262</sup> The “public at large” is one of several conditions or circumstances that are considered in relation to certain crimes. For example, the crime of incitement is only committed if violence or hatred is incited against

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<sup>257</sup> Gábor Medvegy: Elismerték a hatóságnál: tiltólistán van a Hír TV, 24. hu, 9 May 2017, <http://24.hu/kozelet/2017/05/09/elismertek-a-hatosagnal-tiltolistan-van-a-hir-tv/>

<sup>258</sup> Act No. CXII of 2011 on the Right to Informational Self-Determination and Freedom of Information, Art. 65(3).

<sup>259</sup> Act No. V of 2013 on the Civil Code.

<sup>260</sup> Act No. V of 2013 on the Civil Code, Art. 244.

<sup>261</sup> According to case law, “public at large” refers to any situation in which the number of people present is not obvious at first glance, or that takes place in a publicly accessible location. This case law is supplemented in the Criminal Code with the following definition: “public at large” shall mean, *inter alia*, when a crime is committed through publication in the press or other media services, by way of reproduction or by means of publication on an electronic communications network”, see Act No. C of 2012 on the Criminal Code, Art. 459 point 22.

<sup>262</sup> Act No. C of 2012 on the Criminal Code, Art. 459 point 22

specific groups in front of the general public.<sup>263</sup> The penalty for defamation is greater if the crime is committed in front of the general public.<sup>264</sup>

The law does not exempt journalists from criminal sanctions if they are guilty of defamation or disparagement. Although it is not laid down in a specific regulation, established case law, based on several rulings of the Constitutional Court<sup>265</sup>, suggests that subjective expressions of opinion and unintentional false allegations of fact against people in public life are not crimes. This interpretation is also favourable to journalists.

### 3.6.3. Recent and emergent issues

#### 3.6.3.1. Political and social debate

Current debate relating to journalism in Hungary is not primarily focused on the broadening of privileges but on issues such as self-censorship and the use of journalism as a political tool. In a 2017 survey, 28% of journalists questioned said they had concealed or twisted political or economic facts in the past year in order to avoid negative consequences.<sup>266</sup> Annual surveys on the same subject, dating back to 2012, show no clear increase or decrease in this phenomenon.<sup>267</sup>

One major reason for self-censorship is the lack of a clear legal framework for journalism. In 2015, the Venice Commission concluded, in relation to Hungarian media regulation, that “not all types of illegal media content may be precisely defined in law. ... The law should be revisited in order to ensure that those vague concepts (‘morals’, ‘constitutional order’, etc.) are not interpreted by the courts too broadly.” The Commission also stated that “the mere threat of the application of heavy sanctions may have a chilling effect on journalists and media outlets, especially where the sanctions are imposed for violations of such vague requirements as those set in the laws”.<sup>268</sup> The Hungarian legislator has not yet responded to this request.

For journalists and the public, the use of journalism as a political tool is a daily reality. An investigation based on interviews with several journalists summarises the consequences of this trend as follows: “The most spectacular features of the pro-Government media landscape that took shape by 2016 are that the media involved uniformly support and take an active role in promoting the Government’s policies and that

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<sup>263</sup> Act No. C of 2012 on the Criminal Code, Art. 332

<sup>264</sup> Act No. C of 2012 on the Criminal Code, Art. 226

<sup>265</sup> See, in particular, Constitutional Court judgment no. 36/1994. (VI.24.) OJ

<sup>266</sup> Mérték Médiaelemző Műhely: Az újságírók sajtószabadság-képe 2016-ban Magyarországon, Mertek.eu, 16 June 2017, <http://mertek.eu/2017/06/16/az-ujsgirok-sajtoszabadsag-kepe-2016-ban-magyarorszagon/>

<sup>267</sup> The previous surveys can be found at <http://mertek.eu/tevekenysegeink/sajtoszabadsag/>

<sup>268</sup> European Commission for Democracy through Law (Venice Commission): Opinion on Media Legislation (Act CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the legislation on taxation of advertisement revenues of mass media) of Hungary, Strasbourg, 22 June 2015, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2015\)015-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)015-e), p. 8.

they operate as a political weapon against persons, parties or other groups that the Government side in Hungary dislikes. Several of our interviewees noted that they have heard that media organisations in the pro-Government segment of the media coordinate with one another and exchange information about their work.”<sup>269</sup>

### 3.6.3.2. Legislation

Current legislation does not clearly prohibit discrimination against journalists by elected politicians or public officials.

On the grounds that such behaviour makes it impossible for journalists to exercise public control over those in authority, there are calls for such discrimination to be prohibited. There are also demands for freedom of information rules to be reviewed, so that requests for access to information of public interest are answered more quickly. Shorter deadlines could be introduced for journalists' requests, and the fees charged could be limited to copying costs rather than all the other associated administrative costs.

### 3.6.3.3. Case law

As previously mentioned, there is currently no or very little case law relating to the media privileges that were introduced by the 2010 Press Act. The Hungarian courts will therefore, in future, need to make it clear that, in order to be exempted from the legal consequences of legal infringements, journalists do not need to be completely sure that new information can be obtained by committing the infringement, as long as there is a realistic likelihood that such information can be obtained.

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<sup>269</sup> Mertek Media Monitor: Soft Censorship in Hungary in 2016: When Propaganda Rules Public Discourse, Mertek Booklets Vol 12, May 2017, <http://mertek.eu/wp-content/uploads/2017/10/MertekFuzetek12.pdf>, p. 53

## 3.7. IT – Italy

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### 3.7.1. Introduction

In the Italian legal system, media privilege corresponds to a set of rules which only applies to professionals<sup>270</sup> who engage in journalistic activities that exonerate them from the restrictions contained in certain legal provisions.

In order to determine the scope of application of such exceptions it is reasonable to analyse the pertinent Italian legislation and the principal constitutional rights with which the right to information might enter in conflict.

It is worth pointing out that the Italian legislation governing journalistic activities is fragmentary and imprecise; accordingly, the scope of exceptions applying to journalists is explained by the Italian Supreme Court (*Corte di Cassazione*), whose case law, in this regard, is abundant.

### 3.7.2. Media privilege in Italian law

#### 3.7.2.1. Public law

The Italian Constitution<sup>271</sup> does not explicitly regulate the freedom of the press. In order to provide freedom of the press with a constitutional shield, Italian jurisprudence and doctrine<sup>272</sup> has interpreted extensively Article 21<sup>273</sup> of the Italian Constitution, governing freedom of thought<sup>274</sup>.

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<sup>270</sup> The category of professionals to whom media privilege applies, as specified in the section 6.2.2.4 and 6.3., is mainly listed in Article 136 of Legislative Decree n. 196 of 2003. This category has been extended by Italian case law to professionals publishing data in online journals, bloggers, journalists dealing with live television interviews, journalists publishing telephone tapping, etc.

<sup>271</sup> *Costituzione della Repubblica Italiana*, n.298 del 27-12-1947 (Constitution of the Italian Republic, n.298 of 27-12-1947).

For the official text of the Italian Constitution, see <http://www.gazzettaufficiale.it/eli/id/1947/12/27/047U0001/sg>.

<sup>272</sup> See G. E. Vigevani, “Diritto all’informazione e privacy nell’ordinamento italiano: regole ed eccezioni”, in *Diritto dell’informazione e dell’Informatica*, fasc. 3. 2016, p. 473.

<sup>273</sup> Article 21 of the Italian Constitution provides that: “Anyone has the right to freely express their thoughts in speech, by writing, or through any other form of communication. The press may not be subjected to any authorisation or censorship. Seizure may be permitted only by judicial order stating the reason and only for offences expressly determined by the law on the press or in case of violation of the obligation to identify the persons responsible for such offences. In such cases, when there is absolute urgency and timely intervention of the Judiciary is not possible, a magazine may be confiscated by the criminal police, which shall immediately

The legal reason for such extensive interpretation was that as journalism consists in the describing of events, and this process encompasses expression of thought, hence freedom of the press may be protected through Article 21.

Article 21 of the Italian Constitution establishes, *inter alia*, that “the press may not be subjected to any authorisation or censorship”.

As Italian legal doctrine has correctly pointed out, freedom of the press represents both a right and a duty, as it is a right whose scope of application is limited by the need to comply with other constitutional rights. For instance, freedom of the press is often restricted by the right to privacy, which is not directly regulated by the Italian Constitution. In fact, the right to privacy has – again – been defined by Italian jurisprudence,<sup>275</sup> which considers that this right constitutes an expression of Article 2 of the Constitution, that protects the right to personality. Other constitutional references used as a legal basis for the right to privacy in the Italian Constitution are Article 3 (establishing equal social dignity amongst individuals), Article 14 (governing domicile protection), Article 15 (concerning the freedom and secrecy of correspondence), Article 13 (on personal freedom) and lastly Article 21, governing freedom of speech.

### 3.7.2.2. Civil law

The Italian Civil Code<sup>276</sup> does not contain provisions explicitly governing freedom of the press in the context of media privilege.

The Italian courts<sup>277</sup> have applied certain provisions of the Civil Code – governing the compensation of damages – to journalists who have unlawfully exercised their right to inform by violating the right to one’s personal and professional image (i.e. reputation). In particular, the Italian courts have acknowledged to the victims, the right to ask for

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and in any case not later than 24 hours refer the matter to the Judiciary for validation. In default of such validation in the following 24 hours, the measure shall be revoked and considered null and void. The law may introduce general provisions for the disclosure of financial sources of periodical publications. Publications, performances, and other exhibits offensive to public morality shall be prohibited. Measures of preventive and repressive measure against such violations shall be established by law”.

<sup>274</sup> See Francesco Raia, “Privacy and freedom of press with regard to certain categories of persons: public persons and minors”, in Deontology and privacy, <https://www.francoabruzzo.it/document.asp?DID=3298>.

<sup>275</sup> The first case regarding the right to privacy in Italian jurisprudence was a well-known case involving a clash between the freedom of press and the right to privacy: Soraya Esfandiari, Cass. no. 2129, 27.05.1975, [http://www.jus.unitn.it/users/pascuzzi/varie/sem-inf99/Cass\\_1975.htm](http://www.jus.unitn.it/users/pascuzzi/varie/sem-inf99/Cass_1975.htm). See Enrico del Core, Nota di Commento “Attività Giornalistica e trattamento dei dati personali”, in Cass. Civ. I, sez., 25, 6, 2004, n. 11864, Conferma Tribunale Milano 12.10. 2000, in NGCC 2005. See also Cass. Sez III, 9 June 1998, n. 5658, [http://www.legge-e-giustizia.it/index.php?option=com\\_content&task=view&id=484&Itemid=149](http://www.legge-e-giustizia.it/index.php?option=com_content&task=view&id=484&Itemid=149).

<sup>276</sup> *Codice Civile, Regio Decreto 16 marzo 1942, n. 262* (Civil Code, Royal Decree n. 262 of 16 March 1942). For the official text of the Italian Civil Code, see <http://www.gazzettaufficiale.it/sommario/codici/codiceCivile>.

<sup>277</sup> See Valentina Ceccarelli, Elena Occhipinti e Isabella Sardella, in “Il danno alla persona derivante dalla lesione di diritti costituzionalmente tutelati: non solo danno morale ed esistenziale”, in *Danno e Responsabilità*, 5/2016, 498. The authors mention twenty-eight judicial decisions which have dealt with the right of victims to seek damages from the press.

moral and economic damages, in accordance with Articles 2059<sup>278</sup> and 2043<sup>279</sup> of the Civil Code.

In the light of the foregoing, it is reasonable to believe that, in certain cases, media privilege does not exonerate journalists from the payment of damages in the event of their unlawfully exercising of the right to inform.

### 3.7.2.3. Criminal law

In the Italian Criminal Code,<sup>280</sup> freedom of the press is considered a “legal excuse” (*causa di giustificazione*).<sup>281</sup> Hence, media privilege in the context of criminal law is represented by the fact that when a journalist lawfully exercises the freedom of the press he or she does not incur criminal liability, even when he or she publishes information that is damaging to a third party’s reputation<sup>282</sup>.

The fact that the right to inform is deemed to be a legal excuse (i.e. defence against a criminal charge) is potentially a very important benefit for journalists, given the crimes that journalists may commit while providing information. In fact, the press may actually violate the right of honour and the right of reputation of a person – whereas by “right of honour” is intended the degree of respect that a person commands for his personality and his abilities, and “right of reputation” means the opinion that society has of the person.<sup>283</sup>

In particular, the violation of a person’s reputation by the press is punishable under Article 595 (3) of the Italian Criminal Code, which governs the crime of libel. Article 595 § 3, establishes that if a third party’s reputation is damaged by the press or by any other means of publicity, the penalty is imprisonment for a term of between six months and three years, or a fine of not less than EUR 516. Furthermore, Article 57 (entitled “Crimes Committed Through the Press”) also extends criminal liability to the editor of the periodical in question (in addition to the author of the offending text) in the event that that editor has not properly overseen the content of the periodical in order to prevent the commission of crimes through the press.

The scope of application of the freedom of the press as a legal excuse has been further extended by Italian case law.

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<sup>278</sup> Under Article 2059 of the Italian civil code, compensation for non-pecuniary damage may be awarded only in specific cases provided by the law.

<sup>279</sup> Under Article 2043, any culpable or malicious act which cause damage to any third party renders the person who committed the act liable for damages.

