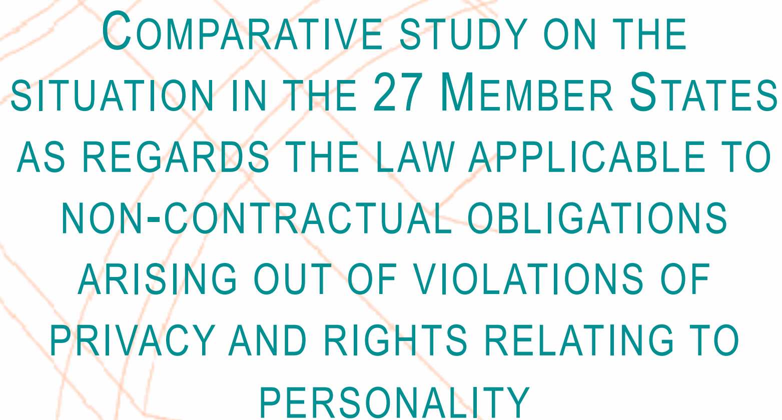

Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality

ANNEX III – EU 27 National Reports

Customer: **European Commission**

Directorate General Justice and Home Affairs

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AUSTRIA[1]

1. National rules

In Austria, personal privacy personality rights ("Persönlichkeitsrechte") are a very wide concept and materialised in different ways: both civil law and public law including criminal law make their specific contributions. It also includes the right to physical integrity and sexual self-determination but we focussed our description on personality rights typically infringed by communication media. We further limited our description to civil rights, although many personality rights have a counterpart in criminal law (e.g. defamation)

General clause:

Article 16 of the Austrian Civil Code (ABGB) dating from 1811 provides that every human being has "natural rights" by the fact of its birth and is therefore considered as a person. Today, this provision is seen as general norm protecting human personality, dignity and identity and therefore interpreted by case law as general personality right and blanket clause for the protection of privacy and personality rights in case of non-existence of any other specific law. It is therefore a very important legal norm in this respect.

Right to protect privacy:

Article 1328a ABGB provides that everyone who infringes the privacy of another person by not respecting diligence duties has to pay compensation and extra compensation for immaterial damage. This term is not applicable if the infringement is caused by communication media as these cases are regulated by the Austrian Communication Media Act (MedienG) being the lex specialis.

Article 6 Austrian Communication Media Act (MedienG) gives a persons defamed, insulted, ridiculed or libelled by communication media the right to compensation for the offense suffered, except if the infringement occurred in/concerns debates in the national or local parliaments the content of the publication is true or the interest of the public in receiving information prevails (only in case of defamation) live broadcasting on TV without infringing due diligence the content of a web page without infringing due diligence is a true statement of a third party and the interest of the public in receiving information prevails

If the infringement affects private life, the right to compensation is only excluded if the content of the publication is true or if it was broadcasted on TV.

Article 7 MedienG protects strictly personal matters of private life. If a communication media exhibits or discusses strictly personal matters of private life, the person concerned has a right to compensation against this communication media. This is excluded if the infringement occurred in/concerns

- debates in the national or local parliaments

[1] MAG. KONRAD LENNEIS and UBC (University of the Basque Country). Special attention was paid to the document on libel and the press and media prepared by the Secretariat of the CDMC [Spanish contemporary music broadcasting centre] for the Council of Europe. CDMC (2006)007.

- the content of the publication is true and related to public life
- the communication media could reasonably assume that the person would agree with the publication
- live broadcasting on TV without infringing due diligence
- the content of a web page without infringing due diligence

Protection of rights in court proceedings

Art 7a MedienG protects against the disclosure of the personal identity of crime victims and suspects of crimes, as far as the public interest in the disclosure of the personal identity is not prevailing.

Art 7b MedienG protects the presumption of innocence by providing that media are not allowed to describe a person as the author of the crime but only as a suspect as far as there is no binding court decision.

Art 7c MedienG protects against the disclosure of the content of images, records or notes in relation to criminal proceedings, which where not used in the trial.

Media cases

Article 51 of the Austrian media act provides that infringements of article 6 and 7 (see the description below) are applicable on foreign media enterprises if

- the information was published or broadcasted or could be received in Austria
- the person whose rights have been infringed is Austrian or has residence in Austria or important interest of Austria have been infringed.
- the following rights have been infringed: honour, economic reputation, privacy and secrecy, sexual integrity and sexual self-determination, public security and peace.

Therefore, if for instance a British media publishes information on the internet, infringing the privacy of an Austrian, the Austrian media act applies. This also applies if the information is published in a British magazine, which is also disseminated in Austria, or if the information infringes Austrian interests heavily.

Defamation

Both civil and criminal liability are provided for by the law.
Defense. Under Article 29 of the Media Act (1981), the strict burden of proof of the truth (in criminal cases) has been relieved; under the 1981 Media Act, journalists are not guilty of libel if they are able to establish both that they observed journalistic care and that there was a major public interest in the publication.

Public Figures. The relevant provisions of the Criminal Law (Article 111 of the Penal Code) and of the civil law (Article 1330 of the Civil Code) apply to value judgements as well as to statements of fact. Following decisions of the European Court of Human Rights, the status of the insulted person is considered and the courts have shown readiness to require politicians to accept a greater degree of criticism and scrutiny regarding matters, which may affect their qualifications for public service than private persons.

Invasion of privacy. The 1981 Media Act introduced a separate cause of action for invasion of privacy: Article 7 provides that a media organ is obliged to grant compensation if matters concerning the private life of a person are presented in such a way as to degrade him or her in public opinion. Publication is permitted in any case where there is a "connection with public

life". However, little use has so far been made of Article 7. It appears that reporting on matters of legitimate public interest is not inhibited by this provision

Article 78 of the Copyright Act forbids the publication of pictures which violate legitimate interests of the person shown. A few courts have found that there was no violation in case of pictures of "public figures".

2. Applicable law

Austrian international private Law is codified. The basic legislation in this context is the law of 15 July 1978 on international private law (IPRG, published in the Austrian Official Gazette, BGBl. no 304/1978).

The point of connection between extra-contractual claims for damages and injuries is found in articles 35 and 48 IPRG. This type of dispute is governed by the law elected for by the parties involved or, if no such election is made, by the law of the state in which the act giving rise to the injury was performed. Notwithstanding, in the case where both parties have a closer link with the law of the other member state, the law of that state prevails, always provided that this is the same for both.

This conflict of laws rule determines the law applicable in matters such as determining if a liability for compensation exists, who has to fund the payment of damages and what the amount of damages should be. Similarly, it addresses the matter of joint liability and of the right of direct action by the injured party against the insurer, and also the question of the time limit on claims for injury and damages.

There is no specific rule to determine the law applicable to liability for infringements of individual privacy by the media and press.

3. Transposition of the Directive

Directive 95/46/CE implemented by Federal Act Concerning the Protection of Personal Data (Datenschutzgesetz 2000 - DSG 2000). It respects the European Directive.

> **Sect. 3** (1) The provisions of this Federal Act [*Bundesgesetz*] shall be applied to the use of personal data in Austria. This Federal Act shall also be applied to the use of data [*Verwendung von Daten*] outside of Austria, insofar as the data is used in other Member States of the European Union for purposes of a main establishment or branch establishment (sect. 4 sub-para. 15) in Austria of the controller [*Auftraggeber*] (sect. 4 sub-para. 4).
>
> (2) Deviating from para. 1 the law of the state where the controller has its seat applies, when a controller of the private sector (sect. 5 para. 3), whose seat is in another Member State of the European Union, uses personal data in Austria for a purpose that cannot be ascribed to any of the controller's establishments in Austria.

(3) Furthermore, this law shall not be applied insofar as data are only transmitted through Austrian territory.

(4) Legal provisions deviating form paras. 1 to 3 shall be permissible only in matters not subject to the jurisdiction of the European Union.

It respects the European Directive.

4. Judicial Competence

Competent Courts for Media/Press Litigation:

The right of compensation according to Art 6-7c and 41 MedienG can be claimed in criminal proceedings before the Regional Courts (Landesgericht) as Criminal Courts where the owner of the communication media is accused. If there is no pending court proceeding, the infringed person may apply for a specific media law compensation proceeding at the Regional Court of the place of the registered office of the owner of the communication media. If the registered office is located outside Austria, the local competence is determined by the place from which the content was published, broadcasted or could be received. If there is no connecting factor like the mentioned before, the Regional Court of that place is competent, where the content was published, broadcasted or could be received in Austria.

Disputes regarding Art 1330 ABGB (defamation) and other "personality rights" are handled by the Commercial Court (Handelsgericht) in Vienna, and by the Regional Courts (Landesgerichte) as Commercial Courts outside Vienna if the defamation concerns the publication in a commercial media and if the amount in disputes exceeds 10.000 Euro, otherwise district courts are competent, in Vienna the District Court for Commercial Matters (Bezirksgericht für Handelssachen). For copyright matters always Commercial Courts are competent.

5. Case law

Supreme Court: judgement of 7th of November 2007, 6 Ob 57/06 k - Ernst Happel/postal stamp

The Supreme Court decided that the use of images for postal stamps (here with the image of the deceased famous Austrian soccer trainer Ernst Happel) does not affect the personality rights of the pictured person. Art. 75 UrhG protects imaginary and physical interest. The protection of physical rights only applies if the infringement of imaginary interests affects also physical interests. The personality rights of the deceased are not hereditary. The right of honour can be protected after death as well as a so called post-mortal personality right which can also be put in claim by the relatives but is not been infringed by showing a picture on a stamp.

Supreme Court: judgement of 28th of March 2007, 6 Ob 6/06k - mock of a video camera

According to Art. 16 ABGB and in consideration of the parties interests, the court decided that even if a video camera installed on the balcony of a private house and directed to the neighbour is a profound infringement of personal privacy of the neighbour, even if the camera is just a mock .

Higher Regional Court of Vienna: judgement of 5th May 2008 – Natascha Kampusch "love pictures"

The court allowed the publication of pictures showing Natascha Kampusch dancing with a young man in a well known Vienna dancing club by a local newspaper. Ms. Kampusch's right to protection her privacy is not infringed if the picture shows a situation taking place in a public area. Therefore, the court marks a clear separation between public appearance and private life.

Commercial Court of Vienna, judgement of 2nd April 2007, 18 Cg 197/06v – Fiona Swarovski/Karl Heinz Grasser

A local newspaper wrote that Ms. Swarovski lost a child she had from Mr. Grasser and was therefore sued by this couple. The Commercial Court found that if a person takes his/her private life voluntarily into the public and is giving interviews about it, he/she can not claim an infringement of his/her right to protection of his/her private life. When considering the parties' interests, the interest of the public in receiving information prevails.

BELGIUM[2]

1. Autonomous legislation

In Belgium the right of every person to a private life is recognised. The importance given by the Belgians to this right is reflected in its inclusion as a fundamental right in Article 22 of the 1994 Belgian Constitution. The Constitution establishes that whenever personal data concerning a person are processed, said person shall have the right to expect and demand that all precautions be taken to protect their private life.

a. Loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel (loi vie privée).

The Act of 8 December 1992 (Private Life Act) protects citizens against any misuse of their personal data. It defines not only the rights and duties of the person referred to by the data but also those of the controller of the processing.

The private life act creates an independent inspection body, the Commission for the Protection of Privacy (or Privacy Commission). This Commission ensures that personal data is used in a way that respects the private life act, its spirit and the precautions imposed to protect citizens' privacy.

Since its enactment, major amendments have been introduced to the act of 8 December 1992.

The first was the result of adoption of EU Directive 95/46/EC intended to harmonise the rules applied in different European Union member states on the protection of personal data. Pursuant to Belgium's obligation to transpose this Directive into national law, the act of 8 December 1992 was amended by the *act of 11 December 1998.*

Another important amendment was made to the privacy act by the Belgian legislator in response to the rapid development of the "Information Society". The Commission had received several demands, not only from the public but also from public authorities, asking it to pronounce on difficult questions related to specific issues that required specific expertise. The act of 26 February 2003 amended the status, composition and powers of the Commission, creating several special committees.

b. Arrêté royal du 13 février 2001 portant exécution de la loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel

On 11 December 1998, profound alteration were made to the private life act in order to ensure transposition of European Directive 95/46/EC. It immediately became necessary to adopt a new executing decision: L'arrêté royal du 13 février 2001. This Decision sets out:

- The conditions under which it is permitted to process personal data for historical, statistical or scientific purposes.
- The conditions to be respected in processing data of a "sensitive" nature.

[2] UBC with the collaboration of Marinus VROMANS

- The manner in which a person who has been the subject of an action by a personal data database can exercises their rights (right to search, right to have the data rectified or removed)
- The systems for declaring the automated processing of personal data

c. Arrêté royal du 17 décembre 2003 fixant les modalités relatives à la composition et au fonctionnement de certains comités sectoriels institués au sein de la Commission de la protection de la vie privée

This Decision establishes the workings of the sectoral committees. It specifies who the experts are and when they must be called in accordance with the procedures on which they must work.

d. Loi du 8 août 1983 organisant un Registre national des personnes physiques

This act determines :

- What information is recorded in the National Register and the means of conserving and updating it
- Who is responsible for managing the national register
- What rules are in place to apply the use of the identification number allocated to each citizen (“National Register Number")
- That the Sectoral Committee of the National Register is the only power to which applications may be made for access to the information recorded in the National Register
- That it can make use of the National Register number.
- The composition, mission and powers of the Sectoral Committee of the National Register

d. Loi du 15 janvier 1990 relative à l'institution et à l'organisation d'une Banque-Carrefour de la Sécurité Sociale

This act established a "Banque-Carrefour" and a sectoral committee of Social Security (from 2007, the Sectoral Committee of Social Security and Health) and determined its composition, workings and powers.

The Banque-Carrefour organises and generates an electronic tool intended to facilitate exchange of information among social security agencies and the National Register. It is not a databank: the Banque-Carrefour does not retain any of the information; rather it ensures electronic transmission between the different organisms within the social security network

e. Loi du 16 janvier 2003 portant création d'une Banque-Carrefour des Entrepris es, modernisation du registre de commerce, création de guichets-entreprises agréés et portant diverses dispositions

This law creates a Banque-Carrefour of companies and establishes the working thereof. It is a register of all the data of the companies contained in the National Register of natural persons, the trade register, the TVA and the ONSS. The services of the TVA, the National Office of Social Security, the Justice and the company windows are connected via the Banque-Carrefour des Entreprises.

f. Loi du 10 août 2005 instituant le système d'information Phenix

This act establishes a system called "Phenix" to allow the internal and external communication necessary for proper working of justice:

- The administration and filing of legal briefs
- The establishment of a national role
- The creation of a database of jurisprudence
- The establishment of statistics and the setting up of a help mechanism for management and administration of legal institutions.

g. Information on defamation

Criminal Code

Book II Chapter V Section VIII of the Criminal Code deals with offences against peoples' moral integrity.

In the Criminal Code, offences against honour are classified into: calumny and defamation (Art. 443, 444, 446, 447, 450 and 451), divulgement (Art. 449), false reports to the authority and false accusations against a subordinate (Art. 445) and slander [*injuria*] - crime (Art. 448). To complete the provisions of Articles 443 - 453, Article 561 No. 7 of the Criminal Code punishes some very different forms of slander not contained therein.

Articles 275 and of the Criminal Code refer more specifically to offences against ministers, members of the legislative chambers and guardians of authority or public order.

Article 447 of the Criminal Code, which includes the false accusations against public persons, has been completed in order to reinforce the protection of people subject to such allegations.

Other provisions

In addition to the aforesaid provisions, Belgian legislation also contains other texts to punish injurious or offensive acts. These refer more particularly to defamation [*injurias*] or offences against certain people due to their rank or their functions. The Act of 6 April 1847 deals particularly with offences against the King and members of the royal family; the Act of 20 December 1852 with offences against foreign heads of government; the Act of 12 March 1858 with offences against diplomatic agents; the Royal Order of 19 July 1926, completed by Royal Order No. 36 of 3 December 1934, concerning attacks on the credit of the state or the stability of the currency, the Act of 10 January 1955 is concerned with the divulgement of inventions or manufacturing secrets that are of interest to the defence of the territory or the security of the state

2. Legislation applying to non-contractual obligations arising out of damages against personality rights

A. General rule

Article 99 of the Belgian DIPp act of 16 July 2004[3]establishes the law applicable to the obligations deriving from a harmful event which in general terms shall be governed:

1. by the law of the state in whose territory the person responsible and the person wronged have their normal place of residence at the time when the circumstances from which the damage arises occur.

2. In the absence of a residence in the state as the territory in which the harmful event occurred or threatened to occur in its entirety.

3. In all other cases by the law of the state with which the obligation in question has the closest associations.

B. Special rule

The Belgian Code of International Private Law introduces a special choice of law rule for cases of defamation or attacks on private life or against personality rights (Art. 99.2.1).

Art. 99, Paragraph 2.1 refers specifically to criminal offences against privacy and establishes that in all cases the obligation derived from a harmful event in case of defamation, attack against private life or against personality rights shall be governed by the law of the state in whose territory the operative event or the damage has occurred or has threatened to occur, at the plaintiff's choosing, except when the person responsible proves that he cannot prevent the damage occurring in that state.

As we can see, this is a rule that offers the damaged party the possibility of choosing between the law of the place where the operative event has occurred and the place where the damage has occurred, either at present or in the future. This is an application of the concept of ubiquity which tends to favour the offended party.

-In the context of the press, the attack made requires a balance of interests of two fundamental rights, protection of private life and protection of freedom of speech. These cases of constitutional order may involve resorting to the general clauses of the exception of public order when the conditions are applied against a foreign law whose application would violate one of these two rights. Does the constitutional imperative of protection of press freedom justify the exclusion from the act of damages in favour of the place where the press article was produced?

The place where the act causing the damage is harm will be the place where the written medium has been published or the place of the programme that has recounted the facts.

[3] Published in the Belgian Moniteur on 27 July 2004. Came into force on 1 Oct. 2004.

-Normally the place where the damage occurs is the plaintiff's place of residence.

However, the natural person or obligated legal institution may argue that they could not have foreseen that the damage was going to occur in a given territory. In this case, they can avoid application of the law of that country. In this case, only the place where the event giving rise to the damage has occurred may be taken into account. (Art. 99, Final Paragraph).

The provision of the place in which the damage occurred depends on the type of dissemination (whether it is a local newspaper, a programme broadcast on national or global satellite channels). The language used will also need to be considered when determining the place where it may have occurred.

The same guidelines apply to the Internet, except that in International Private Law when remarks made about an act are communicated over the Internet it does not necessarily mean that the damage has been caused worldwide, and that therefore the foreseeable place is the whole world. It all depends on the readership expected to visit the website, the language used, etc.

Jurisprudence

- *Bruxelles 27 April 2004, Auteurs &Media (2005) 80.* Location in Belgium, place of publication of the photos, the operative event when the person harmed resides in France and the photos have been taken in France.

3. Transposition of Directive 95/46/EC

• *Belgian Private Life Act of 8 December 1992*

Firstly the Belgian private life act of 8 December 1992 (in the consolidated version , and therefore *amended by the act of 11 December 1998* to adapt to Directive 95/46/EC) seeks to define a series of concepts that will help us to determine its scope.

The first article, for example, defines the concepts involved in the protection of personal data and people's private life.

> *Art. 1er. § 1er. Pour l'application de la présente loi, on entend par "données à caractère personnel" toute information concernant une personne physique identifiée ou identifiable, désignée ci-après "personne concernée"; est réputée identifiable une personne qui peut être identifiée, directement ou indirectement, notamment par référence à un numéro d'identification ou à un ou plusieurs éléments spécifiques, propres à son identité physique, physiologique, psychique, économique, culturelle ou sociale.*
> *§ 2. Par "traitement", on entend toute opération ou ensemble d'opérations effectuées ou non à l'aide de procédés automatisés et appliquées à des données à caractère personnel, telles que la collecte, l'enregistrement, l'organisation, la conservation, l'adaptation ou la modification, l'extraction, la consultation, l'utilisation, la communication par transmission, diffusion ou toute autre forme de mise à disposition, le rapprochement ou l'interconnexion, ainsi que le verrouillage, l'effacement ou la destruction de données à caractère personnel.*
> *§ 3. Par "fichier", on entend tout ensemble structuré de données à caractère personnel accessibles selon des critères déterminés, que cet ensemble soit centralisé, décentralisé ou réparti de manière fonctionnelle ou géographique.*

§ 4. Par "responsable du traitement", on entend la personne physique ou morale, l'association de fait ou l'administration publique qui, seule ou conjointement avec d'autres, détermine les finalités et les moyens du traitement de données à caractère personnel. Lorsque les finalités et les moyens du traitement sont déterminés par ou en vertu d'une loi, d'un décret ou d'une ordonnance, le responsable du traitement est la personne physique, la personne morale, l'association de fait ou l'administration publique désignée comme responsable du traitement par ou en vertu de cette loi, de ce décret ou de cette ordonnance.
§ 5. Par "sous-traitant", on entend la personne physique ou morale, l'association de fait ou l'administration publique qui traite des données à caractère personnel pour le compte du responsable du traitement et est autre que la personne qui, placée sous l'autorité directe du responsable du traitement, est habilitée à traiter les données.
§ 6. Par "tiers", on entend la personne physique, la personne morale, l'association de fait ou l'administration publique, autre que la personne concernée, le responsable du traitement, le sous-traitant et les personnes qui, placées sous l'autorité directe du responsable du traitement ou du sous-traitant, sont habilitées à traiter les données.
§ 7. Par "destinataire", on entend la personne physique, la personne morale, 'association de fait ou l'administration publique qui reçoit communication de données, qu'il s'agisse ou non d'un tiers; les instances administratives ou judiciaires qui sont susceptibles de recevoir communication de données dans le cadre d'une enquête particulière ne sont toutefois pas considérées comme des destinataires.
8. Par "consentement de la personne concernée", on entend toute manifestation de volonté, libre, spécifique et informée par laquelle la personne concernée ou son représentant légal accepte que des données à caractère personnel la concernant fassent l'objet d'un traitement.

Classification:

Art. 1; For the purposes of applying this act "personal data" shall mean any information relating to an identified or identifiable natural person.

Scope: Article 3 refers to the scope of the act. Article 3 stipulates the exemptions provided in the act in the case of attacks produced via the media with the sole purpose of informing, which therefore come within the area of freedom of speech, either artistic or literary.

Art. 3. *§ 1er. La présente loi s'applique à tout traitement de données à caractère personnel automatisé en tout ou en partie, ainsi qu'à tout traitement non automatisé de données à caractère personnel contenues ou appelées à figurer dans un fichier.*
§ 2. La présente loi ne s'applique pas au traitement de données à caractère personnel effectué par une personne physique pour l'exercice d'activités exclusivement personnelles ou domestiques.
§ 3. a) Les articles 6, 7 et 8 ne s'appliquent pas aux traitements de données à caractère personnel effectués aux seules fins de journalisme ou d'expression artistique ou littéraire lorsque le traitement se rapporte à des données rendues manifestement publiques par la personne concernée ou sur des données qui sont en relation étroite avec le caractère public de la personne concernée ou du fait dans lequel elle est impliquée.
b) L'article 9, § 1er, ne s'applique pas aux traitements de données à caractère personnel effectués aux seules fins de journalisme ou d'expression artistique ou littéraire lorsque son application compromettrait la collecte des données auprès de la personne concernée. L'article 9, § 2, ne s'applique pas aux traitements de données à caractère personnel effectués aux seules fins de journalisme ou d'expression artistique ou littéraire lorsque son application aurait une ou plusieurs des conséquences suivantes: – son application compromettrait la collecte des données;
– son application compromettrait une publication en projet;
– son application fournirait des indications sur les sources d'information.
c) Les articles 10 et 12 ne s'appliquent pas aux traitements de données à caractère personnel effectués aux seules fins de journalisme ou d'expression artistique ou littéraire dans la mesure où leur application compromettrait une publication en projet ou fournirait des indications sur les sources d'information.

d) Les articles 17, § 3, 9° et 12°, § 4 et § 8, ainsi que les articles 18, 21 et 22 ne s'appliquent pas aux traitements de données à caractère personnel effectués aux seules fins de journalisme ou d'expression artistique ou littéraire.
§ 4. Les articles 6 à 10, 12, 14, 15, 17, 17bis, alinéa 1er, 18, 20 et 31, §§ 1er à 3, ne s'appliquent pas aux traitements de données à caractère personnel gérés par la Sûreté de l'Etat, par le Service général du renseignement et de la sécurité des forces armées, par les autorités visées aux articles 15, 22ter et 22quinquies de la loi du 11 décembre 1998 relative à la classification et aux habilitations, attestations et avis de sécurité et l'organe de recours créé par la loi du 11 décembre 1998 portant création d'un organe de recours en matière d'habilitations, d'attestations et d'avis de sécurité, par les officiers de sécurité et par le Comité permanent de contrôle des services de renseignements et son Service d'enquêtes, ainsi que par l'Organe de coordination pour l'analyse de la menace lorsque ces traitements sont nécessaires à l'exercice de leurs missions.

- 1. This act applies to all partially or wholly automated processing of personal data and to all non-automated processing of personal data contained or destined to be included in a file.

  2. This act shall not apply to the processing of personal data carried out by a natural person in the exercise of activities which are exclusively personal or domestic.

  3°. a) Articles 6, 7 and 8 <u>shall not apply to the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression</u> in which the processing corresponds to manifestly public data offered by the person concerned or data that are closely related to the public character of the person concerned or in which same is involved.

  b) Article 9. 1 does not apply to the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression in which the application thereof would compromise the gathering of data about the person concerned. Article 9. 2 does not apply to the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression in which the application thereof would have one or more of the following consequences: Its application would compromise the project of a publication or its application would reveal indications as to the sources of information

  c) Articles 10 and 12 do not apply to the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression insofar as its application would compromise a publication or its application would provide indications as to the sources of information

  d) Articles 17.3. 9 and 12; 4 and 8 and Articles 18, 21 and 22 shall not apply to the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression.

4. Articles 6 to 10, 12, 14, 15, 17, 17 bis, row 1 18, 20 and 31 and from 1 to 3, shall not apply to the processing of personal data generated by State Security and by the general information and security service of the Armed Forces….

5…. (Refers to public authorities, etc.)

Applicable law. Article 3 bis refers to the applicable law.

> ***Art. 3bis.*** *La présente loi est applicable au traitement de données à caractère personnel*
> *1° lorsque le traitement est effectué dans le cadre des activités réelles et effectives d'un établissement fixe du responsable du traitement sur le territoire belge ou en un lieu où la loi belge s'applique en vertu du droit international public;*
> *2° lorsque le responsable du traitement n'est pas établi de manière permanente sur le territoire de la Communauté européenne et recourt, à des fins de traitement de données à caractère personnel, à des moyens automatisés ou non, situés sur le territoire belge, autres que ceux qui sont exclusivement utilisés à des fins de transit sur le territoire belge.*
> *Dans les cas visés à l'alinéa précédent, 2°, le responsable du traitement doit désigner un représentant établi sur le territoire belge, sans préjudice d'actions qui pourraient être introduites contre le responsable du traitement lui-même.*

Art. 3 Bis. This act will apply to the processing of personal data:

1. When the processing is carried out in the context of the activities of an establishment of the controller on Belgian territory or in a place where Belgian law applies by virtue of International Public Law.

2. When the controller is not permanently established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on Belgian territory, or others used only for purposes of transit through the territory of the Community.

   In the circumstances referred to in Line 2 above, the controller must designate a representative established in Belgian territory, without prejudice to legal actions which could be initiated against the controller himself.

COMPARISON WITH THE DIRECTIVE: According to Directive 95/46/EC the applicable law will be that of the country in which the controller of the personal data is established; that is to say the country of residence of the controller of the file regardless of the place of processing of the data (*lex loci delicti commissi*) and of the nationality or residence of the victims of said processing.

Under Belgian law the applicable law will be Belgian law when the residence of the controller of the file is Belgium. **The act therefore complies with the Directive**

Like the Directive, Belgian law provides that Belgian law will also apply when the controller of the file does not live in Belgium but makes use of equipment located there for gathering data. It therefore fully complies with the Directive.

4. International jurisdiction on non-contractual obligations

A. General rule

- *Belgian Code of International Private Law (Act of 16 July 2004)*

The Belgian Code of International Private Law has introduced a special rule for lawsuits founded on a non-contractual obligation associated with a harmful event (Art. 96.2). The text is based on the Brussels I Regulation and allows the jurisdiction

of the Belgian Courts to be established in cases in which the "operative event" of the damage occurred in Belgium.

In the event of a partial location in Belgium, jurisdiction is not limited to cases in which the operative event has occurred in Belgium but also includes cases in which the damage has been caused in Belgium. Like the Brussels Regulation the text limits the jurisdiction to local damage, and the defendant must therefore have recourse to the foreign courts if he wishes to obtain a concentration of suits.

Unlike the Brussels Regulation the Code does not normally [*normalmente*] establish the internal territorial jurisdiction. This shall be determined in accordance with Articles 624 et seq. of the Legal Code.

Article 635 of the Legal Code contains no specific provision in this regard and the jurisdiction will therefore be determined in accordance with other concepts such as the domicile or residence of the defendant or plaintiff, or in accordance with the place in which the obligation has been created.

> CHAPTER IX, Obligations, Section 1: International jurisdiction. International jurisdiction in matters of contractual and non-contractual obligations
>
> **Art 96**. The Belgian Courts are qualified to hear all suits in matters of obligations and other cases provided for in the general provisions of this act when the suit concerns:
>
> 1. A contractual obligation…
>
> 2. An obligation derived from a harmful event
>
> a. If the operative event of the damage occurs or threatens to occur in all or in a part of Belgium
>
> b. if and insofar as the damage has occurred or threatens to occur in Belgium
>
> 3. A quasi-contractual obligation if the event from which this obligation arises has occurred in Belgium

B. Special rule on matters of offences against personality

In the absence of special rules we refer to the rules of international jurisdiction governing matters of civil liability.

In the context of the Brussels Regulation the forum corresponding to the "harmful event" is translated as the place where the defamation has been made by way of the media. The term harmful event [*hecho dañoso*] covers two constituent elements: the event giving rise to the damage and the materialisation of the damage and the plaintiff may choose between different EU member states depending on where each of these elements has occurred (TJCE case 21/76, m30 Nov. 1976 Bier c Mines de potase d'Alsace). In the case of the libellous publication the event giving rise to the damage can only be located in the establishment since it is the place of origin of the harmful

event from which the defamation has been declared and circulated (TSCE Case C 68/1993, 7 March Shevill Re. Gene Dr.civ 1996) and the attack on the reputation occurred in the place of its manifestation, the place where the publication has been published or where the victim has learnt of it (Shevill case)

Belgian jurisprudence

- *Bruxelles , 4 mai 2001 "la veuve de Saint Pierre",* Journal des Tribunaux 2003, 234. They locate the event giving rise to the damage in the place of production of the film or of the copies and the damage in the place of distribution (TV programmes abroad, location of a video library)

- *Civ. Bruxelles, 7 janvier 2002, Auteur &Media (2002)455.* The place of materialisation of the damage is considered to be the place of dissemination of a book in Belgium.

- *Bruxelles, 26 février 2003*, Revue générale des assurances et des responsabilités 2004 n° 13871. The place of materialisation of the damage is considered to be the place of distribution by way of the press.

The solution appears to favour the publisher. Indeed, the event will normally be located in the place of his domicile (Art. 2) and this limits the options provided to the damaged party by virtue of Art. 5. Furthermore the decision to disseminate in a given country could be viewed as an event giving rise to damage,

5. Summary

1. Autonomous Legislation: *Loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel (loi vie privée) ; Arrêté royal du 13 février 2001 portant exécution de la loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel .*
2. The Belgian Code of International Private Law introduces a special choice of law rule for cases of defamation or attacks on private life or against personality rights (Art. 99.2.1). Jurisprudence: *Bruxelles 27 abril 2004, Auteurs &Media (2005) 80*. Location in Belgium, place of publication of the photos, the operative event when the person suffering the damage lives in France and the photos have been taken in France.

3. Transposition of the Directive 46/95: It complies with the Directive
4. Jurisdiction: Belgian Code of International Private Law (Act of 16 July 2004): Art. 96.2 special rule on non-contractual obligations.
Belgian jurisprudence: Bruxelles , 4 mai 2001 "la veuve de Saint Pierre", Journal des Tribunaux 2003, 234. They locate the event giving rise to the damage in the place of production of the film or of the copies and the damage in the place of distribution (TV programmes abroad, location of a video library; *Bruxelles, 7 janvier 2002, Auteur &Media (2002)455.* The place of materialisation of the damage is considered to be the place of dissemination of a book in Belgium; *Bruxelles, 26 février 2003*, Revue générale des assurances et des responsabilités 2004 n° 13871. The place of materialisation of the damage is considered to be the place of distribution by way of the press.

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BULGARIA[4]

a) Autonomous Rules

Defamation

The offence of defamation is included in articles 146 to 148 of the Bulgarian Penal Code. After the reform of 1998, the punishment for these offences changed from imprisonment to Court-determined criminal fines which, in accordance with Article 78 of the penal Code, are often changed to administrative fines.

On 22 July 1999, Parliament amended the criminal Code to remove imprisonment as a punishment for insult and defamation. Six months later, Parliament decided to replace custodial sentences with fines of 5,000 to 30,000 levs (around US$2,500-US$15,000). However, President Petar Stoyanov vetoed the level of the fines, claiming that they were too high in light of the salaries paid to journalists. As a result, insult and defamation remain offences, but they are no longer punished by prison sentences.

The civil Code establishes from a civil point of view that both individuals and legal entities may bring an action for insult and defamation by the press. Individuals may claim for damages and both material and non-pecuniary losses; legal parties may only claim for damages and material losses. The defendant bears the burden of proof in establishing the truth of published matter.

Events in criminal application and provision of civil rights concerning defamation at a national level

In July 1998 the Constitutional Court rejected a movement by members of Parliament for total decriminalisation of defamation, arguing that in a democratic society there had to be effective protection for human dignity, and that human dignity was of central importance to and directly protected in the Bulgarian Constitution.

The Constitutional judges justified the penal Code's special protection for civil servants and other government representatives with the explanation that "the criminal provisions protect not just the individual but also the reputation of the relevant institution".

In an official declaration, the Justice Ministry maintained that Bulgaria's defamation law complies with obligations arising from the international human rights Treaties ratified by the State, forming part of its domestic legislation in accordance with Article 4 of the Constitution and more specifically with the European Convention on Human Rights and Fundamental Liberties.

According to the Bulgarian authorities, the quantity of fines imposed on press journalists under the Criminal Code appeared to have fallen in 2000.

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[4] UBC. Particular attention was paid to the document on defamation and press media created by the Secretariat of the CDMC at the Council of Europe. CDMC (2006)007.