<sup>280</sup> *Codice Penale, Regio Decreto 19 ottobre 1930*, n. 1398 (Criminal Code, Royal Decree n. 1398 of 19 October 1930, latest amendments being made by L. n.105 of 3 July 2017, L. n.110 of of 14 July 2017 and L. n. 103 of 23 June 2017, n. 103. For an updated text of the Italian Criminal Code, <http://www.altalex.com/documents/codici-altalex/2014/10/30/codice-penale>.

<sup>281</sup> “*Causa di giustificazione*”, as referred to by the Italian Criminal Code, means a defence that arises because the defendant is not liable for having acted in a way that would otherwise be criminal.

<sup>282</sup> See *Diritto Penale, Parte Generale*, Edizioni Simone, Edizione XXI, 2011.

<sup>283</sup> See Luca Ballerini, “Diffamazione a mezzo di stampa e diritto di cronaca tra verità putativa e falsità sostanziale della notizia”, in *La Responsabilità Civile*, June 2011, p. 445.

#### 3.7.2.4. Secondary legislation

This paragraph contains a historical *excursus* of the most important laws, regulations and other rules regarding the freedom of the press and the exceptions applying to the media in Italy.

At the outset, it is worth mentioning that the notion of the “press” is set out in Article 1 of Law no. 47 of 8 February 1948.<sup>284</sup> Under Article 1, the term “press” encapsulates any typographical reproduction or reproductions obtained by any mechanical, physical or chemical means which is intended for publication, and any other means of advertising attained by using any instrument intended for an indefinite number of people (for instance, public speeches).

On 3 February 1963, the Italian Parliament enacted Law no. 69 governing the profession of journalists,<sup>285</sup> which totally amended the previous legislation and introduced certain rules for journalists by establishing, *inter alia*, that:

1. freedom of information, which is an undisputable right for journalists, must be exercised in compliance with the statutory provisions concerning the protection of human personality;
2. journalists shall be obliged to respect the substantial truth of facts and observe the duties imposed by loyalty and good faith.

Further obligations regarding journalists were introduced by Law no. 675 of 31 December 1996.<sup>286</sup>

It is worth mentioning Article 25 of this law, which provided that the Italian data protection authority shall encourage the adoption of a specific code of conduct by the National Council of the Press Association as regards the processing of data within the scope of the journalistic profession. Such a code should include measures and provisions to safeguard data subjects in a manner that is appropriate to the nature of the data in question. In the course of drawing up the said code, or thereafter, the Italian data protection authority (in cooperation with the Council) should lay down measures and provisions to safeguard data subjects, which the Council should be required to adopt. Hence, Article 25 formally recognised the power of the Italian data protection authority over the National Council of the Press Association.

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<sup>284</sup> Disposizioni sulla stampa, Legge 8 febbraio 1948, n. 47 (Provisions on Press, Law no. 47 of 1948).

For the official version of the law, see

[http://www.gazzettaufficiale.it/atto/serie\\_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1948-02-20&atto.codiceRedazionale=048U0047&elenco30giorni=false](http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1948-02-20&atto.codiceRedazionale=048U0047&elenco30giorni=false).

<sup>285</sup> Legge 3 febbraio 1963, n. 69, *Ordinamento della professione di giornalista* (Law 3 February 1963, n. 69, Regulations of the profession of journalist). For the official version of the law, see

[http://www.gazzettaufficiale.it/atto/serie\\_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1963-02-20&atto.codiceRedazionale=063U0069&elenco30giorni=false](http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1963-02-20&atto.codiceRedazionale=063U0069&elenco30giorni=false).

<sup>286</sup> Legge n. 675 del 31 dicembre 1996, *Tutela delle persone e di altri soggetti rispetto al trattamento dei dati personali* (Law no. 675 of 31 December 1996, Protection of individuals and other subjects with regard to the processing of personal data). For the official version of the law,

<http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/28335>.

For the sake of clarity, it has to be pointed out that the Italian data protection authority (*il Garante dei dati personali*) is the supervisory authority in respect of data (i.e. an administrative body established by Law no. 675 of 1996 and appointed by the Parliament), whose duties are, *inter alia*, to verify whether data processing is carried out in compliance with the laws and regulations in force.<sup>287</sup>

On 29 July 1998 the Code of Conduct<sup>288</sup> was finally enacted. It contains provisions governing both the processing of personal data and the freedom of the press. Article 2 of the Code of Conduct clarifies that the collection and processing of data and information for journalistic activities is an essential precondition for ensuring the freedom of the press; thus, it is different from any other form of collecting and processing data. Owing to the different purpose of data processing by the press, journalists shall benefit from a special system of rules.

A very important law which clearly outlines the range of the exceptions that apply to journalists in the context of data protection is Legislative Decree n. 196 of 30 June 2003<sup>289</sup> (hereinafter referred to as the “Personal Data Protection Code”), which contains a section (*Titolo XII*) devoted to journalists. The Personal Data Protection Code has replaced Law. n. 675 of 1996.

Under the general rules provided by the Personal Data Protection Code, the processing of personal, sensitive and judicial data is only permitted if the person concerned or the Italian data protection authority<sup>290</sup> (which is provided for also by the Personal Data Protection Code) has consented to such processing of data. In particular, the Personal Data Protection Code establishes that:

1. each person has the right to protect his personal data;<sup>291</sup>
2. the processing of personal data by entities or individuals is only permitted after the person concerned has given his consent;<sup>292</sup>
3. sensitive data may be processed only with the written consent of the interested party and the authorisation of the Italian data protection authority.

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<sup>287</sup> For a comprehensive overview of the framework and the duties of the Italian data protection authority, see Articles 30 and 31 of Law no. 675 of 1996, <http://www.privacy.it/archivio/legge675encoord.html> (Eng. Version of the law).

<sup>288</sup> Codice di deontologia relativo al trattamento dei dati personali nell'esercizio dell'attività giornalistica, Provvedimento del Garante del 29 luglio 1998 (Code of conduct concerning the processing of personal data during the exercise of journalistic activities, Order of the Italian data protection authority of July 29, 1998). For an official version of the Code of Conduct, <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1556386>.

<sup>289</sup> *Decreto legislativo 30 giugno 2003, n. 196, Codice in materia di protezione dei dati personali* (Legislative Decree n. 196 of 30 June 2003, the Personal Data Protection Code). For the official version of the Personal Data Protection Code, <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1311248>.

<sup>290</sup> The framework and the duties of the Italian data protection authority are established by Title II, Chapter One, of the Personal Data Protection Code, named the “Supervisory Authority”, Articles 153 - 160. See, the English version of the Code at <http://194.242.234.211/documents/10160/2012405/Personal+Data+Protection+Code+-+Legislat.+Decree+no.196+of+30+June+2003.pdf>.

<sup>291</sup> See Article 1 of the Personal Data Protection Code.

<sup>292</sup> See Article 23 of the Personal Data Protection Code.



However, Articles 136-139 of the Personal Data Protection Code establishes certain exceptions to the above-described rules for journalists. In particular, Article 136 establishes the category of professionals to whom media privilege applies, stipulating that this exception applies to the processing of data, which is carried out:

1. during the exercise of the journalistic profession and solely for purposes related thereto;
2. by persons included either in the list of journalists or in the register of practitioners, as per sections 26 and 33 of Law no. 69 of 03.02.1963; or
3. on a temporary basis, exclusively for the purposes of the publication or occasional circulation of articles, essays and other intellectual works, including artistic expression.

Article 137 sets out the essence of “media privilege” in the context of data processing and establishes that it is not necessary to obtain the consent – written or oral – of the person concerned or authorisation from the Italian data protection authority in order to process data (including sensitive and judicial data), provided that such activity is undertaken exclusively for journalistic purposes. Hence, under this special regime, instead of an *ex ante* evaluation and comparison between the right to privacy and the freedom of the press, there will be an *ex-post* assessment based on the criteria set out in Article 137 (3)<sup>293</sup> – which establishes, *inter alia*, that “if data are communicated or disseminated for the purposes referred to in Article 136, the limits imposed on freedom of the press in order to protect the rights as per section 2 – in particular the limits on the “essential nature” of information concerning facts of public interest – shall be left unprejudiced”.

The concept of “essential nature of information” is clarified in Article 6 (entitled “Essential Information”) of the Code of Conduct, which establishes, *inter alia*, that “disclosure of information of substantial public or social interest is not in conflict with respect for private life, if this information, detailed or not, is indispensable on account of either the particularity of the relevant event(s) or the description of the specific way in which they have occurred, as well as in the light of the qualifications of the persons involved”. The Code of Conduct, which is also contained in the Personal Data Protection Code, is considered a secondary law source; therefore, the definition of Article 6 of the Code of Conduct has not only an ethical value but also a legal value.<sup>294</sup>

Besides introducing the exceptions applying to journalists, Articles 136 and 137 also establish the criteria according to which freedom of the press prevails over privacy: specifically, freedom of the press prevails if data which should be processed are essential for the understanding of information of public interest<sup>295</sup>.

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<sup>293</sup> See Massimo Franzoni, “La responsabilità dei professionisti della carta stampata e dintorni”, in *La Responsabilità Civile*, 2011, p. 805, for a more detailed explanation of the criteria contained in Article 137 of the Personal Data Protection Code and 6 of the Code of Ethics.

<sup>294</sup> See Salvatore Sica, “Tutela della privacy, diritto di cronaca e codice deontologico dei giornalisti”, *Corriere giuridico* n. 9/2008, p. 1236.

<sup>295</sup> See an interview of Avvocato Carlo Melzi d’Eril and l’Avvocato Stefano Rossetti with the Order of Journalists, published on 11/11/2014, <http://www.odg.it/content/diritto-all%E2%80%99oblio-questo-sconosciuto%E2%80%A6>.

On 27 January 2016 the National Council of Journalists – with the aim of harmonising pre-existing ethics-related documents – approved the consolidated Text on the Duties of a Journalist,<sup>296</sup> (effective as of 3 February 2016), which incorporates both the Charter of the Duties of Journalists<sup>297</sup> enacted in 1993 and the Code of Conduct.

### 3.7.2.5. Case law

Italian case law, especially the jurisprudence of the Court of Cassation (*Corte di Cassazione*), has aimed to fill the gaps in Italian legislation, especially with regard to the criteria to be used in deciding whether the right to information or the right to privacy will take priority in the event of a conflict.

The first judicial decisions which indicate the trend of the Italian jurisprudence in relation to the conflict between privacy and the freedom of the press are Cass. 18.10.1984 n. 5259, named “Decalogue of the Journalist”, and Cass. 30.06.1984 n. 8959.

In particular, decision of the Italian Supreme Court n. 5259<sup>298</sup> established that the freedom of the press is exercised lawfully when the following conditions are met:

1. the information disclosed is socially useful,<sup>299</sup> meaning there is a public interest in the knowledge and disclosure of the facts in question;
2. the information disclosed is true, such truth shall be objective, but a “supposed truth” might be acceptable, subject to certain conditions;
3. the facts are correctly exhibited (i.e. in a certain manner).

On the basis of this jurisprudence it was considered that when the right to information is exercised lawfully it prevails over the right to privacy in the event of a conflict. However, it has been duly pointed out that these criteria or conditions might be useful in establishing a balance between freedom of the press and right of reputation (where, for instance, if the information disclosed is true, the journalist does not incur liability for slander) but they are not capable of establishing a balance between privacy and freedom of the press. If the information disclosed by the journalist is true, privacy may still be violated (and what’s more, may be violated especially because the information disclosed is true)<sup>300</sup>.

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<sup>296</sup> *Testo unico dei doveri del giornalista* (the Single text on the duties of journalists), see official version at <http://www.odg.it/content/testo-unico-dei-doveri-del-giornalista>.

<sup>297</sup> Carta dei doveri del giornalista, sottoscritta dal Consiglio Nazionale dell’Ordine dei Giornalisti e dalla Federazione Nazionale della Stampa Italiana l’8 luglio 1993 (Charter on Duties of Journalists, signed by the National Council of the Press Association and the National Federation of the Italian Press on July 8, 1993). See the text at <http://www.medialaw.it/deontologia/doveri.htm>.

<sup>298</sup> Cass. Sez. I civ. 18 October 1984, n. 5259, [http://www.dirittodellainformazione.it/materiale%20di%20ricerca/sentenza\\_decologo.htm](http://www.dirittodellainformazione.it/materiale%20di%20ricerca/sentenza_decologo.htm).

<sup>299</sup> The *Corte di Cassazione* has established that while the public interest to the disclosure of the information is an impartial criteria, the private interest of the author of the publication for the article to be published is irrelevant. See Cass. Sez. V, 17 January 2013 -15 February 2013, n. 7579, CED 255019.

<sup>300</sup> See Vigevani, p.6.

Usually the three criteria must pertain simultaneously in order for the right of press to prevail; however, there are cases in which Italian courts are highly critical and require “accurate lawfulness” in order for freedom of the press to prevail over privacy (depending on the kind of data published); there are also cases where one of the criteria might not be required, and there are other cases in which these criteria have been broadly interpreted in order to foster the application of media privilege to journalists.