Some courts continue to impose heavy sentences with disproportionate fines. (Several non-governmental organisations criticise this situation (Bulgarian Helsinki Committee, AR 2003; RSF-AR, 2004).

While the number of defamation cases rose between 2001 and 2003 (Bulgarian Helsinki Committee AR 2003) the number of journalists convicted is relatively low. According to the Bulgarian Institute of Statistics only 11 people were sentenced in 2004 for affronts in press articles. Seven people were convicted under Article 148 paragraph 1 and one person under Penal Code Article 148 paragraph 2.
Information from the National Reports On Human Rights – 2004 (Office of Democracy, Human Rights and Employment, 28 February 2005) show that the fines imposed may be considered reasonable and range from US$2,000 (3,000 levs) to US$6,670 (10,000 levs) for libel and US$3,335 (5,000 levs) to US$10,000 (15,000 levs) for defamation.

In its 2003 annual report, RSF reports that Pact 146, 147 and 148 of the current law on communication media allows for fines and was used against journalists who accused political figures of corruption (RSF-AR, 2003).

b) Applicable law

- **Bulgarian International Private Law Code.** ***Prom. SG. 42/17 May 2005***

Art. 2. (1) private relationships with an international element are regulated by the legislation of the State with which they are most closely connected. The content of the code provisions with regard to determination of the applicable law shall express this principle.
2) Should it not be possible to determine the applicable law **according to** the reasons given in Part Three, other criteria shall be used to determine the legislation of the most closely linked state.

General rules: Non-contractual obligations

Art. 105. (1) The obligations deriving from the infraction shall be determined by the law of the State on whose territory the harm or direct damages occurred or the danger existed of the harm or direct damages arising.
(2) If the person causing the harm or the injured party are normally resident or active in the same State, the law of said State shall apply.
3) In spite of the provisions of Paragraphs 1 and 2, if given the whole circumstances of the suspected infraction it is deduced that there is a considerably closer connection to another State, the law of this other State shall apply. In the process a closer connection may be found depending on a previous relationship between the parties, such as a contract closely related to the infraction.

Special rules

Art. 108. (1) The wronged party may choose whether obligations arising from defamations by the media relating to personal rights, and above all by press, radio, television or other mass media, are regulated by:
1. the law of the State where they normally reside, or 2. the law of the State on whose territory the harm occurred, or 2. the law of the State where the party whose responsibility is being tested is normally resident or active

(2) In the cases of Paragraph 1, articles 1 and 2 the person whose responsibility is being tested must have been able to foresee that the harm could have occurred on the territory of the respective State.
(3) The right to objection in cases of infraction relating to personal rights by the mass media shall be determined according to the law of the state where publication took place or the programme was broadcast.
(4) The provisions of Paragraph 1 shall also be applied to obligations arising from infraction of rights concerning the protection of personal information.

c) Transposition of the Directive

- Law on protection of data promulgated in the State Gazette ¼ January 2002, enters into force on 1 January 2002 (Prom. SG. 1/4 Jan 2002, amend. SG. 70/10 Aug 2004, amend. SG. 93/19 Oct 2004, amend. SG. 43/20 May 2005, amend. SG. 103/23 Dec 2005, amend. SG. 30/11 Apr 2006, amend. SG. 91/10 Nov 2006, amend. SG. 57/13 Jul 2007)

Art. 4. this law shall be of application to the processing of personal information where the administrator of personal information:
1. is established on territory belonging to the Republic of Bulgaria and processes personal information during the course of business;
2. is not established on territory belonging to the Republic of Bulgaria, but this law is applicable because of international public law;
3. is not established in territory of an EU member state but for the purposes of the media uses localised information-handling measures on Bulgarian territory, except where it is only intended to be used for purposes of transportation; in this case the administrator shall inform a representative, chosen by the Republic of Bulgaria, without discharge of responsibility.

Therefore under Bulgarian law (as well as the Directive) Bulgarian law shall apply to the party responsible for the file if resident in Bulgaria. It fully respects the Directive.

Bulgarian Law. **As well as the Directive, Bulgarian law considers that Bulgarian law shall apply when the party responsible for the file is not situated in France but uses media situated in Bulgaria for the collection of information. Therefore it respects fully the Directive.**

d) Legal Jurisdiction

- Bulgarian International Private Rights Code. Prom. SG. 42/17 May 2005

Art. 18. (1) Bulgarian courts shall have jurisdiction over claims for harm and damages, except for the cases of Art. 4, where the operative event for the harm was committed in the Republic of Bulgaria, or the harms or damages or a part thereof occurred in the Republic of Bulgaria.
(2) the harmed or injured party shall present jurisdiction of Paragraph 1 directly against the insurer of the party whose responsibility is being tried.

Art. 19. (1) The Bulgarian courts shall have exclusive jurisdiction over claims included in Art. 80 Paragraph 1 page “d” of the Civil Procedures Code, where the legal entity is registered in the Republic of Bulgaria.

e) Summary

1. Autonomous Rules: the offence of defamation is included in articles 146 to 148 of the Bulgarian Penal Code.
2. Special conflict rule in the realm of non-contractual obligations deriving from offences against personal rights committed by the mass media: Art. 108, Bulgarian International Private Rights Code. Prom. SG. 42/17 May 2005: choice of the injured party between 1. law of the State where they are normally resident, or 1. the law of the State where the damages occurred, or 3. the law of the State where the party whose responsibility is being tried is normally resident or carries out business
3. Transposition of the Directive 46/95: fully respects the Directive.
4. Legal Jurisdiction: Bulgarian International Private Rights Code. Prom. SG. 42/17 May 2005: Art. 18. "Bulgarian courts shall have jurisdiction over claims for harm and damages, except for the cases of Art. 4, where the operative event for the harm was committed in the Republic of Bulgaria, or the harms or damages or a part thereof occurred in the Republic of Bulgaria"

CYPRUS[5]

1. Substantive Law

The legal system is a mixture of English and continental law. On issues of human rights the relevant part of the Constitution is almost identical to that of Greece. On the other hand common law (anglo-saxon) principles apply extensively. Protection on such issues derives from the international treaties, the EU law, the Constitution and the internal secondary legislation.

The right to respect for the private life of every person is provided by Article 15 (Part II) of the Constitution of the Republic of Cyprus. According to this article:

"1. Every person has the right to respect for his private and family life.
2. There shall be no interference with the exercise of this right except such as is in accordance with the law and is necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person"[6].

For its part, the law on the freedom of expression is acknowledged in art. 19 of the said Constitution[7].

These rights are also protected by the *European Convention of Human Rights and Fundamental Freedoms*, since the Convention was ratified by Cyprus in 1962. The Convention forms part of the Law of Cyprus and its force is superior to any other internal rule, although according to the hierarchy it is under the Constitution.

Another of the internal regulatory instruments to be taken into consideration in connection with this matter is the *Civil Wrongs Law*. Defamation is regulated in sections 17-24 of the *Civil*

[5] Dr. Pavlos Neofytou Kourtellos and the University of the Basque Country
[6] *The Police v. Yiallourus (1992), CLR 147.*
[7] "1. Every person has the right to freedom of speech and expression in any form. 2. This right includes freedom to hold opinions and receive and impart information and ideas without interference by any public authority and regardless of frontiers. 3. The exercise of the rights provided in paragraphs 1 and 2 of this Article may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary. 4. (...). 5. (...).

Wrongs Law[8]. Defamation consists of the publication by any person by means of print, writing, painting, efiggy, gestures, spoken words or other sounds, orby any other means whatsoever, including broadcasting by wireless telegraphy of any matter which: imputes to any other person a crime, or; imputes to any other person misconduct in any public office, or; naturally tends to injure or prejudice the reputation of any other person in the way of his profesión, trade, business, calling or office, or; is likely to expose any other person to general hatred, contempt or ridicule, or; is likeky to cause any other person to be shunned or avoided by other persons[9].

Responsibility for defamation is divided into two categories: *libel and slander*, according as to whether the defamatory statement is in a permanent form.

According to section 19 of the *Civil Wrongs Law* The defendant can allege that: the matter of which complaint was made was true; the matter of which complaint was made was a fair comment on some matter of public interest; the publication of the defamatory matter was privilege under sections 20 and 21 of the Act, and; the defamation was unintentional under section 22 of the Law[10].

2. Rules of Conflict

The jurisdiction of Cyprus is one of *common law* and the principles of *common law* of English Law will apply in the courts of Cyprus when no specific regulation or jurisprudence exists in the law of Cyprus for the specific case[11]. This point has been acknowledged by the courts of Cyprus in the matter *Cochino v. Irfan*[12].

In regard to non-contractual liability, in the private international law of Cyprus the central question is as follows: When a claim is presented in the courts of Cyprus in respect of facts that have taken place in another State, should the courts of Cyprus declare themselves to be competent? And in the case of an affirmative response, which law must be applied?

When the *tort* occurs in Cyprus, the courts will apply the Substantive Law of Cyprus; this is the same solution for which provision is made in English law. This option was confirmed by the *Supreme Court of Cyprus* in the case *Georghiades and son v. Kaminaras*[13].

In cases of defamation taking place abroad, the courts of Cyprus will apply Private International English Law. Accordingly, the rule of *double actionability* will apply. In order for

[8] A Neocleous, *Introduction to Cyprus Law*, Limassol, Yorkhill Law Publishing, 2000, pp. 558 et seq
[9] *Cf. ibid.* p. 559.
[10] *Cf. ibid.* pp. 561-562.
[11] *Ibid.*, p. 871.
[12] *Cochino v. Irfan (1997)* 11 JSC, 1780.
[13] *Georghiades and son v. Kaminaras (1958)*, CLR, 276.

the courts of Cyprus to hear a claim, it must be actionable both in accordance with the Law of the State where the unlawful action (*lex loci delicti*) took place, and in accordance with the Law of Cyprus (*lex fori*).

The Court hearing the case *Coupland v. Arabian Gulf Oil Co.* considered that once the requirement of double actionability had been met, the Law according to which the court should decide must be the *lex fori*, to the extent that this corresponds with the provisions of the *lex loci delicti*. This decision was cited and approved by the *Supreme Court* of Cyprus in the case *Safarino v. Stavrinou*[14].

Civil liability according to the *lex fori* and the *lex loci delicti* must exist between the same parties involved in the proceeding. In the event that in accordance with the *lex loci delicti* the action may only be brought by another person who is not the plaintiff, the said action may not be brought in Cyprus. Equally, if a claim cannot be brought against the defendant in accordance with the Foreign Law according to the *lex fori* the said action cannot take place[15].

However, the general rule on *double actionability* does have one exception. According to this special rule, in specific cases the court may apply another Law when this presents closer connections with the proposed Law and the parties. By means of this exception the flexibility of the rule is increased and instances of injustice can be avoided that could arise as a consequence of the application of the general rule[16], as legal uncertainty is increased.

3. Case Law concerning Rules of Conflict

In regard to the relevant case law concerning rules of conflict in cases of defamation, English case law must be taken into consideration. In particular: *Phillips v. Eyre* (1870) L).R. 6 Q).b. 1 (Exch.) and *Boys v. Chaplin* (1971) AC 356.

Among the decisions the Courts of Cyprus the aforementioned *Safarino v. Stavrinou* is especially noteworthy.

4. Specialised Courts

In Cyprus we do not have courts especially for violations of personality and/or privacy rights.

[14] *Cf. Ibid.*, p. 883.
[15] *Cf. Ibid.*, p. 883.
[16] *Cf. Ibid.*, p. 883

5. Directive 95/46/EC

According to art. 3.3 on the *Processing of Personal Data (Protection of the Individual) Law of 2001, as amended in 2003*:

> *"This law shall apply to any processing of personal data, where this is performed –*
> *a) By a controller established in the Republic or in a place where Cyprus law applies by virtue of public international law;*
> *b) a controller not established in the Republic who, for the purposes of the processing of personal data, makes use of means, automated or otherwise, situated in the Republic, unless such means are used only for purposes of transmission of data through the Republic. In such a case, the controller must designate, by a written statement submitted to the Commissioner, a representative established in the Republic, who is vested with the rights and undertakes the obligations of the controller, the latter not being discharged of any special liability".*

As can be observed in this article, the Cyprus Law of Transposition coincides to a great extent with the provisions of art. 4 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 in relation to the protection of natural persons in connection with the processing of personal data and the free circulation of such data.

However, a notable difference does exist. The Directive establishes that National Law will apply to the entities responsible for the processing the data which are not established within Community Territory and have access, for the processing of personal data, to resources, electronic or otherwise, located within the territory of the said Member State, except where the said resources are used solely for purposes of transit by the territory of the European Community. For its part, the Law of Cyprus provides that in these same cases the Law of Cyprus will apply when the entity responsible for the processing is not established within the Republic of Cyprus (and not in a Member State). This is an important difference, in that the Law of Cyprus will, in principle, apply, notwithstanding that the entity responsible for the processing is established in another Member State where the Directive has been transposed by means of domestic law. This defective transposition goes against the spirit of the rule and amounts to nonfulfilment of the Directive. Accordingly, it would be possible that in future decisions handed down by the Courts of Cyprus contrary to the provisions of art. 4 of the Directive may not be recognized in the other Member States.

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Czech Republic[17]

1. Applicable Law

The Constitution of the Czech Republic does not include a list of fundamental rights and freedoms such as are found in many European Constitutions. Nevertheless, Art. 3 of the Constitution provides that "an integral component of the constitutional system of the Czech Republic is the Charter of Fundamental Rights and Freedoms". Therefore, it should be understood that privacy and personality rights are protected in the constitutional system since Art. 8.1 of the Charter of Fundamental Freedoms and Rights forms an integral part of the Constitution.

The protection of personality rights is set out in the *Civil Code*, Act no 40/1964. The provisions of this law are as follows:

> Para 11: provides that *"an individual shall have the right to protection of his or her personhood, in particular of his or her life and health, civic honour and human dignity as well as of its privacy, name and expressions of personal nature".*
>
> *§ 12: (1) Documents of personal nature, portraits, pictures and image and sound records concerning an individual or expressions of his personal nature may be taken or used only with his or her consent.*
> *(2) The consent shall not be required if the documents of personal nature, portraits, pictures and image and sound records are to be used for official purposes on the basis of an act.*
> *(3) Portraits, pictures and image and sound records may be taken or used without the consent of the individual adequately also for purposes of science or art and for the purposes of press, motion picture, radio and television news service. However, such use must not be at variance with lawful interests of the individual.*
>
> *§ 13: (1) The individual shall be entitled in particular to demand that unlawful violation of his or her personhood be abandoned, that consequences of this violation be removed and that an adequate satisfaction be given to him or her.*
> *(2) If the satisfaction under paragraph 1 appears insufficient due to the fact that the individual's dignity or honour has been considerably reduced, the individual shall also have a right to a pecuniary satisfaction of the immaterial detriment.*
> *(3) The amount of the satisfaction under paragraph 2 shall be specified by the court with regard to intensity and circumstances of the arisen infringment.*

[17] Jakub Vyplel and the University of the Basque Country.

§ 15: After the death of the individual, the right to protection of his or her personhood may be asserted by his or her spouse or children or, if there are no spouse or children, to his or her parents.

§ 16: A person who causes damages by unlawfully violating the right to protection of personhood shall be liable for these damages according to the provisions of this Act concerning liability for damages.

2. Rules of Conflict

In the Czech Republic legal system conflict of laws rules for instances of denial of personal rights are found in Law no. 97/1963, *on International Private and Procedural Law*. There is no specific law governing instances of infringement of personality rights by the media, so general law pertaining to non-contractual obligations set out in Art. 15 of the Law apply. Pursuant on this law,

"Claims to compensation of damages shall be governed by the law of the place where the damages occurred or by the law of the place where it came to the event that justifies the right to compensation of damages unless the matter is non-fulfillment of an obligation following from agreements or other legal acts".

Therefore, claims for compensation for injury arising from personal rights will be governed by the law of the place in which the injury occurred and by the law of the place where the event giving rise to the damage occurred.

By applying this provision to personality right infringements by publications in the press we may conclude that the governing law would be the law of the state in which publication took place, the law of the states in which it was distributed, or in any state in which infringement of personal privacy rights was suffered.

3. Case Law on Rules of Conflict

Only two legal rulings are found that apply Art. 15 of Law no. 97/1963, *on International Private and Procedural Law*: The Supreme Court of the Czech Republic in decision 25 of ref 2881/2004 and The Supreme Court of the Czech Republic in decision 25 ref 2892/2000.

4. Specialised Courts

We are not aware of any specialised court operating in this field.

5. EC Directive 95/46/EC

According to Art. 3.5 of the *Consolidated version of the Personal Data Protection Act,* Act 101 of April 4, 2000 *on the Protection of Personal Data and on Amendment to Some Acts*, which transposes art. 4 of the EC Directive 95/46/EC of the European Parliament and Council of 24 October 1995 relating to the protection of natural persons in terms of processing personal data and free circulation of such data:

"Furthermore, this Act shall apply to personal data processing:
(a) if the law of the Czech Republic is applicable preferentially on the basis of the international public law, even if the controller is not established on the territory of the Czech Republic,
(b) if the controller who is established outside the territory of the European Union carries out processing on the territory of the Czech Republic, unless where it is only the personal data transfer over the territory of the European Union. In this case the controller shall be obliged to authorize the processor on the territory of the Czech Republic under procedure laid down in Article 6.
If the controller carries out processing through its organization units established on the territory of the European Union, he must ensure that those organization units will process personal data in accordance with national law of a respective member state of the European Union".

This provision accurately reproduces the contents of Art. 4 of the Directive.

Denmark[18]

1. National rules

There exist a number of rules relating to protection of private life and intimacy in Denmark. The most important is the following:

- Section 71 constitution stating: "Personal liberty shall be inviolable. No Danish subject shall, in any manner whatsoever, be deprived of his liberty because of his political or religious convictions or because of his descent." This protects the individual against imprisonment due to political, religious convictions or descent. Furthermore subsection 2 of section 71 protects states that imprisonment can only take place if warranted by law.

- Section 72 of the constitution stating: "The dwelling shall be inviolable. House search, seizure, and examination of letters and other papers, or any breach of the secrecy that shall be observed in postal, telegraph, and telephone matters, shall not take place except under a judicial order, unless particular exception is warranted by statute." This protects the individual against unwarranted search of the individual's premises, letters etc.

- Section 73 of the constitution stating: "The right of property shall be inviolable. No person shall be ordered to surrender his property except where required in the public interest. It shall be done only as provided by statute and against full compensation." This means that property cannot be claimed by the state unless this is required due to public interests, and in such case the individual must be compensated and it should be warranted by law.

- Section 1 of the unfair marketing practices Act (Act No. 1389 of 21 December 2005 with amendments of No. 538 of 8 June 2006, No. 1547 of 20 December 2006, and No. 181 of 28 February 2007) stating: "1. Traders subject to this Act shall exercise good marketing practice with reference to consumers, other traders and public interests."

This clause is used by the courts to protect the personality rights, i.e. the right to your name, picture, voice and story. Thus, if a media brings pictures of a person without any text with an editorial content, it will be in conflict with the Unfair Marketing Practices Act.

-Freedom of speech is protected by the Constitution section 77. Section 77 bans all forms for censorship but does not protect the individuals against criminal or civil liability after the speech has been made. Section 77 does not explicitly address the freedom of the press, but as censorship is banned, the press will have the possibility of publishing everything, but of course subject to liability after the publication has been made.

Information on relevant legal provisions on defamation

Criminal Code

[18] Malou Bech Gilbertsson and UBC. Special attention was paid to the document on libel and the press and media prepared by the Secretariat of the CDMC [Spanish contemporary music broadcasting centre] for the Council of Europe. CDMC (2006)007.

The Danish legal provisions on defamation appear in sections 267-273 of the Criminal Code. These offences are liable to private prosecution.
Section 267. "Any person who violates the personal honour of another by offensive words or conduct or by making or spreading allegations of an act likely to disparage him in the esteem of his fellow citizens, shall be liable to a fine or to imprisonment for any term not exceeding four months."

Section 268. "If an allegation has been made or disseminated in spite of one's knowledge to the contrary, or if the author has had no reasonable ground to regard it as true, he shall be guilty of defamation and liable to imprisonment for any term not exceeding two years. If the allegation has not been made or disseminated publicly, the punishment may, in mitigating circumstances, be reduced to a fine."

Section 269. "An allegation shall not be punishable if its truth has been established or if the author of the allegation in good faith has been under an obligation to speak or has acted in lawful protection of obvious public interest or of the interest of himself or of others.
(2) Punishment may be remitted where evidence is produced which justifies the grounds for regarding the allegation as true."

Section 270. "Where the form in which the allegation is made is unduly offensive, the penalty described in Section 267(1) of this Act may be inflicted, even where the allegation is true; the same shall apply if the author had no reasonable grounds for making the insult.
(2) If the injured party demands punishment only under this section, the offender shall not be allowed to prove the truth of the accusation, unless this is clearly justified by considerations of public policy."

Section 271. "In the case of an allegation of a punishable act, the person who made the allegation shall not be allowed to prove the committing of such an act if the accused has already been acquitted of it in the home country or abroad.
(2) Proof of conviction of a punishable act shall not exempt the author of the allegation from punishment if, having regard to the nature of the offence, the person convicted of it had a reasonable claim that the act in question should not now have been revealed."

Section 272. "The penalty prescribed in Section 267 of this Act may be remitted if the act has been provoked by improper behaviour on the part of the injured person or if he is guilty of retaliation."

Section 273. "If a defamatory allegation is unjustified, a statement to that effect shall, at the request of the injured party, be mentioned in the judgment.

(2) Any person who is found guilty of any defamatory allegation may, at the request of the injured party, be ordered to pay a sum fixed by the court to meet the cost of publishing, in one or several public papers, either the full report of the sentence of this together with the court's reasoning. This shall apply even though the judgment was merely one of annulment of the allegation under Subsection (1) above."

Section 121 of the Criminal Code provides that a person who assaults a public servant with insults, abusive language or other offensive words or gestures is liable to a fine or a maximum sentence of 6 months imprisonment. It is the public prosecutor who initiates the proceedings. According to information provided by the Danish authorities, it appears from its wording that the scope of application of section 121 is not defamation as such, but rather

verbal attacks on the categories of persons mentioned by means of insults, abusive language or other offensive words or gestures (e.g. spitting).
Furthermore, section 266 b) provides that "any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin, religion or sexual inclination shall be liable to a fine or to imprisonment for a term not exceeding two years". The Danish authorities specify that this provision deals with information by which certain groups of people threatened, insulted or degraded (so-called hate speech).

Developments in the application of criminal and civil law provisions concerning defamation at domestic level

Section 267, paras. 2 and 3, and section 267a of the Criminal Code, which made specific mentioning of public officials, were revoked in 2004.

When Danish courts decide on a case concerning defamation, they examine the case in the light of the European Convention on Human Rights and they apply the test laid down in the case law of the European Court of Human Rights. The provisions on defamation are thus applied and sanctions measured out within in the limits set out by the European Court on Human Rights. The courts therefore very often specifically refer to the European Convention for Human Rights.

For example, in 2003, the Danish Supreme Court acquitted a defendant from the charge of defamation, making reference inter alia to Article 10 of the European Convention on Human Rights and specifically to judgment of 26 February 2002 from the European Court of Human Rights, Unabhängige Initiative Informationsvielfalt v. Austria. (Ugeskrift for Retsvæsen, 2003, pp. 2044)

2. Applying law to non contractual obligations

Applying law to non contractual obligations resulting from infringements of personal privacy and personality rights: In Denmark the same articles would be used in a non contractual liability case with an international element as a similar case without an international element, provided that the case is subject to Danish law.
In Denmark there is no law regulating the choice of law in non-contractual responsibility cases. The general principle is the lex loci delecti, which means that the law of the place of the infringement will apply. However, if this does not lead to a "reasonable result" then the courts will assess to which country the case has the closest connection, and then this law applies.

3. Court decisions

Court decisions focusing on the applicable law to non-contractual obligations arising from privacy and personality right infringements:

-Decisions from the press council:

2008-6-667 of 24 June 2008 regarding the use of hidden camera; 2008-6-674 of 24 June 2008 regarding use of wrong information from a credible source; 2003 - 32 of 25 May 2008 regarding the right to comment on information

-Court decisions with an international element:

U.1960.1057/2 of 31 October 1960, Supreme Court: Danish law applied in a case where an English ship collided with a bridge in Denmark.

4. Directive 95/46/CE

Directive 95/46/CE implemented by: The Act on processing of personal data (Act No. 429 of 31 May 2000 as amended by section 7 of Act No. 280 of 25 April 2001, section 6 of Act No. 552 of 24 June 2005 and section 2 of Act No. 519 of 6 June 2007. It respects the European Directive.

Estonia[19]

1. SUBSTANTIVE LAW

Article 17 of the Estonian constitution sets forth that no one's honour or good name must be defamed. Article 26 of the Estonian constitution sets forth that everyone has the right to the inviolability of private and family life. State agencies, local governments, and their officials shall not interfere with the private or family life of any person, except in the cases and pursuant to procedure provided by law to protect health, morals, public order, or the rights and freedoms of others, to combat a criminal offence, or to apprehend a criminal offender. Article 25 of the Estonian constitution further sets forth that everyone has the right to compensation for moral and material damage caused by the unlawful action of any person.

The detailed provision of the compensation for damage are stipulated in Articles 1046, 1047 of the Estonian Law of Obligations Act. Compensation for the violation of the right of privacy by ungrounded imprisonment is governed by the Estonian State Liability Act and the Estonian Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty Act.

These relevant provisions of the Law of Obligations Act set forth as follows:

"§ 1046. Unlawfulness of damaging personality rights
(1) The defamation of a person, inter alia by passing undue judgement, by the unjustified use of the name or image of the person, or by breaching the inviolability of the private life or another personality right of the person is unlawful unless otherwise provided by law. Upon the establishment of unlawfulness, the type of violation, the reason and motive for the violation and the gravity of the violation relative to the aim pursued thereby shall be taken into consideration.
(2) The violation of a. personality right is not unlawful if the violation is justified considering other legal rights protected by law and the rights of third parties or public interests. In such case, unlawfulness shall be established based on the comparative assessment of different legal rights and interests protected by law".

"§ 1047. Unlawfulness of disclosure of incorrect information
(1) The violation of personality rights or interference with the economic or professional activities of a person by way of disclosure of incorrect information or by the incomplete or misleading disclosure of factual information concerning the

[19] Maksim Greinoman and the University of the Basque Country.

person or the activities of the person is unlawful unless the person who discloses such information proves that, upon the disclosure thereof, the person was not aware and was not required to be aware that such information was incorrect or incomplete.
(2) The disclosure of defamatory facts concerning a person or facts which may adversely affect the economic situation of a person is deemed to be unlawful unless the person who discloses such facts proves that the facts are true.
(3) Regardless of the provisions of sub-articles (1) and (2) of this article, the disclosure of information or facts is not deemed to be unlawful if the person who discloses the information or facts or the person to whom such facts are disclosed has legitimate interest in the disclosure and if the person who discloses the information has checked the information or facts with a thoroughness which corresponds to the gravity of the potential violation.
(4) In the case of the disclosure of incorrect information, the victim may demand that the person who disclosed such information refute the information or publish a correction at the person's) expense regardless of whether the disclosure of the information was unlawful or not".

"Article 9 of the State Liability Act sets forth as follows:
(1) A natural person may claim financial compensation for non-proprietary damage upon wrongful degradation of dignity, damage to health, deprivation of liberty, violation of the inviolability of home or private life or the confidentiality of messages or defamation of honour or good name of the person.
(2) Non-proprietary damage shall be compensated for in proportion to the gravity of the offence.
(3) Fault in causing damage is not taken into account where the moral damages are claimed for under a decision of the European Court of Human Rights, which established breach of the European Convention of Human Rights or its protocol by a bearer of public authority".

It should be noted that moral damage may be caused by torts other than infringements of personal privacy and personality rights. Such torts are, for example, causing bodily damage, which are however excluded from this study.

As has been seen above, Estonian law differentiates between violation of privacy in general on the one side and libel and slander on the other side.

However, the limitation of claims period is three years from the moment the claimant learnt or must have learned the identity of the defendant, but not more than ten years from committing or occurring of the tort (Article 150 (1), (3) of the Estonian General Part of the Civil Code Act, Article 9 (4) of the Administrative Court Procedure Act).

Both natural and legal persons may sue for violation or privacy, libel and slander, but the legal persons may not sue for the compensation of moral damage. The legal

person is entitled only for the compensation of material damage caused by libel (Decision of the National Court no. 3-2-1-35-97)

Violation of privacy may manifest in different ways. For example, it is a breach of privacy and a violation of Article 26 of the constitution to publish in newspaper information that the defendant was a victim of a sex crime giving data allowing to identify the person (Decision of the National Court no. 3-2-1-138-02). It is also a breach to apply solitary confinement to a person in the custody without a statutory reason (Decision of the National Court no. 3-3-1-2-06).

Estonian law does not give generally different legal consequences to libel (defamatory publication) and slander (oral defamation). However, should a slander occur in public or against a judge or representative of state, this may constitute an offence. Penal law punishment does not however affect a right of the claimant for the damages. By contrast, Estonian law differentiates between libel/slander on one side and insult on the other.

Differentiation of defamation by a factual statement and by an insult is critical both from the points of the burden or proof and remedies.

In its decision no. 3-2-1-99-97 the National Court explained it as follows: "*Factual statement may be potentially controlled, its trueness or falseness may be proven in court proceedings. Value judgement is exposed in the opinion of a person, which is because of its content (way of revealing) or form is in the given cultural environment is of defamatory nature. Value judgement may be reasoned, but its trueness or falseness may not be proven. Therefore if an honour of a person is defamed by a value judgement, this person may not demand [...] refuting – since that information does not content data*."

Differentiating between the two may be challenging and it may be helpful to take a view of the court's) explanation in its case no. 3-2-1-99-97. The court was concerned with the phrase "Luther"[20] is a classical extortioner as all hammerheads[21]". The court ruled that "Luther was an extortioner" was a statement of fact and "hammerhead" was a value judgement. Another good example is a decision of the National Court no. 3-2-1-161-05, where the court has rules that expressions "misappropriation of property" "misuse of the official positions" may be also statement of facts depending of the context and the person to whom these have been addressed (Decision of the National Court no. 3-2-1-161-05, § 9).

[20] This is a person's name.

[21] An Estonian slang expression meaning sa physically strong person wearing short haircut, who is expected to be involved in criminal activity.

However, if the defendant does not disclose facts, but creates an impression, he knows the facts, this is treated as a moral judgment (Decision of the National Court no. 3-2-1-161-05, § 12). Unjustified moral judgement may be caused by its merely inappropriate expression (Decision of the National Court no. 3-2-1-161-05, § 12).

Another issue, is whether s factual statement defamatory or not and, this is obviously a matter of fact. It is important to notice, that "*the expressed factual statements must be taken as they are, that the court must in case of dispute establish what the defendant has expressed taken form a reasonable person's) standpoint. It is irrelevant what the person expressing the statement actually meant*." (Decision of the National Court no. 3-2-1-161-05, § 11). For instance, allegation, that the claimant disclosed the former KGB agents to the Estonian security police for the sake of obtaining a residence permit for himself, may be defamatory (3-2-1-73-07, § 15).

By contrast, court review of a value judgement depend on both the actual grounds as well as on the person being so evaluated. The court has explained that, the "*Value judgement defaming the person is to be ruled by the court as defaming the person's) honour if the person does not give reason (no ground) for such evaluation [...]*" (3-2-1-63-02, § 7). „In defining whether there was a moral damage the court must take account of that the minister as a member of public life had itself under high public attention. Therefore defamation of a member of a public life in relation to his life in public may result in moral damage only when the court treats that the untrue data disseminated in his respect had been especially defamatory for his honour and good name" (3-2-1-123-97).

If the factual data disclosed defames the claimant, the defendant bears burden of proof. However, if the facts are not defamatory, but, in the view of the claimant still violates some other personal right, then the burden of proof that the facts are wrong vests in the claimant (Decision of the National Court no. 3-2-1-161-05, § 13).

Violation of personal rights presumes non-monetary damage, but this does not in itself mean a right for the compensation in money, since the court case and decision of the court may be sufficient remedy for the negative consequences of the defamation (Decision of the National Court no. 3-2-1-11-04). It may be also sufficient for the court to declare the defendant's) behaviour illicit (Decision of the National Court no. 3-3-1-44-06).

In case of untrue factual statement the claimant may good general state of health the court to order the defendant to refute its statement. This is however not possible in case of insult and the claimant may not ask for pardon. The National Court explained that the court may not order the defendant to ask for pardon, but voluntary request for pardon

may be relevant in deciding on the monetary compensation for the caused moral damages (Decision of the National Court no. 3-2-1-17-05, § 28-29).

The National Court has ruled it is generally sufficient to prove the circumstances giving rise for the right to moral damages. The amount of the damages is established in the discretion of the court under Article 127 (6) of the Estonian Law of Obligations Act and Article 233 (1) of the Estonian Civil Procedure Code (decision of the National Court no. 3-2-1-19-08, § 13).

As a general rule, courts prefer no to satisfy the claims for moral damages and, when satisfied, the amount of the damages are in the range of 1.000 to 7.500 EEK, in rare cases up to 30.000 EEK (15.6466 EEK = 1 EUR).[22]

Article 5 (1) of the Compensation for Damage Caused by State to Person by Unjust Deprivation of Liberty Act sets forth that compensation in an amount of the minim seven daily wages shall be paid for each twenty-four hour period during which the person was unjustly deprived of liberty. It should be noted however that in the order no. 3-3-1-32-06, § 23 the National Court hinted this provision may be unconstitutional, because the lump sum amount is fixed and does not allow for review of every given case.

2. RULES OF CONFLICT

For determining the applicable law in cases of violation of privacy or personality rights, reference must be made to the provisions of the *Estonian International Private Law Act* of 2002. The rules to be taken into consideration are the articles comprised between 50 and 54. There is no specific piece of legislation for violations of these rights through the media. Therefore, these cases will remain under the general system of non-contractual obligations.

Art. 50 of the *Estonian International Private Law Act* sets out the general rule. According to this rule, in cases of non-contractual obligations originating from unlawful acts, the Estonian Courts will apply the law of the State where the act that gave rise to the damage occurred.

However, if the consequences are not clear in the State where the act that gave rise to the damage took place, the Law of the State where the consequences of the act or the incident are evident will be applied. The latter Law will only be applied if this is

[22] Margit Vutt, MIttehahalise kahju hüvitamise nõuded halduskohtus, Tartu: 2007, online: http://www.riigikohus.ee/vfs/651/MittevaraliseKahjuHyvitamineHalduskohtus5.pdf, p 22

requested by the injured party, that is to say the victim of the unlawful act. Accordingly, the situation of the victim is favoured, the victim having the option to choose, in these specific cases, the Law that is the most favourable to his interests.

Art. 52 of the Law, for its part, provides for the possibility of restricting the consequences that may arise, in relation to compensation, by the fact of applying a foreign Law. Accordingly, the application of a foreign Law may not lead the Estonian courts to order compensation significantly greater than that provided for similar damages in Estonian Law. Therefore, the *lex fori* serves as a reference law for the foreign Law that may apply in accordance with the rule of conflict of art. 50.

In addition to that which has been stated up until now, art. 53 establishes an exception to the points of connection based on the closest links. By virtue of this precept, if the non-contractual obligation has a closer link with the law of a State other than those indicated by the foregoing rules of conflict, the Law of that other State will apply. Furthermore, art. 52, in its second section, indicates when it should be understood that a closer link exists. In this connection, the closest link can arise in particular: 1) from a legal relationship or a factual connection between the parties or; 2) due to the fact that at the time of occurrence of the act giving rise to the damage, the parties are residing in the same State.

Finally, it is of interest to point out that Estonian Law permits the limited factor of the autonomy of will on the question of non-contractual obligations. Accordingly, in accordance with art. 54 of the Law, the parties may agree on the application of Estonian Law always after the act giving rise to the non-contractual liability has occurred. Therefore, the autonomy of the will of the parties, albeit acknowledged in the Law, is limited. In the first place, their choice is limited to Estonian Law. In the second place, the choice will only be valid if it is subsequent to the fact giving rise to the [non-contractual] liability. And in the third place, the choice of Law cannot affect the rights of third parties.

3. CASE LAW CONCERNING RULES OF CONFLICT

We have no evidence of the existence of case law in this connection.

4. SPECIALISED COURTS

Estonian court system consists of land and administrative court as the court of first instance, district courts as the courts of second instance and the National Court as the highest court. There are no special courts in Estonia.

Estonia is a civil law country and the court decision in civil cases does not have a force or precedent. The courts of first and second instance are bound by the stance of the National Court only in the case, where they have been given (Article 693 (2) of the Code of the Civil Procedure). The National Court is entitled to reverse is previous views (Article 19 (1) of the Code of the Civil Procedure), though such cases are not frequent.

5. DIRECTIVE 95/46/EC

The Data Protection Act, passed on 12 February 2003, and entered into force on 1 October 2003, is the rule of transposition of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 relating to the protection of natural persons concerning the processing of personal data and the free circulation of such data. However, this does not incorporate art. 4 of the Directive which regulates the application of the National Laws.

Given the absence of this provision, and therefore, in view of nonfulfilment due to a lacuna of the Directive, the Romanian authorities [sic] must refer to its ordinary rules of conflict in order to decide on transborder matters when the *Data Protection Act* is applied. This could mean that the scope of application of the Law could be broader than that provided in the Directive.

The consequence of this fact could be the lack of recognition, on the part of other Member States, of the decisions issued by the Romanian Courts [sic] in application of the *Data Protection Act* when they go against the spirit of the Directive.

FINLAND[23]

1. Autonomous Rules

- Act on the Protection of Privacy in Working Life (759/2004)

Information on relevant legal provisions on defamation

Criminal Code

In Finland, the libel of State authorities and symbols as such has not been established as a criminal offence. Under section 8 of the Act concerning the Finnish flag (Statutes of Finland 380/1978), a person who ruins or disrespectfully uses the Finnish flag will be sentenced with a fine.

Criticism against politicians and public servants is only punishable subject to certain conditions. Under chapter 24, section 9, subsection 1, paragraph 1 of the Criminal Code (Statutes of Finland 531/2000), a person who spreads false information or a false insinuation about another person so that the act is conducive to causing damage or suffering to that person, or subjecting that person to contempt, shall be sentenced for defamation. Under paragraph 2, a person who makes a derogatory comment on another person otherwise than in a manner referred to in subparagraph 1 shall also be sentenced for defamation. Under section 9, subsection 2, criticism that is directed at a person's activities in politics, business, public office, public position, science, art or in a comparable public position and that does not obviously overstep the limits of correctness shall not constitute defamation under paragraph 2 of section 1.

Developments in the application of criminal and civil law provisions concerning defamation at domestic level

The number of persecutions, convictions and fines imposed on media companies and journalists have reportedly increased in defamation cases over the past 10 years (FH-FP, 2004; IPI-AR, 2003).

2. Applicable law

The Finnish legislation does not contain any provisions on what law is to be applied to non-contractual obligations, nor are the conflict of laws rules established in customary law.

There are some special provisions on certain questions relating to non-contractual obligations. Finland is bound by the Hague Convention of 1973 on Law Applicable to Products Liability.

The Act on Competition Restrictions, section 2(4) affects the choice of law in connection with non-contractual liability for damages. The section determines the application of this Act on competition restrictions limiting economic competition outside Finland. Unless otherwise provided by a Decree from the Council of State, the Act shall, according to section 2(4) not be apply to competition restrictions limiting economic competition outside Finland in so far as it is

[23] UBC. Particular attention was paid to the document on defamation and press media created by the Secretariat of the CDMC at the Council of Europe. CDMC (2006)007.

not directed against Finnish clients. The State Council may prescribe that the Act be extended to cover a competition restriction felt abroad if so required by an agreement made with a foreign state, or if it is in the interests of Finland's foreign trade. The provision in question shall, however, according to section 2(5) not apply to such measures taken by the Finnish Competition Authority which are covered elsewhere in the EC statutes

Public order

The principle of ordre public is regarded to be in force in Finland as a general principle of international private law. The principle is explicitly expressed in some international conventions binding Finland and in national laws.
Some acts, such as the Marriage Act and the Inheritance Code, include special provisions on internationally mandatory provisions.

3. Transposition of the Directive

Personal Data Act (523/1999)

> Section 4 — *Application of Finnish law*
>
> (1) This Act applies to processing of personal data where the controller is established in the territory of Finland or otherwise subject to Finnish law.
>
> (2) This Act applies also if the controller is not established in the territory of a Member State of the European Union, but it uses equipment located in Finland in the processing of personal data, except where the equipment is used solely for the transfer of data through the territory. In this case the controller shall designate a representative established in Finland.

It fully respects the Directive.

FRANCE[24]

1. Rights to a private life and rights to press freedom in France

A. Autonomous Legislation

a. Private Life

The French Constitution does not include the right to privacy [*intimidad*] and private life [*vida privada*]. The only national text alluding to the right to private life and privacy is Article 9 of the French Civil Code: "every person has the right to a private life"[25]. This article refers more to the respect for private life than the "intimacy of private life". To distinguish between the two terms in France, it should be noted that the right to privacy [*intimidad*] refers to private life only in matters concerning the control of personal data; according to a French expression the right to privacy should be seen as the "secret to private life"[26].

Article 9 of the French Civil Code was introduced by *Act 70/643 of 17 July 1970*[27]. During preparation of this bill, the scope of the concept was discussed; the government feeling that "we should not risk violating the principle of press freedom in an attempt to protect private life too greatly. The bill tends to limit the scope of private life subject to legal protection stating that only attacks on the privacy of that private life will be punished by criminal or civil means"[28].

The concept of private life is not established in law and we therefore need to have recourse to jurisprudence. According to jurisprudence, the concept of privacy includes: home, image, voice, the fact of being pregnant, health, sentimental life, postal correspondence (including correspondence at work). Nonetheless, jurisprudence does not protect against the divulgement of the assets of public persons (such as, for example, the head of a company) or a person's religious persuasion. The fact that a person has divulged certain facts does not authorise them to be "redivulged" (the so-called "right to forgetting"). It is necessary to have the consent of the person for the "re-divulgement", except when no harm is caused to the person or there exists a legitimate interest.

There are two versions in case law: some that view it is as a broad concept and within private life include the right to a normal family life, the "right to a sex life", "respect for acts" and even "respect for appearances"[29]. This concept of private life is close to the English concept of

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[24] UBC. In particular we have taken into account the document on defamation and the media drawn up by the secretariat of the CDMC of the Council of Europe. CDMC (2006)007.

[26] ALVARAZ, H. "El Derecho a la intimidad en Francia en la época de la "sociedad de la información", Aracucaria. Revista iberoamericana de filosofía, política, y humanidades n° 18. Segundo semestre de 2007.

[27] Loi n° 70.643, JO 19/07/1970, JCP 1970 III n°36850; add.D. 1970 L., p. 199.

[28] Speech by M. J. Pleven, Garde de Sceaux, JORF Debates of the National Assembly, Session of 28 May 1970, pp. 2068. [Spanish] translation and text taken from ALVARAZ, H., "El Derecho a la intimidad en Francia…*op cit*, p. 8..

[29] "El derecho de la persona a ser percibida por terceros con la apariencia que ella haya escogido", LEBRETON, G., *Libertés publiques y Droits de l'homme*, Paris, Armaud Collin Dalloz, 2003 7°ed, pp. 290 and ss.

privacy [30]. And others preferring a more limited concept, closer to the "right to privacy". These are the ones who speak of "the right to keep secret the intimacy of the existence itself, for the purpose of not being prey to public curiosity and malice"[31].

In France, there is a National Commission for Information Technology and Liberties (Commission Nationale de l'informatique et des libertés - CNIL) whose purpose is to safeguard the protection of personal data and private life. Germany, Sweden and France were the first countries to introduce an act for the protection of private life in the computer area.

The concept of malicious denunciation in France is very similar to that of Spain. It is governed by Articles 226-10 et seq. of the French Criminal Code. It consists of the making of a denunciation before a public functionary of the commission of an offence knowing that denunciation to be false or inaccurate, for the purposes of damaging a person. It is punishable by five years' imprisonment and a fine of €45,000.

The concept of slander [*injuria*] is established in Article R 621-2. Non-public slander against a person, when not preceded by a provocation, is punishable with a first degree fine (38e), provided that the veracity of the event has not been proven, in accordance with press freedom. By virtue of this freedom Article 29 establishes that "any insulting expressions, terms of disdain or invectives that do not contain the imputation of any fact is an *injuria*".

It may be an offence or a crime depending on the circumstances of the event, whether it was made publicly or not, whether it was preceded by a provocation or not. A public insult is punishable with a fine of €12000 (Act of 1881, Article 33). The act of selling T-shirts with homophobic inscriptions over the Internet was ruled to be a public *injuria* to homosexual people; likewise, a dismissed worker was condemned for having referred to the company in question in her blog as an "association of thieves".

b. Freedom of Press

The Council of Europe, in Art. 10. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority.

In France press freedom was one of the achievements of the French Revolution of 1789. During that period the press became a social phenomenon. Article 11 of the Declaration of the Rights of Man recognises the right of all citizens "to print freely" their opinions.

Following the restoration of the monarchy in 1814, Article 8 of the Charte du 4 juin 1814 proclaimed the press freedom and reaffirmed that, "The French have the right to print their opinions, in accordance with the laws that must suppress the abuse of this freedom"[32]. Nonetheless, the Act of 21 October 1814 re-established censorship and in 1817, newspapers were subjected to a regime of authorisation. With the coming of the Second Republic in 1848, a very liberal position was adopted with regard to press freedom in the constitution of 1848. However, the gradual transformation of the republican regime into an imperial one was accompanied by new attacks against press freedom. It was not until the final years of the reign of Napoleon III and the period of the liberal empire, that the traditions of liberalism were

[30] WARREN, S.D, and BRANDEIS, L. D. *The right of privacy,* Harvard law review 5, 1890, vol. IV, p. 193.
[31] MAZEAUD, H and L ; MAZEAUD J and CHABAS, F., Leçons de Droit civil. Les personnes. Paris. Montchrestien 1997, T. 1 Vol. 2, 8° Ed.

restored. Thus the Act of 11 June 1868 eliminated censorship and the requirement for prior authorisation. But this act was to have little influence

With the coming of the Third Republic, there was doubt as to what attitude to take with regard to press freedom; ultimately, however, the sentiment that triumphed was that it was necessary to provide the press with a true statute that would guarantee its freedom. And that was precisely the aim of the Act of 29 July 1881.

- *The Loi du 29 juillet 1881*

The Act of 29 July 1881 [*Loi du 29 juillet 1881*] on press freedom remains today the positive French law on the issue. From that point on censorship and prior authorization were definitively abolished. Likewise, the repression of press crimes was also liberalised and crimes of opinion were done away with.

The press freedom act of 29 July 1881[33] included the prohibition of defamatory acts in three cases, of which the one relating to the privacy of the person is particularly pertinent. This provision is today contained in Article 35 of the Act of 29 July 1881, amended by the Order of 3 May 1944[34] It reads as follows:

"The truth of the defamatory fact, solely if it relates to their functions, can be established by normal means in cases of allegations against established bodies, the armed forces, public administrations and against all of the persons listed in Article 31. The truth of defamatory or insulting allegations may also be established against directors or administrators of any industrial, commercial or financial enterprise that publicly seeks (investments through) savings and loans. The truth of defamatory facts may be proven, except: a) When the allegation concerns the person's private life;b) When the allegation refers to facts that are more than 10 years old"

The punishments for crimes against private life are provided for in Articles R 226-1 et seq. of the Criminal Code. A penalty of one year's imprisonment and a fine of €45,000 is incurred for any wilful violation of the intimacy of the private life of other persons without prior consent for that public divulgement. Moral persons may also be responsible. The right to anonymity and freedom of conscience and opinion are also included[35].

c. The thin line between public life, private life and press freedom

It is becoming increasingly difficult to speak of press freedom and the right to private life and the issue has become confused with the right to information in the case of "public" personalities who may operate both in the public and the private spheres.

These are unquestionably two different concepts since private life and public life are situated in different domains (C.A. Paris, 16 mars 1955, Recueil Dalloz 1955 p 255). Thus, in principle the legitimate exercise of the right to information lies in the area of public life but it is often not easy to disassociate the two concepts[36].

d. Right to information

[35]LUCHAIRE, F., La protection constitutionnelle des droits et libertés Paris, Economica, 1987.

Any person may contact the CNIL to request its help in exercising his rights (especially in the case of a refusal of the right to access). Any person may directly contact a body to know whether or not files are held on him.

B. Judgements on the concept of private life and press freedom

a. Nature of protection

For French jurisprudence the right to the protection of private life derives from the concept of freedom established in Article 2 of the Declaration of the Rights of Man and of the Citizen and recognised together with the right to property, security and resistance to oppression[37]:

- *Décision du Conseil constitutionnel 23 juillet 1999 n° 99/416.* Recueil critique de jurisprudence et législation Dalloz, Journal Officiel 28 juillet. Recueil Dalloz, 2000, Sommaire 265, observations Marino. Ibid Sommaire 422 observations Fatin Rouge. Communication Commerce électronique 1999, n° 52, note Desgorges, Revue trimestrelle de droit civil (Dalloz) 1999, 725, observations Molfessis.
- *9 novembre 1999, n° 99/419* Recueil critique de jurisprudence et législation, Journal Officiel 16 nov. Esta decisión establece que el Derecho de cada uno a la vida privada proclamada por el art. 9 no tiene porque partir de aquello concerniente al estado de las personas.
- *Arrêt de la chambre criminelle de la Cour de cassation 16 avril 1980* Recueil Dalloz 1981, 68, note Mestre

b. Autonomy of the protection resulting from Art. 9 of the CC

According to Article 9 the mere verification of an attack on private life gives rise to an entitlement for reparation:

- *Arrêt d'une chambre civile de la Cour de cassation, 1ere, 5 novembre 1996.* Bulletin des arrêts des chambres civiles de la Cour de cassation, 1, n° 38. Grands arrêts de la jurisprudence civile par F. Terré et Y. Laquette, 11 ed. 2000 (Dalloz) n° 17 ; Recueil Dalloz 1997, 403, note Laulom ;Recueil Dalloz 1997 Sommaire 289 observations Jourdain; Juris classeur périodique (Semaine juridique) 1997, II, 22805 note Ravanas ; Juris classeur périodique 1997, I, 4025 n° 1, observations Viney ; Revue trimestrielle de droit civil (Dalloz) 1997, 632, observations Hauser.
- *25 février 1997*, Bulletin des arrêts de la chambre civil 1 n°73. Juris classeur périodique (Semaine Juridique) 1997, II, 22873, note Ravanas.
- *6 octobre 1998*, Civ 1re, Bulletin des arrêts des chambres civiles de la Cour de cassation, I, n° 274, Recueil Dalloz 1999, sommaire 376, observations Lemoland ; Revue Trimestrielle de droit civile 1999, 62, observations Hauser. Esta decisión establece que la divulgación de relaciones mantenidas por una oven con un deportista de renombre constituyen una violación de la vida privada.

c. Freedom of speech and the protection of private life

The right to respect for private life and freedom of speech, as contained in Articles 8 and 9 the European Convention of Human Rights and in Art. 9 of the CC, have the same legal value. It is

[37] Art. 2 Déclaration des droits de l´homme et du citoyen "Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance a l'oppression».

therefore up to the judges to seek a suitable balance and to protect the most legitimate interest in each case.

For French jurisprudence any interference into the private life of another is illicit:

- *Arrêt d'une chambre Civil de la Court de Cassation 1er 6 de mars 1996*. Recueil Dalloz 1997, 7 note, Ravanas.
- *Arrêt d'une chambre Civil de la Court de cassation 2e de 3 de juin 2004*. Bulletin des arrêts des chambres civiles de la Cour de cassation, n°273 ; Recueil Dalloz 2004, 2069 note, Ravanas ; Droit de la famille 2004, n°172, note Larribau Terneyre ; Revue trimestrielle de droit Civil (Dalloz), 2004, 489, observations Hauser, note 12 :

*« L'atteinte à la vie privée est indépendante du mode compassionnel, bienveillant ou désobligeant sur lequel elle est ópérée ».*It is considered an attack on private life regardless of the manner with which it is carried out and whether or not is degrading:

- *Arrêt d'une chambre Civil de la Court de Cassation 1ere, 23 de avril 2003.* Bulletin des arrêts des chambres civiles de la Cour de cassation, I, n°98 ; Recueil Dalloz 200, 1854 note C. Bignot (2e esp); ibid sommaire 1539, observations A. Lepage ; Juris classeur périodique (Semaine Juridique) 2003, II, 10085, note Ravanas ; Gazette de Palais 2003, 2403, note Amson :

« Caractérise une immixtion illicite dans la vie privée d'une personne le fait de la faire épier, surveiller et suivre ». The act of spying on, surveying or following a person is considered to be an interference on that person's private life:

- *Arrêt d'une chambre Civil de la Court de cassation, 1ere 25 janvier 2000*. Bulletin des arrêts des chambres civiles de la Cour de cassation I, n° 26 ; Recueil Dalloz 2000, sommaire 267, observations A. Lepage

d. Freedom of information

It is necessary to reconcile freedom of information and each person's right to have their private life respected:

- *Arrêt d'une chambre Civil de la Court de cassation, 1ere, 23 avril 2003*. Bulletin des arrêts des chambres civiles de la Cour de cassation, I, n°98 ; Recueil Dalloz 200, 1854 note C. Bignot (2e esp); ibid sommaire 1539, observations A. Lepage ; Juris classeur périodique (Semaine Juridique) 2003, II, 10085, note Ravanas ; Gazette de Palais 2003, 2403, note Amson :

« Il n'y a pas atteinte à la vie privée lorsque les prétendues révélations ne sont que les relations de faits publics ou ne présentent qu'un caractère *anodin ».* It is considered that there is no attack on the private life when the revelations made by the press are accounts of public facts or are harmless and irrelevant.

- *Arrêt d'une chambre Civil de la Court de cassation, 1ere, 3 avril, 2002.* Bulletin des arrêts des chambres civiles de la Cour de cassation I, n° 110 ; Recueil Dalloz 2001, 316, note C Bignot ; Recueil Dalloz 2003, Sommaire 1543, observations Caron ; Juris classeur périodique (Semaine Juridique), I, 2003, 126 n° 11, observations Tricoire ; Gazette Palais 2003, 1040, note Toucas et Juillard ; Petites Affiches 6 mai 2002, note Derieux ; Commerce électronique 2002, n° 158 note A. Lepage.

- *23 avril 2003.* Recueil Dalloz 2003, 1854, note C. Bignot (1ere esp) fait de actualité, officiel et notoire.
- *Arrêt d'une chambre civil de la Court de cassation 2e 19 février, 2004.* Bulletin des arrêts des chambres civiles de la Cour de cassation, II n° 72 ; Recueil Dalloz 2004, 2596, note C Bignot (3e esp) ; ibid sommaire 1633 observations Caron ; Gazette de Palais 10/12 avril 2005, note Guerder (détails anodins au sujet d'une naissance princière)
- *3 juin 2004.* Bulletin des arrêts des chambres civiles de la Cour de cassation II, n° 272(faits publics déjà divulgués)
- *8 juillet 2004.* Bulletin des arrêts des chambres civiles de la Cour de cassation II, n° 388, Recueil Dalloz 2004, ir, 2694 (commentaires anodins sur le futur mariage d'une personnalité. Simple perturbation insuffisante)

«*Le respect de la vie privée peut s'imposer avec davantage de force à l'auteur d'une œuvre romanesque qu'à un journaliste remplissant sa mission d'information ».* Respect for private life can be imposed with greater solidity on the author of a novel than on a journalist exercising his mission of information.

- *Arrêt d'une chambre civil de la Court de cassation 1er, 9 juillet 2003.* Bulletin des arrêts civils de la Cour de cassation I, n° 172. Recueil Dalloz 2004, sommaire 1633 observations Caron ; Gazette de Palais 2003, 3853, note Guerder ; Droit et patrimoine janvier 2004, p. 90, observations Loiseau (*feuilleton consacré à la disparition d'une couple et des ses enfants : interdiction en référé*).
- In the following cases there is considered to have been no attack on the private life of the wife and children by a newspaper article recounting the circumstances of the death of the husband and father and this information only responds to the need for public information of a relatively "divers" event; *Arrêt d'une chambre civil de la Court de cassation 2e, 20 novembre 2003.* Bulletin des arrêts civils de la Cour de cassation n° 354 ; Gazette de Palais, 10/12 avril 2005, note Guerder : *« ni à la vie privée d'un fonctionnaire de police la révélation de son nom dans un article des presse relatant son inculpation ».* The revelation of the name of a police official in a press article recounting his denunciation was not considered to be an attack on his private life.
- *Arrêt d'une chambre civil de la Court de cassation 2e, 29 avril 2004.* Bulletin des arrêts civils de la Cour de cassation, n° 201 ; Recueil Dalloz 2004, ir, 1430 : *« Mais le traitement journalistique d'un événement d'actualité dont un organe de presse peut légitimement rendre compte peut constituer une extrapolation non nécessaire à la information du public et un détournement de l'objectif d'information ».* But the journalistic treatment of a current event by a press organ about which it legitimately reports may constitute an unnecessary extrapolation of the information to the public and a deviation from the purpose of informing.

The publication of an article devoted exclusively to the private life of a 13-year-old from a "*princière*" family, with no official function does not constitute a current event and therefore infringes the respect of her private life:

- *Arrêt d'une chambre civil de la Court de cassation 2e 25 nov, 2004.* Bulletin des arrêts de II, n° 506 ; Recueil Dalloz 2004, ir, 3197.

e. Ways of infringing on private life.

Domicile: the publication in the press of the photograph of the home of a person together with the name of the owner and the precise location of the dwelling constitutes an infringement of the respect for private life:

- *Arrêt d'une chambre de la cour de cassation civil 2e, 5 de juin, 2003.* Bulletin des arrêts civils de la Cour de cassation II n° 175 ; Recueil Dalloz 2003, 2461, note Dreyere ; Deffrenois, 2003, 1577 observations Aubert ; Gazette Palais 2004, sommaire 1387 observations Vray ; Droit et Patrimoine octobre 2003, p. 83, observations Loiseau, Revue juridique des personnes et famille (Dalloz) 2003 11/13 note Caron.

Previously in this regard, also:

- Jugement d'un Tribunal de Grand Arrêt de la Cour européenne des doits de l'homme 28 de octobre instante, Paris 2 uin 1976, Recueil Dalloz 1977, 363, (3e esp) note Lindon, on the divulgement in the press of the home address of a person without his consent
- Likewise, the dissemination of a telephone number is also considered to be an infringement of the private life of its owner as established by le Jugement d'un Tribunal de chambre correctionnelle, Briey, 15 septembre 1992; Gazette Palais 1993, 1 201.
- But it is not an infringement of the person's private life for the directory published by the Posts and Telegraphs to impose or establish the payment of an amount for the person's telephone not to appear in the telephone directory, as establece l' arrêt du Conseil d'État 30 decembre 1998, Juris classeur périodique (Semaine Juridique) 1999, IV; 1759.

However, although every person has the right to deny that their address or residence be known, this possibility cannot be used to evade compliance with their obligations or to free themselves from the rights of their creditors:

- *Arrêt d'une chambre de la cour de cassation civil, 1ere 19 mars 1991* Recueil Dalloz 1991, 568, note Velardocchio ; Revue trimestrielle de droit civile 1991, 499 observations Hauser.

Civil Status. Le nom patronymique (de la familia) échappe par sa nature à la sphère de la vie privée

- Paris, 30 oct 1998, recueil Dalloz 1998, ir, 259 ; D'Affaires 1999, 165, observations J.F (nom attribué a des personnages de bande dessiné), el nombre atribuido a las personas de una banda designada.
- Le nom d'une personne en tan que moyen identification personnelle et de rattachement à une famille concerne à la vie privé et familiale de cette personne). The name of a person as a means of identification and of belonging to a family concerns his private and family life. Arrêt de la Cour européenne des doits de l'homme, 22 février, 1994, Burghartz c/suisse, serie A n° 280/B, Recueil Dalloz 195, 5 note Marguéneaud
- Para los titulos nobilieres la solución es la contraria. Arrêt de la Cour européenne des doits de l'homme 28 de octobre 1999, Pilar de la Cierva et a cl Espagne; Droit de la famille 2001, n° 90, note Lamy.
- However, the public revelation of an artist's true "*patronyme*" (family name) accompanied by his address and home, his telephone number and the town in which he has his country home do constitute an interference into

his private life, as can be deduced from Paris, 15 de mai de 1970, Recueil Dalloz 1970 466, conclusions Cabannes.

State of health. A person has the right to oppose remarks on his state of health in an article intended to arouse public curiosity and to exploit his private life for commercial purposes.

- Paris 9 juillet, 1980. Recueil Dalloz 1981, 72 (2e esp) note Linton
- The revelation in a book of facts covered by medical confidentiality and concerning a dead person constitutes an attack against the intimacy of the private life of the spouse and children; as may be deduced from Paris ref 13 mars 1996, Juris classeur périodique (Semaine Juridique) 1996, II, 22632 note Derieux; Revue trimestrielle Droit civil 1997, 499, observations Normand Masiis , Recueil Dalloz 19987 choriique 291
- Jugement d'un Tribunal de Grand instance, Paris 6 juin 1988, Gazette de Palais 1989, 1 , 30 ; the photographing of a comedian on his discharge from hospital is an attack against medical confidentiality and the person's private life.

C. Defamation

In French law, defamation is both a tort (a civil wrong) and a criminal offence. It consists of any allegation of fact which constitutes an attack on the honour or reputation of a person (Article 29 of the 1881 Press Act). If found guilty, the editor, publisher or author may be ordered to pay a criminal fine to the State in addition to civil damages to the aggrieved party.

The major amendment under the Law dated 9 March 2004 was the abrogation of such a crime as insult against the head of a foreign state. The amendment was enacted pursuant to the relevant ruling of the European Court of Human Rights.
Under the Law dated 15 June 2000 most terms of imprisonment for libel or insult were repealed.

Jurisprudence: Developments in the application of criminal and civil law provisions concerning defamation at domestic level

Following the ECtHR's judgment in the Colombani case (judgment of 25 June 2002), the offence of insulting a foreign Head of State was repealed and Article 36 of the Press Law was abrogated in March 2004.

No progress can be noted concerning the specific offences of protecting public institutions and authorities against defamation, provided in the Press Law of 1881.

On 22 December 2004, the Senate passed legislation creating a council against discrimination and for equality (HALDE). Organisations fighting sexism and homophobia will be able to bring complaints for insult or defamation if they took place within the last five years. The new law, that carries penalties of prison sentences, brings legislation into line with that on racism and anti-Semitism. (RSF 23/12/04)

Following a judgment of the Court of Cassation of 11.06.2002, in the course of court proceedings in a libel case, journalists are now allowed, for their defence, to provide documents which would normally be covered by the rule of secrecy of preliminary investigations pending in other cases (such as information from preliminary investigations) (Cour de Cassation, appeal n° 01-85.237, 11.06.2002).
In 2003, 422 people were convicted on cases of insult and defamation.

4. Law applicable to non-contractual obligations

A. General rule

Art. 3 CC "Le lois de police et de sûreté obligent tous ceux qui habitent le territoire. Les immeubles, même ceux possédés par des étrangères, son régis par la loi française. Le lois concernant l'état et la capacité des personnes régissent les Français, même résidant en pays étrangère » The Police and Security Act is binding on all persons living on French territory. Properties [real estate] located in France, even if it belongs to foreigners, is also governed by French law. The law concerning peoples' status and capacity governs French citizens even if they are living abroad.

This is confused wording which requires firstly considering the rules on tortious [delict] liability, in the sense of the Civil Code, as police laws; and to submit to the criterion of residence in the territory, which is also imprecise and allows for different interpretations[38].

In matters of tort [delict], jurisprudence has generally opted for the law of the place in which the crime was committed, *lex loci delicti,* which corresponds to the traditional solution of jurisprudence and legal doctrine since the Middle Ages. The rule was consecrated by the Lautour and Luccantoni rulings of the Cour de Cassation[39].

There are numerous arguments in favour of this criterion; it is the only neutral criterion of connection in the absence of a decisive reason for choosing the jurisdiction of the victim over and above that of the offender or vice versa; the consequences of crimes or quasi-crimes are of interest to the state of the territory on which the crime has been committed; the law of the place of the crime and the law of the forum frequently coincides, the court of the place in which the crime is committed holds jurisdiction (Art., 46 nouveau C Processale civile and 5. 3rd Lugano Convention and Regulation 22/2000)

The Rome II Regulation adopted on 11 July 2007 which will apply from 11 July 2009 also follows this traditional solution as a general principle but it should be noted that it excludes attacks on private life and personality rights (Art. 1).

B. Jurisprudence: The general principle of local law

Therefore, unless otherwise stipulated in international treaties, non-contractual obligations are governed by the law of the place in which the event has occurred that gave rise to them. As provided for in the following jurisprudence:

- Arrêt d'une chambre civil de la Cour de Cassation 1ere, 1 juin 1976, Recueil Dalloz 1977, 257 note Monéger, Juris Classeur 1977.91, note Audit
- 16 avril 1985, Bulletin des arrêts des chambres civiles de la Cour de cassation I, n° 114
- In the same sense as the aforementioned: Arrêt d'une chambre civil de la Cour de Cassation 25 mai 1948, Dalloz 1948 357 note PLP, Juris classeur périodique (Semaine juridique) 1948, II, 4542, note Vasseur

- Arrêt d'une chambre civil de la Cour de Cassation 1ere, 30 mai 1967, Recueil Dalloz 1967 629 note Malaurie
- 28 octobre 2003, Bulletin des arrêts des chambres civiles I, n° 219 ; Rapport annuel de Cour de cassation p. 477 ; Dalloz 2004, 233, note Delebecque; Juris classeur 2004, II 10006, note Lardeux ; Responsabilité civil et assurances 2004 n° 30, note Groutel; Petites affiches 23 décembre 2003, note P. Ancel
- Paris 16 janvier de 1997, Journal de Droit International (Clunet) 1997, 987 note Légier, reference to the place where the damage has occurred and where the interest being tried has been broken.

In the case of a composite or complex offence, the jurisprudence refers to the search for the country with the closest associations with the harmed circumstance:

- Arrêt d'une chambre civil de la Cour de Cassation 1ere, 11 mai 1999, Bulletin des arrêts des chambres civiles I, n° 153 ; Recueil Dalloz 1999, sommaire 295, observations Audit ; Juris Classeur périodique (Semaine Juridique) 1999 II 10183, note Muir Watt ; Revue critique DIPr 2000, 199, note Bischoff ; Juris Classeur 1999 1048 note Légier

C. Attacks on personality rights

Specifically in attacks against personality rights, the issue becomes more complex. Classing this category of crimes as crimes linked to non-contractual responsibility creates some problems.

First of all, this type of crime cannot be contained in a uniform category but diversifies by virtue of the rights subject to protection (right to privacy, right to private or family life, right to image, right to honour); by virtue of the materials and technologies used as a medium (press, radio, Internet, etc.) or from the point of view of the means of protection of the victims (civil, penal, etc.). This diversity necessarily has an influence when it comes to determining as a choice-of-law rule the place of the crime and from this point of view some flexibility needs to be given and other connecting factors should be taken into account such as the operative event, the domicile or residence of the victims without entirely abandoning any classification of tort [delict] for personal status. In this regard, the use of connecting factors —associated or not with these choice-of-law rules— must also be recommended[40].

Classification. Within the area of attacks against the person, the plaintiffs are generally "spontaneously" located in the domain of the civil liability contained in Art. 9. 2. The Cour de Casation has declared that "the consequences of an attack on a person's private life or of the violation of a right he possesses to his image shall be governed by the law of the place where it has been committed" evoking the classification of tort [delict].

This choice is complicated when the event has occurred in different places at the same time, thus dispersing the place of commission. The typical case is the publication of a photographs in a magazine that may involve the photo's being made in one place and the magazine's being published in another or in various places or its being printed an another place. in this case the damage has to prevail over the operative event and the conflict is solved by opting for the domicile of the defendant or his main activity. (Gaudemet Tallon sentence 1976).

It is also possible to award the plaintiff the possibility of opting in favour of the place of the establishment of the author of the attack. However the solution that most closely accords with reality appears to be to consider that in cases of attacks by way of the press in which the

dissemination causes different damage in each country, giving rise to the distributive application of the laws of the different countries where the attack has occurred. This option will mean taking into account the criterion of local dissemination and assessing the damage in each country separately[41]. In the Yasmina Aga Khan sentence of 1976, French and German law were applied distributively.

The draft European Regulation on applicable law in delict designated that the applicable law was that of the habitual residence of the person harmed at the time when the crime occurred (art. 7).

French jurisprudence does not appear to define offences against the personality as an independent category. The Cour de Cassation has not defined the notion of the place of commission of the crime committed by way of the press, limiting itself to speaking of the place of the facts without further precision (Civ. 13 avril 1988). When the underlying jurisdiction faces more problems of jurisdictional authority than of legislative authority it appears to manifest itself in favour of the place of dissemination[42], and as a result the applicable laws multiply when this dissemination occurs in the territory of various states, unnecessarily complicating the task of the judges. A similar consequence can be avoided by centring the indices of location on the place of residence of the victims[43].

D. Jurisprudence on non-contractual obligations, private life and press freedom

In jurisprudence, therefore, the consequences of an attack against privacy or against the violation of the right to image are subject to the law of the place in which the deeds were committed. As we shall see, French jurisprudence has regularly used the criterion of the place of dissemination in issues of damage to personality rights via the press.