For instance, when journalists disclose facts regarding ongoing lawsuits they must – pursuant to the principle of the presumption of innocence established by Article 27 (2) of the Italian Constitution – faithfully represent the procedural case, clarifying if need be that the facts disclosed are undergoing evaluation by the judicial authority, in order to be understandable that there is still uncertainty regarding the criminal liability of the person under investigation. According to the relevant jurisprudence, in this case, the criteria of “true information” shall be complied with, if the information disclosed corresponds to the judicial decision issued.<sup>301</sup>

In the case of investigative journalism – a form of journalism in which the reporter directly obtains the information through first-hand enquiries (i.e. without making use of external sources<sup>302</sup>) – the *Corte di Cassazione* has ruled that there is no need for the journalist to comply with the criteria of accuracy of information, because the journalist acquires his or her information directly.<sup>303</sup>

In the field of criminal law, the Italian jurisprudence has extended the criteria of true information to also include information that is “supposed to be true”. According to the development of the case law<sup>304</sup>, if a journalist has diligently checked and verified its sources, he is not liable if the information does not turn out to be actually true. Accordingly, media privilege also applies when a journalist wrongly believes that facts disclosed are true, if he has scrupulously verified the facts disclosed. In this case, Article 59 (governing the “supposed legal excuse”) of the Italian Criminal Code shall apply,<sup>305</sup> and the journalist shall not bear criminal liability for having disclosed information he supposed was true.<sup>306</sup>

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<sup>301</sup> See Cass. Sez. I Civile, n. 8807 of 5 april 2017,

<http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snciv&id=./20170405/snciv@s10@a2017@n08807@tS.clean.pdf> .

<sup>302</sup> See Viviana Del Maschio, “I limiti all’esercizio del diritto di cronaca del giornalismo d’inchiesta”, *La Responsabilità Civile*, Gennaio 2012, p. 60.

<sup>303</sup> See Del Maschio, p 60.

<sup>304</sup> See Marianna Pulice, “Nella cronaca una verità incompleta è una notizia falsa” in *Diritto 24*, [http://www.diritto24.ilsole24ore.com/civile/civile/primiPiani/2013/01/nella-cronaca-una-verita-incompleta-e-una-notizia-falsa.php?refresh\\_ce=1](http://www.diritto24.ilsole24ore.com/civile/civile/primiPiani/2013/01/nella-cronaca-una-verita-incompleta-e-una-notizia-falsa.php?refresh_ce=1) – which discusses also the content of the judicial decision Cass. Sez. Unite 23 October 1984 n. 8959, and Ballerini, 447.

<sup>305</sup> Article 59 governs the supposed ground of exclusion of criminal liability. Under this Article, the erroneous assumption of facts excludes criminal liability, subject to certain criteria.

<sup>306</sup> Gaetano Anzani presents an overview of judicial decisions in which the tribunal concerned has not applied media privilege (i.e. the exclusion of criminal liability) to journalists who disclosed facts supposed to be true. See Gaetano Anzani, “Diritto di cronaca e diritto di critica su vicende giudiziarie e reputazione del magistrato inquirente”, in *il Corriere Giuridico*, 8-9, 2012, p. 1097.

Finally, another decision that validates the tendency of Italian jurisprudence towards the primacy of the freedom of the press is the decision of the *Corte di Cassazione* (Supreme Court) of 9 July 2010,<sup>307</sup> in which the Court explained that “the right to information prevails over the right to privacy in consideration of the functional relationship between information and popular sovereignty – said relationship being based on Article 1 § 2 of the Italian Constitution, according to which popular sovereignty may be developed only when public opinion is thoroughly informed”. This decision is important for the extension of media privilege, as in the view of the Court the right to privacy is the exception and the freedom of the press is the rule.

### 3.7.3. Dimensions of media privilege

If one considers that the Italian Constitution protects (albeit indirectly) the freedom of the press, it is reasonable to claim that media privilege shall apply not only to the professionals mentioned in Article 136 of the Personal Data Protection Code but also to professionals dealing generally with the press, as defined in Article 1 of Law 47 of 1948 (i.e. typographical reproductions or any other means of advertising attained by using any instrument intended for an indefinite number of people).

As for the definition of press with regard to the application of the exceptions provided for journalists, this concept has been interpreted extensively by Italian jurisprudence. In one case of libel, the *Corte di Cassazione* answered the question of whether the online press is to be considered as part of the traditional press, within the meaning intended in the Italian Constitution.<sup>308</sup> By decision n. 31022 of 2015 the *Corte di Cassazione*<sup>309</sup> established that media privilege rules apply to telematic journals functionally similar to traditional ones, and to online journals. With regard to social networks, it is worth mentioning that according to Italian case law, Facebook is not considered to be part of the press, but rather as “means of circulation”.<sup>310</sup>

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<sup>307</sup> See Cass. Sez. III, Civile 9 July 2010, n. 16236, <http://www.privacy.it/archivio/cassaz20100709.html>.

<sup>308</sup> In fact, for a considerable period of time Italian jurisprudence has refused to apply media privilege to the online press, stating that the warranties provided by the law applies only to “printed paper”. See Giuseppe Ortolani, “Diffamazione a mezzo stampa: no al sequestro preventivo della testata giornalistica telematica – SSUU 31022/2015”, *Giurisprudenza Penale* 3 agosto 2015, <http://www.giurisprudenzapenale.com/2015/08/03/diffamazione-a-mezzo-stampa-no-al-sequestro-preventivo-della-testata-giornalistica-telematica-ssuu-310222015/>.

<sup>309</sup> Cassazione Penale, Sezioni Unite, 17 luglio 2015 (ud. 29 gennaio 2015). n. 31022, <https://www.ricercagiuridica.com/sentenze/sentenza.php?num=4529>.

<sup>310</sup> See Cassazione Penale, V Sezione, n. 4873, February 1, 2017 and Carlo Melzi d’Eril e Silvia Vimercati, “Diffamazione, Facebook non è stampa”, *Il Sole 24 Ore*, 8 February 2017, <http://www.ilsole24ore.com/art/norme-e-tributi/2017-02-08/diffamazione-facebook-non-e-stampa--161559.shtml?uuid=AEkN30Q>.

As for bloggers, the Italian data protection authority has declared that they will benefit from privileges afforded to journalists<sup>311</sup> because blog activities are included among the activities listed in Article 136 of the Personal Data Protection Code.

In a criminal law case the *Corte di Cassazione* extended the application of media privilege (i.e. the exclusion of the criminal liability of journalists) to a live television interview, as in this case it is not possible for a journalist to verify the validity of information disclosed because the journalist discloses the information at the same moment that he finds out about it.<sup>312</sup>

Media privilege in the criminal context also extends to publications of the results of telephone tapping executed by the judicial police when the journalist has faithfully reproduced the content of the intercepted conversation.<sup>313</sup> Lately the *Corte di Cassazione* has stated that telephone tapping may be published if journalists lawfully exercise the freedom of the press and the information is essential to the understanding of an event of public interest.<sup>314</sup>

With regard to the kind of data which can be published by journalists or professionals to whom the exceptions apply, they are better clarified by the case law as well, as in fact the secondary legislation only qualifies data in categories of “sensitive”, “personal” and “judiciary”.

At the outset, it might be worth pointing out that the Italian data protection authority has clarified that journalists should be very cautious with regard to the circulation of the following data:<sup>315</sup>

1. pictures of minors;
2. names and pictures of persons who have been arrested and are under investigation;
3. names of victims, witnesses and other persons involved in a lawsuit;
4. information concerning health and sexual life.

As for photographs of individuals, Italian jurisprudence has established that even though the right of press has been exercised correctly, and the disclosure of information is lawful, this does not mean that journalists can also disclose pictures of the individuals concerned, as it must be verified if there is a public interest in respect of these pictures.<sup>316</sup>

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<sup>311</sup> See Order of Italian data protection authority n. 29 of January 27, 2016, <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/4747581>.

<sup>312</sup> See Cass. Sez. V Penale 14 June 2016, n.24727, <http://www.neldiritto.it/appgiurisprudenza.asp?id=12940#.WhgNsVXiaUk>, and Cass., Sez. V, n. 3597/2008 of 20/12/2007.

<sup>313</sup> See the decision of the Tribunal of Palermo, sez. I, 29.11, 2009, in [www.dejure.giuffre.it](http://www.dejure.giuffre.it).

<sup>314</sup> See Cassazione civile, Sez. III, 25 March 2017, n. 13151, <https://renatodisa.com/2017/06/26/corte-di-cassazione-sezione-iii-civile-ordinanza-25-maggio-2017-n-13151/>.

<sup>315</sup> See communication of the Italian data protection authority, doc. web n. 1007634 at <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1007634>.

<sup>316</sup> See Cassazione civile, Sez. I, 22/07/2015, n. 15360, <http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snciv&id=./20150723/snciv@s10@a2015@n15360@tS.clean.pdf>.

Usually, photographs of people may be published as long as they have been legally acquired – that is, provided by the person concerned or taken in public places or places open to the public or during public events or in connection with facts of public interest. In this context, the Italian data protection authority has considered it not unlawful to collect images of places “by their nature exposed to the visibility of third parties”, referring to areas (such as a beach or a jetty) not delimited by hedges, walls or other visual barriers, and applied this principle in a case brought before the Italian data protection authority by George Clooney against the Italian journal *Novella* 2000.<sup>317</sup>

By contrast, secondary legislation (i.e. Article 50 of the Personal Data Protection Code) prohibits the publication and circulation by any means whatsoever of reports or images allowing an underage person to be identified.

Media privilege might have a wider application in the case of prominent persons, such as politicians, as their private data are of public concern for society; therefore, in principle, the freedom of the press prevails over the right to privacy. Indeed, for a significant period of time the Italian political and social arena has been very busy discussing [former Prime Minister] Silvio Berlusconi’s sexual behaviour, which was widely disclosed in the press. However, in this case, Article 6 of the Code of Conduct is pertinent, as it establishes that the private sphere of prominent persons or of politicians must be respected if the data or information in question does not have any impact on their position or on their public life.

### 3.7.4. Recent and emergent issues

#### 3.7.4.1. Freedom of the press and the “right to be forgotten”

The right to be forgotten, a right shaped as a counterbalance to data digitalisation, might have an important impact on the content of the privileges granted to the media. In Italy, the right to be forgotten has received protection mainly through the development of jurisprudence.

The right to be forgotten consists of the right of a person to ask for his data not to be circulated, if these data are not correct, or are not updated, or are no longer of public concern.

Initially, from a legal point of view, the right to be forgotten was considered a special form of guarantee as it was applied in order to prevent the circulation of data that were not recent and which were detrimental to the honour of a person – in particular, the dissemination of a person’s previous judicial records. In this context, according to the case

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<sup>317</sup> See Order of the Italian data protection authority of December 22, 2009, doc. Web 1686747, at <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1686747>.

law, the right to be forgotten must prevail over the right to information if there is no public interest in the information.<sup>318</sup>

Following the digitalisation of data, and the creation of web archives of information, Italian case law and doctrine has linked the right to be forgotten to the right of personal identity. The leading case is represented by the decision n. 5225 of April 5, 2012, delivered by section III of the *Corte di Cassazione* [in this case an Italian politician was arrested for corruption in 1993<sup>319</sup> and at the end of the judicial proceedings was found not guilty. The politician complained that, afterwards, the only information available online (specifically, in the web archive of *Corriere della Sera* – a well-known Italian daily newspaper) concerned the arrest, and no reference was made to the favourable outcome of the court case]. In an attempt to balance the collective interest (guaranteed by the freedom of the press) with the individual interest (protected by the right to privacy and the right to be forgotten the Court ruled that the archived articles should be correlated with the relevant updates and that all online journals are required to provide their archives of “a system capable of reporting (in the body or in the margin) the existence of a follow-up or the development of information allowing rapid and easy access by users for their relevant and in-depth study”.

Accordingly, pursuant to such a decision, following the request of the concerned party the journal may alternatively:

1. delete the page with the information;
2. obscure the name and surname of the person concerned by removing the tags that link the data to the search engines, thus preventing the article from being inserted into the subject's details;
3. keep the article in the journal's internal archive, but de-index it.

In the meanwhile, the Court of Justice of the European Union (C 131/12)<sup>320</sup> stated that Google should also be liable for de-indexing non-updated webpages (besides the online journal concerned).

It is worth mentioning here the recent decision of *Corte di Cassazione*, n. 13161 of 24 June 2016,<sup>321</sup> by which the court extended the scope of application of the right to be forgotten, restricting media privilege, notwithstanding the fact that the personal data in question had been processed for journalistic purposes. The court stated, *inter alia*, that the persistent dissemination of remote news on an online newspaper (the news was related to judicial proceedings in respect of an event which had occurred about two years and a half previously) constituted a violation of the right to privacy given that, considering the

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<sup>318</sup> See Maria Carla Daga, nota a commento (Cassazione Civile, Sez. III, 26 giugno 2013, n. 16111) , *Danno e Responsabilità* 3/2014, p. 274 and 278.

<sup>319</sup> See Bruno Saetta, “Cassazione tra oblio e diritto all'informazione”, in *Internet e Diritto*, 10 April 2012, <https://brunosaetta.it/privacy/cassazione-tra-oblio-e-diritto-allinformazione.html>.

<sup>320</sup> See ECJ, Judgment of the Court (Grand Chamber), 13 May 2014, C-131/12, ECLI:EU:C:2014:317, Google Spain, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=123534> .

<sup>321</sup> <http://www.centrosarg.com/wp-content/uploads/2016/11/Cass-civ-13161-del-2016.pdf>.

time that had elapsed, there was no public interest related to the news itself. The court recognised the lawful exercise of the freedom of the press; however, it stated that the dissemination of information for an uncertain period was unlawful as it caused damage to the persons concerned. Obviously, there is uncertainty about the period for which information can be disseminated or stored in the online archives in order for the exercise of the freedom of the press to be considered lawful. It will be decided on a case-by-case basis.