- *Trib. gr. inst. Paris (1er Ch) 27.04.1983* (Carolina de Monaco c. Soc. Burda GmbH) rev. crit. 1983, 672;
- *Trib. gr. inst. Paris (1er Ch) 29.09.1982* (Romy Schneider c. les Editions Heinrich Bauer Verlag), rev. cri. 1983, 671.
- *Trib. gr. inst. Paris (3er Ch) 23.06.1976* (Dlle. Aga Khan c. soc. Axel Springer er autre), rev. crit. 1978, 132.
- Sobre el principio de la lex loci delicti en materia de delitos cometidos por medio de la prensa ver también, *Cour de Cassation (1re Ch. civ.) 13.04.1988 (soc. jours de France c. Farah Diba)*, rev crit. 1988, 546, note Bourel; Juris classeur périodique (Semaine juridique) 1988 II 21320 note Putman. En el mismo sentido Paris 13 enero 2003, Juris classeur périodique (Semaine juridique) 2004 II , 10018 note Chabert.

5. Transposition of Directive 95/46 in France. The French personal data protection act

The "Information Technology and Freedoms" act is one of the oldest in the area of personal data protection. In 1974, the disclosure in the French press of a government project to interconnect all administrative files, on the basis of the single citizen identification number (known by the name of the project, SAFARI), aroused public debate.

Arising out of this controversy a commission was set up to make proposals to guarantee that the information technology would be developed in respect of private life and individual and public liberties. In accordance with the recommendations of the European Commission, these were presented to the Parliament and on 6 January 1978 an act was passed on information technology, files and liberties, which in turn established an independent authority in charge of ensuring its compliance:

- *Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés.*

The issue of the protection of personal data vis-a-vis information technology was raised shortly thereafter at European level, first with the Agreement of the Council of Europe of 28 January 1981, and then with Directive 95/46 of 24 October 1995.

Thelatter, the founding text of a harmonised European legislation, was supposed to be integrated by each Member state into its national legislation within a period of 3 years.
France was the last country to do so, with an act published on 6 August 2004 that profoundly amended the act of 6 January 1978. Without trying to justify this delay, it is partly explained by the fact that the French act was largely inspired by the European text and respects most of the contents of the Directive:

- *Loi n°2004-801 du 6 août 2004 - art. 1, JORF 7 août 2004*

The "Commission National de l'informatique et des libertes" (CNIL) presented the text on 21 February 2006.

This delay had certain positive consequences; as a result the amended French act is considered to be one of the most modern; particularly because it was passed after a long and mature reflection, and it capitalised on all the options provided by the directive to transform the way it focused personal data protection and put its principles into practice. Notable features are the idea of companies' responsibility in applying the law (recognition of the interest of self-regulation), but also of the citizens' responsibility for protecting their rights. It also takes into account all the possibilities of simplification and exemption of notification, even in the case of designation of a person "in charge of protection of personal data".

The most important development is the reestablishment of the balance between monitoring prior to the processing, which has always been the privileged form of action of the CNIL, and subsequent control, especially through the hearing of complaints, inspections and —an entirely new feature— the exercise of the authority to sanction.

A. Scope

Art. 2. - La présente loi s'applique aux traitements automatisés de données à caractère personnel, ainsi qu'aux traitements non automatisés de données à caractère personnel contenues ou appelées à figurer dans des fichiers, à l'exception des traitements mis en oeuvre pour l'exercice d'activités exclusivement personnelles, lorsque leur responsable remplit les conditions prévues à l'article 5.

Article 5. I. - Sont soumis à la présente loi les traitements de données à caractère personnel :
1° Dont le responsable est établi sur le territoire français. Le responsable d'un traitement qui exerce une activité sur le territoire français dans le cadre d'une installation, quelle que soit sa forme juridique, y est considéré comme établi ;

2° Dont le responsable, sans être établi sur le territoire français ou sur celui d'un autre État membre de la Communauté européenne, recourt à des moyens de traitement situés sur le territoire français, à l'exclusion des traitements qui ne sont utilisés qu'à des fins de transit sur ce territoire ou sur celui d'un autre État membre de la Communauté européenne.

II. - Pour les traitements mentionnés au 2° du I, le responsable désigne à la Commission nationale de l'informatique et des libertés un représentant établi sur le territoire français, qui se substitue à lui dans l'accomplissement des obligations prévues par la présente loi ; cette désignation ne fait pas obstacle aux actions qui pourraient être introduites contre lui.

Art. 5. I. Databases of personal data are subject to this act

1. When the controller (of the database) is established in France. The controller of a database that carries out activity in French territory in the context of an establishment, whatever its legal form, is considered to be established
2. When the controller is not established on French territory or on the territory of another community state and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on French territory, unless such databases are used only for purposes of transit through this territory or the territory of any other community state.

B.- Conclusions

a. The law applicable In Directive 95/46/EC

What law applies in the case of a violation of privacy when the personal data used are gathered in a country other than that of the residence of the subject in question for processing and storage in another country if, in turn, the gathering company may be established in another country?

Article 4 of Directive 95/46/EC deals with the applicable law. The first paragraph refers back to the national provisions adopted by the member states in order to transpose and apply the content of this Directive.

Scope of the Directive
The scope of Directive 95/46/EC is established in Article 3. Section 1 of this article states that its provisions shall apply "to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system".

Applicable law. As established in Recital 10, the purpose of the Directive is to harmonise the level of protection offered by the member states in their various legislation on the protection of privacy and thus to ensure "a high level of protection in the Community" or an "adequate level". Pursuant to this objective, and Article 32 of the Directive, member states had to transpose the Directive into their national legislation within a period of three years. (Before 2008). In short the States will apply the law they have passed in transposition of the Directive to their national legislation in the following cases contained in Art. 4 of Directive 95/46/EC, when the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State.

We can state, although this is a somewhat confusing text[44], according to Directive 95/46/EC the applicable law shall be that of the country in which the controller of the personal data is established; That is to say the country of residence of the controller of the file regardless of the place of processing of the data (lex loci delicti commissi) and the place of nationality or residence of the victims of said processing[45]. The connecting factor chosen is the "country of location of the responsible file [sic]" and, obviously, it may not be the case, in an international event, that it is the court of said state that is hearing the matter.

As can be seen, Directive 95/46/EC does not apply the general rule on non-contractual responsibility which is the *lex loci delicti Comissi* or the law of the country where the illicit processing of the data takes place. In this way it avoids the problems derived from data processing in different countries and the consequent concurrence of various national laws, as frequently happens with companies that process personal data using information technology. This demonstrates that it is intended to facilitate the activity of this type of company and promote free circulation of data within the community area.

The law of the country of establishment is a criterion of application intended to reduce costs for companies and thus the choice of this connecting factor is marked by an "economic argument" which does not take into account the law of the country with the closest links, but rather pursues a given material result that is favourable to IT companies operating in the industry, regardless of the country in which the company performs its activities[46]. It does not take into account the principle of proximity that supposedly underlies any choice of law rule and rejects criteria such as that of the nationality or residence of the subject affected or the nationality or residence of the controller of the file or the country of the physical location of the file. By doing so, Directive 95/46/EC in accordance with its Recital 18, seeks to ensure that individuals are not deprived of the protection to which they are entitled under this Directive, by submitting any processing of data by any person (regardless of his nationality or the place in which the activity is carried out) acting under the authority of a controller who is established in a Member State to the law of that State. This also ensures that companies do not have to inform themselves on the contents of all the laws of the community countries where they might carry out their activity.

Furthermore, this is a choice of law rule without an exclusion clause or escape clause, establishing a rigid rule in order to favour the controller of the file

Thus, if an IT company located in France gathers a series of data in France, Spain, Portugal and Italy and subsequently stores these data in Germany, all the activities of the French company are exclusively bound by French law, and their administrative obligations are those established by French law. Neither Spanish, Portuguese nor Italian law shall apply, even if data has been gathered in these countries; Nor shall German law apply, even though the data is stored in said country[47].

The choice of the aforementioned connecting factor demonstrates that the Directive offers greater concessions to companies than to individuals, who, if their rights are violated, are

[44]HEREDERO HIGUERAS, M, La Directiva Comunitaria de Protección de datos de Carácter personal, Aranzadi, Pamplona, 1997, p. 94
[45]CALVO CARAVACA A.I, CARRASCOSA GONZÁLEZ J., *Conflicto de leyes y conflicto de jurisdicción en Internet,* Madrid, 2001, pp. 156-157.
[46]CALVO CARAVACA A.I, CARRASCOSA GONZÁLEZ J., *Conflicto de leyes y conflicto de jurisdicción en Internet,* Madrid, 2001, pp. 159.
[47]Ejemplo tomado de CALVO CARAVACA A.I, CARRASCOSA GONZÁLEZ J., *Conflicto de leyes y conflicto de jurisdicción en Internet,* Madrid, 2001, pp. 161.

obliged to litigate in accordance with the law of the place of establishment of the controller of the file and in accordance with a jurisdiction with which they are probably not familiar. Economic considerations and free circulation of data in the European area is therefore given precedence over protection of individual privacy.

However, to prevent companies' getting round the applicable legislation of the states in which they operate and to guarantee the suitable framework of protection pursued by the Directive, if the controller of the file is established, either by way of a branch or a subsidiary, in various member states, he must guarantee that each of his establishments complies with the legislation of the state in which it is located. Likewise the activities carried out in each establishment shall be governed by the law of the country of residence of the establishment (Recital 18 and Art. 4.1 of the Directive)

French Law. **As we have seen, French Law will apply the French act (like the Directive) to the controller of the file when he lives in France. It fully complies with the Directive.**

Establishments located in third countries

in turn, when the establishment responsible for the file is not located in a community member state but in a country in which the law of a member state is applied, in accordance with the standards of International Public Law, the legislation of said state will likewise apply (Art. 4 b. Directive 95/46/EC)

Along the same lines, with the aim of ensuring that all activities carried out within the framework of the European area observe the same level of protection to the persons included in the Directive; when the controller is not established in a member state but for purposes of processing personal data makes use of equipment situated on the territory of a Member State, unless such equipment is used only for purposes of transit, the law of said state shall apply (Recital 20 and Art. 4 c) Directive 95/46/EC)

Likewise, in order to ensure the protection established in the Directive the transfer of personal data of community citizens to non-community third countries (insofar as *lex loci delicti commissi* would apply) the national authorities may reject that transfer when it considers that the country does not offer “an adequate level of protection” of privacy (Art. 25 Directive 95/46/CE).

And, finally, when data processing is carried out by a third country in an EU member state, the criterion of location of the file is not used, but Art. 4.1 c) of the Directive might apply, referring to the applicable law of the member state in which the processing has been carried out (law of the place of gathering of the data, law of the place of its classification, dissemination, etc.). Therefore in the case of a third country making use of a member state for processing data, the *lex loci delicti commissi* does apply.

***French Law*. Like the Directive, French Law stipulates that French law will apply when the controller of the file is not located in France but uses equipment located in France for gathering data. It therefore fully complies with the Directive.**

6. Jurisdiction

Process Civil Code Art. 33 to 52
Chapter I: Objective jurisdiction, Art. 33 to 41
Chapter II: Territorial jurisdiction, Art. 42 to 48
Chapter III: Common provisions; Art. 49 a 52

7. Summary

1. Autonomous legislation: In France, the only national text alluding to the right to private life and privacy is Article 9 of the French Civil Code.
The Press Freedom Act of 29 July 1881 [Loi du 29 juillet 1881] *(Loi du 29 juillet 1881 sur la liberté de la presse)*is still today the positive French law on the issue.
2. General rule Art. CC. There is no specific choice of law rule for crimes to govern attacks against private life committed by the media.
Principal jurisprudence: *Trib. gr. inst. Paris (1er Ch) 27.04.1983* (Carolina de Monaco c. Soc. Burda GmbH) rev. crit. 1983, 672; *Trib. gr. inst. Paris (1er Ch) 29.09.1982* (Romy Schneider c. les Editions Heinrich Bauer Verlag), rev. cri. 1983, 671; *Trib. gr. inst. Paris (3er Ch) 23.06.1976* (Dlle. Aga Khan c. soc. Axel Springer er autre), rev. crit. 1978, 132; *Cour de Cassation (1re Ch. civ.) 13.04.1988 (soc. jours de France c. Farah Diba)*, rev crit. 1988, 546, note Bourel; Juris classeur périodique (Semaine juridique) 1988 II 21320 note Putman. En el mismo sentido Paris 13 enero 2003, Juris classeur périodique (Semaine juridique) 2004 II, 10018 note Chabert.
3. Transposition of the Directive: It fully complies with the Directive
4. Jurisdiction: Process Civil Code Art. 33 to 52

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GERMANY[48]

1. National legislation

a) The Constitution

The German Constitution of 23 May 1949, does not lay down any principle directly recognising the right to personal and family privacy. Notwithstanding, paragraph 1 of the German Constitution establishes the inviolability of human dignity and paragraph 2 recognises the guarantee of free development of personality and the inviolability of the person.

In spite of this paragraph 10.1 recognises privacy of correspondence and confidentiality of communications and paragraph 13 establishes the inviolability of the home. For the protection of privacy in relation to data processing, it is important to refer to the finding of the German Federal Court of 15 December 1983, which gathered together the bases of the content of the right to protection of data of a personal nature

Starting from the provisions of the two constitutional principles referred to, German case law has developed personality rights. A central decision was the ruling in “Leserbrief-Urteil” of the Supreme Court in 1954. The German Supreme Court then maintained as the judicial foundation of the ruling, that the Constitution through its express recognition of the right to respect for human dignity in Art. 1.1 and the right to free development of personality, guarantees the right to personality as a fundamental right

Since then this universal right to personality is recognised as being fundamental and is a freedom that can be used as a defence against all parties in Germany. Furthermore, the Supreme Court has repeatedly confirmed its existence. (See the Soraya case)

The content and the scope of personality right is, however, not definitively delimited. It is considered as a single and indivisible right, from which each individual may derive personality protection when confronted with certain facts. Within personality rights are included the right to free development of personality, the right to protection against indiscretions and the right to one's own image.
In counterpoint to the universal personality right, the freedom of opinion and the freedom of the press is constitutionally guaranteed in Art. 5 of the Constitution

“Each individual has the right freely to express and circulate his opinion by word of mouth, in writing or by images, and to distribute it in general and freely accessible sources. The freedom of the press and freedom of information by radio or visual media are guaranteed. Censorship is not allowed.

These rights are limited by general laws, by the provisions of regulations on the protection of youth and the right to personal dignity"

Case law has been consistent, especially in the Supreme Court, in finding the fundamental right in Art. 5 to be of dominant significance in the Democratic constitutional organisation of the German Federal Republic. There is wide freedom of the press and of expression. This applies to political commentaries as well as for sensationalist publications, for sport and for the field of economics. Paragraph 2 is limited only by general laws and regulations for the protection of youth and of personal dignity.

[48] UBC/Cuatrcasas

The constitutional positions of freedom of the press and of opinion on one hand and personality right on the other hand have the same weight constitutionally. (Art. 5 gives neither the one nor the other precedence)

From all this it emerges: The question of whether a press publication infringes the personality rights of an individual is usually decided by weighing up the interests in play.

b) The Civil Code

The protection of personality right that is constitutionally guaranteed is supplemented by various laws. For this purpose, Art. 823 of the Civil Code on illegal activities has a special significance.

“ Anyone who unlawfully inflicts injury by falsehood or with intent against life, the body, health, freedom, property or other rights of another person, shall be obliged to compensate them for the injury inflicted.
“The same obligation applies to anyone who infringes the protection established by another law. By virtue of the content of the law, it is also possible to infringe it without culpability.

Under illegal types of conduct or activity within the meaning of Art. 823 is included any illegal intervention or interference in the protected rights of a third party. The fundamental right of personality is, by the “Leserbrief” ruling, considered to be an "other right” in the understood meaning of the law.

A claim under Art. 823 presupposes in reality that the interference with the personality right was illegal. There will be no illegality when the expression or display was made within the framework of Art. 5.1 of the Constitution. A weighing up of all the interests is always necessary in this case.

When dealing with illegality, German case law usually refers back to Art. 193 of the Criminal Code which rules out criminal responsibility for the press when the press acted in the exercise of legitimate interests.

193 of the Criminal Code: Critical opinions on scientific, artistic or commercial supplies or services, as well as opinions or displays that are made in assertion or defence of rights or for the exercise of legitimate interests, as well as opinions and criticisms by superiors of their juniors, official criticism or opinions on any aspect of a government employee and similar cases, are only liable to criminal sanction when accompanied by offensive elements in the formation of the opinion or expression, or under some particular circumstance

When there is an illegal infringement of personality rights, by Art. 823 of the Civil Code the injured parties have a number of remedies available, which they can validly exercise in parallel, or also successively:

-Claim of omission.

The most usual claim is one pursuant on Art. 823 in conjunction with Art. 1004 of the Civil Code (applied analogously), which is a claim of omission. Its effect is to prevent a repetition of the information which infringes the personality right. Under strict conditions, it establishes the fact of the danger of the act committed and considers preventive prohibition of publication. Only false statements of fact can be prohibited. Declarations of fact are, according to many case law cases, all circumstances, happenings, tasks, situations or states that can be established by evidence.

Conversely, Art. 5.5 claims of omission may not include opinions expressed that are determined by elements for which proof cannot be brought. Only exceptionally can opinions that are expressed be banned, when they represent defamation in such a way that it seeks only to defame the injured party.

-Claim for correction

For inaccurate statements Art. 823and 1104 of the Civil Code applied analogously, also provides a claim for correction. As a condition for the said claim, it is essential to demonstrate that what was said included false statements and that the personality right of those affected has been infringed. In principle, only statements of facts can be corrected; the expression of opinions enjoys the protection of Art. 5 of the Constitution

-Claims for physical damage

By Art. 823 a claim for payment of compensation can be raised for property damage arising out of personality rights; the damage must be proved and must result from the illegal interference with personality rights

-Claim for intangible injury

Alongside the claim for physical damages, a claim for intangible damages can also be recognised. After the Supreme Court “Herrenreiten” case in 1958, a repeatedly upheld case law doctrine maintains that a serious infringement of personality rights may also entail financial payment by way of compensation. It is nevertheless always necessary that a serious infringement of personality right should be involved, together with particular fault, and the need for recognition by payment of damages.

f) Law governing art and the author

The right to one's own image as part of rights that are constitutionally guaranteed has its special law in Art. 22 of the regulation governing authors' rights over graphic works of art and photographs, and the rights of the author.

Images may be displayed or published for exhibition only with the consent of the person portrayed or shown in the picture. In cases of doubt, consent is understood to have been given, when the person portrayed receives payment for allowing the picture to be reproduced. After the death of the person portrayed, a period of up to ten years is needed for the consent of the relatives of the person whose image has been reproduced. From the perspective of this law, relatives include the surviving spouse or partner and the children of the person portrayed, and if none of them exist, the parents of the person portrayed.

Art. 23 of the regulation governing the right of the author provides:

The following may be exhibited without the consent required by Art. 22:
1. Images belonging to the field of contemporary history
2 Images in which people appear only incidentally the site a landscape or place of interest
3. Images of gatherings, processions or similar events in which the people being portrayed were taking part.
4. Images that had not been commissioned, but the distribution or exhibition of which provides substantial artistic interest

However, this authorisation does not extend to a publication or exhibition that has the effect of infringing the legitimate interest of the person being portrayed or, if he is dead, of his Descendants.

An image within the meaning of Art. 22. paragraph 1, is any picture or representation of a person that enables them to be recognised as an individual

Art. 22 is configured in the exception-counter exception system: in principle it is permissible to distribute an image in accordance with the above principle only with the consent of the person affected or being portrayed. Art. 23 provides an exception and in specific cases can permit publication of the image without authorisation. As a counter exception paragraph 2 of art. 23 prohibits the publication or display, where the legitimate interests of the person portrayed (or his descendants if he is dead) are injured.

The main exception from the requirement for consent in relation to infringements of personality rights by press publications is found in Art. 23.1.1, and affects images or pictures in the "field of contemporary history". Whether a picture of a defendant can be published without his consent depends in the first instance on whether it can qualify as "a contemporary history image". To simplify the application and operation of this principle, German case law in the past made use of the judicial concept of "the contemporary history person". A distinction is made between people intrinsically of contemporary and historical interest and people incidental to contemporary historical interest. People of intrinsic historical interest are those persons in public life, who because of their express social position (for example notable politicians) or because of their outstanding services or worth are usually presented intentionally by the media (scientists, artists, sports personalities). These persons have a duty to accept routine publication of their images.

"Persons incidental to contemporary history" are, conversely, persons who present public interest only by reason of their relationship with some event in contemporary history (for example, survivors of the disaster).

This scheme or schematic division between contemporary history persons is out of date (particularly since the European Court of Human Rights decision on Caroline of Monaco on 24 June 2004). The ruling of the European Court of Human Rights in Strasbourg confirmed that the photos invaded the privacy of Caroline and her family. Publication had no public interest to justify it. The judgment contradicted another of the German Supreme Court of 1993 which, on the same issue, found that Princess Caroline was a *"contemporary history person"* . This status obliged her to accept the publication of photos taken in public places except for those of her minor children.

The Princess appealed to Strasbourg after the German Constitutional Court ruled in 1999 that Princess Caroline must accept publication of photographs taken in public places, even where these related to scenes of her private life, because of her status as a "public figure". The German courts ruled in her favour about the photographs in which her children appeared, considering that minors should be granted greater protection.

Nevertheless, the European Court considered that "any person, including those well-known by the public, should have the benefit of a legitimate expectation of protection and respect for their private life" and that there should be a "balance" between protection for private life and freedom of expression. According to the ruling, the "decisive factor" of this balance would be the "contribution" of the photos and the articles published to a "debate of general interest".

Pursuant on the interpretation of this Court it is of fundamental importance to distinguish between a report on facts that appear in an article on a discussion on political life in a democratic society, and on the other hand, a report on the details of the private life of a person,

which has no such function. There will be no general interest when the person concerned has not performed any official duties and the photographs and articles in question are about curiosity into their private life.

As a response to the Strasbourg ruling, the German Supreme Court changed its case law from 2007. Furthermore the Supreme Court considers it necessary to weigh up the fundamental rights that are in conflict, the rights of the person whose image is being published and the fundamental rights of the press. If the press were communicating a new and accurate piece of information of general interest for public opinion that would be decisive, as it would be if the value of the information had no objective social relevance for the public.

g) The law of press in each länder

Another major claim for the individual against a report or information which infringes personality rights is the claim for correction; this is not governed by German Federal law, but by the laws of each Lander. The reason for this stems from the jurisdiction that the Lander have over the press, with the consequences that the 16 Lander have passed their own laws on the press and the media.

Art. 10 of the Berlin press law, for example, provides that:

The publisher and the editor responsible for a publication are obliged to correct the publication concerning the person or authority. The obligation extends to all additional editions of the publication in which the facts are published.

The obligation to correct does not apply when the person or authority affected has no legitimate interest in the publication, when the scope of the correction cannot be balanced out by announcements that commercial traffic provides. When the correction does not exceed the scope of the offending text, it is considered that it can be balanced out and therefore a correction is applicable. Correction must be limited to objective facts, and may not have any sanctionable content. Publication of the correction may only be required by the affected parties or their representatives from the publisher or editor responsible when made as soon as possible, at most within three months of publication. The correction must be made in writing

The correction must be made at the next broadcast of the programme; for printed matter it must be in the same part of the publication, in the same typeface as the offending text without insertions or omissions. The correction cannot be in the form of letters to the readers: If correction is put into the same publication, it must be limited to objective data.

To avoid groundless claims, a procedure has been laid down. On application by the affected party, the court may order the publisher and editor responsible to publish a correction in the form laid down in the previous paragraph. The regulations applying to civil procedures for grant of a restraining order apply to this procedure.

For audiovisual media (radio and television) paragraphs 1 to 5 provide for a parallel process. The claim for correction can be made against radio, which is responsible for the format of the programme broadcast. The correction must be made immediately by the same sector and at the same program time as the offending broadcast.

The claim for correction must be grounded on the respect for personality rights and must give the affected party the chance to present their point of view on the matter. The strong power of the media in influencing the formation of public opinion and the danger arising from an incomplete, incomprehensible or defamatory publication determines the framing of federal law

which establishes as a condition that the parties that are affected by a press publication should have an immediate instrument to hand to make the readers aware of their position.

Case law

BJC1984, no. 33, page. 126-170. The right to self-determination in data matters arose as a response to the possibility of large-scale data processing. It was put together and developed from the basis of the German Federal Constitutional Court ruling of 15 December 1983. In this ruling, the Court devised, based on general personality rights contained in article 2.1 of the Bonn Fundamental Law, the ability of the individual, arising from self-determination, to decide basically for themselves, when and within what limits, situations relating to their private life should be disclosed. This gave rise to the need for establishing judicial mechanisms for protection of personal data for computerised use, not so much because of the strictly private nature of this data, but because of the danger that utilisation of it presupposes.

e) Defamation

Defamation is both a criminal offence and a tort. Insults and defamation in the narrower sense are defined in Sections 185ff. of the German Criminal Code (Strafgesetzbuch) (StGB). The wording is as follows:

Section 185 Insult
"Insult shall be punished with imprisonment for not more than one year or a fine and, if the insult is committed by means of violence, with imprisonment for not more than two years or a fine."

Section 186 Malicious Gossip

"Whoever asserts or disseminates a fact in relation to another, which is capable of maligning him or disparaging him in the public opinion, shall, if this fact is not demonstrably true, be punished with imprisonment for not more than one year or a fine and, if the act was committed publicly or through the dissemination of writings (Section 11 subsection (3)), with imprisonment for not more than two years or a fine."

Section 187 Defamation
"Whoever, against his better judgment, asserts or disseminates an untrue fact in relation to another, which maligns him or disparages him in the public opinion or is capable of endangering his credit, shall be punished with imprisonment for not more than two years or a fine, and, if the act was committed publicly, in a meeting or through dissemination of writings (Section 11 subsection (3)), with imprisonment for not more than five years or a fine."

Section 188 Malicious Gossip and Defamation Against Persons in Political Life
(1) "If malicious gossip (Section 186) is committed publicly, in a meeting or through dissemination of writings (Section 11 subsection (3)) against a person involved in the political life of the people with a motive connected with the position of the insulted person in public life, and the act is capable of making his public work substantially more difficult, then the punishment shall be imprisonment from three months to five years.
(2) A defamation (Section 187) under the same prerequisites shall be punished with imprisonment from six months to five years."
Section 189 Disparagement of the Memory of Deceased Persons
"Whoever disparages the memory of a deceased person shall be punished with imprisonment for not more than two years or a fine."

Section 190 Judgment of Conviction as Proof of Truth
"If the asserted or disseminated fact is a crime, then the proof of the truth thereof shall be considered to have been provided, if a final judgment of conviction for the act has been entered against the person insulted. The proof of the truth is, on the other hand, excluded, if the insulted person had been acquitted in a final judgment before the assertion or dissemination."

Section 192 Insult Despite Proof of Truth
"The proof of the truth of the asserted or disseminated fact shall not exclude punishment under Section 185, if the existence of an insult results from the form of the assertion or dissemination or the circumstances under which it occurred."
Section 193 Safeguarding Legitimate Interests
"Critical judgments about scientific, artistic or commercial achievements, similar utterances which are made in order to exercise or protect rights or to safeguard legitimate interests, as well as remonstrances and reprimands of superiors to their subordinates, official reports or judgments by a civil servant and similar cases are only punishable to the extent that the existence of an insult results from the form of the utterance of the circumstances under which it occurred."

Section 194 Application for Criminal Prosecution
(1) "An insult shall be prosecuted only upon complaint. If the act was committed through dissemination of writings (Section 11 subsection (3)) or making them publicly accessible in a meeting or through a presentation by radio, then a complaint is not required if the aggrieved party was persecuted as a member of a group under the National Socialist or another rule by force and decree, this group is a part of the population and the insult is connected with this persecution. The act may not, however, be prosecuted ex officio if the aggrieved party objects. The objection may not be withdrawn. If the aggrieved party dies, then the right to file a complaint and the right to object pass to the relatives indicated in Section 77 subsection (2).
(2) If the memory of a deceased person has been disparaged, then the relatives indicated in Section 77, par. 2, are entitled to file a complaint. If the act was committed through dissemination of writings (Section 11 subsection (3)) or making them publicly accessible in a meeting or through a presentation by radio, then a complaint is not required if the deceased person lost his life as a victim of the National Socialist or another rule by force and decree and the disparagement is connected therewith. The act may not, however, be prosecuted ex officio if a person entitled to file a complaint objects. The objection may not be withdrawn.
(3) If the insult has been committed against a public official, a person with special public service obligations, or a soldier of the Federal Armed Forces while discharging his duties or in relation to his duties, then it may also be prosecuted upon complaint of his superior in government service. If the act is directed against a public authority or other agency, which performs duties of public administration, then it may be prosecuted upon complaint of the head of the public authority or the head of the public supervisory authority. The same applies to public officials and public authorities of churches and other religious societies under public law.
(4) If the act is directed against a legislative body of the Federation or a Land or another political body within the territorial area of application of this law, then it may be prosecuted only with authorization of the affected body."
In the wider sense, Section 166 of the German Criminal Code also covers insults and defamation. This Section protects public peace and is worded as follows:
Section 166 Insulting of Faiths, Religious Societies and Organizations Dedicated to a Philosophy of Life
(1) "Whoever publicly or through dissemination of writings (Section 11 subsection (3)) insults the content of others' religious faith or faith related to a philosophy of life in a manner that is capable of disturbing the public peace, shall be punished with imprisonment for not more than three years or a fine.
(2) Whoever publicly or through dissemination of writings (Section 11 subsection (3)) insults a church, other religious society, or organization dedicated to a philosophy of life located in

Germany, or their institutions or customs in a manner that is capable of disturbing the public peace, shall be similarly punished."
These legal norms have not been amended for quite some time.

Developments in the application of criminal and civil law provisions concerning defamation at domestic level

According to the German authorities freedom of opinion and expression, which is also emphasised by the European Court of Human Rights, is protected by and large by Section 193 of the German Criminal Code cited above. They advance that the latter, in respect of the category relating to the consideration of legitimate interests, requires thorough consideration of values and interests in individual cases, which, based on the precedents set by the Federal Constitutional Court, must take into account the fundamental importance of freedom of opinion and expression for the constitution of a democratic body politic. That particularly applies to all matters of public interest and in a political battle of opinions. In this area, the Federal Constitutional Court accepts an assumption in favour of freedom of opinion and expression. Based on this precedent, derogatory utterances may be permissible in this area and, in view of the overexposure, catchy, even strong wording must be accepted unless it appears excessive in a particular case based on the facts and circumstances. This precedence accorded to the freedom of opinion and expression may, however, be limited depending on the individual circumstances of the case if so-called malicious insult is involved where the focus is not on the matter itself but rather on the defamation of a person or if claimed facts are clearly, or in the offender's view, untrue. Based on this jurisdiction, freedom of expression, freedom of the press and freedom of artistic expression are afforded extensive protection in the interpretation and application of penal provisions relating to insult and defamation.
In 2003 15,311 people were convicted for insult, 142 for malicious gossip, 145 for defamation; 1 person was convicted for malicious gossip and defamation against a person in political life, and 5 for the disparagement of the memory of a deceased person.

2. Applicable law

General rules on extra-contractual obligations. No specific rules exist.

The main source of the German private international law is the Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB - Law applying the Civil Code), in particular articles 3 to 46. Notwithstanding, article 3. 2 of the EGBGB establishes that the provisions of legal instruments of the European Community and of international agreements that are directly applicable in Germany take precedence over this law in their respective fields of application.
Alongside the EGBGB, there are also conflict of laws rules in other fields of German legislation, specifically in the *Insolvenzordnung* (InsO - Insolvency Law) and the *Einführungsgesetz zum Versicherungsvertragsgesetz* (EGVVG - Law on insurance policies).

Article 40 of the EGBGB provides that claims for damage and injury from illegal actions shall be governed in principle by the legislation of the country in which the illegal action took place. Nevertheless, the injured party may require that the law of the country in which the illegal act took effect should apply. If, at the time the liability arose, both parties are habitually resident in the same country, the law of that country will apply, as that is the specific point of connection.
In all cases, the parties, by application of article 42 the EGBGB, can elect which law is to apply after the fact that gave rise to the liability

When the infringement of personality rights crosses borders (for example a French person proceeds against a publication in Germany) the question of applicable law goes back to Art. 40

EGBGB. Article 40 of the EGBGB provides that claims for damage and injury from illegal actions shall be governed in principle by the legislation of the country in which the illegal action took place. Nevertheless, the injured party may require that the law of the country in which the illegal act took effect should apply. If, at the time the liability arose, both parties are habitually resident in the same country, the law of that country will apply, as that is the specific point of connection.
Article 41 of the EGBGB allows substitution of applicable law by another which, because of special circumstances, has much closer links with the events.

Claims subject to the law of the other State, may not be effective insofar as
1. they clearly have objectives other than a measure of compensation for the injured party
2. they conflict with German Federal Republic agreements on rules of legal liability

It may be observed that injured parties have a right to opt for and may request, that instead of the law of the place in which the claim was raised, the law of the state in which the injury occurred should apply instead. This is often the place of habitual residence of the injured party, and particularly each place in which the broadcast was made. In reality, the law applicable in the place of broadcast will apply only when injury arises in each of the broadcast zones (patchwork system). Where this happens in a number of states, the injured party has the right to opt to claim damages in each state but the claim must be limited to the injury suffered in each state. For the correction claim, prevailing opinion holds that the law of the place that the action took place will apply, that is to say, the place of publication.

Right of option. In spite of the foregoing, the injured party may require that the law of the state in which the injury was suffered should apply.

Law of the place of residence: If the party responsible and the injured party have the same residence at the time of the event giving rise to liability, then the law of the place in which they reside shall apply. For associations, companies, and legal entities it will be the place of their principal establishment or in the case of a branch, the place in which it is located.

General law. Art. 40.3
Finally, article 40.3 of the EGBGB limits, as a special preserve of general law, the scope of claims for compensation for illegal actions.
Claims lodged with a foreign jurisdiction cannot be relied upon in so far as they do not substantially exceed the appropriate compensation for the injured party, and are intended for purposes other than compensating the injured party or conflict with provisions of the law of liability of an Agreement of which Germany is a signatory.

Case law

Law applying the Civil Code (the version of the law of 21 May 1999). Art. 40, illegal acts. German law has a ubiquity rule to link infringements of rights of personality caused by the media. Its case law considers that the place in which the publication appeared (generally the publisher's head office) is the determinant of place, together with the various places in which it was put on sale (place of distribution).

- OLG Hamburg 8.12.1994, NJW RR 1995, 790, (792 y ss)
- OLG Manchen 17.9.1986 IPRspr. 1986, no. 142
- OLG Hamburg 4.8.1998 (divorce of the Prince of Hanover) IPRspr. 1988/43

3. Jurisdiction of the Courts

Objective judicial competence to deal with claims on negligence, correction, liability and compensation belongs to the civil courts. Civil proceedings are followed. Alongside the general jurisdiction of the debtor, in the press sector there is also established what is known as "forum shopping". Art. 21 of the Legislation governing civil procedure establishes that for claims on unauthorised actions, the court within whose jurisdiction the action took place has judicial competence

From this it follows that claims for the protection of what is referred to as civil rights could validly be lodged where the publication is usually distributed

The forum shopping has no application for the correction procedure, for which the general principle of making a claim in the place of publication or broadcasting applies.

4. Transposition of the Directive

The Federal law on data protection was adopted on 18 May 2001, and published in the Bundesgesetzblatt I. No. 23/2001, p. 904 on 22 May.

This law applies both to the public and private sectors. All landers (except Sacasen and Bremen) have adopted their own rules for applying the Directive.

GREECE[49]

1. National legislation

a) Greek Constitution

Article 9 par. 1 of the Greek Constitution provides that: "The private and family life of the individual is inviolable".

b) Civil Code

Article 57 of the Greek Civil Code provides that: "A person who has suffered an unlawful infringement on his personality has the right to claim the cessation of such infringement as also the non-recurrence thereof in the future. A claim for compensation, according to the provisions about tort, is not excluded".

Article 59 of the Greek Civil Code provides that: "Following the petition of the person infringed and after taking into consideration the kind of the infringement, the Court with its decision may also condemn the liable person to satisfy the moral damage of the person infringed".

In relation to infringement of the personality through the press, Law 1178/1981 on "Civil liability of the press", as amended and in force today, provides for a fine of at least 30,000 Euros for the newspapers published in Athens and Thessalonica and at least 6,000 Euros for those published in the rest of the country upon a publication that infringes a person's honour and reputation. Said minimum fines are 300,000 and 90,000 Euros respectively with regard to television channels and radio stations.
Especially for the infringement of personal privacy, Law 2472/1997 "Personal Data Protection Act" may also apply. Said law provides in Article 23 that anyone, who in breach of the personal data regulatory framework, causes material or moral damage, is liable for damages in full.

In light of the above, the Greek Civil Code recognizes an all-inclusive, comprehensive right of personality of natural persons. This protection encompasses compensation for the victim, thus going beyond the protection of Constitutional Law, which, strictly speaking, protects the person from state rather than from private intrusion. On purpose, the Greek Civil Code does not define the exact perimeters of the concept of personality, thus allowing expansion of the concept as the fabric and mores of society change. It is generally said that personality encompasses all the tangible and intangible elements, which constitute one's physical, emotional, intellectual, moral, and social existence. The Greek Civil Code grants a general action for the protection of one's personality against any "unlawful" intrusion, invasion, or infringement. The action is available even against a defendant who is not, or is incapable of being, at fault, and may result in a prohibitory or mandatory injunction. If at fault, the defendant may be forced to pay monetary compensation or make other reparation for moral damage and may be sued under general tort law for damages. Special provisions are in force regulating the infringement of personality through the press and the case of infringement of privacy through the processing of personal data.

c) Courts decisions

[49] UBC. Special attention was paid to the document on libel and the press and media prepared by the Secretariat of the CDMC [Spanish contemporary music broadcasting centre] for the Council of Europe. CDMC (2006)007.

- Decision No 1143/2003 of the Supreme Court if Greece ruled that:

The Court can freely decide upon the amount of the awarded compensation based on the principle of "common sense".
The infringement of personality establishes legal liability even if committed by negligence.

- Decision No 391/2006 of the Supreme Court if Greece ruled that liability cannot be established if the infringement of personality is1 committed through a lawful act.
- Decision No 816/2007 of the Supreme Court ruled that even though the law provides for minimum fines in cases of personality infringement through the press, the Courts may award lesser amounts based on the constitutional principle of "justice and proportionality".

d) Information on relevant legal provisions on defamation

Penal Code

The law provides for criminal liability for insult and defamation.

Pursuant to Art.361(1) of the Penal Code ("PC") "insult" is a criminal offence punished with a maximum one-year imprisonment and/or a pecuniary penalty of 150 - 15,000 Euro (Art.57 PC). "Unprovoked criminal insult" is punished with a minimum three-month imprisonment (Art.361A(1) PC) and when it is committed by two or more persons the penalties are higher - minimum six-month imprisonment (Art.361A(2) PC).

Defamation is punished with a maximum two-year imprisonment and/or a pecuniary penalty (Art.362 PC). Aggravated defamation is punished with imprisonment of at least three months (Art. 363 PC), to which a pecuniary penalty can be added. The offender can also be punished with deprivation of his/her civil rights.

Defamation of a public limited company ("anonymi eteria" – "AE") is punished with imprisonment of up to a year or with a pecuniary penalty (Art.364(1) PC), while aggravated defamation of an AE is necessarily punished with imprisonment (Art.364(3)).

Defamation of deceased persons is punished with imprisonment of up to six months (Art.365 PC)

Charges for the aforementioned crimes can be brought only if there is a prior complaint filed by the victims (Art.368 (1) PC). There are limitations to the defendant's right of appeal against a criminal court decision which are set out in Art.489 Criminal Procedure Code and are relative to the severity of the punishment and the type of court involved. These limitations apply to all criminal court decisions regardless of whether the crime concerned was defamation or insult.

The law provides for more severe sentences in cases of libel and defamation of public officials than of ordinary citizens. Defamation of the President of the Republic and of the Parliament is punished with imprisonment of not less than three months (Arts.157(3) and 168(2) PC). Insult to local authority council members is punished with imprisonment of up to two years (Art.157(3) PC). These punishments may also be accompanied by dismissal from public office where applicable (Art.157(4) PC). Defamation of a foreign Head of State is punished with imprisonment (Art.153(1)b PC).

Journalists can invoke the notions of proof, good faith and public interest in their defence against charges of insult or defamation. According to the Art.366(1) PC, defamation is not punished where it is based on true information, though punishment for insult is not excluded even if the intent to insult is proven beyond reasonable doubt (Art.366(3) PC).

Disapproving criticism of scientific, artistic or professional work, or criticism as part of the fulfilment of lawful duties, the exercise of lawful authority or the protection of a right or some other justified interest, do not constitute an unlawful act (Art.367(1) PC), unless they contain aggravating elements of aggravating defamation or an apparent intention to insult. (Art.367(2)b PC).

Provisions dealing with Defamation are also contained in the Civil Code ("CC").

Art.920 CC ("Defamatory rumours") provides that persons who intentionally disseminate false information which can be damaging to someone else are liable to compensate the person harmed (plaintiff).

In addition, pursuant to Art.57 CC ("right to personality") a person whose personality is unlawfully offended has the right to demand the withdrawal of the offensive act and it's non-repetition in the future. Compensation may also be sought cumulatively.

Art.59 CC ("Damages for Mental Distress") provides that based on a claim by the plaintiff the court may also award damages for mental distress or order the public revocation of the offensive material. The defendant's obligation to compensate the plaintiff is also prescribed in Arts.919 ("offence to public decency") and 932 ("damages for mental distress" in cases of unlawful acts) CC. Moreover, pursuant to the Law 1178/1981 on Civil Liability of the Press (as amended) media owners and chief editors may be held liable to compensation as well as for damages for mental distress for injury inflicted to the plaintiff's personality, irrespective of whether that was done knowingly or whether the editor of the offensive publication was known to them. The minimum sum for mental distress damages in this case is 29,347 Euro.

Finally, Art.681D of the Civil Procedure Code ("CPC") provides a special procedure for all disputes concerning offensive publications or broadcasts, which is much speedier than the standard civil procedure – the court hearing must take place within a maximum of 30 days from the filing of the complaint and the decision must be issued within a maximum of one month from the day of the hearing.

Developments in the application of criminal and civil law provisions concerning defamation at domestic level

According to RSF, the number of cases brought against journalists for libel was still rather high and sometimes resulted in very heavy fines (RSF-AR, 2004).
There have been some recent instances where the provisions concerning the crimes of defamation and insult were examined by the ECtHR in the light of Arts.6 and 10 ECHR.
For instance, on 27.05.2004, in the Rizos and Daskas case, concerning newspaper publications containing allegations about certain prosecutors, the ECtHR reviewed the special civil procedure followed pursuant to Art.681D CPC and held that there was no violation of Art.6 EHCR. However, in this case Greece was found in violation of Art.10 ECHR, because the ECtHR considered that there had not been a reasonable balance between the restrictions on the applicants' right to freedom of expression and the legitimate aim pursued (ECtHR, Press Release, 27.05.2004).
The Greek authorities also draw attention to the case of Pasalaris and Idryma Typou S.A., which was declared inadmissible by the ECtHR. The case involved the defamation of a public prosecutor and in the decision reference was made inter alia to the fact that the fine involved was not considered disproportionate and to the need to preserve the credibility of the judiciary.

Finally, concerning the decriminalization of offences of defamation and insult, it should be mentioned that until today there hasn't been any relevant legislative initiative, nor is it envisaged for the near future.

2. Applicable law

Greek national law is the basic source of Greek private international law. The basic provisions are found in the Civil Code (article 4 to 33), although there are also provisions in other laws, such as law 5960/1933 on cheques (articles 70 to 76). The concept of law also includes bilateral and multinational agreements ratified by Greece, which apply in the same way as Greek national law.

The law applying to liabilities arising from an injury is the law of the state where the injury took place (article 26 of the Civil Code).

The law applying to liabilities arising from unjust enrichment is the law of the state most closely connected with it according to the specific circumstances of the case.

General law:

If Greek private international law (conflict of laws procedures) establishes that foreign law should apply, but its application clashes with the fundamental moral values set out in Greek general law (article 33 of the Civil Code), the Greek court, when it hears the case in question, will not apply the relevant provision of foreign law, although it may apply the other foreign provisions (negative function). If, on the other hand, when such a provision has been excluded there are remains a legal vacuum in the foreign law, it will be filled by applying Greek legislation (positive function).

One way of protecting the interests of general Greek legislation is to adopt direct application laws. These laws govern questions of particular importance for legal interrelationships within the state and are also applied directly by Greek courts in cases with an international element that cannot be resolved by applying Greek private international law.

Case law:

According to article 25 of the Greek Civil Code, the law which applies to obligations arising from tort is the law of the state in which the wrongdoing was committed. In other words applying law is the law of the state where the infringement took place.
Decision No 1143/2003 of the Supreme Court: of Greece deals with the issue of infringement taking place in Greece and abroad simultaneously and ruled that in such case Greek Courts have jurisdiction and Greek Law is applicable.

3. Transposition of the Directive

Implementation Law 2472 on the Protection of individuals with regard to the processing of personal data (this is in Greek only)

Hungary[50]

1. SUBSTANTIVE LAW

Inherent rights are protected in Hungarian legal system in various levels and by different means. The term "inherent rights" covers a wide group of personal privacy and personality rights that are detailed below.

The Hungarian Constitution protects the inherent rights in general.

Section 54. § states that in the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights. No one shall be subject to torture or to cruel, inhuman or humiliating treatment or punishment. Under no circumstances shall anyone be subjected to medical or scientific experiments without his prior consent.

Section 59. § sets forth that in the Republic of Hungary everyone has the right to the good standing of his reputation, the privacy of his home and the protection of secrecy in private affairs and personal data.

Furthermore, Section 61. § lays down that in the Republic of Hungary everyone has the right to freely express his opinion, and furthermore to access and distribute information of public interest. the Republic of Hungary recognizes and respects the freedom of the press.

The Act on Civil Code (Civil Code) gives more detailed description of inherent rights and enumerate in Sections 75-83. §, with a non-exhaustive listing, the following major types of violation of inherent rights such as:

- breach of the principle of equal treatment,
- violation of the freedom of conscience,
- unlawful deprivation of personal freedom,
- injury to body or health,
- contempt for or to insult the honour, integrity or human dignity of an of private persons,
- right to bear a name,
- protection against defamation,
- misuse of the likeness or the recorded voice of another person,
- violation the sanctity of mails,
- breaching the privacy of business secrets,
- violation of private dwellings and premises used by legal persons protected by law.

Pursuant to Section 79. § if a daily newspaper, a magazine (periodical), the radio, the television, or a news service publishes or disseminates false facts or distorts true facts about a person, the person affected shall be entitled to demand, in addition to other actions provided by law, the publication of an announcement to identify the false or distorted facts and indicate the true facts (rectification). The rectification shall be published within eight days of receipt of the relevant demand in the case of daily papers, in the next issue of a periodical or a news service in the

[50] Dr. Zsolt Füsthy and the University of the Basque Country.

same manner, or (also within eight days) at the same time of the day if the defamation had been broadcast over radio and television.
Under Section 84. § a person whose inherent rights have been violated shall have the following options when instituting a legal action, depending on the circumstances of the matter concerned:

a) demand a court declaration of the occurrence of the infringement,
b) demand to have the infringement discontinued and the perpetrator restrained from further infringement;
c) demand that the perpetrator make restitution in a statement or by some other suitable means and, if necessary, that the perpetrator, at his own expense, make an appropriate public disclosure for restitution;
d) demand the termination of the injurious situation and the restoration of the previous state by and at the expense of the perpetrator and, furthermore, to have the effects of the infringement nullified or deprived of their injurious nature;
e) file charges for punitive damages in accordance with the liability regulations under civil law.

If the amount of punitive damages that can be imposed is insufficient to mitigate the gravity of the actionable conduct, the court shall also be entitled to penalize the perpetrator by ordering him to pay a. fine to be used for public purposes. The above provisions shall also apply if the infringement occurred through the publication of an illegal advertisement.

As regards the role of mean in this system, Sections 2. § and 3. § of the Act No. II). of 1986 on Press describe that the function of the press is to give authentic, accurate, quick and genuine information to the public. While exercising the freedom of the press, the press shall not commit a crime, call up someone to commit a crime, shall not offend public morality and the inherent rights of other people.

In so far as judicial practice is concerned, we turn to a couple of decisions of the Hungarian Supreme Court. The abbreviation "BH" covers the periodical called "Judicial Resolutions" (in Hungarian: Bírósági Határozatok"). We summarize the lessons drawn from judgements in two groups: (i) judgements rendered in ordinary infringement cases and (ii) judgements rendered in rectification cases: We do so because the experience collected from ordinary infringement cases would be reliable also in rectification cases should the infringement had been committed in a. press release. We tried to focus on the most recent cases and judgements rendered in the past few years.

1. Judgements in Ordinary Infringement Cases:
   - The opinion of a historian on a ceremony organized to commemorate a historical event does not provide basis for protection of personality, regardless of its value and content. The court is not authorized to decide in historical, social or political debates (BH 2006.210.).
   - If, in their charge against the plaintiff on the basis of suspicion of a crime, the defendant uses a term that would unjustifiably offend the same, breach of good reputation, honour of human dignity cannot be established even if the penal procedure did not result in the establishment of the criminal responsibility of the plaintiff (BH 2004.357.).
   - Forming a negative opinion or judgement concerning public persons is not to be considered as a breach of personal rights even if exaggerated or it reflects

passionate emotions. People participating in public have to accept that their political opponents- especially at the time of elections- will form a critical opinion on their activities and person, and will inform the public accordingly. Public people will have to accept all opinions and critics that cast a bad light on them. (BH 2004.104.).

2. Judgements in Rectification Cases

- The party whose personal rights were breached may claim moral compensation in the course of retraction. Retraction shall not cover solatium. Non-monetary damage may be ascertained with the general rules of liability of damage (BH 2006.318.).
- No rectification is required if the medium involved publishes truthful information on the facts established in the course of administrative procedure before the completion thereof (BH 2004.273.).
- A medium (editorial board) is under obligation to publish a counterstatement (carry out a rectification) in the case of paid advertisements as well, if those contain an untruthful statement (BH 2000.441.).
- Press law liabilities cannot be evaded by means of publishing untruthful statements regarding the facts as reference to the presumptions (opinions) of others. – In the case if an action seeking the remedying of a mistake committed by the press, it is the respondent that has to prove the verity of the published statements (BH 2000.241.).
- No correction needs to be published in the press, if the press reports accurately on a disciplinary decision made according to the proceedings regulated by the procedural provisions of law (BH 2002.432.).
- A press organ cannot be obliged to check the reality of the state of affairs presented at the press conference; the press release does not violate the presumption of innocence and the rights pertaining to the personality of it reports in accordance with what was said at the press conference held by the police that there are criminal procedures under way because of similar crimes committed in other areas of the country in addition to the procedure being the subject of the press conference against the plaintiff against whom the procedure was started (BH 2002.51.).

- The press is not acquitted of the legal consequences of handling facts untruthfully, if previously it reported accurately on the facts (BH 2002.392.).

2. RULES OF CONFLICT

With regard to the rule of conflict that is applicable in cases of violation of privacy and personality rights, we must have recourse to *Decree-Law No. 13 of 1979 on International Private Law*.

Art. 32 of the *Decree-Law* includes the general rule of conflict relating to non-contractual liability. This article provides as follows:

> *"(1) The law applicable at the place and time of the activity or omission causing damage shall apply to the liability for damage caused outside contracts, unless this Law-Decree provides otherwise.*
> *(2) If it is more favourable for the injured party, the law of that state shall apply, in the territory of which the damage came about.*
> *(3) If the places of residence of the party causing the damage and the injured party are in the same state, the law of that state shall apply.*
> *(4) If, according to the law of the place of the activity or omission causing the damage, culpability is a condition of liability, the capacity of culpability may be established either according to the personal law of the party causing the damage, or according to the law of the place of the violation of law".*

Accordingly, in the first place the Law of the common place of residence of the perpetrator of the damage and of the injured party will apply. When the parties do not reside in the same State the non-contractual liability is regulated by the Law in force at the time and in the place where the act or omission causing the damage occurred. Now, the Law of the State in whose territory the damage occurred will apply whenever this Law is more favourable for the injured party.

The solution provided by the rule of conflict gives priority to the connection of the common residence above all other circumstances, particularly in respect of the place where the damaging act occurred or the place where the damage materialised.

At the same time, it favours the position of the injured party by providing for the application of the Law most favourable to the interests of the latter, between the Law of the place where the act or omission giving rise to the damage occurs and the place where the damage is materialised.

This clear intentionality to favour the position of the victim is also reflected in section four of art. 32. According to the provisions of this section, when, by virtue of the Law of the place

where the act or omission causing the damage takes place, liability requires the culpability of the perpetrator of the damage, imputability can be established either in accordance with the personal law of the perpetrator of the damage, or by virtue of the law of the place of the damage. Accordingly, the possibilities of the injured party successfully to submit a claim of this type are increased.

However, article 32 must be applied together with the rule for which provision is made in art. 34 of the said *Decree-Law*. According to this article:

"(1) A Hungarian court may not establish liability for conduct which is not unlawful according to the Hungarian law.
(2) A Hungarian court may not establish a legal consequence on the grounds of liability for damage caused which is not recognized by the Hungarian law."

With this rule it is sought to avoid a situation where Hungarian Courts establish the liability or some of the consequences deriving from the liability when no provision is made for these in Hungarian Law. It is a type of control of foreign law according to the standards of the *lex fori*. In these cases the *lex fori* acts as a limit of the possible non-contractual liabilities demandable in accordance with the applicable foreign Laws by virtue of the foregoing rules of conflict.

Although the general rule of conflict of non-contractual obligations in Hungarian Law has been described, when we refer to actions affecting personality rights we must have recourse to art. 10 of *Decree-Law No. 13 of 1979 on International Private Law.*

Art. 10.1 indicates that the capacity of individuals, in addition to the state and the rights attaching to the individual, are regulated by personal law. There is set out below the second section of art. 10 which provides that:

*"The law applicable in the place and at the time of the violation of rights shall apply to claims arising from the violation of the rights attached to one's person; if, however, the Hungarian law is more favourable for the person suffering the injury in respect of the resultant compensation or indemnification, the claims shall be adjudged according to that law"***.**

If we consider that the rights of privacy with which this study is concerned, fall within the Scope of application of this article - which it would be appear to be logical to consider - art. 32 would be displaced by the necessary application of art. 10.2. Accordingly, although the general rule would continue to be the *lex loci delicti*, that is to say the Law of the place where the personality rights have been violated, the question of the alternatives raised in art. 32 disappears. Therefore, the applicable law in the place and at the time of the violation of the

rights connected with the individual would only cease to be applied if it were to be established that the Hungarian Law (*lex fori*) is more favourable for the injured party in relation to the redress or compensation to be received.

In this latter exception one also observes the clear intention on the part of the legislator to favour the position of the injured party.[51].

Accordingly, the rule of art. 10.2 is presented as a special rule for cases of violation of personality rights, extracting these cases from the scope of application of the general rule for non-contractual obligations of art. 32.

3. CASE LAW CONCERNING RULES OF CONFLICT

As a matter of fact we have not found any court decisions about the Conflict Laws related to non contractual responsibility in case of damage of personality rights**.**

4. SPECIALISED COURTS

No specialised courts exist, as such, for the resolution of this type of dispute.

In the Republic of Hungary the judiciary system consists of courts in four instances: (i) the Supreme Court, (the courts of appeal, (iii) the county (metropolitan) courts and the (iv) local (districts of Budapest) courts.

If somebody feels that his inherent rights were violated by a press release he may choose between two options to seek for remedy: (i) either to institute an ordinary legal action for infringement of his personality rights or (ii) ask for publishing a correction and if it is refused by the medium he may commence a special type of lawsuit called rectification.

Very special rules shall apply to the mean and press litigation, the so-called rectification that are placed in a separate Chapter No. XXI. of the Code on Civil Proceedings.

Common feature of both types of litigation is that the courts at second level, i.e. the county courts or the Metropolitan Court in Budapest, have competence as courts of first instance. This fact shows the importance of such lawsuits.

In press rectification cases the special rules of the Code on Civil Proceedings shall so apply that within 30 days from the release of the article (or in case of radio and

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51 T. Kadner Graziano, *Gemeineuropaisches Internationales Privatrecht,* Tubingen, 2002.

television the date starts from the broadcasting) the person concerned has to ask a correction from the press in a written form. If the press does not comply with it the one requesting the correction he can file a claim against the editorial office of the newspaper, the broadcaster or the Hungarian News Agency. The claim shall be filed within 15 days from the deadline of the rectification obligation of the press organ. If the court gives place to the claim the press shall perform its rectification obligation. (Sections 342-346. § in Chapter XXI. of the Code on Civil Proceedings)

5. DIRECTIVE 95/46/EC

Art. 4 of Directive 95/46/EC of the European Parliament and Council of 24 October 1995 relating to the protection of natural persons in connection with the processing of personal data and the free circulation of such data, has not been transposed very clearly in *Act LXIII of 1992 on the Protection of Personal Data and Public Access to Data of Public Interest*. Art. 4/A.6 of the law provides as follows:

> *"The provisions of this Act shall apply where a data controller performing the processing of personal data outside the territory of the European Union commissions, for the technical processing of data, a technical data processor having his seat or premises (branch) or residence (place of sojourn) in the territory of the Republic of Hungary, or uses equipment in this country, except when the equipment is solely used for the transit of data through the territory of the European Union. Such data controllers shall appoint a representative in the territory of the Republic of Hungary."*

This rather confusing provision should be interpreted in the sense of article 4 of the Directive, with the understanding that the Law applies when the entity responsible for the processing is established in the State of Hungary; and if the entity is not established in a Member State, when, for the processing of personal data, it has recourse to media, electronic or otherwise, situated in the territory of the said Member State, except where the said media are used solely for purposes of transit through the territory of the European Community.

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Ireland[52]

1. SUBSTANTIVE LAW

The right to privacy in Ireland is relatively new having been first identified only in 1973 to protect marital privacy. Developments have been slow in the area with the result that, at the moment, there is no specific law of privacy in Ireland leaving plaintiffs to rely on various aspects of statute, common law and constitutional law to assert their rights. In recent times, the adoption of the European Convention on Human Rights (ECHR) into Irish law has strengthened the right. Today there is an ongoing debate in the area and the Minister for Justice, Equality and Law Reform has formed a working group to propose a new statutory privacy law. The group reported in 2006 and a Bill was initiated in parliament (The Privacy Bill 2006). There has been some controversy over the Bill, especially with respect to the tension between the rights of a free press and privacy of individuals. Therefore, the passage of the Bill has been delayed and it is not clear when the proposed law will be enacted.

As already noted there are several sources of privacy law in Ireland, and Section 2 of the report of the Working Group on Privacy contains a comprehensive statement of the current law in Ireland[53]. To summarise the report, there are three distinct areas of protection as well as the additional protection of A8 of the ECHR as applied in Irish law by the European Convention on Human Rights Act 2003.

Statutory Protection: Although a new privacy bill is making slow progress through the national legislature, there is no dedicated statutory protection for privacy in Irish law. There are certain statutes applicable to aspects of privacy and these include Acts regulating broadcasting in Ireland, data protection laws and the criminal law regarding harassment.

Common Law Protection: Irelandhas a common law system in which law may be derived from court decisions as distinct from actions of the legislature and/or executive. The most relevant common law to privacy lies in the torts of trespass and nuisance (relating to incursion on or interference with property) and the equitable action for breach of confidence. It is accepted that the common law does not adequately protect privacy, particularly in the light of remote surveillance techniques.

Constitutional Protection: Prior to the adoption of the ECHR in Irish Law, the

[52] Fred Logue and the University of the Basque Country.
[53] http://www.justice.ie/en/JELR/WkgGrpPrivacy.pdf/Files/WkgGrpPrivacy.pdf

Constitution was regarded as the most likely basis on which Irish Courts would protect individual privacy. There is no express right of privacy but Article 40.3 obliges the State to vindicate the personal rights of the citizen. The Courts have found that implicit in that provision are rights that are not enumerated in the Constitution. In 1973 the right to marital privacy was identified (McGee v) AG [1974] IR 284) and since then several other aspect of the Constitutional right to privacy have emerged. The problem with the Constitutional protection lies in the fact that there is no reliable guide to the scope or limits to the protection afforded, giving rise to a large amount uncertainty for a person who believes their right of privacy has been infringed.

There is little case law in the personal privacy area generally in Ireland with many cases settling. There is virtually no case law which has an international dimension to the infringement of privacy rights. We would refer the following:

- Cogley v) RTE and Aherne and others v) RTE [2005] IEHC 180[54]. This was the latest judgment in which privacy issues were addressed and involved the plaintiffs seeking to prevent RTE, the national broadcaster, from broadcasting footage taken in Mr and Mrs Aherne's) nursing home showing alleged mistreatment of residents. The first case raised the issue of defamation of one of the senior nursing staff and the second the right to privacy of the owners of the nursing home. The judgment highlights many aspects of privacy law in Ireland including its derivation from the Irish Constitution and the balance sheet between privacy and freedom of expression. The case further explores the interplay of privacy law with defamation law and the law of trespass in Ireland. Ultimately, the plaintiffs in both cases did not succeed in preventing the broadcast.

- Julia Kushnir libel settlement[55]. In this case a report of a Moscow car crash in which Liam Lawlor, a well known former Irish politician, was killed contained allegations that a Ukrainian national who was a passenger in the car was a prostitute. Ms Julian Kushnir, who survived the accident, was in fact a professional translator who was engaged by Mr Lawlor for the purpose of assisting in the negotiation of business deals in Moscow. Although not named in the report she brought defamation proceedings in Ireland against several newspapers which published the story. The case ultimately settled for a large sum.

- Irvine & Others v) TalkSport Ltd. [2003] EWCA Civ 423[56]. This was a case, heard before the English Courts, concerning the unauthorised use of images of Eddie

[54] http://www.bailii.org/ie/cases/IEHC/2005/H180.html
[55] http://www.rte.ie/news/2007/1106/lawlorl.html?rss
[56] http://www.bailii.org/ew/cases/EWCA/Civ/2003/423.html

Irvine, an Irish F1 driver, which falsely represented that Mr Irvine endorsed TalkSport's radio station. The proceedings were taken under the law of passing off which is primarily an intellectual property action under common law. Although taken in England the underlying law is very similar in Ireland. This case was viewed as being significant since it was the first time this law was applied to false endorsement and the court held that Mr Irvine had a property right in the goodwill associated with his image.

- Norris v) AG [1984] IR 36[57]; Norris v Ireland [1988] European Court of Human Rights, application no. 10581/83[58]. This case was an (unsuccessful) challenge to Irish laws criminalizing certain homosexual acts between males. It is interesting because the case was ultimately brought before the European Court of Human Rights where the applicant was successful and although not binding on Ireland at the time the decision was viewed as contributing to the subsequent repeal of these laws.

2. RULES OF CONFLICT

The solution adopted by Irish Law in regard to the rule of conflict relating to non-contractual obligations, has developed together with the evolution of other rights of *common law*.

However, the rule of *double actionability* forming a part of Anglo-Saxon rights was rejected radically in the mid 'eighties. The decision of the *Supreme Court of Ireland*, in the case *Grehan v. Medical Incorporated and Pine Valley Associates* (1986), criticised and rejected the rule of *double actionability* established in the case *Phillips v. Eyre*. The *Supreme Court of Ireland* has indicated that

> "*the rule in Phillips v), Eyre… has nothing to recommend it because it is capable of producing quite arbitrary decisions and it is a mixture of parochialism and a vehicle for being, in some casesm unduly generous to the plaintiff and, in others, unduly harsh. In my view, so far as choice of law in torts is concerned, the Irish courts should be sufficiently flexible to be capable of responding to the individual issues presented in each case and to the social and economic dimensions of applying any particular choice of law rule in the proceedings in question*".

The Court has adopted a flexible position with respect to the rule of conflict to be used in cases of non-contractual liability. This appears to defend the use of different rules of conflict according to the case; rules of conflict that should be selected having

[57] http://www.bailii.org/ie/cases/IESC/1983/3.html

[58] http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695424&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

regard to the socio-economic consequences that would involve the adoption of one rule or another. However, this alternative with respect to the rule of double actionability is not entirely satisfactory; mainly because it does not indicate the rules in question. There is no reference to the rule of conflict of 'division' or to the alternative solutions; nor is there any indication of the significant connections or links that should be taken into consideration.

Accordingly, it is possible to affirm that, dismissing the rule of double actionability, the rule or rules of conflict of Irish Law are a source of significant legal uncertainty.

3. CASE LAW CONCERNING RULES OF CONFLICT

Special relevance is given to the decision of the *Supreme Court of Ireland* in the case *Grehan v. Medical Incorporated and Pine Valley Associates* (1986) mentioned earlier, which flatly dismisses the *double actionability rule*[59].

Subsequently in the case *An Bord Trachtala v. Waterford Foods Ltd*, High Court, 25 November 1992, there was a leaning towards the traditional rule of double actionability.

However, also of considerable interest are the observations made by the *Supreme Court* in the case *Shortt v. Ireland, the Attorney General and British Nuclear Fuels Limited (1997)*, concerning matters of international judicial competence and the applicable law. In this decision the court declared that: "*Prima facie* it is difficult to see how any provision of English law could make legal in Ireland injury or damage which would otherwise be tortious under Irish law. Certainly it is hard to see how any provision of UK law could deprive the Irish courts of jurisdiction which they would otherwise have. *Prima facie* the relevan law would appear to be the *lex loci delicti* rather than the law of the United Kingdom".

4. SPECIALISED COURTS

In the Irish legal system no courts exist for resolving disputes of the media/press. In practice the majority of cases are referred to the *High Court* since it has full original jurisdiction including the determination of constitutional issues, as well as not being limited in the quantum of damages it may award.

[59] P.M. North, "Reform, But Non Revolution", *R). des C).*, t. 220, 1990-I), pp. 231 et seq.; O'Higgins, P. and P. Mc. Grath,: "Third Party Liability in the Field of Nuclear Law and Irish Perspective", en http://www.nea.fr/html/law/nlb/nlb-70/007_021.pdf, p. 18.

Action may also be taken in the Circuit Court which may award damages up to a maximum of approximately €38K. Judgments are rarely reported from the Circuit Court.

5. DIRECTIVE 95/46/EC

The transposition of art. 4 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 relating to the protection of natural persons concerning the processing of personal data and the free circulation of such data is to be found in section 3B of the Data Protection (Amendment) Act 2003 enacted on 10 April 2003. According to this:

"(3B) (a) Subject to any regulations under section 15(2) of this Act, this Act applies to data controllers in respect of the processing of personal data only if—
(i) the data controller is established in the State and the data are processed in the context of that establishment, or
(ii) the data controller is established neither in the State nor in any other state that is a contracting party to the EEA Agreement but makes use of equipment in the State for processing the data otherwise than for the purpose of transit through the territory of the State.
(b) (...)
(c) A data controller to whom paragraph (a)(ii) of this subsection applies must, without prejudice to any legal proceedings that could be commenced against the data controller, designate a representative established in the State."

As can be observed, the transposition respects the provision in art. 4 of the Directive, extending its application to that which is provided in the Community rule.

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ITALY[60]

1. SUBSTANTIVE LAW

The Italian Constitution has no provision for a specific rule that enshrines the right of privacy and personality rights. However, the constitutional basis for the protection of the rights of personality can be found in article 2 of The Constitution. This Article provides that "*the republic recognizes and guarantees the inviolable human rights, be it as an individual or in social groups expressing their personality (...)*".

This article has been interpreted by jurisprudence openly, which has made it possible to include within it personality rights.

The Civil Code provides for the protection of certain personality rights. Provision is made for the right to physical integrity and life (art. 5), the right to the name (art. 6) and the right to the image (art. 10) integrated with the provisions of the law on authors rights (L. 633/41) in arts. 96 et seq [61].

For their part, other personality rights have found protection in jurisprudential development. We can emphasise the right to personal identity (judgment No 3769 of 22 June 1985, of the *Corte di cassazione*), the right to health and the right to intimacy or privacy (judgment of 27 May 1975, No 2199, of the *Corte di cassazione*).

Furthermore, defamation is a criminal offence that is punishable with a maximum prison sentence of five years, in the case of defamation of the President. The precepts to be taken into account are arts. 278, 290, 290 bis and 291 of the Criminal Code, which provide for the protection of the President of the Republic, the Italian Nation, the Republic, the legislator and other public officials. For their part, arts. 594 and 595 of the Criminal Code, regulate libel and slander. Libel consists of offending the honour of a person who is present, while slander consists of insulting the reputation of a person who is absent. Art. 595 also regulates slander through the press[62].

The requirement to safeguard the honour and reputation of individuals must be compared with freedom of expression guaranteed by art. 21 of the Italian Constitution. In fact the Court of Appeal has declared on numerous occasions respect for the limits of

[60] Paolo Balboni, Martino Sforza and the University of the Basque Country.

[61] S. *Gaetano,* "La tutela civile dei diritti della personalita", *Diritto & Diritti ~ il portale giuridico italiano*, disponible en http://www.diritto.it/materiali/civile/tut_dir_pers.html.