This decision shows a dissimilar trend for Italian case law to restrict media privilege with regard to the online press.

### 3.7.4.2. Political and social debates

According to Reporters Without Borders, Italy holds only the fifty-second place in the world when it comes to freedom of the press<sup>322</sup>:

One of the most serious challenges to which the Italian press is exposed is the degree of political influence exercised over the media. For instance, Silvio Berlusconi's<sup>323</sup> Mediaset empire operates Italy's top private television stations, and the public broadcaster, Rai, has traditionally been subject to political influence, so that when Berlusconi was prime minister, he was able to exert tight control over both public and private broadcasting.<sup>324</sup> Carlo de Benedetti, the owner of the Espresso Group, which publishes the country's second most widely read newspaper, *La Repubblica*, has strong links to Italy's centre-left Democratic Party<sup>325</sup>.

In addition, another topic which deserves attention in this context is the reaction of the Italian mafia to certain journalists who discussed the phenomenon of organised crime in southern Italy. For instance, Roberto Saviano, a well-known Italian journalist and writer, who wrote *Gomorra*, a book against the Italian southern mafia, has been threatened by the Casalesi clan and lived under police protection for a considerable amount of time. In 2008 he decided to emigrate for a certain period of time. In addition, the Italian journalist Paolo Borrrometi<sup>326</sup> was forced to move to Rome from Sicily due to mafia threats and currently lives under police protection.

Lastly, an additional issue lies in the power accorded in Italy to the Italian data protection authority. The Personal Data Protection Code provides the possibility for the owners of data to appeal to the Italian data protection authority on the basis of Article 141 c) of the Code in order to enforce the rights provided in Article 7. At the end of the proceedings, the Italian data protection authority may provisionally order either the partial or total blocking of some of the data, or the immediate termination of one or more

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<sup>322</sup> See data of press freedom ranking 2017 at [https://rsf.org/en/ranking\\_table](https://rsf.org/en/ranking_table).

<sup>323</sup> Silvio Berlusconi leads Forza Italia, the principal right wing party.

<sup>324</sup> See Italy profile on BBC, <http://www.bbc.com/news/world-europe-17433146>.

<sup>325</sup> See "Press freedom in Italy: Six key things to know", in <https://www.thelocal.it/20170503/press-freedom-in-italy-six-key-things-to-know>.

<sup>326</sup> See Lorenzo Bagnoli, "Mafia versus the media: Italian journalists face upsurge in threats and intimidation" <https://www.indexoncensorship.org/2017/09/italy-mafia-threats-media/>.



processing operations.<sup>327</sup> The blocking measure may also be adopted prior to the notice of appeal. The Italian data protection authority has repeatedly used this measure towards the press – for instance, with regard to television stations<sup>328</sup> and magazines<sup>329</sup>. It is worth to emphasising the fact that although the Italian data protection authority is an independent administrative authority, it is appointed by Parliament.

### 3.7.5. Conclusion

In order to understand the rights accorded to journalists in Italy, it might be helpful to imagine a soldier (freedom of the press) surrounded by five adversaries:

1. the right to privacy and the strong authority exercised by the Italian data protection authority;
2. the right to honour and reputation;
3. the right to be forgotten;
4. compensation for damage;
5. other constitutional rights which may at some time come into conflict with the press.

Any progress made by the warrior on the battlefield will depend exactly on the progress made of any of the adversary parties.

In order to clarify who wins the battle, Italian legislation has set forth certain criteria, which have been developed by case law. However, case law often reflects the changes of the political, economic and industrial system. Accordingly, initially media privilege was the rule, in order for journalists to exercise their constitutional right, *i.e.* freedom of press, which is extremely important for any given society (without press no individual can build a social opinion). Currently, media privilege has become the exception and has been restricted due to the recognition of influence to other constitutional rights. The reason for such evolution might be explained very easily by quoting the President of the Italian data protection authority, Antonello Soro, who stated during an interview: “We are our data.”<sup>330</sup>

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<sup>327</sup> See Article 150 of the Personal Data Protection Code.

<sup>328</sup> The Italian data protection authority has blocked the transmission of data to the Lene television show; see Alessandro Tognetti, “Droga e parlamentari: il Garante della privacy blocca la trasmissione “Le Iene” - <http://www.altalex.com/documents/news/2007/04/28/droga-e-parlamentari-il-garante-della-privacy-blocca-la-trasmissione-le-iene>.

<sup>329</sup> See Masa Maria Francesca, “Caso Yara: garante privacy blocca articolo di Repubblica con dettagli sfera sessuale”, <http://it.blastingnews.com/cronaca/2014/09/caso-yara-garante-privacy-blocca-articolo-di-repubblica-con-dettagli-sfera-sessuale-00131193.html> - the Italian data protection authority has blocked the article in *Repubblica* an important Italian journal, regarding sexual data.

<sup>330</sup> See Paolo Anastasio, “Garante Privacy, Antonello Soro: ‘Noi siamo i nostri dati. No a controlli invasivi dei lavoratori’”, <https://www.key4biz.it/garante-privacy-antonello-soro-noi-siamo-i-nostri-dati-no-a-controlli-invasivi-dei-lavoratori/124006/>.

The restrictions imposed on press for the purpose of data protection are minor compared to those imposed on it in order to ensure the right to be forgotten. Somebody once said that “One of the keys to happiness is a bad memory”.<sup>331</sup> Well, apparently the Italian case law agrees with that.

Considering that Italy was one of the first members of the European Union and considering its tradition as a parliamentary democracy, the scenario analyzed is not so optimistic at the end of the day.

## 3.8. PL – Poland

*Dominika Bychawska-Siniarska, Konrad Siemaszko*

### 3.8.1. Dimensions of media privilege

Under the Polish Constitution of 1997 the protection of media privilege is not directly expressed. Nevertheless, it did not create any obstacle to the Constitutional Court to interpreting the constitutional provisions widely and in accordance with European standards.

Under the Polish legal system, the protection of sources' identity derives from the freedom of the press (Article 14) and – closely related to this – the freedom to acquire and to disseminate information (Article 54 paragraph 1 of the Constitution). Moreover, it should be seen as related to the protection of privacy (Article 47 of the Constitution) and to informational autonomy (Article 51 paragraph 1 of the Constitution). Article 14 of the Constitution is one of the main founding rules enshrined in the first chapter of the Constitution. This chapter lays out the foundations of the legal order and legal system of the Republic of Poland. Its content is as follows: “The Republic of Poland shall ensure freedom of the press and other means of social communication.” The freedom to acquire and to disseminate information, in turn, is expressed directly in Article 54 paragraph 1 of the Constitution. This provision, which sets out the freedoms, rights and obligations of persons and citizens, has the following wording: “The freedom to express opinions, and to acquire and to disseminate information, shall be ensured for everyone.” While interpreting Article 14 and Article 54 of the Constitution, the Constitutional Court has widely referred to the interpretations of the European Court of Human Rights (ECtHR) as regards Article 10 of the European Convention on Human Rights (ECHR), thereby confirming that there are significant differences between the standards of protection of the freedom of the press under the ECHR and under the Polish Constitution of 1997.

In the case law of the Constitutional Court special emphasis is given to the protection of information acquired by persons occupying so-called “professions of public

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<sup>331</sup> This quote is attributed to Rita Mae Brown.

trust”, within and with regard to the activities taken up by them.<sup>332</sup> Apart from the professions of doctor or attorney, the profession of journalist is also regarded as one of public trust. The protection of the confidentiality of “information acquired” (but not that of the “person acquiring the information”) is an innate requirement of a complex process aimed at protecting confidentiality, both in the individual and the private dimension.

Under Article 15 paragraph 2 of the Press Law,<sup>333</sup> journalists shall be bound by the obligation of secrecy in relation to data enabling the author of a press release, an editorial letter or other material of this nature to be identified, as well as any other persons providing information published or made available for publication, if such persons have reserved the non-disclosure of such data. This obligation shall also apply to any other person employed in editorial offices, press publications and other press organisational units.<sup>334</sup>

### 3.8.1.1. Public law

Media privilege is in particular enshrined in Article 3a paragraph 2 of the Law on Data Protection of 29 August 1997<sup>335</sup>. According to this provision, the Law on Data Protection is not applicable to journalistic activity (as defined in the Press Law) or to artistic activities. The law is only applicable if freedom of expression is explicitly interfering with the rights and freedoms of the person whose data are protected. This privilege was introduced to the Data Protection Law only on 22 January 2004 and constitutes the implementation of Article 9 of Directive 95/46/EC.

Exemption from data protection regulations means that editorial houses or other entities dealing with journalistic activities are not bound by the obligations resulting from the Data Protection Law. Such entities are bound by the Press Law and are not bound with data processing obligations, such as the obligation to register databases.<sup>336</sup>

The Press Law does not contain a legal definition of “journalistic activity”. However, on the grounds of jurisprudence in respect of Article 3a paragraph 2 of the Law on Data Protection, journalistic activity was defined as press activity which consists of gathering, editing and preparing material which would be published in the printed press.<sup>337</sup> It also relates to activities which have not resulted in the publication of journalistic material.<sup>338</sup>

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<sup>332</sup> Judgments of the Constitutional Tribunal of 22 November 2004, (case file SK 64/03, paragraph III.3); judgment of 2 July 2007 (case file K 41/05, paragraph III.7); judgment of 13 December 2011 (case file K 33/08, paragraph III. 6.4), <http://otk.trybunal.gov.pl/orzeczenia/>.

<sup>333</sup> From 26 January 1984, Official Journal 1984, item. 24, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19840050024>.

<sup>334</sup> See art.15 par. 3.

<sup>335</sup> Ustawa o ochronie danych osobowych, Official Journal 1997, No. 133, item. 883, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19971330883>.

<sup>336</sup> Barta, Janusz, Fajgielski, Paweł i Markiewicz, Ryszard. Część pierwsza. Wstęp. W: Ochrona danych osobowych. Komentarz, wyd. VI. LEX, 2015.

<sup>337</sup> Judgment of the Supreme Administrative Court of 22 March 2011 r. (case file I OSK 623/2010), judgment of the Supreme Administrative Court of 22 January 2015 (case file I OSK 1161/13); judgment of Regional

The Press Law contains a definition of “press material” (Article 7 paragraph 2(4)) and a definition of “journalist” (Article 7 paragraph 2(5)). Legal uncertainty exists as to the application of the Press Law to blogs. The current jurisprudence accepts that a blog may be considered to constitute press material and therefore the Press Law (and the exemption of the Data Protection Law) is applicable. However, a blog needs to meet the definition of press (e.g. it needs to be published periodically) and needs to be registered by the competent registry court.<sup>339</sup> Such a registered blog is bound by the obligations stipulated by the Press Law, and is the beneficiary of the privileges enshrined in the Law. Increasingly, the courts apply the Press Law to news portals, Internet radio and television.<sup>340</sup> However, courts will decide, *ad casum*, whether the Press Law is applicable to an Internet page.

The doctrine and jurisprudence accepts that Article 3a of the Law on Data Protection is applicable to different types of media, including press, radio and television.<sup>341</sup> It is also accepted that the privilege is applicable to press material published on the Internet.<sup>342</sup>

The application of the data protection privilege needs to be interpreted narrowly. It is not applicable to the processing of data accompanying journalistic activity.<sup>343</sup> Therefore, marketing or editorial activity of publishers would not benefit from privilege. Publishers processing data about, for example subscriptions need to register these and to accomplish other obligations specified in the Data Protection Law.<sup>344</sup>

According to the relevant jurisprudence, media privilege is linked to journalistic activity and not to the journalist. In other words journalists *per se*, as a professional group are not exempted from data protection requirements. Media privilege is linked to the activity of gathering, editing and preparing press material.<sup>345</sup>

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Administrative Court in Warsaw of 11 August 2011 (case file II SA/Wa 1152/11), <http://orzeczenia.nsa.gov.pl/cbo/query>.

<sup>338</sup> Judgment of Regional Administrative Court in Warsaw from 22 March 2007 (case file II SA/Wa 1933/06).

<sup>339</sup> Judgment of Łódź Appellate Court (case file I ACa 1032/12), [http://orzeczenia.lodz.sa.gov.pl/content/\\$N/152500000000503\\_I\\_ACa\\_001032\\_2012\\_Uz\\_2013-01-18\\_001](http://orzeczenia.lodz.sa.gov.pl/content/$N/152500000000503_I_ACa_001032_2012_Uz_2013-01-18_001).

<sup>340</sup> Judgment of the Supreme Court of 26 July 2007 r. (case file IV KK 174/07); decision of the Supreme Court of 15 December 2010 (case file III 250/10), <http://sn.pl/orzecznictwo/SitePages/Baza%20orzecze%C5%84.aspx>.

<sup>341</sup> Barta, Janusz, Fajgielski, Paweł i Markiewicz, Ryszard. Art. 3(a). W: Ochrona danych osobowych. Komentarz, wyd. VI. LEX, 2015.

<sup>342</sup> Judgment of the Regional Administrative Court in Warsaw of 4 August 2011 (case file II SA/Wa 969/11), [http://www.orzeczenia-nsa.pl/wyrok/ii-sa-wa-969-11/sprawy\\_zwiazane\\_z\\_ochrona\\_danych\\_osobowych/c529f.html](http://www.orzeczenia-nsa.pl/wyrok/ii-sa-wa-969-11/sprawy_zwiazane_z_ochrona_danych_osobowych/c529f.html).