[62] Secretariat of the Council of Europe:+++ "Examination of the alignment of the laws on defamation with the relevant case-law of the European Court of Human Rights, including the issue of decriminalisation of defamation", Strasbourg, 2006, pp. 70-71.

freedom of expression (the right of reporting and the right of critique) in relation to the right of the honour of individuals. In relation to the right of reporting by journalists, the Court of Appeal has considered the same to be lawful when three conditions are met: it must respond to social benefit; the facts revealed must be true and; the revelations of the facts must follow a civilised form (judgment 3999/2005). In regard to the right of critique: correct language must be used and the rights of others must be respected

2. RULES OF CONFLICT

Italian Law No 218 on Private International Law, of 31 May 1995, provides for a specific rule of conflict for personality rights. Art. 24 of the Law[63]. In the said article different points of connection are provided for determining the law applying to the existence and content of such rights on the one hand, and for the consequences deriving from their violation, on the other. Accordingly, while the former are regulated by the national law of the individual, in order to identify the law applying to the consequences deriving from the violation personality rights recourse is had to the law applying to responsibility for unlawful acts.

Accordingly, in the case of an alleged violation of the personality rights of an individual, the liability of the third party will be established in accordance with the rules applying to the question of liability for unlawful acts. This reference leads to the application of art. 62 of the International Private Law of Italy. This article includes the rule of conflict applying to cases of liability for unlawful acts.[64].

In accordance with the general rule of art. 62.1 of the Law, the law applying to non-contractual obligations originating from an unlawful act is the law of the State where it occurred; that is to say, the place where the damage occurred However, the person who has suffered the damage may request the application of the law of the State where the act that caused the damage occurred.

[63] art. +++ 24 Diritti della personalità "1. L'esistenza ed il contenuto dei diritti della personalità sono regolati dalla legge nazionale del soggetto; tuttavia i) diritti che derivano da un rapporto di famiglia sono regolati dalla legge applicabile a. tale rapporto. 2. Le conseguenze della violazione dei diritti di cui al comma 1 sono regolate dalla legge applicabile alla responsabilità per fatti illeciti".

[64]Art. 62 Responsabilità per fatto illecito "1. La responsabilità per fatto illecito è regolata dalla legge dello Stato in cui si è verificato l)evento. Tuttavia il danneggiato può chiedere l)applicazione della legge dello Stato in cui si è verificato il fatto che ha causato il danno. 2. Qualora il fatto illecito coinvolga soltanto cittadini di un medesimo Stato in esso residenti, si applica la legge di tale Stato."

Finally, in accordance with the second section of art. 62, when the unlawful act involves solely citizens of the same State, who, in turn, reside in that same State, the law of the said State will apply.

As a general rule the point of connection used for the Italian rule of conflict responds to the criterion of the place of the damage. However, in the event that the place where the damage occurred and the place where the act that gave rise to the damage are in different States, the victim of the damage may opt for the application of either of the two. It is observed that the Italian rule favours the position of the injured party, giving him the opportunity to opt, in these cases, for the application of the rule that is most favourable to his interests.

The last subsection of art. 62, for its part, seeks to provide a particular response in those cases which, fulfilling the requirements established in the rule, would clearly be more closely connected to the said law. It responds, therefore, to a criterion of closeness, which, in principle, favours both parties, as it will be the most familiar law for all the parties involved.

3. CASE LAW CONCERNING RULES OF CONFLICT (DEFICIENCY)

No case law whatsoever has been found that applies the rule of conflict of art. 62 in cases of violation of personality rights through the media.

4. SPECIALISED COURTS

No specialised courts exist in this connection.

5. DIRECTIVE 95/46/EC

Section 5 of The *Data Protection Code (Legislative Decree No 196 of 30 June 2003* of Italy, which is the principal legislative act containing rules for the protection of personal data, in line with the provisions of art. 4 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 relating to the protection of natural persons concerning the processing of personal data and its free circulation, provides that:

“1. This Code shall apply to the processing of personal data, including data held abroad, where the processing is performed by any entity established either in the State’s territory or in a place that is under the State’s sovereignty.

2. This Code shall also apply to the processing of personal data that is performed by an entity established in the territory of a country outside the European Union, where said entity makes use in connection with the processing of equipment, whether electronic or otherwise, situated in the State's territory, unless such equipment is used only for purposes of transit through the territory of the European Union. If this Code applies, the data controller shall designate a representative established in the State's territory with a view to implementing the provisions concerning processing of personal data."

This provision faithfully reproduces that which is provided in the Directive.

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Latvia[65]

1. SUBSTANTIVE LAW

Person's rights to private life are first of all provided in the **Constitution of the Republic of Latvia** (*Latvijas Republikas Satversme*) which states the following:

Art. 96: "Everyone has the right to inviolability of his or her private life, home and correspondence".

Art. 92: "Everyone, where his or her rights are violated without basis, has a right to appropriate compensation".

The Constitution of the Republic of Latvia separately provides protection of honour and dignity (reputation):

Art. 95: "The State shall protect human honour and dignity".

The **Civil Law** (*Civillikums*) of the Republic of Latvia provides responsibility for moral injury caused by wrongful act:

Art. 1635: "Every delict, that is, every wrongful act per se, as a result of which harm has been caused (also moral injury), shall give the person who suffered the harm therefrom the right to claim satisfaction from the infringer, insofar as he or she may be held at fault for such act.
By moral injury is understood physical or mental suffering which are caused as a result of unlawful acts committed to the non-financial rights or non-financial benefit delicts of the person who suffered the harm. The amount of compensation for moral injury shall be determined by a court at its own discretion, taking into account the seriousness and the consequences of the moral injury.
If the unlawful acts referred to in Paragraph two of this Article are expressed as criminal offences against a person's life, health, morals, inviolability of gender, freedom, honour, dignity or against the family, or minors, it is presumed that the person who suffered the harm as a result of such acts has been done moral injury. In other cases moral injury shall be proved by the person who suffered the harm".

The term act is used here within the widest meaning, including not only acts, but also the failure to act, that is, inaction.

[65] Linda Lejina, Ieva Roze,Guntis Lauskis and the University of the Basque Country.

Art. 2352: "Each person has the right to bring court action for the retraction of information that injures his or her reputation and dignity, if the disseminator of the information does not prove that such information is true.
If information, which injures a. person's) reputation (honour) and dignity, is published in the press, then where such information is not true, it shall also be retracted in the press. If information, which injures a person's reputation and dignity, is included in a document, such document shall be replaced. In other cases, a court shall determine the procedures for retraction.
If someone unlawfully injures a person's reputation and dignity orally, in writing or by acts, he or she shall provide compensation (financial compensation). A court shall determine the amount of the compensation".

Law On the Press and Other Mass Media (*Likums Par presi un citiem masu informacijas lidzekliem*) applies to newspapers, magazines, newsletters and other periodicals (published not less frequently than once every three months, with a one-time print run exceeding 100 copies), as well as television and radio broadcasts, newsreels, information agency announcements, audio-visual recordings, and programmes intended for public dissemination.

Art. 7: "Information not for Publication

(3) It is prohibited to publish the content of correspondence, telephone calls and telegraph messages of citizens without the consent of the person addressed and the author or their heirs.
(4) The use of the mass mean to interfere in the private life of citizens is prohibited and shall be punished in accordance with the law.
(5) It is prohibited to publish information that injures the honour and dignity of natural persons and legal persons or slanders them".

Art. 21: "Retraction of False Information
Persons are entitled to require mass mean to retract information published (broadcast) about them if such information is not true. For other honour and dignity infringement cases person is entitled to require apology".

Art. 28: "Compensation for Injury
Injury, also, moral injury, caused by a mass medium to a natural or a legal person by providing false information, slandering and injuring the honour and dignity of a person by the publishing of data and information the publication of which is prohibited by law, a mass media shall provide compensation to such person in accordance with the procedures prescribed by law".

Radio and Television Law (*Radio un Televizijas likums*)

Art. 38: "Civil Liability for Injury
(1) Pursuant to the provisions of The Civil Law and other laws the broadcasting organisation shall compensate for injuries, including moral injuries, caused to a natural or

legal person by the provision of information in a broadcast that injures the honour or dignity of a person, if it does not prove that such information corresponds to the truth.
(2) A broadcasting organisation shall be exempted from the payment of compensation for injury if the information injuring the honour and dignity of a person is contained in an announcement made by State and administrative institutions or officials, as well as when the false information has been distributed on a live broadcast and the broadcasting organisation did not have the possibility to influence the distribution of such information".

Based on the described regulation, it should be pointed out that personal privacy and personality rights include rights to intimity, own image, honour and dignity and related rights. Particularly person's right to privacy as the right to hide its private life from society to such extent as the person wishes.

Honour and dignity is the only aspect of personal privacy and personality rights that is more or less regulated by laws.

The major problems arise with regard to such concept as person's right to intimity, its own image. Until the last year there had been no court cases where person claimed its rights to personal privacy and personality, particularly its rights to own image. Latest tendencies show that people have realized their rights to privacy and personality and there appear claims in the courts based on such rights claiming to be infringed by mass mean. However, there is no final court decision adopted yet.

Last year one woman claimed compensation for moral injury done by mass mean when publishing papparacci photographs taken at the moment when she left maternity hospital with her new born baby. The court of first instance satisfied the claim, however, the appeal court rejected the claim, arguing that she is awife of well known person in Latvia and that there has been no disproportionate interference in her private life. The Supreme Court has not jet heard the case.

As it derives from the court practice the situation is different in case the picture taken and published infringes person's) honour and dignity. There is quite large court practice on issues of person's) honour and dignity infringed by false information, however, there is still an open question whether person has rights to compensation for moral injury done by mass mean when publishing abusive opinion or true information that infringes persons honour and dignity.

As the court practice of European Court of Human rights is binding to Latvia our courts definitely have to take into account criteria developed by ECHR when interpreting such rights as right to freedom of speech and private life. However, as already mentioned there has been no final court decision on claim resulting from infringement of personal privacy (except from honour and dignity cases).

6. RULES OF CONFLICT

In regard to the rule of conflict currently existing in Estonia [sic] this is to be found in art. 20 of the *Civil Law*. According to this article:

"Obligations not based on contract shall be adjudged, in respect of their substance and consequences, in accordance with the law of the place where the basis, from which the obligation arose, was created. Obligations arising from wrongful acts shall be adjudged in accordance with the law of the place where the wrongful acts took place".

Therefore, no specific rule of conflict exists for cases of violation of privacy and personality rights. The rule for which provision is made in the second subclause of art. 20 will be applied. According to the said article, the obligations arising from unlawful acts are regulated by the law of the place where the said unlawful act occurred. Therefore, the rule of *lex loci delicti* is applied.

In specific cases of violations of privacy and personality rights through the press, problems may arise with respect to determining the place where the unlawful act occurred, when this does not coincide with the place of publication and the places where it was possible to distribute the information giving rise to the damage. The law does not provide any response whatsoever to the said problems, and therefore jurisprudence must establish the criteria to be used in each specific case for determining the *lex loci delicti*.

7. CASE LAW CONCERNING RULES OF CONFLICT

We do not have any information whether Latvian courts have ruled on the applicable law to non contractual obligations with an international element in infringements of personal privacy and personality rights.

8. SPECIALISED COURTS

In Latvia, there are no courts specializing in press/mean litigation; therefore, such cases are reviewed by common courts.

9. DIRECTIVE 95/46/EC

Art. 4 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 relating to the protection of natural persons concerning the processing of personal data and the free circulation of such data, is included in section 3 of the *Personal Data Protection Law Amended by Law of 24 October 2002*:

"(1) This Law, taking into account the exceptions specified in this Law, applies to the processing of all types of personal data, and to any natural person or legal person if:
1) the system administrator is registered in the Republic of Latvia;
2) data processing is performed outside the borders of the Republic of Latvia in territories, which belong to the Republic of Latvia in accordance with international agreements; and
3) in the territory of the Republic of Latvia is located equipment, which is utilised for the processing of personal data.
(2) In the cases referred to in Paragraph one, Clause 3 of this Section, the system administrator shall appoint an authorised person who shall be responsible for compliance with this Law.
(3) (…)".

Although this precept responds partially to the provisions of the Directive, a difference exists which merits emphasis. In section 1.3 no reference is made to the fact that the administrators of systems used by the media, whether electronic or otherwise, located within the territory of Latvia must be established in non-member States. Thus, according to the provisions of this precept, Latvian Law could apply in those cases in which the entity responsible for the processing of the personal data is located in a Member State, thus going against the provisions of the Directive. Therefore, this fact can be considered to be a nonfulfilment of the Directive as it does not respect the spirit of art. 4. The expansion of the scope of application of Latvian Law with respect to the provisions of the Directive, could lead to a situation where the decisions handed down by Latvian courts in application of this Law are not recognized in the other Member States when they are contrary to the provisions of art. 4 of the Directive.

Lithuania[66]

1. SUBSTANTIVE LAW

Art. 22 of the Lithuanian Constitution acknowledges the right to private life on the part of individuals. In this connection it provides that:

"The private life of a human being shall be inviolable.
Personal correspondence, telephone conversations, telegraph messages, and other intercommunications shall be inviolable.
Information concerning the private life of an individual may be collected only upon a justified court order and in accordance with the law.
The law and the court shall protect individuals from arbitrary or unlawful interference in their private or family life, and from encroachment upon their honour and dignity".

For its part, art. 25 establishes the right to freedom of expression on the part of individuals. According to this article, freedom of expression should not be limited except by law, in case it is necessary to protect, inter alia, the private life of individuals.

The protection of personality rights is developed in the *Civil Code of The Republic of Lithuania* between articles 2.20. and 2.27. Among the civil rights of individuals that are cited and regulated are the right to the name, the right to the image, the right to privacy and secrecy and the right to protection of the honour and dignity of individuals. The relevant rules to be taken into consideration are as follows:

Article 2.22. Right to an Image

1. Photograph (or its part) or some other image of a natural person may be reproduced, sold, demonstrated, published and the person may be photographed only with his consent. Such consent after natural person's death may be given by his spouse, parents or children.
2. Where such acts are related to person's public activities, his official post, request of law enforcement agencies or where a person is photographed in public places, consent of a person shall not be required. Person's photograph (or its part) produced under the said circumstances, however, may not be demonstrated, reproduced or sold if those acts were to abase person's honour, dignity or damage his professional reputation.
3. Natural person whose right to image has been infringed enjoys the right to request the court to oblige the discontinuance of the said acts and redressing of the property and non-pecuniary damage. After person's death, such claim may be presented by his spouse, children and parents."

[66] Stasys Drazdauskas and the University of the Basque Country.

Article 2.23. Right to Privacy and Secrecy
1. Privacy of natural person shall be inviolable. Information on person's private life may be made public only with his consent. After person's death the said consent may be given by person's spouse, children and parents.
2. Unlawful invasion of person's dwelling or other private premises as well as fenced private territory, keeping his private life under observation, unlawful search of the person or his property, intentional interception of person's telephone, post or other private communications as well as violation of the confidentiality of his personal notes and information, publication of the data on the state of his health in violation of the procedure prescribed by laws and other unlawful acts shall be deemed to violate person's private life.
3. Establishment of a file on another person's private life in violation of law shall be prohibited. A person may not be denied access to the information contained in the file except as otherwise provided by the law. Dissemination of the collected information on the person's private life shall be prohibited unless, taking into consideration person's official post and his status in the society, dissemination of the said information is in line with the lawful and well-grounded public interest to be aware of the said information.
4. Public announcement of facts of private life, however truthful they may be, as well as making private correspondence public in violation of the procedure prescribed in paragraphs 1 and 3 of the given Article as well as invasion of person's dwelling without his consent except as otherwise provided by the law, keeping his private life under observation or gathering of information about him in violation of law as well as other unlawful acts, infringing the right to privacy shall form the basis for bringing an action for repairing the property and non-pecuniary damage incurred by the said acts.
5. Where the said acts are committed on the basis of reasoned judgement of the court, restrictions imposed on the publication and collecting of information about the person which are laid down in the provisions of paragraphs 1 and 3 of the given Article shall not be applied.

Article 2.24. Protection of Honour and Dignity
1. A person shall have the right to demand refutation in judicial proceedings of the publicised data, which abase his honour and dignity and which are erroneous as well as redress of the property and non-pecuniary damage incurred by the public announcement of the said data After person's death this right shall pass on to his spouse, parents and children if the public announcement of erroneous data about the deceased person abases their honour and dignity as well. The data, which was made public, shall be presumed to be erroneous as long as the person who publicised them proves the opposite.
2. Where erroneous data were publicised by a mass medium (press, television, radio etc.) the person about whom the data was publicised shall have the right to file a refutation and demand the given mass medium to publish the said refutation free of charge or make it public in some other way. The mass medium shall have to publish the refutation or make it public in some other way in the course of two weeks from its receipt. Mass medium shall have the right to refuse to publish the refutation or make it public only in such cases where the content of the refutation contradicts good morals.
3. The request to redress the property or non-property non-pecuniary damage shall be investigated by the court irrespective of the fact whether the person who has disseminated such data refuted them or not.
4. Where a mass medium refuses to publish the refutation or make it public in some other way or fails to do it in the term provided in paragraph 2 of the given Article, the person gains the right to apply to court in accordance with the procedure established in paragraph 1 of the given Article. The court shall establish the procedure and the term for the refutation of the data, which were erroneous or abased other person's) reputation.
5. The mass medium, which publicised erroneous data abasing person's reputation shall have to redress property and non-pecuniary damage incurred on the person only in those

cases, when it knew or had to know that the data were erroneous as well as in those cases when the data were made public by its employees or the data was made public anonymously and the mass medium refuses to name the person who supplied the said data.
6. The person who made a public announcement of erroneous data shall be exempted from civil liability in cases when the publicised data is related to a public person and his state or public activities and the person who made them public proves that his actions were in good faith and meant to introduce the person and his activities to the public.
7. Where the court judgement, which obliges the refutation of erroneous data abasing person's honour and dignity, is not executed , the court may issue an order to recover a fine from the defendant for each day of default. The amount of the fine shall be established by the court. It shall be recovered for the benefit of the defendant irrespective of the redress for the inflicted damage.
8. Provisions of the given article shall, too, be applied to protect the tarnished professional reputation of a legal person.
9. Provisions of the given article shall not be applied to those participants of judicial proceedings who are not held responsible for the speeches delivered at court hearings or data made public in judicial documents.

2. RULES OF CONFLICT

The most noteworthy aspect of the rules of Lithuanian Private International Law for which provision is made in the *Civil Code of The Republic of Lithuania* is that they provide for a specific rule of conflict for determining the law applying to claims resulting from the violation of non-proprietary rights of the individual Accordingly, art. 1.45 of the *Civil Code* (law applicable to claims resulting from infringement of personal non-property rights) provides as follows:

"1. Claims for reparation of damage resulting from infringement of personal non-property rights committed by the mass mean shall be governed, depending on the choice of the aggrieved person, by the law of the state where the aggrieved person is domiciled, or has his place of business, or where the infringement occurred, or by the law of the state where the person who caused the damage is domiciled or has his place of business.
2. Response to the mean (denial) shall be governed by the law of the state in which the publication appeared, or the radio or television program was broadcast".

This rule clearly favours the position of the individual whose non-proprietary rights have been injured, i.e., the rights relating to his personality. The form of favouring the position of the victim is expressed through a broad range of possible applicable laws to be decided by the injured party. Among the various options he will select the law that presents the greatest advantages in relation to his interests. The laws among which the injured party may choose are as follows:

- Law of the State where the injured party has his residence.
- Law of the State where the injured party has his place of business.
- Law of the State where the violation occurred.

- Law of the State where the individual who caused the damage has his residence.
- Law of the State where the person who caused the damage has his place of business.

For its part, according to the second section of art. 1.45 of the Law, the right of rectification will be regulated by the Law of the State where the publication appeared or the radio or television programme was broadcast.

3. CASE LAW CONCERNING RULES OF CONFLICT

We have no evidence of the existence of case law in this connection.

4. SPECIALISED COURTS

We have no evidence of the existence of specialised courts in this connection.

5. DIRECTIVE 95/46/EC

The Law on Legal Protection of Personal Data, of 21 January 2003, No. IX-1296, with amendments of 13 April 2004, by virtue of its art. 1.3, transposes art. 4 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 relating to the protection of natural person concerning the processing of personal data and the free circulation of such data as follows:

"This Law shall apply to the processing of personal data where:
1) personal data are processed in the course of its activities by a data controller who is established and operating on the territory of Lithuania;
2) personal data are processed by a data controller which is not established on the territory of the Republic of Lithuania but to which the laws of the Republic of Lithuania apply by virtue of international public law, including diplomatic missions and consular institutions;
3) personal data are processed by a data controller established and operating in a non-member state of the European Union, which makes use of automated personal data processing means established in the Republic of Lithuania, with the exception of cases where such means are used only for transit of data through the territory of the Republic of Lithuania and the territory of the European Union. In the case specified in this subparagraph, the data controller must have its representative - an established subsidiary or a representative office in the Republic of Lithuania to which the provisions of this Law in respect of the data controller shall apply".

This precept faithfully reproduces the provisions of art. 4 of the Directive.

LUXEMBOURG[67]

1. National legislation

a) Private Life

- *11 August 1982. – Law on the protection of private life*[68]

Luxembourg has a specific law on the protection of privacy of natural persons. In Art. 1 it establishes that each person shall have a right to a private life.

Within this is included in the right of each person over their own image and use of their image and the right to object to any unauthorised publication. Furthermore, models and celebrities have an absolute right of ownership over their photographs and can authorise their reproduction for strictly business purposes (Reference 20 November 1978. 25. 358)

b) Freedom of expression

- *The law of 8 June 2004 on freedom of expression of the media*

The law of 8 of June of 2004 ensures freedom of expression for the media. This law replaces the law of 20 July 1989. According to Article 2 corresponding to Art. 10 of the Convention on human rights and fundamental freedoms signed in Rome on 4 November 1950, and ratified by the law of 29 August 1953, any restriction or interference in this matter must be provided for by law.

This law abolished the law dated 20 July 1869 concerning the press and offences committed by other means of publication, which featured specific provisions with respect to insult, outrage, defamation and slander against the Grand Duc and his family as well as against foreign Heads of State. The law of 2004 does not contain specific criminal provisions.

Scope of freedom of expression. According to Art. 6 the freedom of expression referred to in article 1 includes the right to receive and investigate information, and to decide to communicate it to the public in forms or by methods freely chosen, as well as to make comments or criticisms on them.

Accuracy By operation of Art. 11 if any inaccurate presentation of a fact is contained in a publication, the mistakes of fact must be promptly corrected as soon as the publishers or staff become aware of it.

Freedom of expression and private life
In the 3rd section the law refers to protection of private life. And in article 14 it establishes that each person has a right to a private life.

It provides that when information on the private life of an individual is publicised a judge may, without prejudice to compensation for the injury suffered, require that all necessary means be taken to correct it or to distribute a communication intended to put an end to the infringement of

[67] François MOYSE and UBC
[68] http://www.mj.public.lu/legislation/index.html

private life, with costs always being for the account of the person responsible for the infringement.

However, as provided for in article 15, communication to the public of a publication containing information on the private life of an individual does not entail liability when:

1. It was done with the authorisation of that individual.
2. It was necessarily done at the prior request of the judicial authorities as part of a legal case or investigation.
3. When it was directly connected with the public life of the individual involved.
4. When it comes from a communication made directly to the public, always provided that all steps and precautions have been taken to avoid an infringement of the right to private life, and provided that the identity of the author of the words quoted is stated
5. When it is a faithful quote of from third party, always provided that it is clearly identified as a quote, and that the identity of the author is stated, and that the communication of this quote is justified by the existence of substantial public interest in disclosing the quote.

- *Other laws relating to the media* [69] *:*

1. L. 23 mai 1927 concernant les publications obscènes
2. L. 29 décembre 1937 permettant d'interdire l'entrée au Luxembourg de publications étrangères obscènes
3. L. 27 juillet 1991 sur les médias électroniques
4. L. 3 août 1998 sur la promotion de la presse écrite et règl. d'exécution
5. L. 2 août 2002 sur la protection juridique des services à accès conditionnel et des services d'accès conditionnel

Case law:

At the internal level, the following rulings on freedom of expression and protection of private life are referred to:

Luxembourg Court of Appeals, 15/02/07: In order to know that the distorted use of a name is defamatory in character, the analysis must be done *in concreto*. That is, it must be done by studying the facts surrounding the allegedly defamatory use of the name.

Luxembourg Court of Appeals, 31/01/07: It has been decided that even if a journalist can not be completely objective, he breaks the law when he spreads unfonded blame regarding a person, without adequate supporting evidence.

Luxembourg Court of Appeals, 06/01/05 : When several persons are implicated in a scandal, the fact that an editor selected the photograph of a particular person is only one element among others that would make up the violation implicating his non-contractual responsibility.

[69] http://www.legilux.public.lu/leg/textescoordonnes/compilation/recueil_lois_speciales/MEASURED.pdf

2. Applicable law

General law

Art. 3. Les lois de police et de sûreté obligent tous ceux qui habitent le territoire.
Les immeubles, même ceux possédés par des étrangers, sont régis par la loi luxembourgeoise.
Les lois concernant l'état et la capacité des personnes régissent les Luxembourgeois, même résidant en pays étranger.

8° La responsabilité de l'auteur d'un dommage est régie par la loi du lieu où s'est produit le fait générateur du dommage. C'est d'après cette même loi que doit être tranchée la question de la prescription de l'action en réparation. Lux. 14 juillet 1959, 17, 501.

21° La loi étrangère normalement applicable en vertu des règles de conflit de lois n'est écartée que si son application porte dans une situation concrète précise une atteinte grave à un principe que le législateur luxembourgeois considère comme essentiel à l'ordre moral, politique ou économique

Specific laws on liability[70]

1. L. 1er septembre 1988 relative à la responsabilité civile de l'Etat et des collectivités publiques
2. L. 21 avril 1989 relative à la responsabilité civile du fait des produits défectueux
3. L. 4 juillet 2000 relative à la responsabilité de l'Etat en matière de vaccinations
4. Conv. 2 octobre 1973 sur la loi applicable à la responsabilité du fait des produits

Case law on the law applicable to non-contractual liabilities
As Luxembourg is a very small country there are no cross-border decisions on liability concerning infringements of the right to private life by the media.

3. Transposition of the Directive

- *Loi modifiée du 2 août 2002 relative à la protection des personnes à l'égard du traitement des données à caractère personnel*

The law of 2 August 2002 relating to the protection of individuals in relation to the processing of personal data came into force on 1 December 2002. It was amended by the law of 27 July 2007 which transposed the provisions of EC Directive 95/46/CE relating to the protection and free circulation of data into Luxembourg law. This law then replaced the previous data protection law of 1979.

- *Loi du 27 juillet 2007 portant modification de la Loi modifiée du 2 août 2002 relative à la protection des personnes à l'égard du traitement des données à caractère personnel*

[70] http://www.legilux.public.lu/leg/textescoordonnes/compilation/recueil_lois_speciales/RESPONSABILITE.pdf

Scope of application

Art. 3. 1 of the law establishes that the law applies:
- To the automatic processing of data, in whole or in part, together with non-automated processing of data that is contained in or that will be contained in a file.
- To all forms of capture, processing and publication of images in which individuals can be identified
- To processing data on public security, defence, and investigation and monitoring criminal offences for purposes of state security, or for economic or financial purposes, without prejudice to the specific provisions of national or international law

And Art. 3.2 refers to when such actions will be subject to the said law.

a)- when the data file was compiled by a data controller established on Luxembourg territory
b)- when the data file was compiled by a controller who, although not established on Luxembourg territory or in another EU member state, used resources located on Luxembourg territory; except for those used for purposes of transit across such territories. When this is the case, the data controller must nominate, in a written return to the National Commission, a representative established in Luxembourg territory to act as an agent for the controller in these cases.

As a result Luxembourg law applies when the data controller's establishment or its residence (which is the same thing) are in Luxembourg in the same way as the Directive. This adheres fully to the Directive

In the same section, with the purpose of ensuring that all activities carried out in the European area provide the same level of protection to individuals as envisaged by the Directive; when the controller is not established in a member state but uses resources situated in a member state to process personal data, the law of that state will apply, unless such data is used only for transfer purposes. **This adheres fully to the Directive.**

Case law
On whether images recorded by a video camera can be used as evidence in accordance with the un-ratified law, as amended, of 2 August 2002:

- Jugement du tribunal d'arrondissement de et à Luxembourg (13 juillet 2006)
- Arrêt de la Cour d'appel (28 février 2007)
- Arrêt de la Cour de Cassation (22 novembre 2007)
- Refus pour une entreprise d'effectuer une vidéosurveillance dans ses locaux:
- Jugement du tribunal administratif (15 décembre 2004)
- Arrêt de la Cour administrative (12 juillet 2005)

4. Judicial competence

Civil procedures code of 16 September 1998

Art. 42 establishes that for purposes of compensation for injury caused by offences or negligence, at the plaintiff's option, the application may be brought before the courts of the place of domicile of the defender or of the place in which the deleterious act took place

5. Summary

1. National law:*11 août 1982. – Loi concernant la protection de la vie privée ; Loi du 8 juin 2004 sur la liberté d'expression dans les medias ;* 1. L. 23 mai 1927 concernant les publications obscènes ; L. 29 décembre 1937 permettant d'interdire l'entrée au Luxembourg de publications étrangères obscènes ; L. 27 juillet 1991 sur les médias électroniques ; L. 3 août 1998 sur la promotion de la presse écrite et règl. d'exécution ; L. 2 août 2002 sur la protection juridique des services à accès conditionnel et des services d'accès conditionnel.
Case law: Luxembourg Court of Appeals, 15/02/07; Luxembourg Court of Appeals, 31/01/07; Luxembourg Court of Appeals, 06/01/05 :
2. General law. Art.3 Civil Code "Public order and security laws are binding on all those who live in Luxembourg territory". There is no special procedure for conflict of laws for offences to govern infringements of the right to private life committed by the media.
3. Transposition of the Directive: As a result Luxembourg law applies when the data controller's establishment or its residence (which is the same thing) are in Luxembourg in the same way as the Directive. This adheres fully to the Directive.
4. Judicial competence: *Civil procedures code of 16 september 1998;* Art. 42 establishes that for purposes of compensation for injury caused by offences or negligence, at the plaintiff's option, the application may be brought before the courts of the place of domicile of the defender or of the place in which the injury took place.

Malta[71]

1. SUBSTANTIVE LAW

Maltese law contemplates 'privacy' with a two-fold approach. It first establishes a general and rather subjective right to privacy by way of the Maltese Constitution and the European Convention Act (which transposes the provisions of the European Convention on Human Rights into Maltese law). Additionally, it further recognises and indirectly promotes the enforcement of the privacy right by means of various secondary laws and regulations that each independently contemplate the notion of privacy.

The *Maltese 1964 Constitution*, as amended over the years, stipulates the rights appertaining to Maltese citizens including the right to privacy. Moreover, the European Convention Act of 1987 (Chapter 319 of the Laws of Malta) ratified the European Convention on Human Rights thus allowing for its direct application and enforceability in Malta. Therefore an analysis of the rights contained in the Maltese Constitution and any interpretation of the said rights by the Courts of Malta must undoubtedly be carried out in this context. Essentially, this means that the Maltese judiciary within its constitutional jurisdiction may apply the provisions of both the Constitution and the Convention, whereas on the other hand, the European Court only has the competence to apply the latter and may not necessarily interpret the law in the same way as the Maltese Courts may interpret it.

It is also important to consider that following Malta's) accession to the European Union in 2004, the acquis communitaire and EU legislation have a positive and direct impact on Maltese legislation and the way the Courts are to interpret such laws and in fact, various European Union initiatives, particularly those related to Data Protection, have had an important impact on Maltese law.

Article 32 of the Constitution on the Fundamental Rights and Freedoms of the Individual stipulates that every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:

[71] Dr. Paul Gonzi and the Unversity of the Basque Country.

(a) life, liberty, security of the person, the enjoyment of property and the protection of the law;

(b) freedom of conscience, of expression and of peaceful assembly and association; and

(c) respect for his private and family life.

It is therefore sub-article 32(c) that is of concern here, and yet this article is a general provision that still does not give a profound insight into the concept of privacy. It fails to define what the terms ‘respect’, ‘private’ or ‘family life’ really mean and for that reason is dependent upon the discretion and interpretation of the Courts.

Arguably, the right to privacy is enshrined as a fundamental human right in the Maltese Constitution only ‘to a degree’ – and this because the right to privacy per se, albeit referred to as a sui generis right, is not defined. Moreover as was confirmed by a number of cases (see *Schembri Joseph vs Hon. Prime Minister et al* - 2002) Article 32 of the Constitution is not directly enforceable under Article 46 of the Constitution (Article 46 is the article that confers jurisdiction on the Constitutional Court to examine infringement of fundamental human rights. It stipulates that only the rights under Articles 33 to 45 of the Constitution are in effect directly enforceable.) Therefore, Article 32 has always been interpreted as an Article that contains a declaration of principles, which, in spite of them being laudable and should be followed, are not enforceable before a Court.

Notwithstanding this however, the Court in the *Schembri* case emphasised that the right to respect of the person’s) private life, home, and correspondence also result from Article 8 and Article 1 of the first Protocol of the European Convention which are incorporated in Maltese law by Chapter 319.

The Court in *Schembri* however held that these rights, just like any other rights (except perhaps those relating to torture and inhuman treatment of persons) are all subject to exceptions that in turn would be in the interest of other rights, just as equally important, belonging to society in general. With reference to *Stjern Vs Finland* (1994 – EHHR) the Court concluded that Article 8 (and hence Article 32 of the Constitution) are subject to exceptions made in favour of, amongst other things, public interest, health or morals, or ‘for the protection of rights and liberties of third parties’. Therefore, "The right to respect for private life and home must not be looked at in isolation", and "a fair balance sheet had to be struck between the competing interests of the individual and the community as a whole".

This is inline with the exception to Article 8 expressed in the European Convention Act which states that interference by a public authority may arise if it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the

economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

This said, a number of important decisions have been determined by the Courts of Malta, in particular by the Constitutional Court, with reference to Article 32(c). As shall be seen, most cases have been related to the publication and/or distribution in Malta of defamatory or libellous writings (regulated under Article 32 in terms of the respect for privacy but also by Article 41 of the Maltese Constitution that transposes Article 10 of the European Convention on Human Rights on the freedom of expression.

Together with Article 32 another article of the Constitution that is relevant to the notion of privacy is Article 38 which speaks of the protection of the privacy of the home or other property of the individual. In brief, this lays down the principle that subject to certain obvious exceptions, no person shall be subjected to a. search of his person, premises or his property or the entry by others on his premises.

Press Law & Privacy

As alluded to above, the right to privacy resurfaces with respect to issues related to defamation and libellous publications. In fact, Maltese law provides for the specific regulation of publications and distribution of publications by means of the 1974 Press Act as amended (Chapter 248 of the Laws of Malta).

The offences regulated by the Act include inter alia, the publication or distribution of printed matter that give rise to (i) distribution of racist threats or insults, (ii) obscene and/or defamatory libel, (iii) malicious publication of false news, (iv) divulging of professional secrets, (v) negligent publication of false news, and (vi) publication with intent to extort money or to instigate an offence or to incite to disobey the law. Criminal and/or civil proceedings may be instituted against both the author and the editor of any work (or if the latter two persons cannot be identified, the publisher of the work) and it is no defence to prove that the writing was a copy, or an extract, or abridgement, or translation of another writing which has been otherwise printed or published.

In spite of the above it must be reiterated that no right is absolute - or rather – a fundamental right subsists (or should subsist) along a number of other equally important fundamental rights. Therefore, as has been confirmed by numerous court decisions, the right to privacy provided by the Constitution (or the European Convention) as enforced by the Press Act is subjected to and must take into account other rights, particularly the rights to freedom of expression (established under Article 41 of the Constitution or similarly under Article 10 of the

Convention) or the right to freedom of thought, conscience and religion (established under Article 9 of the Convention.

In relation to the Press Act key emphasis is generally put on the freedom of expression which is perceives as as a right to hold, receive and express information and ideas freely and without interference.

Indeed, this right is also not absolute and for instance Article 10 of the European Convention itself imposes certain restrictions and limitations to the right (e.g. for national security, territorial integrity, protection of health and morals, preventing the disclosure of confidential information and so on). In addition other rights (such as that of privacy) by their very existence (or rather as a result of their being enforced) restrict Article 10. Similar restrictions apply under Article 41 of the Maltese Constitution and under the Press Act which makes provision for privileged publications, journalistic freedoms and the need to create a balance sheet when the matter “refers to the domestic life of the aggrieved party”.

Breach of Confidence – Civil Offence

An infringement of one’s) privacy could arise when information contained in confidence - or information which a person has clearly stated to be confidential and acted to keep it as confidential – is no longer retained as confidential without the consent of that person.

Under the Maltese Civil Code breach of confidentiality could amount to a breach of Fiduciary Obligations towards the person where such Fiduciary obligations arise in virtue of law, contract, quasi-contract, trusts, assumption of office or behaviour whenever a person (the "fiduciary") receives information from another person subject to a duty of confidentiality and such person is aware or ought, in the circumstances, reasonably to have been aware, that the use of such information is intended to be restricted.

Fiduciary obligations also arise from behaviour when a person (a) without being entitled, appropriates or makes use of property or information belonging to another, whether for his benefit or otherwise; or (b) being a third party, acts, being aware, or where he reasonably ought to be aware from the circumstances, of the breach of fiduciary obligations by a fiduciary, and receives or otherwise acquires property or makes other gains from or through the acts of the fiduciary.

Article 1044 of the Civil Code further stipulates a general principle of law whereby if any damage has been unjustly caused, any person who has wilfully contributed to that damage with advice, threats, or commands, shall also be guilty of an offence. This might possibly apply in the case of damages that may arise out of breach of privacy and/or fiduciary obligations.

Harassment - Criminal Offence

Article 251A of the Maltese Criminal Code stipulates that a person shall be guilty of an offence if he/she pursues a course of conduct: which (a) amounts to harassment of another person, and (b) which he knows or ought to know amounts to harassment of such other person,.

2. RULES OF CONFLICT

The source of the rules of conflict of Malta are found basically in the rules of conflict of the United Kingdom. At the present time no Maltese law exists that clearly establishes its own rules of conflict. Therefore, legal decisions are the sole national source of these rules, which interpret and apply the rules of conflict of the United Kingdom; that is to say the *double actionability rule* according to the jurisprudential interpretation made in the cases *Phillips v. Eyre* (1870) L).R. 6 Q).b. 1 (Exch.), *Boys v. Chaplin* (1971) AC 356 and *Red Sea Insurance v. Bouygues SA* (1994) 3 All ER 749 (CA).

3. CASE LAW CONCERNING THE RULES OF CONFLICT

We have no proof of the existence of case law in this connection

4. SPECIALISED COURTS

In Malta there are no specialised courts thus such courts do not exit. Any dispute would have to go to the normal civil court.

5. DIRECTIVE 95/46/CE

The Data Protection Act of 2001 was enacted in Malta on the 14th December 2001, with both sides of the House of Representatives voting in favour of the Act. It is significant of course that the European Directive, upon which the Maltese Data Protection Act is based, expressly recognises its origins in the right of privacy as expressed in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Therefore the Data Protection Act provides for the protection of individuals against the violation of their privacy by the processing of personal data and for matters connected therewith or ancillary thereto. It was brought fully into force on the 15th July 2003, enabling data subjects to enjoy their rights under the Act.

In terms of the cross-border enforcement and territorial application Article 4 of the Data Protection Act transposes art. 4 of the Directive as follows:

> *"(1) This Act shall also apply:*
> *(a) to the processing of personal data carried out in the context of the activities of an establishment of a controller in Malta or in a Maltese Embassy or High Commission abroad;*
> *(b) to the processing of personal data where the controller is established in a third country provided that the equipment used for the processing of the personal data is situated in Malta.*
> *(2) Without prejudice to the following proviso, the provisions of subarticle (1)(b) shall not apply if the equipment is used only for purposes of transit of information between a third country and another such country:*
> *Provided that the controller in such a case shall appoint a person established in Malta to act as his representative".*

In this case, section 1.b) does not require, as does art. 4 of the Directive, that when the entity responsible for the processing of the data is not established in Malta and makes use of resources situated within its territory, in order for the Law of Malta to apply, it is necessary for it to be established within a Non-Member State. The Law of Malta refers to the establishment in "third States", where the other Member States would also be included. Accordingly, the application of the Law would cover cases not provided in the Directive, potentially expanding its scope of application; this means, in turn, nonfulfilment of the Directive as it goes against the spirit of the Directive.

NETHERLANDS[72]

1. Autonomous Legislation

a) The Constitution

Article 10 of the Dutch Constitution of 1983 recognises the right to privacy.

b) Information on relevant legal provisions on defamation

- *Civil Code*

Defamation is covered by the Civil Code, Book 6, Title 3, Article 162: tort (wrongful act).

• Under the civil code, the defendant can equally call to his defence that disclosure of the defamatory statements was in the general interest. This happens particularly frequently when it concerns statements expressed through the media.
• In the case-law of the Supreme Court it is explicitly recognized that a judgement debt in cases concerning statements expressed via the media constitutes an interference in the right the freedom of expression, and therefore the case law of the ECHR on legitimate grounds for this interference (Art. 10.2 ECHR) needs to be taken into account.
• When the defamatory statement in question is not a fact but a publicly expressed opinion, the Court will be particularly reserved about demanding a sentence.

Possible sanctions for defamation under civil law are:

1) compensation of material or immaterial damages
2) declaration of the wrongful or defamatory nature of the statements (by publication of the Courts judgement)
3) prohibition of the expression of the statements or repetition of the statements
4) publication of the verdict or a rectification

- *Criminal Code*

Title XVI of the Second Book of the Criminal Code contains provisions on defamation (articles 261, 262, 266, 267, 268, 270, 271). The specific subject of these different articles is as follows: Libel (art. 261 and 262), 'simple defamation' (art. 266), defamation of public authorities or the head of a friendly state (art. 267), defamatory written false complaint or declaration reported to the government (art. 268), defamation of a deceased person (art. 270), libel inflicted upon a deceased person (art. 271).
A charge may only be brought by a private party filing a complaint with the prosecutor, who then has the discretion to dismiss frivolous complaints.
Crimes under Title XVI can be punished with a prison sentence of between 3 months and 2 years, or alternatively with fines of different categories.
Apart from the provisions under Title XIV, Defamation, the Second Book of the Criminal Code also contains provisions on crimes against Royal dignity (Title II), crimes against heads of friendly nations and other internationally protected persons (Title III) and crimes against public order (discrimination) (Title V).

72 Jeroen Koëter and UBC. We have particularly taken into account the document on defamation and the media drawn up by the secretariat of the CDMC of the Council of Europe. CDMC (2006)007.

Public figures. Public figures, including politicians, are often expected to accept more criticism than private persons. They are, however, protected against rash accusations. The concept of "public figure" is applied by both the courts and the Press Council.
Insults to government institutions or officials. The Criminal Code penalises the "deliberate insult" of the King or Queen or other members of the Royal Family as well as the insulting behaviour toward the friend of a friendly nation or ambassadors of such nations, while that person is staying in the Netherlands in an official capacity. However, there have been no recent cases concerning the press under any of these charges.
Defence. Journalists do not need to prove the truth of their accusations; it is sufficient that they have assumed the accuracy of their statements in good faith and that they made them in the public's interest (Articles 261 (3) and 271).

c) *Developments in the application of criminal and civil law provisions concerning defamation at domestic level*

According to information provided by the Dutch authorities, a person will only be prosecuted and sentenced on the basis of defamation offences, if such a prosecution or sentence is compatible with the case-law of the European Court of Human Rights; this applies in particular with regard to the right to freedom of expression.
No progress has been reported concerning the fact that journalists may face up to 5 years imprisonment for intentional defamation of the Monarch and the royal family (FH-FP, 2004).

In the period between 2002 and 2004, a total of 4276 defamation cases were dealt with by criminal courts. In 104 of these cases, a prison sentence was imposed, of which the average duration was 13 days. The maximum prison sentence imposed was 2 months. In 3217 cases, a fine was imposed (average € 206, maximum € 1000).
It is not possible to distinguish an exact separate figure for defamation cases against journalists or media professionals, as this is not separately registered. However, the Ministry of Justice has indicated that this figure is very low and that prison sentences in these type of cases are extremely rare.

2. Applicable law

Several provisions of private international law are included in the General Provisions (Kingdom Legislation) Act [Wet houdende algemene bepalingen der wetgeving van het Koninkrijk] (hereinafter: AB).

There are also a number of Acts that on conflicts of laws in certain legal areas: divorce (Wet conflictenrecht echtscheiding, WCE), family names and given names (Wet conflictenrecht namen, WCN), marriages (Wet conflictenrecht huwelijksvermogensregime, WCHv), matrimonial property regimes (Wet conflictenrecht huwelijksvermogensregime, WCHv), life insurance, non-life insurance, matrimonial relations(Wet conflictenrecht huwelijksbetrekkingen, WCHb); maritime law and inland navigation law(Wet bepalingen van internationaal privaatrecht met betrekking tot zeerecht en binnenvaartrecht, WIPRZ), trusts(Wet conflictenrecht trusts, WCT), succession (Wet conflictenrecht eropvolging, WCErf), corporations, unlawful acts (Wet conflictenrecht onrechtmatige daad, WCOD), parentage (Wet conflictenrecht afstamming, WCA), adoption (Wet conflictenrecht adoptie, WCAd), register partnerships (Wet conflictenrecht geregistreerd partnerschap, WCGP)

The Unlawful Acts (Conflict of Laws) Act [Wet conflictenrecht onrechtmatige daad] stipulates that an unlawful act shall be governed by the law of the state in which the act took place (Article 3 paragraph 1 of the WCOD). However there are a number of exceptions to this, particularly if

the consequences of an act occur in a state other than that in which it took place, if the perpetrator and the injured party have their place of habitual residence in the same state or in the case of illegal competition. If an unlawful act is closely linked to another legal relationship between parties, the court may, contrary to the foregoing, also apply the law governing the other legal relationship to the unlawful act (Article 5 of the WCOD).

Contrary to the foregoing, parties may also choose the applicable law themselves (Article 6 of the WCOD).

There is no specific rule for attacks against character by the media.

Public order:

Foreign law must be disregarded if that law or its application is in contravention of international public order under private law. This is the case if (the application of) the foreign law would infringe the fundamental principles of the Dutch legal system. The rule must be applied in a restrictive manner. The sole fact that the foreign law differs from Dutch law is insufficient grounds to invoke public order, even if the Dutch law in question is of a mandatory nature. If it is not the rule itself but rather its application that may potentially breach the public order, the assessment of this may then partly depend on the extent to which the case is linked to Dutch jurisdiction. Public order may be invoked, even if the regulation in question does not contain a provision to this effect.

Jurisprudence:

- Dutch Supreme Court November 19, 1993, NJ 1994, 622.
- Dutch Supreme Court November 19, 1993, NJ 1994, 622, ground 4.2.
- *District Court of Arnhem, February 14, 1997, NIPR 1997, 247*

In 1997 the president of the District Court of Arnhem ruled on a case in which Dutch plaintiffs invoked the responsibility for damage to their reputation or good name through a publication in the German magazine" Stern ". The plaintiffs, resident in Curacao, sued the journalist who had written the article and who lived in the Netherlands. The magazine was sold in Germany and in Netherlands. In response to the publication —which was about smuggled nuclear power— the Dutch Minister for Antillean and Aruban Affairs was asked questions in parliament. According to the presiding judge, Dutch law applied because the publication was distributed and the consequences of the damage occurred principally in the Netherlands.

- *Court of Appeal, January 11, 1996, NIPR 1997, 333*

In another case between the Dutch corporation Ahold and the Russian corporation Tonar, Dutch law also was applied by the Amsterdam Court of Appeal. However, unlike the previous example, the article was only published in the Netherlands, whereas the damage was inflicted on a foreign party that suffered the consequences in another country. Ahold and Tonar had signed a collaboration agreement. After a year, Ahold terminated the agreement with Tonar. A journalist from a Dutch newspaper asked Ahold what had happened and published an article on it. Tonar believed that the article misrepresented the situation. The court decided that Dutch law was applicable to this case, because the statements in the media were made in the Netherlands, by and on behalf of a Dutch organisation to a newspaper for a Dutch readership. in this case, no argument was made on the harmful consequences outside of the Netherlands.

3. Transposition of the Directive

DPL approved by the Senate on 06.07.2000 (O.J. 302/2000). Personal Data Protection Act (Wet bescherming persoonsgegevens), Act of 6 July 2000

Art 4. This Act applies to the processing of personal data carried out in the context of the activities of an establishment of a responsible party in the Netherlands.

2. This Act applies to the processing of personal data by or for responsible parties who are not established in the European Union, whereby use is made of automated or non-automated means situated in the Netherlands, unless these means are used only for forwarding personal data.

The transposing act fully complies with the European Directive.

POLAND[73]

1. Autonomous rules

a) Dignity and the right to private life

The Constitution of the Polish Republic of 2 April 1997 establishes in Art. 30 that dignity, being inherent and inalienable for all, constitutes a source of rights and liberties for citizens.

- *The 2007 Supreme Court Ruling* states that according to article 20 of the Polish constitution, the inherent and inalienable dignity of the person is inviolable and the respect and protection of it is an obligation of the public authorities. This obligation must be observed by the public authorities above all in those cases in which the State acts as *imperium*, via repressive acts which should not lead to greater restrictions on human rights and dignity than those resulting from the tasks of protection.

Art. 41.1 establishes that inviolability and personal security should be assured for all people. Any deprivation or limitation of liberty may be imposed only in accordance with the principles of and under procedures specified by statute.

Art. 42.2 states that the freedom and the privacy of communication is assured. Restrictions upon this liberty may only be adopted according to the terms of the statute.

Art. 51 establishes that no-one is obliged (except where stated) to supply personal information about themselves.

- ***The Civil Code of 23 April 1964***

Art. 23 establishes that the personal interests of an individual, particularly the health, freedom, honour, freedom of conscience, name or pseudonym, image, secrecy of correspondence, and the inviolability of the home and of the creative scientific or artistic activity of the creator are protected by civil law independently of the protection apportioned by other regulations.

- *Supreme Court judgment of 11 May 2007, (I CSK 47/07)* It is possible to challenge the degree of protection for facts relating to the private life of a public person if they are connected to their public duties.

- *Judgment of Appeal Court in Katowice of 4 April 2007, (I ACa 139/07*) Should a particular person infringe upon the personal interests of other people, such as the right to privacy, control of one's own image, right to liberty and private property, he or she will thereafter be unable to legitimately demand the protection of his or her own personal interests if in turn he or she as the author of said infringement allows (or forces) other persons to behave similarly.

- *Supreme Court judgment of 21 March 2007 (I CSK 292/06).*

[73] UBC. Particular attention was paid to the document on defamation and press media created by the Secretariat of the CDMC at the Council of Europe. CDMC (2006)007.

1. Facts which give rise to doubts cannot be considered truthful within actions linked to justified public interest or sensationalist acts carried out by the press.
2. A person cannot lose personal dignity, this being an internal conviction of one's moral and ethical impeccability and honour as an expression of other people's positive attitudes towards the personal and social value of an individual.
3. If in certain circumstances an infringement of a person's dignity or honour is not illegal, this does not mean that no infringement has occurred: quite the opposite – the determination that an infringement occurred is the basic premise on which the question may be resolved as to whether the author was responsible in light of article 24 of the Civil Code, the key point in this respect being whether the infringement in the given circumstances can be justified, the key factor being if there was no illegality involved.

Article 24. of the Civil Code establishes that:

§ 1. Anyone whose personal interest is threatened may take necessary steps to ensure the action stops, except where illegal. In the case of infringement, he or she may also demand that the person responsible carry out any measures necessary to block its effects, in particular a declaration of the appropriate content in the appropriate form. Furthermore he may also demand financial satisfaction or that the appropriate monetary sum be paid to a named public cause.
§ 2. If damages arise as a result of the infringement of personal interest, the injured party may demand reparation for the damages in accordance with general principles.

- *Supreme Court judgment of 24 January 2008 (I CSK 338/07)* A defendant accused of infringing personal interests may not rely on the exclusion of the illegal act if the publication is based solely on official documents and its author did not intend to enter into contact with the person being criticised.

- *Supreme Court judgment of 12 September 2007 (I CSK 211/07*) Actions in the justified public interest or sensationalist acts carried out by the press may not publish false statements.

Art 8 establishes that the circulation of an image requires the permission of the person represented in it. Except where clearly stated to the contrary, permission is not required if the person has received the agreed payment.

2. Permission to circulate an image is not required:

1) of a generally recognised person if the image was taken in relation to the execution of their public duties, particularly duties of a political, social and professional nature;
2) of a person forming only one part of a whole, such as a meeting, a landscape or a public event.

- *Supreme Court judgment of 20 May 2004 (II CK 330/03*) The responsibility for proving that the circulation of an image does not exceed the reach of the permission obtained and for the specified purpose rests with the party circulating the image.

- *Judgment of Appeal Court in Krakow of 19 December 2001 (I ACa 957/01) y Judgment of Appeal Court in Warsaw of 13 January 1999 (I ACa 1089/98)* Articles 81 and 83 of the copyright law protect the exclusive power of persons portrayed to control the circulation of their image. Each person has full autonomy of decision over whether their image may be circulated and in which circumstances. II. A person depicted in a photograph (or other physical depiction of their image) may limit as they see fit the degree of permission to circulate their image: permitting publication only in a specific

periodical and / or in specific circumstances (e.g. in relation to the specific text of a press article) fixes the time limits for publication) III. For application of article 81.2.2. of the copyright law it is necessary to determine the relationship between an image of persons and other representative elements; permission to circulate an image is not required if it is an incidental element or accessory, which is to say that the theme and nature of the representation is unchanged if the image is removed.

- ***PRESS Law Act of 26 January 1984***

Art. 31 establishes

Upon demand of an individual, legal entity or other organisational unit, the editor-in-chief of a journal or newspaper must publish free of charge:
1) the denial and substantive norms regarding false or imprecise notices,
2) the response to a declaration which threatens personal interests.

- **Supreme Court judgment of 6 October 2006 (V CSK 151/06)**

1. Personal interest is infringed by a press publication only if, according to an average recipient (the reader) of said material, the information contained therein infringes the specific personal interest of the individual.
2. If the wronged party referred to in article 39 of the Press law has not requested the editor-in-chief to publish a correction, he or she may not ask the court to require the editor-in-chief to do so.

- **Judgment of Appeal Court in Poznań of 27 September 2005 (I ACa 1443/03)** The obligation of the editor, editor-in-chief and author of the press material to apologise for infringement of personal interests caused by the publication of such material is not a joint obligation under the auspices of article 378.2 of the Civil Procedures Code. The press law does not require the author to contact an individual before publishing an article including unfavourable information about them.
The behaviour of public persons affects "public life" and is the basis for the reasonable interest of the wider public and rights relating to the acquisition of information. For this reason, it is commonly assumed that the scope for permissible criticism is wider and the permitted protection weaker with regard to such individuals.

b) Defamation

- **Criminal Code**

Art. 135.2. Whoever publicly insults the President of Republic of Poland in public, shall be subject to imprisonment for up to 3 years.

Art. 137
Paragraph 1 penalises public defamation, destroying, damaging or removal of an emblem, banner, standard, flag, ensign or other symbol of the State and provides for that offence a fine, restriction of liberty or deprivation of liberty for up to one year.
Paragraph 2 penalises the same behaviours as indicated in paragraph 1 but these behaviours must be directed towards emblems and symbols of other country publicly displayed by a mission of this State or upon an order of the Polish authority and provides for this offence a fine, restriction of liberty or deprivation of liberty for up to one year.

Art. 226
Paragraph 1 penalises defamation of a public official or a person called upon to assist him, in the course of and in connection with the performance of official duties and provides a fine, restriction of liberty or deprivation of liberty for up to one year for this offence.
Paragraph 3 penalises public defamation or humiliation of the constitutional authority of the Republic of Poland and provides a fine, restriction of liberty or deprivation of liberty for up to two years for this offence.

Art. 236: "Insulting a public official or one assisting a public official in the course of and in connection with the performance of official duties," shall be punishable by up to two years imprisonment or a fine.

Art. 270: "Publicly insulting, ridiculing and deriding the Polish nation, the Polish Republic, its political system or its principal organs," shall be punishable by six months to eight years imprisonment.

Art. 273: If the acts prohibited in Art. 270 are committed in print or through the mass media, the punishment is one to ten years imprisonment.

The Penal Code provides for criminal responsibility for defamation, which is an offence prosecuted upon motion of the injured person, although the prosecutor may join the proceedings if an important social interest so requires (Article 212.1. Whoever accuses another person, a group of persons, an institution, a legal person or an organisational unit without legal personality, of such conduct or characteristics as may degrade them in public opinion, or expose them to the loss of confidence necessary for a given position, occupation, or type of activity, shall be subject to a fine, limitation of liberty, or imprisonment for up to 1 year.) The penalty is more severe if the offence has been committed through the media (Article 212.2)

- **Developments in the application of criminal and civil law provisions concerning defamation at domestic level**

In a recent case involving the editor-in-chief of the weekly Wiesci Polickie (Police News), the journalist was sentenced to a three-month prison sentence for libeling a local official after having refused to apologise in writing. The Polish Supreme Court upheld the sentence of imprisonment on 22.06.2004 (see inter alia CPJ, 06.02.2004, 23.06.2004; RSF, 02.04.2004, 23.06.2004; IPI, 25.06.2004; IFJ/IFEX, 01.07.2004; EFJ, 01.07.2004).
FH evaluates at more than 40 the number of investigations pending against journalists and editors for violations of the press laws, defamation or misuse of confidential information (FH-FP, 2004). IHF and IPI denounce the growing pressure on media and journalists which is reportedly exerted to stop their investigative efforts and curtail press freedom (IHF-AR, 2004; IPI-AR, 2003).

2. Applicable law

In Polish law, article 31 of the Law on Private International Law governs the question of the law controlling non-contractual obligations. However, by analogy to what happens with regard to contractual obligations, the applicable law is also governed by bilateral and multilateral agreements, as well as by national legislation via application of sectorial directives regarding conflict of laws. This regulation takes precedence over the dispositions of the aforementioned Law.

- In the case of road traffic accidents, the 1971 Convention takes precedence over the law applicable to road traffic accidents, to which Poland is a party.

- In the framework of its application, the regulations regarding conflict of laws in sectorial directives take precedence over the dispositions of the Law (for example, with regard to consumer protection).

Special rule on non-contractual obligations
Parts 1 and 2 of Article 31 of the Law establish that a non-contractual obligation is governed by the law of the country where the act constituting the source of the obligation took place. However, if the parties are citizens and residents of the same country, the law of that country is applicable.

Public order
Article 6 of the Law on Private International Law establishes an exception relating to public order, according to which a foreign law may not be applied if said application gives rise to an infringement of the fundamental principles of the Polish Republic's public order.
This disposition is only applied exceptionally, in cases in which the foreign law violates the essential principles of judicial order in force at the time of the judicial resolution. Furthermore, before application it is necessary to consider not just the differences between the national and the foreign laws, but also the consequences of applying these two legal ordinances in a specific situation. Essentially, it is possible that the application of rules from different legal systems produces similar results in spite of the existence of radically different regulations, thereby excluding the application of the aforementioned Article 6.

3. Transposition of the Directive

Act of August 29, 1997 on the Protection of Personal Data, amended January 1, 2004, March 1, 2004, May 1, 2004

Art. 3 states that said law shall be applicable to:
1) non-public bodies carrying out public works
2) individuals, legal entities and organisational units which are not legal entities, if they are involved in the processing of personal information as part of their business activities or profession or implementation of statutory objectives when they implement same or are resident on territory belonging to the Republic of Poland or a third country if they are involved in the processing of personal information via technical means located on territory belonging to the Republic of Poland.

Criterion for establishment or residence of the party responsible for the file. Complies with the Directive.

Art. 31. In case of the processing of personal data by the subjects having the seat or residing in a third country, the controller shall be obliged to appoint its representative in the Republic of Poland.

4. Legal jurisdiction

The Polish Civil Procedures Code envisages four types of territorial jurisdiction: general (articles 27 to 30 of the CPC), concurrent (articles 31-37 of the CPC), exclusive (articles 38-42 of the CPC) and special (articles 43-46 of the CPC)

5. Summary

1. Autonomous rules: The Constitution of the Polish Republic of 2 April 1997 comprises rights related to the person in its Articles 30; 41.1; 42.2 and 51.

Art 23 of the Civil Code, of 23 April 1964, states that the personal interests of an individual, particularly the health, freedom, honour, freedom of conscience, name or pseudonym, image, secrecy of correspondence, and the inviolability of the home and of the creative scientific or artistic activity of the creator are protected by civil law independently of the protection apportioned by other regulations. Related articles 24 and 8.

PRESS Law Act of 26 January 1984
Jurisprudence: Judgment of Appeal Court in Poznań of 27 September 2005 (I ACa 1443/03); Supreme Court judgment of 6 October 2006 (V CSK 151/06);

2. Conflict rules:
Parts 1 and 2 of Article 31 of the Law on Private International Law establish that a non-contractual obligation is governed by the law of the country where the act constituting the source of the obligation took place. However, if the parties are citizens and residents of the same country, the law of that country is applicable.

3. Transposition of the Directive: Act of August 29, 1997 on the Protection of Personal Data, amended January 1, 2004, March 1, 2004, May 1, 2004; Criterion for establishment or residence of the party responsible for the file. Complies with the Directive.

4. Legal jurisdiction: The Polish Civil Procedures Code envisages four types of territorial jurisdiction: general (articles 27 to 30 of the CPC), concurrent (articles 31-37 of the CPC), exclusive (articles 38-42 of the CPC) and special (articles 43-46 of the CPC)

PORTUGAL [74]

1. Autonomous Rules

The Portuguese Constitution considers personal rights as basic offences. The right to life, to the integrity of the person, to personal identity and to personal development, the right to defend one's reputation, the right to one's own image, and the right to privacy are all rights protected in the Constitution.

The Civil Code dedicates a special section to personal rights.

Defamation

Civil Code
Article 483 of the Civil Code imposes civil liability on the authors of illicit facts. If a person violates someone else's rights or any legal rule that protects the interests of others with prejudicial intention or negligently illicitly is obliged to compensate the harmed person for the damage caused. Article 484 of the Civil Code also foresees liability for an offence against somebody else's reputation or good name.

Penal Code Article 180 of the Penal Code stipulates a penalty for defamation of up to six months of imprisonment (no minimum limit) or of a fine of up to 240 days (no minimum limit). Defamation is defined as a judgment about someone or the imputation to a person of a fact that is offensive of her honor or consideration when the perpetrator is addressing a third party. Suspicion and the reproduction of one offensive imputation or judgment are also considered defamation.

The aforementioned conduct shall not, however, be punished when the imputation is made in order to fulfill legitimate interests and the author proofs the veracity of such imputation or if he has a serious basis to believe, in good faith, this imputation to be truthful (180 nr 2). Is the assertion however related to a fact concerning the intimacy of private and family life, legitimate interest and truth are not considered adequate defenses, unless the defendant made the assertion in the exercise of a right, in the accomplishment of a duty imposed by law or legitimate order of authority or with the consent of the envisaged person (Article 180 nr 3 conjugated with Article 31 al. b) c) and d)).

Legal provisions concerning defamation are established under the assumption that the author who addresses a third party with a conscientious intention to harm, imputes facts or suspicions to another person with prejudice of her honor or consideration. The author can claim good faith as a defense, except in those cases where he did not accomplish the information duty about the truth of the imputation imposed by the circumstances (Article 180 nr 4).

Article 184 in connection with Article 132 nr 2 j of the Penal Code, establishes that the penalty may be increased to the double of its maximum and minimum limits whenever the victim is a member of a body that exercises sovereign power, of the State's Council, Minister of the republic, magistrate, member of an organ of the government of one of the Autonomous Regions,

[74] Created by in collaboration with Magda Cocco and Vasco Marques Correia, with particular reference to the document on defamation and press media created by the CDMC Secretariat of the European Council.. CDMC (2006)007.

Justice Purveyor, civil governor, member of an organ of the local autarchies or of an organ or service of public authority, commander of a public force, member of a court's jury, witness, lawyer, agent of security forces or security services, public officer civil or military, public forces agent or a citizen in charged of public service, teacher or examiner or a minister of religious cult, and the claim relates to the victim, being in the exercise of his/her functions or the offence is made because of them. The same applies if the author is a public officer and acts with serious abuse of authority (Article 184 coordinated with Article 132 nr 2 j).

Article 183, nr 1 states that if the defamation is committed through means or in circumstances that facilitate its public diffusion or when the defamation is about the imputation of facts, and it is determined that the author knew that those facts where not true, the penalty shall be increased by 1/3 of its minimum and maximum limits. If the crime is committed through the media, the author may be punished with an imprisonment penalty of up to 2 years or with a fine never inferior to 120 days (Article 183 nr 2).

The court, nevertheless, may refrain from a penalty if the author explains the offensive claim before the court and the claimant considers it as satisfactory. The court refrain from a penalty if the offence was provoked by an illicit or a reprehensible act by the offended claimant.

Article 328 nr 1 provides a penalty of a maximum imprisonment of up to 3 years or a fine for offending the President of the Republic or the person who constitutionally replaces him. If the insult or defamation against the head of state are made through public speech, published writing or drawing, or through any technical public communication method (technical means that allows communication with the public), the author may be punished with an imprisonment penalty from 6 months up to 3 years or with a fine never inferior to 60 days.

In the Portuguese legal framework, defamation is considered a private crime. This means that in order to the alleged crime be submitted to trial a private accusation is required[55] (Article 188 nr 1). Such requirement does not, however, exist in those cases in which the victim is a member of a body that exercises sovereign power, of the State's Council, Minister of the republic, magistrate, member of an organ of the government of one of the Autonomous Regions, Justice Purveyor, civil governor, member of an organ of the local autarchies or of an organ or service of public authority, commander of a public force, member of a court's jury, witness, lawyer, agent of security forces or security services, public officer civil or military, public forces agent or a citizen in charged of public service, teacher or examiner or a minister of religious cult in the exercise of his/her functions or because of those functions (Article 188 nr 1 a)).

Developments in the application of criminal and civil law provisions concerning defamation at domestic level

In 2003, 3 971 cases of defamation, injury and other crimes against a person's honor were brought before courts and 1 494 defendants were convicted.
Currently the question of decriminalization of defamation is still under consideration by the Portuguese authorities.

2. Applicable law

Most Portuguese conflict rules are found in the Civil Code. For the Portuguese, personal law is the law of citizenship.

The Civil Code establishes that personal law applies to the existence and protection of personal rights, as well as to restrictions on the exercise of those rights. Therefore it is citizenship that

determines the concession of individual rights, the content of each of those rights and restrictions placed upon the exercise thereof.

Art 27 Civil Code – Rights of the Person

5. Personal law applies to existence to judicial protection not recognised according to Portuguese law
6. Personal law determines if a personal right exists and which of the personal rights are protected.
7. With regard to foreign individuals we believe the correct interpretation is that personal law for the foreign individual determines the content of the complaint while the Portuguese law determines the procedural route by which the complaint may be made. This interpretation is the only one conforming with another basic principle of international private Portuguese law which states that Portuguese law is always *lex fori* in procedural matters.
8. Notwithstanding the above consideration with regard to civil responsibility (e.g. offence) Portuguese law offers protection for personal rights and privacy.

In the Civil Code the conflict rule concerning the law applicable to responsibility is determined by the law on non-contractual obligations which brings forth formal rights for the person and for privacy.

ARTIGO 45º
(Responsabilidade extracontratual)
1. A responsabilidade extracontratual fundada, quer em acto ilícito, quer no risco ou em qualquer conduta lícita, é regulada pela lei do Estado onde decorreu a principal actividade causadora do prejuízo; em caso de responsabilidade por omissão, é aplicável a lei do lugar onde o responsável deveria ter agido.
2. Se a lei do Estado onde se produziu o efeito lesivo considerar responsável o agente, mas não o considerar como tal a lei do país onde decorreu a sua actividade, é aplicável a primeira lei, desde que o agente devesse prever a produção de um dano, naquele país, como consequência do seu acto ou omissão
3. Se, porém, o agente e o lesado tiverem a mesma nacionalidade ou, na falta dela, a mesma residência habitual, e se encontrarem ocasionalmente em país estrangeiro, a lei aplicável será a da nacionalidade ou a da residência comum, sem prejuízo das disposições do Estado local que devam ser aplicadas indistintamente a todas as pessoas.

Art. 45 (Civil Responsibility) 1. Civil responsibility, arising from a legal or illegal act, or the constitution of strict liability, is governed by the law of the country where the act occurred giving rise to the harm; or, in the case of liability by omission, the law of the country where the act ought to have occurred. 2. If the law of the country where the harm occurred considers the agent liable, but the laws of the country where the act giving rise to the harm does not, the former law is applicable on condition that the agent could have prevented the existence of the harm (the act), in that country, as a consequence of his / her action.
3. However, if the person sustaining harm and the appellant are of the same nationality, or in the lack thereof the same usual country of residence, and they find themselves from time to time in the same foreign country, the applicable law is the law of their common nationality or residence, without prejudice to the provisions of the local country which must currently be applied to all individuals.

3. Transposition of the Directive

The law relating to personal data protection, transposes to the Portuguese Law Directive 95/46/CE of the European Parliament and the Council of October 24th 1995, concerning data

protection on physical citizens, taking into account the treatment of personal data and the free movement of such data.