<sup>343</sup> Supreme Administrative Court judgment of 22 January 2015 (case file I OSK 1161/13), <http://www.orzeczenia-nsa.pl/I-OSK-1161-13.html>.

<sup>344</sup> Młynarska-Sobaczewska, Anna i Sakowska, Marlena. "Klauzula prasowa" z ustawy o ochronie danych osobowych jako gwarancja wolności wypowiedzi. Państwo i Prawo, 2005; Drozd, Andrzej. Art. 3(a). W: Ustawa o ochronie danych osobowych. Komentarz. Wzory pism i przepisy, wyd. IV. Wydawnictwo Prawnicze LexisNexis, 2008.

<sup>345</sup> Judgment of the Supreme Administrative Court of 22 January 2015 (case file no. I OSK 1161/153) and judgment of the Supreme Administrative Court of 28 June 2011 (case file I OSK 1217/10), <http://orzeczenia.nsa.gov.pl/cbo/query>

Therefore, it is accepted in the case law that publishers are requested to reveal the data of one of the journalists in the event that a party wishes to lodge civil proceedings for protection of personal attributes.<sup>346</sup> It is accepted in the jurisprudence that the address of the journalist for the purposes of a civil law suit, as long as it does not interfere with the journalistic activity, is not protected by the exemption from Article 3a paragraph 2 of the Law on Data Protection.<sup>347</sup> In other words, the transmission of such data is not protected by media privilege.

Media privilege does not mean that collected data should not be stored and protected in accordance with the Law on Data Protection (Article 36 paragraph 1). The Data Protection Authority may check with a publisher that the data that it collects are protected properly and also to check the purpose and scope of (and compliance with) the law on the processing of data (data are often processed for purposes other than those of journalistic activity).<sup>348</sup> The scope of the Authority's oversight is prescribed in Article 14-18 of the Law on Data Protection.

### 3.8.2. Recent and emergent issues

Checks undertaken by the Data Protection Authority may lead to the violation of the protection of journalistic sources. This secrecy is protected by Article 15 paragraph 2 of the Press Law and can be derogated only by a court (Article 180 paragraph 2 and 3 of the Criminal Procedure Code). It should be noted that the Data Protection Authority has the right to access data which are covered by source protection. Access to data by the Authority is not subject to court review. Such a situation is heavily criticised by the legal doctrine. Some authors claim that the Authority should not be allowed to check entities which benefit from the privilege enshrined in Article 3a paragraph 2 of the Law on Data Protection.<sup>349</sup>

It is also accepted that an entity dealing with publishing activities is not a data administrator, as defined by the Law on Data Protection.<sup>350</sup> The editor-in-chief is responsible for the security of the data not as an administrator, but as a guardian, ensuring that the data will not be conveyed to unauthorised persons.<sup>351</sup>

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<sup>346</sup> Personal goods in the Polish civil law are such things as reputation, image, good name etc. According to Polish civil law, a reputation law suit (for personal goods protection), can be lodged only if the address of the violator is known.

<sup>347</sup> Judgment of the Supreme Administrative Court of 22 January 2015 (case file I OSK 1161/13), <http://orzeczenia.nsa.gov.pl/cbo/query>

<sup>348</sup> Barta, Janusz, Fajgielski, Paweł i Markiewicz, Ryszard. Część pierwsza. Wstęp. W: Ochrona danych osobowych. Komentarz, wyd. VI. LEX, 2015.

<sup>349</sup> M. Sakowska, A. Młynarska-Sobaczewska, "Klauzula prasowa" z ustawy o ochronie danych osobowych jako gwarancja wolności wypowiedzi, PiP 2005, z. 1, s. 74.

<sup>350</sup> Judgment of the Supreme Court of 2 October 2006 (case file V KK 243/06), <http://sn.pl/orzeczniactwo/SitePages/Baza%20orzecze%C5%84.aspx>

<sup>351</sup> Supreme Court judgment of 2 October 2006 (case file KK 243/2006), <http://sn.pl/orzeczniactwo/SitePages/Baza%20orzecze%C5%84.aspx>

Another problem concerning the issue of privilege is the fact that if freedom of expression seriously violates the rights of others, the exemption from Article 3a paragraph 2 of the Law on Data Protection is not applicable. However, in practice, it is only possible to assess if there has been a serious violation of rights of others *post factum*; therefore, only at that stage would the Law on Data Protection be entirely applicable. However, for obvious reasons, at that stage it will no longer be possible to apply it. This leads to an internal contradiction around the issue of privilege.<sup>352</sup>

### 3.8.2.1. Criminal law

If freedom of expression seriously violates the rights of others, particularly the right to privacy, then the exemption under Article 3a paragraph 2 of the Law on Data Protection is not applicable. In other words, if a journalist violates the reputation or privacy of others, his editor-in-chief will bear criminal responsibility under the Law on Data Protection. For example, under Article 51, a data administrator can face up to two years of imprisonment for allowing access to data by unauthorised persons.<sup>353</sup>

The notion of the “serious violation of rights of others” has been clarified in case law. For example, the publication of taxi drivers’ license numbers does not constitute a violation of the rights of others.<sup>354</sup> However, the publication of a personal address constitutes, according to the relevant jurisprudence, a “serious violation of the rights of others”.<sup>355</sup> Whether the rights of others have been violated (and therefore media privilege does not apply) may only be decided by a court; such a decision does not fall under the power of the Data Protection Authority.<sup>356</sup>

### 3.8.2.2. Civil law

According to Article 1 of the Press Law, the press exercises freedom of expression and enables citizens to exercise their right to access fair information and to voice criticism. It is often necessary to process various types of information, including personal data, in order to fully realise these objectives. The Press Law requires that journalists in the course of their activities act in accordance with professional ethics and the principles of social coexistence and within the limits set by the law. Journalists are obliged to exercise particular diligence in the collection and use of press material – in particular to check the

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<sup>352</sup> Dominik Lubasz, „Ochrona Danych Osobowych a działalność dziennikarska – granice przywileju medialnego” – uwagi na kanwie debaty dziennikarskiej”, available at: <https://portalodo.com/ochrona-danych-osobowych-a-dzialalnosc-dziennikarska-granice-przywileju-medialnego-uwagi-na-kanwie-debaty-dziennikarskiej>.

<sup>353</sup> Judgment of the Supreme Court from 2 October 2006 (case file V KK 243/06), <http://sn.pl/orzecznictwo/SitePages/Baza%20orzecze%C5%84.aspx>.

<sup>354</sup> Judgment of the Olsztyn Regional Court from 11 December 2015 (case file VII Ka 869/15), [http://orzeczenia.olsztyn.so.gov.pl/details/\\$N/150515000003506\\_VII\\_Ka\\_000869\\_2015\\_Uz\\_2015-12-11\\_002](http://orzeczenia.olsztyn.so.gov.pl/details/$N/150515000003506_VII_Ka_000869_2015_Uz_2015-12-11_002).

<sup>355</sup> Judgment of the Supreme Court of 2 October 2006 (case file V KK 243/06), <http://sn.pl/orzecznictwo/SitePages/Baza%20orzecze%C5%84.aspx>.

<sup>356</sup> M. Sakowska, A. Młynarska-Sobaczewska, “Klauzula prasowa”, s. 75–76; A. Młynarska-Sobaczewska, M. Sakowska-Baryła, Glosa, s. 292–302.

truthfulness of the news discovered or to provide their source – and to protect the interests of informants and other persons who place their confidence in journalists.

It seems relevant, from the point of view of the protection of personal data, to cite the provisions contained in Article 14 of the Press Law. The dissemination and publication of information (including by means of audio and visual records) requires the advance consent of the person providing the information. A journalist should receive consent for publication of a quote from the person that he/she is directly quoting, unless that quote has been previously published. The person providing the information may, for important social or personal reasons, stipulate the date and the scope of its publication. In addition, a journalist may not publish information if the person providing it has requested so for reasons of professional confidentiality. If the journalist fails to receive consent but nevertheless publishes the article, he faces criminal responsibility and the possibility of a fine (Article 49 of the Press Law).

Under Article 14 paragraph 6 of the Press Law, a journalist may not publish information and data concerning a person's private life without the consent of the person concerned, unless it relates directly to the public activity of that person. This provision should be regarded as one of the most important when it comes to the protection of personal data by the press.

In the context of data protection, particular importance should be given to journalistic professional secrecy. Under Article 15 of the Press Law, editors are obliged to preserve the secrecy of data that allows the identification of the author of material supplied to the press, the author of a letter to the editor, or the author of other material serving as a source of information. Moreover, the data of persons providing information for publication should not be disclosed if the person has requested that their data remain secret. In such a case, no data that would allow the identification of the source should be disclosed by the journalist.

The obligation of secrecy also applies to non-journalists employed in editorial offices and publishing houses. Exceptionally, a journalist is relieved of the duty to maintain professional secrecy if the received information, press material, editorial letter or other material relates to an offence listed in Article 254 of the Criminal Code (Official Journal No. 13, item 94) – namely, high treason, espionage, terrorist acts, misappropriation, sabotage and murder. The journalist may reveal the data of the source if the person transmitting material agrees to the disclosure of his or her name or the transmitted material (Article 16 paragraph 1 of the Press Law).

Special provisions refer to the processing of data of persons subject to preliminary or judicial proceedings. Article 13 paragraph 2 of the Press Law prohibits the publication in the press of personal data and the image of persons who are subjects to preliminary or judicial proceedings, as well as personal data and the image of witnesses and victims, unless they have given their consent. However, the competent prosecutor or court may authorise the disclosure of personal data and the image of the persons against whom the proceedings are pending if it is in the great interest of the public. The Constitutional Court has ruled on the incompatibility with the Constitution of Article 13 paragraph 3, in so far as that provision did not provide for the possibility of appeal against a decision of the public prosecutor to disclose the personal data and image of persons against whom

preparatory proceedings are pending. Amendments to the Press Law were introduced in that respect on 19 August 2011,<sup>357</sup> providing for the possibility of such a complaint.

The Press Law provided for the possibility of demanding a correction and the right of response to journalistic material. This provision was amended in June 2012. Under the previously worded Article 31 of the Press Law, an individual or legal persons described in journalistic material could ask for the correction of information provided in an article, even if that information had not referred to facts but had constituted subjective analysis undertaken by the author. The editor-in-chief of the journal or magazine in question was obliged to publish free of charge a correction of erroneous information, factual mistakes or inaccurate information. He was also obliged to publish a substantive reply to a statement damaging personal attributes (such as reputation). These institutions provided a sort of guarantee to protect the rights of the subjects of press publications. However, Article 31 of the Press Law was considered by the Constitutional Court<sup>358</sup> to be incompatible with the Constitution of the Republic of Poland and ceased to have effect on 14 June 2012. Pursuant to the amendment made by a law of 14 September 2012 amending the Press Law Act,<sup>359</sup> an Article 31a was added to the Press Law. The new Article provides the right to demand rectification, while the legislator has cancelled the right of reply. Under the new Article 31a paragraph 1 of the Press Law the editor-in-chief is obliged to publish, at the request of an individual or legal person, free of charge, a rectification of factual mistakes in an article.

Despite the privilege enshrined in Article 3a paragraph 2, journalists should act diligently in processing data for the purpose of the activities described above. Under Article 26 of the Law on Data Protection, an administrator of data should ensure that data is processed with due diligence.

Another provision which applies to journalists and relates to data processing is the duty to obtain the consent of a person whose image is being published.<sup>360</sup> Under Article 81 paragraph 2 of the Copyright Law there is no need to obtain the consent of a person who is publicly known or if the image of a person is simply an element of a broader picture.

It should also be noted that the publication in the press of personal data without consent or in violation of the above-mentioned provisions may be considered as a violation of personal attributes, which are protected under Articles 23 and 24 of the Civil Code.<sup>361</sup> Examples of attributes considered as “personal attributes” by the courts are the name and surname of a person.<sup>362</sup>

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<sup>357</sup> Official journal No. 205, item 1204,

<http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19940240083>.

<sup>358</sup> Judgment of 1 December 2010 (case file K 41/07), <http://otk.trybunal.gov.pl/orzeczenia/>.

<sup>359</sup> Journal of Laws No. 1136, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20120001136>.

<sup>360</sup> Art. 81 par. 1 of the Copyright law from 4 February 1994,

<http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19940240083>.

<sup>361</sup> Law from 23 April 1964, Official journal 1964, No. 16, item 93, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19640160093>.

<sup>362</sup> Judgment of the Łódź Appellate Court of 29 December 2016 (case file I ACa 797/16), [http://orzeczenia.lodz.sa.gov.pl/details/\\$N/15250000000503\\_I\\_ACa\\_000797\\_2016\\_Uz\\_2016-12-29\\_001](http://orzeczenia.lodz.sa.gov.pl/details/$N/15250000000503_I_ACa_000797_2016_Uz_2016-12-29_001).



### 3.8.2.3. Political and social debates

There is very little debate around media privilege in Poland within the context of data protection. The current debate mostly concerns potential violations of journalistic secrecy by increasing the powers of the police and security services.

Currently work is underway on a new Law on Data Protection. The draft is a transposition into Polish law of Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data and the repeal of Directive 95/46/EC. Article 2(1) of the draft is the equivalent of the present Article 3a paragraph 2 of the Law on Data Protection.

The new Article 2 paragraph 1 stipulates that for the activity of editing, preparing, creating or publication of press materials within the meaning of the Press Law, as well as for literary or artistic activities, the provisions of Articles 5-9, 11, 13-16, 18-22, 27, 28 2-10 and Article 30 of Regulation 2016/679 do not apply. The provisions of the Regulation to which Article 2 of the new draft law refer are:

- Article 5: rules for the processing of personal data,
- Article 6: conditions for the legality of the processing of personal data,
- Article 7: conditions governing the granting of consent by the data subject,
- Article 8: conditions governing the granting of consent by a child in information society services,
- Article 9: processing of specific categories of data,
- Article 11: processing of the personal data of a person that do not require identification,
- Article 14: obligation to provide information in the case of data acquisition from a person other than the data subject,
- Article 15 paragraphs 1 and 2: the right of a data subject's access to such data,
- Article 16: the right to rectify data,
- Article 19: the obligation to notify the recipient of corrected data of the deletion of personal data or a reduction in processing,
- Article 20: the right to data transfer,
- Article 21: the right to object,
- Article 22: automated decision-making in individual cases, including profiling.

## 3.9. RU – Russia

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### 3.9.1. Introduction

The 1991 Statute on the Mass Media (hereinafter “the Mass Media Law”)<sup>363</sup> sets standards for media operations in the Russian Federation, including “media privilege”. It defines a journalist as “a person who edits, creates, collects or prepares messages and materials for the editorial office of a mass media outlet and is connected with it through labour or other contractual relations or is engaged in such activity with its authorisation” (Article 2 “Mass Media. Basic Notions.”)

The same article’s definition of a mass media outlet was revised in 2011 and now provides as follows: “a periodically printed publication, a network publication, a television channel, a radio channel, a television programme, a radio programme, a video program, a newsreel programme, or any other form of periodical dissemination of mass information under a consistent name or title.”

The Mass Media Law now defines a “network publication” as “any site on the Internet information-telecommunications network which is registered as a mass media outlet”. While such registration of a network publication remains formally optional, no editorial office of a mass media outlet may engage in any professional (journalistic or editorial) activity without such registration.

These definitions are generally used in case law when adjudicating on media rights and privileges.

### 3.9.2. Dimensions of media privilege

#### 3.9.2.1. Public law

The Constitution (Part 2 Article 29) promulgates “freedom of mass information” and specifically bans censorship.<sup>364</sup>

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<sup>363</sup> Закон РФ “О средствах массовой информации” (Statute of the Russian Federation “On the Mass Media”), No. 2124-1 of 27 December 1991 (in English, as of 8 December 2003): [http://www.legislationline.org/download/action/download/id/3713/file/Russia\\_Law\\_Mass\\_Media\\_1991\\_am2003\\_en.pdf](http://www.legislationline.org/download/action/download/id/3713/file/Russia_Law_Mass_Media_1991_am2003_en.pdf).

<sup>364</sup> The Constitution was adopted by popular vote on 12 December 1993. See <http://constitution.ru/> for the official translations of the Constitution into English, German and French.

Article 19 (“The Status of an Editorial Office”) of the aforementioned Statute on the Mass Media specifies that an editorial office shall carry on its activity on the basis of its professional independence. Moreover, Article 58 (“Responsibility for the Infringement on the Freedom of Mass Media”) stipulates that censorship or interference in the activity and breach of the professional independence of an editorial office presents an infringement of this freedom. Such interference includes prevention by individuals, public officials and public associations of the lawful activity of the founders, editorial offices, publishers and distributors of mass media products, as well as of their journalists.

The Statute “On the Mass Media” provides a journalist with a set of rights in relation to freedom of information and also in relation to his/her editorial activities, while an editorial office is guaranteed editorial freedom. Article 47 (“The Rights of the Journalist”) lists, *inter alia*, the following rights, which relate to issues relating to the production of (informational) content:

- to look for, lodge a request for, receive and disseminate information;
- to visit state organs and organisations, enterprises and institutions, public associations or the press services thereof;
- to be received by officials in connection with a request for information;
- to secure access to documents and materials, with the exception of fragments thereof containing information constituting a state, commercial or any other kind of secret specifically protected by law;
- to make recordings with the use of audio and video equipment, photography and film, except in cases provided by law;
- to visit specially protected places of natural disasters, accidents and catastrophes, mass disorder and mass gatherings, and also localities where a state of emergency has been declared;
- to attend meetings and demonstrations;
- to verify the authenticity of information that he/she has received;
- to set forth his/her personal judgements and assessments in reports and material intended for dissemination under his or her signature;
- to refuse to prepare under his/her signature reports and material inconsistent with his or her convictions;
- to remove his/her signature placed under a report or material whose content was distorted, in his/her opinion, in the process of editorial preparation or to ban (or stipulate in any other way the conditions and character of) the use of this report or material, in keeping with the copyright provisions;
- to spread reports and material prepared under his/her signature, under a pseudonym or without any signature.

Accreditation is another right of a media outlet that was specified in a separate article of the same statute (Article 48).

Confidentiality of sources is provided in yet another article of the Mass Media Law (Article 41 “Confidential Information”), where it is presented as an obligation and not a privilege of journalists and the media:

“The editorial office shall be obliged to keep the source of information secret and shall not have the right to name the person who has submitted information with the

proviso that his name not be divulged, except for the case when the corresponding demand came from a court of law in connection with a case with which it is dealing.”

Separately, Article 49 (“Obligations of the Journalist”) lists among the duties of journalists the obligation “to preserve the confidential character of information and (or) of its source”.

As we can see, the first of the two provisions makes an exception in the case of a demand of a court for the disclosure of a confidential source of information. But this demand can be addressed to an editorial office only, and not to a journalist, who – according to the second provision – has no such excuse for divulging a source.

In June 2010 Russia’s Supreme Court adopted a coherent interpretation of case law relating to the mass media, editors and journalists. The Resolution “On Judicial Practice Related to the Statute of the Russian Federation entitled ‘On the Mass Media’” (hereinafter – the Resolution)<sup>365</sup> among other issues discussed the conditions for the disclosure of confidential sources of information.

The Resolution reminds the courts that they shall be guided by Article 41 of the Mass Media Law, which stipulates that editorial offices are obliged to keep sources of information secret and have no right to name a person who has provided information with the proviso that his name not be divulged. The Resolution states that the personal data of the person making such a proviso constitutes “secret information, which is specially protected by federal statute” (point 26). An exception applies if the demand for disclosure is made by a court of law in connection with a case pending before that court.

However, even though a court of law may still demand such a disclosure at any stage of the proceedings in respect of a case, the Supreme Court makes an important clarification regarding the freedom of the media in this regard. The Resolution stipulates that such a demand is allowed only after “all other means of learning about the relevant circumstances, which are important for the just examination and adjudication of the case, are exhausted and the public interest in disclosure of the source of information overrides the public interest in keeping it a secret” (point 26). Here the Supreme Court follows the case law of the European Court of Human Rights.<sup>366</sup> It is clear that the Resolution obliges the courts to provide specific reasons why the public interest in disclosure would outweigh the necessity to keep the source secret.

In practice, however, more important is the fact that Russian journalists, editors and media outlets enjoy certain privileges that under particular circumstances protect

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<sup>365</sup> Постановление Пленума Верховного суда Российской Федерации “О практике применения судами Закона Российской Федерации «О средствах массовой информации»” (Resolution of the Plenary of the Supreme Court of the Russian Federation “On the Judicial Practice Related to the Statute of the Russian Federation ‘On the Mass Media’”). 15 June 2010, No. 16. See the Russian text at <http://merlin.obs.coe.int/redirect.php?id=12489>. An official English translation is available on the website of the Supreme Court at: [http://www.vsrfr.ru/vscourt\\_detale.php?id=6786](http://www.vsrfr.ru/vscourt_detale.php?id=6786) and [http://www.vsrfr.ru/vscourt\\_detale.php?id=6787](http://www.vsrfr.ru/vscourt_detale.php?id=6787). An unofficial translation into English/German/French and a detailed analysis by this author is included in IRIS Plus 2011-1, “A Landmark for Mass Media in Russia”, [http://www.obs.coe.int/documents/205595/264635/Iris\\_plus\\_2011-1\\_EN\\_FullText.pdf](http://www.obs.coe.int/documents/205595/264635/Iris_plus_2011-1_EN_FullText.pdf).

<sup>366</sup> For example, the judgment on the case of *Goodwin v. the United Kingdom* (Application no. 17488/90), <http://hudoc.echr.coe.int/eng?i=001-57974>.

them from the need to check the truthfulness of the information that they disseminate, and from related accusations of violating the law. These are all listed in Article 57 (“Absolution from Responsibility”) of the Mass Media Law. Under its wording, they generally bear no liability for the dissemination of information that does not conform to reality and defames private citizens and organisations or infringes the rights and lawful interests of individuals or represents an abuse of the freedom of mass communication and/or the rights of the journalist:

1. if this information is available in binding reports;
2. if this information was received from news agencies;
3. if this information is contained in the reply to its enquiry either in material issued by the press services of state organs, organisations, institutions, enterprises, and organs of public associations;
4. if this information constitutes the *verbatim* reproduction of fragments from of the speeches of People’s Deputies at the congresses and sessions of Soviets of People’s Deputies, or delegates at congresses, conferences and plenary meetings of public associations, or of official statements by the office-bearers of state organs, organisations and public associations;
5. if this information is to be found in the author’s works that go on air without preliminary recording or in texts not subject to editing, in keeping with the present Statute;
6. if this information constitutes the literal reproduction of reports and materials or of their fragments disseminated by another mass medium, which can be ascertained and called to account for a specified breach of the legislation of the Russian Federation on the mass media.<sup>367</sup>

### 3.9.2.2. Civil law

In civil cases, most likely concerning defamation, journalists who are defendants must prove the truth of their reporting. Aside from a legal ban on such an action, the mere divulging of the journalist’s source makes no sense as it would not (in most cases) bring to the defendant relief from civil liability for the dissemination of defamatory information. This was proven by our study of the court cases, which was undertaken when this issue was a subject of widespread contention.<sup>368</sup>

For example, a defamation lawsuit was brought against the online news agency *URA.ru* and its editor in Yekaterinburg. In this case the plaintiff demanded that the source of defamatory information be disclosed, while the defendants argued that the source was confidential. They also referred to the above-mentioned point 26 of the 2010 Supreme Court’s Resolution “On the Judicial Practice Related to the Statute of the Russian Federation ‘On the Mass Media’”. The district court agreed to follow the Supreme Court’s instructions and noted that the public interest in the disclosure of the source of

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<sup>367</sup> For case law related to Article 57 of the Mass Media Law, see *IRIS Extra 2017-1: Judicial practice on media freedom in Russia: the role of the Supreme Court*. Author: Andrei Richter.

<sup>368</sup> *Ibid.*

information in this case did not override the public interest in keeping it secret. It also referred to the need to protect personal data of a confidential source, as specified by the Mass Media Law. The court refrained from demanding that the source be disclosed but came to the conclusion that as there was no one available to prove the truthfulness of defamatory statements disseminated by *URA.ru* they were to be considered as untrue. Still, taking into account the fact that the plaintiff was a public figure it did decrease the amount of compensation for moral harm requested as part of the law suit.<sup>369</sup>

At the same time the courts may take conflicting opinion into account when deciding on the media's obligation to protect confidential information. In a defamation lawsuit brought by Mr Igor Sechin, the CEO of state-run Rosneft oil company, against Axel Springer Russia, then the publisher of the Russian edition of *Forbes* magazine, at issue was *Forbes'* assertion that the annual monetary compensation of the CEO was 50 million dollars.<sup>370</sup> The plaintiff pleaded that this figure exceeded his actual compensation. The defendant referred to the obligation to keep his confidential source on the data secret. The court dismissed the argument as "a technique of oral persuasion, which was prompted by the lack of real sources of information." It also dismissed the argument that the plaintiff was a public figure because to rule otherwise would be to deny him his right to a just evaluation of his business qualities. The court ordered a refutation of the assertion on the forbes.ru website and in the magazine.<sup>371</sup>

In a lawsuit brought by the head of a municipal pre-school education department in the Nizhny Novgorod Region and the department itself against the *Sarov* newspaper and its online version, the issue in question was the published assertion that the annual salary of the department head was some the equivalent of USD 30,000 (at the then exchange rate) and that of each of her deputies some USD 20,000. The plaintiff argued that this figure exceeded the actual salaries by several times. The court agreed with the defendant's argument that the disclosure of confidential source of the information on the salaries should not supersede the public interest in keeping it secret. It also determined the actual amount of the annual salaries and found that the cited higher figures did not cross the threshold of "exaggeration and provocation", and that provided that the media did not cross that threshold, they should be free discuss issues that were of interest to the public. The court dismissed the lawsuit in its entirety.<sup>372</sup>

We see that the courts of law generally tend to stay away from ordering media outlets to disclose a source. Since non-disclosure of confidential sources constitutes an obligation and not a privilege on the part of journalists and the media, in a number of media cases judges have tended to hold that it is the defendant who should apply to the court for it to relieve them of the obligation by ordering the disclosure. If such an

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<sup>369</sup> Decision of Leninsky District Court of the City of Yekaterinburg of Sverdlovsk Region of 10 April 2012: <http://xn--90afdbaav0bd1afy6eub5d.xn--p1ai/bsr/case/1451697>.

<sup>370</sup> See <http://www.forbes.ru/kompanii/resursy/248634-poslednii-konkistador-kak-igor-sechin-vedet-borbu-zaneftyanoe-gospodstvo>.

<sup>371</sup> Decision of Savelovsky District Court of the City of Moscow of 1 August 2014, <https://rospravosudie.com/court-savelovskij-rajonnyj-sud-gorod-moskva-s/act-454171756/>.

<sup>372</sup> Decision of Sarov City Court of Nizhny Novgorod Region of 29 August 2011, <https://rospravosudie.com/court-sarovskij-gorodskoj-sud-nizhegorodskaya-oblast-s/act-102492187/>.

application does not take place, the defendant must prove the truth of the whole of the disseminated information without reference to confidential sources.<sup>373</sup>

### 3.9.2.3. Criminal law

The Criminal Procedure Code of the Russian Federation sets out in its Article 56 a list of persons who may not be called to testify in court as witnesses (attorneys, clergymen, etc.). The list does not mention journalists or editorial workers, but it does not exclude that there may be other groups that are exempt from the duty to give testimony in court. This is confirmed by the Constitution (Article 51 paragraph 2) which declares: “A federal statute may envisage other circumstances [in which there is] absolution from the obligation to testify”. This can be interpreted within the context of articles 41 and 49 of the Mass Media Law (see above).

Article 144 paragraph 2 of the Criminal Procedure Code stipulates that reports on crimes disseminated by the mass media shall be checked, upon instructions from the public prosecutor, by the relevant investigatory bodies. It also protects the confidentiality of sources:

“The editor or the editor-in-chief of mass media outlet in question shall hand over – upon the demand of a prosecutor, investigator or investigating body – the documents and materials in the possession of that mass media outlet which substantiate a report on a crime, as well as data on the person who provided the above information, with the exception of cases in which such a person made it a condition [of his/her providing such information] that the source of information should be kept secret”.<sup>374</sup>

### 3.9.3. Recent and emergent issues

Confidentiality of sources is also supported by the Code of Professional Ethics of the Russian Journalist, approved by the Congress of Journalists of Russia in 1994. This Code is the main (though not really effective) mechanism of self-regulation of journalists in Russia. Paragraph 4 of this document says: “A journalist shall maintain professional confidentiality in respect of the source of information that was obtained in a confidential way. No one shall force him to disclose the source. The right to anonymity can be violated only as an exception to the general rule when there is a suspicion that the source in a

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<sup>373</sup> Decision of Leninsky District Court of the City of Yekaterinburg of Sverdlovsk Region of 27 April 2015. Case N 2-3601/2015: <https://rospravosudie.com/court-leninskij-rajonnyj-sud-g-ekaterinburga-sverdlovskaya-oblast-s/act-551328709/>. See also decision issued by the same court on 20 March 2015 in case N 2-317/2015, <https://rospravosudie.com/court-leninskij-rajonnyj-sud-g-ekaterinburga-sverdlovskaya-oblast-s/act-469428448/>.

<sup>374</sup> Уголовно-процессуальный кодекс Российской Федерации (Criminal Procedure Code of the Russian Federation). Adopted on 18 December 2001, N 174-FZ, [http://www.consultant.ru/document/cons\\_doc\\_LAW\\_34481/](http://www.consultant.ru/document/cons_doc_LAW_34481/).

conscientious manner distorted the truth and when such a disclosure is the only way to avoid grave and imminent damage to human beings.”<sup>375</sup>

Similar provisions refer to at least four other acting professional codes of journalists in Russia.<sup>376</sup> They are rarely referred to in the courts of law or by self-regulatory councils.

## 3.10. TR – Turkey

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### 3.10.1. The extent of media privilege

#### 3.10.1.1. Public-legal

The general legal regime concerning periodical and non-periodical publications is regulated through the Press Law.<sup>377</sup>

Under Article 12 of the Press Law, the owner of a periodical, its editor and the owner of a work published in that periodical cannot be forced to reveal the sources (including all types of information and documents) used in producing that work and cannot be forced to testify in this respect. Therefore, journalistic sources are protected by law.

The “right to make news”, as it is known in Turkish, is well established under the case law of civil and criminal tribunals, and constitutes a “justification” with regard to publications which would otherwise breach rights belonging to persons affected by the news in question. According to the case law in question a publication (or broadcast) is lawful when it constitutes “news”. This is the case when:

- The news is accurate and veracious, i.e. it reflects the truth. It is sufficient that the “ostensible” or “apparent” truth (*görünürde gerçeklik*) is reflected: if the journalist has displayed sufficient effort in ascertaining the truthfulness of his or her report by using all relevant journalistic skills and resources, and the news has been

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<sup>375</sup> See its text in English: [http://ethicnet.uta.fi/russia/code\\_of\\_professional\\_ethics\\_of\\_russian\\_journalist](http://ethicnet.uta.fi/russia/code_of_professional_ethics_of_russian_journalist).

<sup>376</sup> They are the 2001 Code of Professional Ethics of Journalists of Chuvashia (Кодекс профессиональной этики журналистов Чувашии), 2007 Professional-Ethical Code of Journalists of Belgorod Region (Профессионально-этический кодекс журналистов Белгородчины), 1994 Declaration of the Moscow Charter of Journalists (Декларация Московской хартии журналиста), 2002 Code of Creative Union of Journalists of Sverdlovsk Region (Кодекс Свердловского творческого союза журналистов).

<sup>377</sup> Act no. 5187, adopted on 09 June 2004. For the official text in Turkish of this law see the Official Journal of 26 June 2004 (No. 25504), available at:

<http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2004/06/20040626.htm&main=http://www.resmigazete.gov.tr/eskiler/2004/06/20040626.htm>.



published after such verification process, the news will be legitimate even if it later turns out to be inaccurate.

- There must be a public interest in the publication of the news, and not merely a general public demand in the shape of, or motivated by, curiosity only.
- The news must be current and actual.
- There must be a causal or intellectual link between the news and the words used in formulating it. In practice, words which may otherwise lead to a violation of a person's rights must be functional in reflecting to the public the content of the news in question.

The right to criticism is also interpreted in accordance with the various criteria established by the ECtHR. Therefore, all of the following are considered by case law as relevant factors in assessing civil claims or criminal cases concerning publications and broadcasts which allegedly infringe on the right of individuals and/or legal persons:

- The status of the author and of the victim (e.g. Is the author a journalist? Is the victim a public official or politician?);
- The subject matter of the impugned expression (e.g. Is it a political or a civil expression?);
- What are the means through which the statement was made? (eg, tv, radio, newspaper, novel, public meeting, etc.);
- Whether the impugned expression constitutes a statement of fact or a value judgment;
- The severity of the penalty and its possible chilling effect.

The right of rectification and reply is protected at constitutional level. Article 14 of the Press Law lays down the conditions for the exercise of this right, which exists with regard to periodical publications in which there is a breach of the honour and dignity of a person, or an untruthful statement concerning a person. The rectification or reply must be sent within two months of the publication, and must not contain any criminal element and must not harm legally protected interests belonging to third persons. Where the rectification or reply is not published within three days, or where it is not published in accordance with the requirements of Article 14 (1), the person concerned can apply within 15 days to the local judge of the peace, who shall decide, without holding a hearing, within three days. It is possible to lodge an objection. This decision must also be taken within three days, and is definitive. Article 18 includes economic sanctions for a failure to comply with the requirements of Article 14.

The general legal regime concerning online publications is regulated through the Law on the Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publication<sup>378</sup>.

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<sup>378</sup> Act no. 5651, adopted on 4 May 2007. For the current official full version of the text in Turkish you may refer to the legislation website of the Office of the Prime Ministry, available at: <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.5651.pdf>.

Article 8 of this law concerns decisions on the blockage of access when there is a “sufficient suspicion” that one (or more) of the crimes enumerated in paragraph 1 has been committed. This decision is taken by the justice of the peace during the investigation, and by the relevant court before which the case is being heard. However, where delay is deemed prejudicial, a prosecutor may also order this measure to be taken during the investigation. This decision is subject to the approval of a judge within a maximum of forty-eight hours. If no decision is taken by the judge within this time-limit, the measure is automatically lifted. In addition, with regard to certain crimes (see Article 8 (4)), the president of the Information and Communication Technologies Authority (Bilgi Teknolojileri ve İletişim Kurumu)<sup>379</sup> may also order this measure. The access provider must execute these decisions “immediately, within a maximum of four hours starting from the time of notification”. Failure to comply will result in a judicial fine (Article 8(10) and (11)).<sup>380</sup>

A new Article 8/A was added to the Law in 2015 which concerns the removal of content or access blockage in “cases where delay is deemed prejudicial”. In the event of the occurrence of one of the circumstances enumerated in paragraph 1 (on “protection of the right to life, limb and property of persons, protection of national security and public order, prevention of the commission of crimes, protection of public health”), the Prime Minister may directly order this measure. Again, in certain cases (concerning the protection of national security and public order, the prevention of the commission of crimes, or the protection of public health), upon the request of the relevant Ministry, the president of the Information and Communication Technologies Authority may order either measure. These decisions must be submitted for judicial review within twenty-four hours, and the justice of the peace must decide within a further forty-eight hours (paragraph 2), otherwise the measure is automatically lifted.

Article 9, as amended in 2014, concerns the removal of content and access blockage in the event of a violation of the personality rights of physical or legal persons. Those harmed may apply to the content provider, or where this is not possible to the hosting service provider, or directly to the justice of the peace. Requests must be answered within twenty-four hours by the content and/or hosting service provider. The justice of the peace shall also decide, without holding a hearing, within twenty-four hours; it is possible to object to this decision (paragraph 7).

Article 9/A was added to the Law in 2014, and concerns the access blockage in the event of a violation of privacy rights. In such a case, those concerned may apply directly to the Information and Communication Technologies Authority to have the access directly blocked. Once such a request is made, an application must also be made within twenty-

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<sup>379</sup> This is a sectoral regulatory body established through law. According to Act no. 5809, it has duties such as creating and maintaining the competition in the sector; protecting the rights of subscribers, users, consumers and end users; carrying out dispute resolution procedures between operators; tracking the developments and stimulating the development of the electronic communications sector; planning and allocating the frequencies, satellite position and numbering, <https://www.btk.gov.tr/en-US/Pages/Establishment>.

<sup>380</sup> See Art. 8 (4), the President of the “Information and Communication Technologies Authority” may also order this measure. The access provider must execute these decisions “immediately, and within four hours at most starting from the time of notification”. Failure to comply will result in a judicial fine (Art. 8 (10) (11)).

four hours of this request to the justice of the peace, who must decide within a further forty-eight hours; if he does not, the decision is automatically lifted (paragraph 5). In cases where delay is deemed prejudicial, then upon the order of the president of the Information and Communication Technologies Authority, access may be blocked directly by the Authority, subject to the same judicial review procedure (paragraph 8).

With regard to online publications, the exercise of the right to reply was regulated in Article 9 of Law no. 5651. However, through an amendment of 2014, the article has been thoroughly amended, and now regulates blocking orders and the removal of content.

With regard to state-owned television and radio channels, the general regulatory framework is provided by the Law on Turkey Radio and Television.<sup>381</sup> The operation of all other “media service providers” is regulated by the Law on the Establishment and Broadcast Services of Radios and Television,<sup>382</sup> which replaced Law no. 3984 of 1994. Under Article 2, a media service provider is deemed to be established in Turkey if the company headquarters is situated in Turkey, or if editorial decisions concerning broadcast services are taken in Turkey. However, paragraphs 3-4 provide for other instances where the provider is considered to be under Turkish jurisdiction.

The right of rectification and reply is regulated under Article 18. The conditions are the same as above, except for certain time-limits: physical and legal persons have a time limit of sixty days to send a rectification or reply to the media service provider, and the provider has a maximum of seven days to disseminate it. In the event of failure to do so, or failure to disseminate it in accordance with the requirements established by law, the person concerned may apply to the justice of the peace within ten days. A decision shall be taken, without holding a hearing, within three days. An objection against this decision may be lodged within seven days with a criminal court of first instance, which shall decide within three days on such a complaint. This decision is final. Administrative sanctions for failure to comply with the prescribed requirements are set out under Article 32, and judicial sanctions are laid down under Article 33.

The planning and allocation of frequencies and the granting of broadcast licences falls under Article 133 of the Constitution<sup>383</sup> under the authority of the Radio and Television Higher Council (“RTÜK”), an autonomous and impartial administrative organ. Articles. 34-43 stipulate in detail various aspects of this body. The planning and allocation of frequencies is subject to the provisions (Articles 36-37) of the Law on Electronic Communication.<sup>384</sup>

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<sup>381</sup> Act no. 2954, adopted on 14 November 1983. Official Turkish text available at: <http://www.mevzuat.gov.tr/Metin1.Aspix?MevzuatKod=1.5.2954&MevzuatIliski=0&sourceXmlSearch=&Tur=1&Tertip=5&No=2954>

<sup>382</sup> Act no. 6112, adopted on 3 March 2011. Official Turkish text available at: <http://www.mevzuat.gov.tr/Metin1.Aspix?MevzuatKod=1.5.6112&MevzuatIliski=0&sourceXmlSearch=&Tur=1&Tertip=5&No=6112>

<sup>383</sup> Constitution of the Republic of Turkey, Official Journal of 9 November 1982 (No. 17863). Full English text available at [https://global.tbmm.gov.tr/docs/constitution\\_en.pdf](https://global.tbmm.gov.tr/docs/constitution_en.pdf).

<sup>384</sup> Act no. 5809, adopted on 5 November 2008. Official Turkish text available at: <http://www.mevzuat.gov.tr/Metin1.Aspix?MevzuatKod=1.5.5809&MevzuatIliski=0&sourceXmlSearch=&Tur=1&Tertip=5&No=5809>.

### 3.10.1.2. Civil Law

Under Article 13 (1) of the Press Law, the following persons are jointly and severally liable for compensation for pecuniary and non-pecuniary damage caused by acts committed through printed works: (i) in the case of periodical publications – the author, the responsible editor and, where applicable, the deputy editor responsible; (ii) in the case of non-periodical publications – the author, the publisher and (where the publisher cannot be identified) the printing house.

Under Article 13 (2), this provision also applies to any physical or legal persons who may be the responsible editor, trademark or licence owner, leaseholder, administrator or any other rightholder or any person acting as publisher. Where the legal person is a corporation, the chair of the board of directors (in the case of a joint-stock company) or the highest-ranking manager (in the case of any other type of company) is jointly and severally liable, together with the company in question.

Article 13 (3) furthermore transfers liability to other persons and organs where (i) the publication is transferred under any circumstances, (ii) the publication is merged with another publication, or (iii) where the physical or legal person who is the responsible editor has changed under any circumstances after the act causing the damage in question has been committed.

### 3.10.1.3. Criminal Law

The “right to criticism”, a corollary of the more specific freedom of the press (Constitutional Article 28) and the more general freedom of expression (Constitutional Article 26) constitutes a “justification” with regard to the crime of defamation embodied in Article 125 of the Turkish Penal Code (Law no. 5237)<sup>385</sup> and Article 299 concerning specifically insulting to the Head of State.

Article 11 of the Press Law regulates criminal responsibility for printed work. In both periodical and non-periodical publications the owner of a printed work is the person bearing primary responsibility for it. However, in the case of periodicals, there are “fall-back” alternatives: If the owner is unknown, or has no criminal record at the time of the publication, or cannot be tried due to his or her being abroad, or if a penalty would have no effect due to the existence of another final conviction in respect of another crime, various alternative organs of the relevant publishing organ are held responsible. Where the person responsible at editorial level has objected to the publication in question, the responsibility belongs to the publisher alone. In the case of non-periodicals, in the same four cases indicated above, the publisher is held responsible. If the publisher is unknown, or has no criminal capacity at the time of the publication, or cannot be tried due to his or her being located abroad, the printer is held responsible.

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<sup>385</sup> Act no. 5237, adopted on 26 September 2004. Official Turkish text available at: <http://www.mevzuat.gov.tr/Metin1.aspx?MevzuatKod=1.5.5237&MevzuatIlski=0&sourceXmlSearch=&Tur=1&Tertip=5&No=5237>.

### 3.10.2. Recent and emergent issues

On 15 July 2016, elements of the military attempted to carry out a coup d'état against President Recep Tayyip Erdogan and the Justice and Development Party (AKP) government. In the aftermath, the government declared a state of emergency, announced its derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights, and issued a series of decrees aimed at addressing the security threats that gave rise to the coup attempt.

These decrees supplemented the existing legal framework regarding anti-terrorism measures and gave authorities broad discretion to take measures against, in particular, the press that had an impact on the exercise of media privilege. Issues which constitute topics for current political and legal debate include: the takeover of media companies; the prosecution and jailing of journalists on the basis of Article 301 (which addresses, *inter alia*, insulting the Turkish nation) or charges under Article 299 of the Turkish Penal Code (insulting the Head of State), or in relation to the disclosure of journalistic sources (Article 12 of the Press Law); financial sanctions on the advertising revenues of press organs on the grounds of ethical violations; and restrictions on the Internet and the occasional banning of access to Internet platforms through administrative or judicial decisions.

This raises the important question of determining to what extent media privilege and the right to freedom of expression may be restricted under special political circumstances on the grounds of a state of emergency.



## 4. Trends and outlook

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### 4.1. Trends revealed by the comparison of countries

The national reports show that – apart from the special case of the United Kingdom, which has no written constitution – national constitutional law plays a particularly important role in the interpretation and application of ordinary media privilege legislation. The legislative provisions themselves are extraordinarily diverse and varied, which is hardly surprising in view of the different legal traditions of the countries concerned. Comparisons demonstrate that only a few rules are standard; this sets very tight constraints on any harmonisation of laws at EU or even Council of Europe level. Conversely, they also show that media self-regulation is playing an increasingly prominent role in media privilege, including aspects related to data protection (as in, for example, Germany and the UK). The regulatory response to the emergence of new types of media in particular is showing some interesting parallels.

In some countries, such as France, media privilege is specifically regulated by detailed legislation, while in others it is the subject of evolving case law. In all the countries studied, case law in particular shows a trend – in parallel with a broad interpretation of the scope of protection afforded by media freedoms, which covers all forms of the journalistic process – towards the inclusion of new forms of journalism, such as blogging, within the scope of certain media privileges. Case law is also particularly important for the weighing-up process between the protection of the personal data of individuals whose behaviour is investigated and reported by journalists on the one hand, and freedoms in relation to mass communication on the other. This process plays a crucial role in the application of current media privileges in all the countries studied. With regard to the right to be forgotten, the ECJ's *Google Spain* ruling has not yet produced a common response in the EU member states studied. In some of these countries (Germany, for example), supreme court decisions on the ECJ ruling's impact on the national legal system are pending, while in others (such as Italy and Spain) there is a clear shift towards greater data protection where non-news-based media forms are concerned.

Journalists are not excluded *per se* from the civil or criminal law systems of any of the countries studied. They and other members of the media, for example, can be ordered under civil law to pay compensation for infringing third-party rights through their reporting, or sentenced under criminal law for breaches of secrecy or for treason. When deciding whether a civil claim is valid or a crime has been committed, determining

whether the journalist concerned met the due diligence obligations incumbent on journalists is a key factor in some of the countries studied (such as Germany and the UK).

Some countries (Italy, for example) even have specific criminal law provisions that only apply to members of the media.

Journalists' work is protected by a series of special privileges, including exemption from seizure and searches, the right to refuse to testify and the protection of sources. These privileges range from general prohibitions (e.g. that in Germany on seizure or searches), to the possibility of temporary legal protection against such measures (as in the UK). In some countries (such as Hungary, Russia and Turkey), there has been a worrying recent dismantling – both legally and in practice – of safeguarding mechanisms for independent and free media, such as the temporary suspension of the protection of sources or data protection privileges (Hungary), or measures to distribute the burden of proof in a way that obstructs media freedoms (Russia).

In the fight against terrorism, repeated efforts have been and continue to be made to promote security interests, sometimes without giving appropriate consideration to the media's ability to work independently.

A comparative study would be wholly inadequate if it did not take into account the conditions for media independence and protection from state interference, self-censorship and discrimination in terms of privileged access to information for pro-Government media (as in Hungary) on the one hand and the regulatory framework for the protection of media plurality and diversity of opinion against a dominant influence on public opinion (as in the UK, for example) on the other. Even in parliamentary democracies, this two-fold danger cannot be ruled out. The less these threats are properly restricted and the more forcefully independent case law is prevented from effectively counteracting them, the more likely it is that safeguards enshrined in ordinary or constitutional law to protect the media's public remit will come to nothing.

However, attacks on press and broadcasting freedoms by states or traditional media companies with a dominant market position are not the only factors that threaten the effectiveness of media privileges. Technological advances are also creating a need to adapt existing safeguarding tools for free media to new challenges. The use of artificial intelligence (AI) has a special role to play.<sup>386</sup>

## 4.2. Prospects for future challenges to media privilege

In the debate over the future development of media regulation, questions related to the safeguarding of high-quality journalism and positive incentives to fulfil the public remit,

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<sup>386</sup> See below, briefly, and, in more detail, *Jörg Ukrow*, Institute of European Media Law (EMR), *Aktuelles Stichwort – Die Bedeutung Künstlicher Intelligenz (KI) im Medienbereich*, available (in German) at <http://emr-sb.de/journalism/>.



including by privately-owned media, are particularly prominent.<sup>387</sup> Media privilege can be a useful tool for promoting quality journalism: legislators can assign media privilege according to the importance of individual media for the formation of public opinion and decision-making. When determining the scope of media privilege, they do not need to adopt a broad interpretation of the requirements of the media's public remit with a view to data protection restrictions. When weighing media freedom against personality rights protected under data protection law, they can therefore assign a greater degree of privilege, through incentive-based regulations, to media providers that make a specific contribution to the formation of public opinion by providing the kind of quality reporting that is not found in the tabloid press.

This study has not only shown that the shaping of media privilege plays, and can continue to play in the future, an important role in safeguarding the necessary special status of journalism. It has also demonstrated that the definition of who is or who should be entitled to such privileges is becoming increasingly blurred because new forms of journalism have emerged that are no longer based on the work of professionally organised publishing houses, but that are capable, with little (technical and financial) expense, of achieving a similar or greater reach than traditional media content. Against this background, media privilege in European states, as an instrument for the protection of journalistic freedom, is in a period of transition.

However, when looking to the future, it should also be pointed out that the use of artificial intelligence could have a further negative impact on the role and status of journalism. It is true that research into the opportunities and dangers of AI use in the media production and value chains is still in its infancy.<sup>388</sup> However, artificial intelligence will change society and the media landscape for the long term. Essentially, it comes down to the question of how this technology can be used to achieve or improve on the remit or business objectives of the media. Even taking into account the human influence on creative processes, it throws up new ethical, social and economic problems.<sup>389</sup> For example, AI can help to establish what defines the search behaviour of media library users or when media consumers need what news in how much detail with what prior knowledge from which media via which communication channel.<sup>390</sup> However, AI can also foster the development of filter bubbles in and through journalism and seriously limit the openness to new ideas of both journalists and recipients of journalistic products. It is arguable that, as far as safeguarding the free formation of individual and public opinion

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<sup>387</sup> See *Schulz/Held*, *Regulierung durch Anreize. Optionen für eine anreizorientierte Regulierung der Leistungen privater Rundfunkveranstalter im Rundfunkstaatsvertrag*, 2011

<sup>388</sup> See, for example, *Wahlster*, *Bestimmt die künstliche Intelligenz, welche Nachrichten wir lesen?* <http://www.medien-impulse.de/2016/10/24/kuenstliche-intelligenz-fuer-personalisierte-medien-chancen-und-risiken-interview-mit-prof-wolfgang-wahlster-algorithmen-kuenstliche-intelligenz-cybersicherheit/>.

<sup>389</sup> See *Gerber/Schierbaum*, *Künstliche Intelligenz wird die Medienlandschaft nachhaltig verändern*, <https://www.ard-zdf-medienakademie.de/mak/trends/kuenstliche-intelligenz-wird-die-medienlandschaft-nachhaltig-veraendern>.

<sup>390</sup> See *Stoffers*, *Künstliche Intelligenz – Warum nicht jeder programmieren lernen muss*, <https://www.ard-zdf-medienakademie.de/mak/trends/kuenstliche-intelligenz-warum-nicht-jeder-programmieren-lernen-muss>.

and decision-making is concerned, the use of artificial intelligence has already created problems that are virtually irreversible.

In order to meet its obligation to safeguard the democratic process within the context of AI use in the media, the state has an extensive prerogative to assess and evaluate. Relevant media law provisions regulating the use of AI include in particular transparency, data protection and journalistic due diligence obligations. It will also need to be determined whether robot journalism can enjoy unlimited media privilege, since this form of journalism lacks the human balance between journalistic research and its impact on personality rights.

In the world of online media, there are still many regulatory gaps regarding journalistic and editorial services. This may pose a threat to the protection of a media order that reflects the diversity of existing opinions in all its breadth. The German *Netzwerkdurchsetzungsgesetz* (Network Enforcement Act)<sup>391</sup>, which recently entered into force, may, despite heavy criticism from constitutional and European law perspectives<sup>392</sup>, serve as a model for political debate in other countries – not only in the Russian Federation<sup>393</sup> – on account of its regulation of Internet-based services. For social media can still too often be misused as a way of disseminating anti-social messages and, in extreme cases, fan the flames of vicious propaganda. Although politicians are taking steps to counter these undesirable developments, they will need to respect the limits imposed by constitutional and European law, in particular the principle of proportionality.

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<sup>391</sup> Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Act to improve law enforcement in social networks – NetzDG) of 1 September 2017, Official Law Gazette 2017 I p. 3352

<sup>392</sup> See, for example, *Deutscher Bundestag*, Der Entwurf des Netzwerkdurchsetzungsgesetzes - Vereinbarkeit mit dem Unionsrecht, <https://www.bundestag.de/blob/513888/14a282a1c20f00b87b19ef3931f8a36c/pe-6-022-17-pdf-data.pdf>; *Deutscher Bundestag*, Der Entwurf des Netzwerkdurchsetzungsgesetzes - Vereinbarkeit mit der Meinungsfreiheit, <https://www.bundestag.de/blob/510514/eefb7cf92dee88ec74ce8e796e9bc25c/wd-10-037-17-pdf-data.pdf>

<sup>393</sup> See <https://www.reporter-ohne-grenzen.de/presse/pressemitteilungen/meldung/russland-kopiert-gesetz-gegen-hassbotschaften/>



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