Art. 4 establishes its scope of application and in paragraph 3 reference is made to the present law in treating information accrued in the realm of activities carried out by the responsible party on Portuguese territory

Art 4 "A presente lei aplica-se ao tratamento de dados pessoais efectuado:
a) No âmbito das actividades de estabelecimento do responsável do tratamento situado em territorio português;
b)Fora do território nacional, em local onde a legislação portuguesa seja aplicável por força do direito internacional;
c) Por responsável que, não estando estabelecido no território da União Europeia, recorra, para tratamento de dados pessoais, a meios, automatizados ou não, situados no território português, salvo se esses meios só forem utilizados para trânsito através do território da União Europeia"

It respects the Directive

Romania[75]

1. APPLICABLE LAW

The Constitution of Romania in article 26 establishes the fundamental right to privacy. This article provides that:

> *"(1) The public authorities shall respect and protect the intimate, family, and private life.*
> *(2) Any natural person has the right to freely dispose of himself unless by this he causes an infringement upon the rights and freedoms of others, on public order, or morals".*

Concerning the legislation that implements this right, there is no special regulation having a general applicable feature. For the protection of such rights, the general civil or criminal law norms are used. As legal provisions of the civil law, we mention art. 998-999 Civil Code:

> Art. 998. – "*Any deed of a person, who damages another, binds the one in fault to remedy such damage*".
> Art. 999. – "*A person shall be held liable not only for the damage caused by its actions, but also for the damage caused through its negligence or imprudence*".

These articles protect natural and/or legal persons against damages caused in any way by another person. Based on these articles several judgments have been pronounced, by means of which it has been decided the compensation of material or moral damages incurred by one person through harmful actions.
As criminal law means applicable in the matter of protection of persons' legitimate rights and interests in connection with the extra-contractual obligations resulting from violations of rights related to private life issues and personality rights, we mention art. 205 and 206 of the Criminal Code (*Cod Penal).*

2. CONFLICT OF LAW

Law no. 105 of 22 September 1992 *on the Settlement of the Private International Law Relations*, governs the matter of the law applicable to extra-contractual obligations arising from infringement of personality rights by the media.

[75] Irena Tudorie and Gabriela Constantin (Popovici Nitu and Asociatii Attorneys at Law) and the University of the Basque Country.

The first point that becomes clear is that the law, taking account of the special nature of moral damage, lays down specific laws for the settlement of these points[76]. Thus, Art. 112 of the Law provides that:

> *"(1) The claims for redress based on a prejudice caused to the personality by the mass media, especially by press, radio, TV or by other public means of information shall be governed, at the choice of the injured person, by:*
> *a) the law of the state of his domicile or residence;*
> *b) the law of the state where the damaging outcome emerged;*
> *c) the law of the State where the author of damage has his domicile or residence or registered office.*
> *(2) In cases provided under letters a) and b) it shall also be required that the author of the damage should have reasonably expected that the effects of the prejudice caused to the personality be produced in one of the two states".*

Pursuant on this article the injured party can opt that any of the three following laws should apply: the law of the state of his domicile or residence, the Law of the state in which the deleterious effects arose or the law of the state in which the author of the injury has his domicile, residence or its registered office. In choosing between the three options, the injured party's position is clearly to be favoured.

Notwithstanding, as is stated in the second section of this article, if the injured party wishes to opt for application of the law at a) and b) the following will also be needed: the author of the injury should have had a reasonable expectation that the effects of the personality injury would have been produced in one of these two States[77]. Therefore, in this way, by this limitation the existence of a relationship is asserted between the author and effect of the injury in a particular place[78].

However, in Romania there is some debate as to whether the law of the habitual residence of the injured party has a separate significance. According to the majority opinion, habitual residence is a variant of the place of effect, so that it will only be applicable if injury was incurred there as well, and that will be the case only if the publication was distributed in that place[79]. Only thus can the limitation of the second section be understood, which for application of the law of the state of the injured party's residence, requires that the author should reasonably have foreseen the production of injury in that state[80].

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[76] R. Bogdan Bobei, *Legea nr. 105/1992 cu privire la reglementarea raporturilor de Drept International Privat*, 2005.
[77] *See ibid.*
[78] T. Kadner Graziano, *Gemeineuropaisches Internationales Privatrecht,* Tubingen, 2002
[79] *Cf. Ibid.*
[80] *Ibid*.

Finally, Art. 113 of the Law provides specific legislation for instances involving claims that do not involve seeking damages, but the right of reply or correction. In these cases this right will be governed by the law of the state in which the broadcast or publication was took place.

3. CASE LAW ON CONFLICT OF LAW

We are not aware of any specialised case law applicable to this field.

4. SPECIALISED COURTS

At the moment, in Romania, there are no legal courts specialized in the settlement of media/ press litigations. Any such litigation is subject to common law courts (courts of justice, law courts, courts of appeals, the High Court of Cassation and Justice), in compliance with the general procedural rules included in the Romanian Civil Code.
However, there is an administrative entity in the media field, which has jurisdictional powers[81]. It is the National Audiovisual Council, authority having jurisdictional powers, which reviews the violation of *de jure* norms of the audiovisual domain and enforces penalties accordingly. There is no liability in connection with resorting to this entity's jurisdiction prior or instead of informing law courts.

5. EC DIRECTIVE 95/46/EC

There are regulations in the Romanian law which are adopted for the enforcement of Directive 95/46/EC on the protection of natural persons in connection with the process of personal data and the free movement of such data. Law No. 677/2001, Law no. 102/2005 and Law No. 506/2004.
The Law No. 677/2001, in Art. 2.2, implements the provisions of Art. 4 of Directive 95/46/EC of the European Parliament and Council of 24 October 1995 relating to the protection of natural persons in terms of processing personal data and free circulation of such data. According to this provision:

> *"The present law applies to:*
> *a) personal data processing, carried out within the activities of data controllers based in Romania;*
> *b) personal data processing, carried out within the activities of Romanian diplomatic missions or consular offices;*

[81] By jurisdictional power it is understood the competence of an authority to settle the dispute, following a procedure based on contradictoriness and ensuring the right to defense, and pronouncing a binding decision for both parties.

c) personal data processing, carried out within the activities of data controllers not based in Romania, by using any means on Romanian territory, unless these means are only used for transiting the processed personal data through Romanian territory.
(3) In the circumstance referred to in paragraph (2) letter c), the data controller must designate a representative which must be a person based in Romania. The provisions of this law, applicable to the data controller, are also applicable to his representative, without prejudice to legal actions which could be initiated before a court of law against the controller himself".

This provision diverges from the provisions of the Directive in the following way: the Directive lays down that national Law shall be applicable when the persons responsible for processing the data are not established in any member State, and where they process personal data using resources, automated or otherwise, located in the territory of the state, the law of which is held to be applicable. Nevertheless, Romanian law will be applicable when this controller happens not to be established in Romania, for example in another member State, thereby widening the scope of application of the law from that set out in the Directive. This constitutes failure to comply with the Directive and might have the consequence that rulings handed down by the Romanian courts would not be recognised in other member states if the law applied in circumstances not provided for in the Directive.

6. BIBLIOGRAPHY

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Slovakia[82]

1. SUBSTANTIVE LAW

The right of privacy is provided in art. 19 of the Constitution of Slovakia. According to this provision:

"(1) Everyone has the right to the preservation of his human dignity and personal honor, and the protection of his good name.
(2) Everyone has the right to protection against unwarranted interference in his private and family life.
(3) Everyone has the right to protection against the unwarranted collection, publication, or other illicit use of his personal data".

The legal development of this right can be found in various regulatory instruments. Defamation in Slovakia, in addition to being a crime regulated by the *Criminal Code* (Law No 140/1961), is regulated in the *Civil Code* (Law No 40(1964)[83]. In art. 11 of the *Civil Code* it is stated that:

"Any natural person has the right to protection of his or her personality, in particular of his or her life and health, civil and human dignity, privacy, name and personal characteristics".

A person whose personal rights have been violated unjustifiably according to art. 13 of the *Civil Code* shall be able to request that the said violation be terminated and the consequences originating therefrom be eliminated, in order to obtain appropriate satisfaction. In those cases in which such satisfaction is insufficient, because the dignity and social standing of the affected person have been considerably diminished, the affected person may apply for compensation for non-pecuniary damages.

2. RULES OF CONFLICT

In Slovakian Law the rule of conflict relating to instances of privation of personal rights is to be found in *Law No 97/1963, on International Private and Procedural Law*. There is no specific piece of legislation that regulates cases of infringement of personality rights; therefore,

[82] University of the Basque Country.
[83]+++Secretariat of the Council of Europe:+++ "Examination of the alignment of the laws on defamation with the relevant case law of the European Court of Human Rights, including the issue of decriminalisation of defamation", Strasbourg, 2006, pp. 99-100.

the general rule concerning non-contractual obligations will apply. According to art. 15 of the Law:

"Claims to compensation of damages shall be governed by the law of the place where the damages occurred or by the law of the place where it came to the event that justifies the right to compensation of damages unless the matter is non-fulfillment of an obligation following from agreements or other legal acts".

Accordingly, compensation claims for damages caused in relation to personality rights will be regulated by the law of the place where the damages have occurred and by the law of the place where the act giving rise to the damages took place.

Applying this provision to the damages of personality caused by publications in the press, we can conclude that the Law of the State where the publication took place, the Law of the States of distribution, or any State where damages have occurred in respect of the privacy rights of individuals, may apply.

3. CASE LAW CONCERNING RULES OF CONFLICT

We have no evidence of the existence of case law relating to violation of personality rights with a transborder element.

4. SPECIALISED COURTS

We have no evidence of the existence of specialised courts for resolving differences relating to violations of personality rights originating in the media.

5. DIRECTIVE 95/46/CE

Provisions 2 and 3 of art. 1 set out the scope of application of *Act No. 428/2002 Coll. on Protection of Personal Data, as amended by Act No. 602/2003 Coll., Act No. 576/2004 Coll and Act No. 90/2005 Coll,* according to which Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 relating to the protection of natural persons concerning the processing of personal data and the free circulation of such data, is transposed. According to these provisions:

"(2) This Act applies to the state administration authorities, territorial self-government authorities, other public authority bodies, as well as to other legal and natural persons,

which process personal data, determine the purpose and means of processing or provide personal data for their processing.
(3) This Act also applies to the controllers, which do not have their registered office or permanent residence on the territory of

a) the Slovak Republic but are located abroad at a place, where the laws of the Slovak Republic take precedence based on an international public law,

b) a Member State of the European Union, provided that for the purposes of personal data processing they use fully or partially automated means or other than automated means of processing located on the territory of the Slovak Republic, while such means of processing are not used solely for the transfer of personal data through the territory of the Member States of the European Union; in such case the controller shall proceed pursuant to Section 23. Paragraph 3."

As can be observed, the provision of art. 4 of the Directive has been faithfully transposed to domestic legislation.

6. BIBLIOGRAPHY

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Slovenia[84]

1. SUBSTANTIVE LAW

Article 35 of the Slovenian Constitution (Protection of Rights to Privacy and Personality Rights) provides that: "*the inviolability of the physical and mental integrity of every person, his privacy and personality rights shall be guaranteed*". Therefore, as fundamental rights of the individual, privacy and personality are protected by the Slovenian supreme legislation.

When an individual suffers a violation of his private life, intimacy, dignity or any other right of a similar nature, the method of redressing the damage is established in the *Obligation Code*. Art. 179 of the *Obligation Code* provides that a person who is a victim of "*defamation of good name or reputation, the truncation of freedom or a personal right*" shall be able to demand the payment of "*just monetary compensation*". The extent of the compensation for intangible damages will depend on the importance of the affected asset and the purpose of the compensation.

One of the things which is very important concerns the Court Decisions. Only de infringements of personal privacy and personality rights itself is not enough. The infringement must also cause some damage, so called mentality pain and circumstances of each case, particularly the power of pain and the time lasting of the pain must excuse equitable money amount.

2. RULES OF CONFLICT

In Slovenian Law no special rule of conflict exists for cases of non-contractual obligation deriving from the violation of privacy or personality rights. Accordingly, the applicable rule will be the general rule intended for cases of non-contractual obligations. This is art. 30 of the *Private International Law and Procedural Act*. This rule provides that,

"1. for non-contractual liability for damages, the law of the place where the action was committed shall be used. If it is more favourable for the injured party, the law of the place where the consequence occurred shall be used instead, but only if the

[84] Rok Janez Steblaj and the University of the Basque Country.

perpetrator could not have foreseen or should have foreseen the location where the consequence occurred.
2. If the law determined under the first paragraph of this Article does not have a close connection to the relation, and a connection with some other law obviously exists instead, then that law shall be used".

This rule clearly favours the position of the victim of a violation of his privacy or his personality rights. In the event that it is more favourable for the victim, the law of the place where the consequences of the said action have manifested themselves can be applied, instead of the law of the place where the action giving rise to the damage took place, always provided that the other party could have foreseen that the damages would be extended to that other place.

Now, the possibility of opting for the application of the law that is most favourable to the interests [of the victim] is not of unlimited scope. That is to say, in no way does it seek to safeguard the position of the perpetrator of the unlawful act limiting the said possibility. Accordingly, the law of the place where the damages were manifested could be applied if it is considered to be more favourable to the victim, always provided that this option does not amount to a clear injustice for the perpetrator of the damage by involving the application of a law not anticipated by the latter. That is to say, irrespective of the applicable law, its application should be foreseeable for the perpetrator of the damage; this, in turn, will be foreseeable when the perpetrator can foresee that the damages resulting from his action could be manifested in the said State.

In addition to favouring the position of the victim, the second section of art. 30 provides for a rule according to which, when the law of the place of the occurrence or the laws of the States where the damage was manifested involve the application of a law that is not closely connected with the relationship, but the said connection exists with respect to another law, the latter may be applied. This rule introduces a degree of notable flexibility in the rule. The Court that hears the matter must evaluate these questions and decide as appropriate on the application of a Law other than those indicated in the first section of art. 30. In principle, this Law may be of any other State, always provided that there is a close connection with the relationship.

What are the circumstances to be taken into consideration when determining the said connection? In principle, the rule says nothing in this respect, and therefore the Court may take into account any circumstances that it considers to be appropriate in order to demonstrate this close connection. With time, case law should identify what these links are and the relevance of each of them. However, together with the flexibility, this

provision introduces a degree of uncertainty which may act against the value of foreseeability of the rule.

3. CASE LAW CONCERNING RULES OF CONFLICT

We have no evidence of the existence of case law relating to non-contractual damages originating from the violation of privacy and personality rights with transborder elements.

4. SPECIALISED COURTS

We have no evidence of the existence of specialised courts for resolving differences relating to violations of personality rights originating in the media.

5. DIRECTIVE 95/46/EC

The rule that transposes the Directive is the Personal Data Protection Act of the Republic of Slovenia. It is art. 5 that incorporates art. 4 of the Directive, when the domestic rule is applied. This article indicates that:

"(1) This Act shall apply to the processing of personal data if the data controller is established, has its seat or is registered in the Republic of Slovenia, or if a subsidiary of the data controller is registered in the Republic of Slovenia.
(2) This Act shall also apply if the data controller is not established, does not have its seat or is not registered in a Member State of the European Union or is not a part of the European Economic Area and for the processing of personal data the data controller uses automated or other equipment located in the Republic of Slovenia, except where such equipment is used solely for the transfer of personal data across the territory of the Republic of Slovenia.
(3) The data controller from the previous paragraph must appoint a natural person or legal person that has its seat or is registered in the Republic of Slovenia to represent it in respect of the processing of personal data in accordance with this Act.
(4) This Act shall also apply to diplomatic-consular offices and other official representative offices of the Republic of Slovenia abroad."

The said article reproduces the provisions of the Directive, and therefore it is possible to affirm that the transposition has taken place correctly.

SPAIN[85]

1. Internal rules

a) Right to privacy and to private life

In Spain the right to privacy and to private life is recognised constitutionally in article 18 of the CE (Spanish Constitution). The right to privacy is dealt with in the first part of chapter II under heading I of the CE, in which fundamental rights are proclaimed.

b) Right to freedom of expression and the freedom of information

The right to freedom of expression and the right to the freedom of information are found in articles 20. 1 a) and d) of the CE.

Jurisprudence Right to privacy and to private life versus the right to freedom of the press

- STC (Judgement of the Constitutional Court) 134/1999, FJ 5, (with reference to STCs 73/1982, of 2 December; 10/1984, of 26 November; 231/1988, of 2 December; 197/1991, of 17 October; 143/1994, of 9 May, and 151/1997, of 29 September) is an established doctrine of this Court that the fundamental right to privacy recognised in CE art. 18.1 is intended to guarantee individuals a private aspect to their lives, linked to the respect for their personal dignity (CE art. 10.1), when faced with the actions or knowledge of other parties be they public authorities or private individuals. The right to privacy gives rise to the right to protect this private aspect of life from divulgence of information concerning it by third parties and from unwanted publicity, not just for the person but for the family (STCs 231/1988, of 2 December, and 197/1991, of 17 October). (...) CE art 18.1 guarantees, therefore, the secrecy of our own private sphere and prevents third parties – be they individuals or public authorities - from deciding what the boundaries of our private life should be.
- STC151/1997, of 29 September
- STC 143/1994, of 9 May
- STC 254/1993, F. J.6: Together with the general declaration on the right to privacy, some facets of the same are specifically recognised, such as domestic privacy, freedom and confidentiality of private communications or secrecy of communication, in order to arrive at the constitutionalisation of the *habeas data* or informatics aspect of privacy.
- STC 29/1992, FJ 3, "where reporting results from the public interest (STC 171/1990, FJ 5, for all) it may then only apply to that which affects or disturbs the content of information which is necessarily in the interests of wider knowledge and fact spreading and situations of interest to the community. (…)". But that immunity may only be granted "for the right to information concerned if the disseminated matter affects by its aim or value the public realm not coinciding with that which may merely arouse or awaken the curiosity of others".
- STC 20/1992, of 14 February, FJ 3. "… regarding privacy, truth does not reduce, even presumptively, in any case, the injury" of the fundamental right".
- STC 197/1991, FJ 4: "not all information regarding a person of public notoriety enjoys that special protection, except that for him or her it is objectively applicable that,

[85] UBC. Particular attention was paid to the document on defamation and press media created by the Secretariat of the CDMC at the Council of Europe. CDMC (2006)007.

alongside that subjective element of the affected person's public character, the facts comprising the information, by their public relevance, do not affect privacy, restricted though this may be.".

- STC 172/1990 of 12 November, FJ 2. "The criterion for determining the legitimacy or illegitimacy of intrusions on personal privacy is not that of truth but exclusively that of relevance to the public of the divulged fact, which is to say that submission to public opinion, though truthful, must necessarily be in the public interest with regard to the subject in question".
- STC 12 November 1990
- STC 110/1984, FJ 3
- STC 231/1988, FJ 4: privacy and such facts affect not only the realm of personal privacy but also that of the family

c) Defamation in the Civil Code

In Spain, protection for defamation is granted in the penal regime as well as via Organic Law 1/1982 on civil protection of the right to honour, to personal and family privacy and to the protection of personal reputation. This law provides civil protection for this right against illegitimate intrusions. Art. 7 specifically mentions: imputation of value judgments via acts or expressions which harm the dignity of another person by lowering their reputation or self respect

According to article 9.2, this civil protection consists of sentencing to compensate for damages done; and article 9.3 states that there is the presumption of damage wherever an illegitimate intrusion has occurred. Compensation shall extend to moral harm, as relevant for the circumstances of the case and the seriousness of the injury effectively produced. In all cases the means of diffusion or the audience of the mass communication media is kept in mind.

Practical applications

Organic Law 15/2003, of 25 November, modified the Penal Code by introducing certain modifications in these types of offenses, and one may observe its modification from the article 206 types of Penal Code: increase of the minimum applicable fine for the offence of public defamation and the minimum and maximum amounts applicable to the offence of non-public defamation. Investigation by officially named lawyer was introduced for these types of offences should the injured party be a government employee or authority acting in a professional capacity.

In the civil order we see that Regulation 4 final [a] of Organic Law 10/1995, of 23 November, which adopted the Penal Code, gave a new reading to article 7.7 of Organic Law 1/1982: we consider as an illegitimate intrusion upon reputation the imputation of facts or the manifestation of value judgments which harm the dignity of another person, lowering his or her reputation or self respect.

In June 2004 the Supreme Court upheld the conviction of a newspaper for insulting the former King of Morocco. The newspaper had written that the former King had been involved in drug trafficking and though the court recognised that the accusation was true, it convicted the newspaper of having damaged the reputation of the former King. Reference must be made to the ECTHR trial Colombani v others France of 26.02.2002, in which violation of ECHR Article 10 was found for similar reasons.

2. Applicable law

General extra-contractual rule

Chapter IV of the Civil Code, on International Privacy Law Rules, establishes in art. 10.9.I that non-contractual obligations should come under "the law of the place where the fact occurred from which they derived".

Jurisprudence
SAP Madrid sec1, 4 January 1994

Qualification and public order
Article 12 Cc:

1. Qualification for determining the applicable conflict rule shall always be made in accordance with Spanish law.
2. Referral to foreign law shall be deemed made to the material law, notwithstanding the transfer that its conflict rules may make to another non-Spanish law.
3. In no case shall foreign law be of application when it is contrary to the public order.

Special rule for offences against private life
There is no special rule.

3. Transposition of Directive 95/46/CE

In Spain the transposition of the Directive took place towards the end of 1999 through:

- *Organic Law 15/1999, of 13 December, on protection of data of a personal nature,* (BOE (Official State Gazette) no. 298, of 14 December 1999).

The LOPD (Organic Law on Data Protection) presumes the repeal of Organic Law 5/92, of 29 October, on regulation of the automated processing of personal data (henceforth referred to as LORTAD) and the transposition of Directive 95/46/CE to Spain's internal order The objective of LOPD is to guarantee and protect public liberties and the fundamental rights of individuals, especially of their reputation and personal and family privacy with regard to treatment of personal data (art. 1).

Art. 2.1 of Organic Law 15/1999 concerns the applicable Law, stating:

Article 2. Scope. General rule

1. This Organic Law shall apply to personal data registered on a physical medium, making it suitable for processing, and to all methods of later use of this data by the public and private sectors.
All processing of personal data shall be governed by this Organic Law:
a) When the processing is carried out on Spanish territory within the framework of the activities of an establishment of the party responsible for the processing.
b) When the party responsible for the processing is not established in Spanish territory, Spanish legislation will be applicable when applying the rules of public International Law.

c) When the party responsible for the processing is not established in the European Union and uses in the processing of data media situated in Spanish territory, except where such media are used only for the purposes of transport.

Scope of application

We note that this law includes all relationships pertaining to the compilation of data even where they are between individuals or the Administration, public or private.

4. Conclusions

Organic Law 15/1999, of 13 December does not seem to follow the criterion chosen by the Directive in that it does not refer to the country of residence of the party responsible for the file but seems to point to the "place where data is processed".

We note that in the Spanish order, art. 4 c) Directive 95/46/CE is used in a general sense while the criterion established by the Directive in reference to the residence of the data-gathering business is set aside.
In one sense this option simplifies cases in which the responsible company is not located in non-Community third countries, given that for the purposes of the Spanish law attention will be paid to neither the company's residence nor its nationality. The main criterion is *lex loci delicti commissi* and there is no differentiation whether the data processing is carried out by a company resident in the EU or not, in contrast to the Directive. As a consequence of this differentiation one may state that the objective of protecting Community data processing companies derived from the Directive seems to have been lessened during transposition to Spain.

Jurisprudence

- STC 292/2000, of 30 November, FJ 6 and 7: "the content of the fundamental right to data protection consists of a disposal and control power over personal data which allows the individual to decide which information to provide to a third party, be it the State or an individual, or which information this third party may obtain, and which also allows the individual to know who possesses this personal data and for what reason, and allows the individual to oppose this possession or not."

5. Jurisdiction

Autonomous legislation

The special courts for the subject in hand are to be found in Art. 22.3 and 4 of the LOPJ. In such cases Spanish courts shall have jurisdiction when there is a lack of jurisdiction in the general courts (Art. 22 LOPJ).

Extracontractual obligations are found in art. 22.3, according to which Spanish courts shall have jurisdiction when the harmful event from which they derive occurred on Spanish territory or the right of the event's author and victim are normally resident in Spain.

Jurisprudence

AP Balearic Islands (Section 3), sentence no. 771/2000 of 27 November. JURISDICTION OF SPANISH COURTS: INADMISSIBILITY: Action for illegitimate intrusion on right of honour:

publication effected abroad: absence of express or tacit submission to Spanish courts: foreign residence of the defendant; TERRITORIAL JURISDICTION: tacit submission: inadmissibility: formulation of international plea before responding to the action.

Constitutional Court (First Division), sentence no. 300/2006 of 23 October
Constitutional Court (Plenary Chamber), sentence no. 292/2000 of 30 November

6. Summary

1. Autonomous legislation: In Spain the right to privacy and private life is recognised constitutionally in art. 18. The right to privacy is recognised in the first section of chapter II under heading I of the Spanish Constitution, where the fundamental rights are proclaimed. The right to freedom of expression and the right to freedom of information are found in articles 20.1 a) and d) of the Spanish Constitution.
Organic Law 1/1982, of 5 May, on civil protection of the right to honour, to personal and family privacy and to self respect
Jurisprudence Right to privacy and private life versus the right to press freedom: STC 134/1999, FJ 5, (with reference to SSTCs 73/1982, of 2 December; 10/1984, of 26 November; 231/1988, of 2 December; 197/1991, of 17 October; 143/1994, of 9 May, and 151/1997, of 29 September); STC151/1997, of 29 September; STC 143/1994, of 9 May; STC 254/1993.

2. There is no specific regulation for incursions on private life committed by the press media

3. Transposition of the Directive: Organic Law 15/1999, of 13 December does not appear to follow the criterion given in the Directive in the sense that it does not refer to the country of residence of the party responsible for the file but seems to refer to the "place where data is processed".

4. Judicial jurisdiction: Extracontractual obligations are found in art. 22.3 LOPJ according to which Spanish Courts shall have jurisdiction when the event from which the harm derived occurred on Spanish territory or the rights of the author and victim of the harmful event have habitual rights in Spain.

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SWEDEN[86]

1. National legislation

The Swedish Constitution of 1974 in its second chapter recognises a list of rights and freedoms of the individual. Specifically, article 3 guarantees protection to citizens "against any injury to their personal integrity arising from holding data affecting them via electronic means". Also the inviolability of the home and confidentiality of communications are the subject of express legislation, in article 6 of the Swedish Grand Charter

The Freedom of the Press Act

Chapter 7 on offences against the freedom of the press
Art. 4. "With due regard to the purpose of a universal freedom of the press as set forth in Chapter 1, the following acts shall be regarded as offences against the freedom of the press if they are committed by way of printed matter and if they are punishable under law:

14. libel, whereby a person alleges another is a criminal or is blameworthy in his way of life, or otherwise communicates information liable to expose the other to the contempt of others, and, if the person libelled is deceased, to cause offence to his survivors or which might otherwise be considered to violate the sanctity of the grave except, however, in cases in which it is justifiable having regard to the circumstances, or in order to provide information in the matter concerned, and proof is presented that the information was correct or that there were reasonable grounds for it; and

15. insulting words or behaviour, whereby a person insults another by means of offensive invective or allegations or by any other insulting behaviour towards him."
Both criminal and civil actions may be brought under the law on libel. Criminal actions may be brought by either public or private prosecution. Public prosecutions are rare and must be conducted by the Chancellor of Justice. Normally, public prosecutions are only brought when the injured party is a civil servant in this capacity. For example, the Chancellor has prosecuted cases where police officers were libelled in the line of duty. Individuals normally sue jointly for criminal liability and civil damages.

Opinions. Opinions or value judgements about a person can never be libellous. If formulated in a very insulting way, they may be judged as an affront (although there are few cases to illustrate this). If an opinion is based on implicitly expressed facts, it may thereby constitute a libel.

Defence: Truth, Public Interest and Public Figures
The key issue in many libel actions is whether the publication was "justifiable". A publication is justifiable when the public interest in the information (not to be confused with the interest of the public or general curiosity) overrides the interest in protecting the person concerned. For example, it would be considered justifiable to publish information about a minor tax fraud committed by a politician, whereas it would be considered unjustifiable to publish the same information concerning a person with no public record.

[86] UBC. Special attention was paid to the document on libel and the press and media prepared by the Secretariat of the CDMC [Spanish contemporary music broadcasting centre] for the Council of Europe CDMC (2006)007.

Institutions. Companies, organisations and government authorities have no rights under the law on libel. As a result, the press enjoys great freedom in scrutinizing and criticizing government, business corporations, unions and other institutions.

Insults to government institutions or officials. There is no criminal law protecting government institutions from insults or libellous statements.
The last remnant of such legislation disappeared in the mid-1970s when a provision which prohibited the "belying of state authority" was abolished on the grounds that, in a democratic society, government institutions should be open and responsive to all criticism, even when based on lies. Although government officials enjoy protection under the law on libel, actions on their behalf are rarely brought.

Developments in the application of criminal and civil law provisions concerning defamation at domestic level

According to HRP, the independent media remained active and expressed a wide variety of views without restriction (HRP, 2003).

2. Applicable law

The most important source of Polish private international is the law of 12 November 1965 on International Private Law. But international private law is only partly codified and consists of a collection of laws coming from Parliament and from case law. Most of the laws coming from Parliament have the objective of applying international agreements that Sweden has signed up to.

Specific legislation on prejudice or injury

- Articles 8, 14 and 38 of the law of road traffic accidents (1975:1410).
- Article 1 of law (1972:114) relating to the Agreement of 9 of February 1972 on reindeer grazing entered into between Sweden and Norway.
- Article 1 of law (1974:268) relating to the agreement for protection of the environment of 19 of February 1974 signed between Denmark, Finland, Norway and Sweden.

In general, the question of law applicable to non-contractual obligations is not governed by the legislation. In the ruling on case reference NJA 1969 s. 163, it was held that in non-contractual matters the liability for compensating for damage was determined in accordance with the law of the country in which the act causing the injury occurred (lex loci delicti). In this case the fact that the person causing the injury and the person suffering it had the same habitual residence was not taken into account. There is no case law clarifying the question of which law would be applicable when the country in which the injurious act was performed is different to the one in which the injury took place.

General law

It is considered to be a general principle of Swedish private international law that no provision of foreign law may apply when it is clearly incompatible with the principles of that country's general law system. Provisions of this nature may be encountered in the greater part of the legislation on international private law. Nevertheless, it should not be understood from this that general law restrictions have to be based on legislation. There have been very few cases decided in which foreign law has not been applied on grounds of general law.

The courts are usually competent to decide which Swedish legislation is obligatory at an international level.

3. Transposition of the Directive

The European Directive was transposed in Sweden by the Personal Data Law of 29 April 1998 (1998:204).

Art. 4 established that this law would apply when the database controllers were established in Sweden.

Also when the controllers were established in a third country but where they used resources situated in Sweden for collection of the data. In spite of that, this does not apply in cases where resources situated in Sweden are used for transfers from one third-party state to another third-party state

Art. 4
This Act applies to those controllers of personal data who are established in Sweden.
The Act is also applicable when the controller of personal data is established in a third country but for the processing of the personal data uses equipment that is situated in Sweden.
However, this does not apply if the equipment is only used to transfer information between a third country and another such country.
In the case referred to in the second paragraph, first sentence, the controller of personal data shall appoint a representative for himself who is established in Sweden. The provisions of this Act concerning the controller of personal data shall also apply to the representative.

COMPARISON. According to Swedish law, Swedish law will apply when the file controller is established in Sweden (where they reside in Sweden). This adheres fully to the Directive.
Moreover, equally with the Directive, Swedish law envisages that Swedish law will apply when the data controller is not located in Sweden but uses resources located in Sweden to collect data. In this it adheres fully to the Directive

4. Judicial competence

1. General law of territorial competence
According to the general regulations, the case should be heard in the place of residence of the defendant. It is considered that a natural person is resident in the place in which they are on the electoral register. It is generally considered that legal entities are domiciled in the place in which they have their main office.

It is also possible to bring a case before a Swedish court even although the person does not live in Sweden. If the defendant is not domiciled in Sweden, the case may be brought in the place where the defendant is situated or, in some cases, in their last known place of residence. In some civil disputes, legal proceedings may be brought in Sweden even although the defender is resident abroad. It is of crucial importance for the criteria of judicial competence that the defender should own property in Sweden or that there should be a contract concluded in Sweden.

In international cases it is important to remember that the Swedish rules on judicial competence are only applicable when Swedish authorities have judicial competence. In the majority of cases, Swedish judicial competence exists when a Swedish court is competent under national legislation. In this matter applicable international agreements should also be taken into account.

The main ones for Sweden are the Brussels I Regulation, the Brussels Convention and the Lugano Convention, which govern the judicial competence of courts if the defender is resident in a State covered in the Regulations or the Conventions. In these it is also established that the criteria on judicial competence, according to which applications for liability to pay may be made in the place in which the defender may have property may not apply to a person resident in a member state or a state that is a signatory of the Convention.

2. Specific legislation

- All persons who may have suffered injury may bring actions in the place where the injury was incurred or took effect. In principle, this rule does not apply to non-performance of contract. The remedy of compensation for a criminal offence can be claimed at the same time as criminal proceedings.
- Consumers may bring actions against a supplier of services before the jurisdiction of that supplier, in retail consumer cases.
- Cases relating to liabilities for payment stipulated by contract may be brought, in some cases, before the courts of the place in which the contract was signed. In contrast, there is no provision whatsoever in Swedish legislation conferring judicial competence on the courts of the place in which the contract was signed.
- In some cases actions may be brought against a business in respect of a dispute arising from an activity in the place where the activity was carried out

UNITED KINGDOM[87]

1. Material Law

No statutory English law dealing specifically with individual privacy rights (or similar infractions) exists. Data protection rules recognise some limited rights with respect to processing of photographs or images but, apart from copyright, no statutory protection of image and personality rights exists.

Regulations have developed through common law, via court rulings.

In 2000, the European Convention on Human Rights (ECHR) was incorporated into English regulations via the Human Rights Act (HRA), entering into force in England and Wales in the year 2000. Under the HRA courts are obliged to act in a manner compatible with the laws of the ECHR and must take the decisions of the European Court of Human Rights into consideration. Thus the courts must bear in mind on the one hand article 8(1) of the EHCR, which guarantees individuals the right to private and family life, privacy of home life and correspondence, and on the other hand article 10, which recognises the right to freedom of expression.

As a consequence of this statutory development, the courts have developed common law to bring the rights contained in the ECHR into full effect. The courts have extended common law in light of the ECHR to infractions of the obligations on confidentiality, thereby extending the redress available to individuals for infringement of their privacy.

Common law is in a state of development and change. The extent of protection under art. 8 of the ECHR has been defined by the courts on a case-by-case basis. The courts are gradually refining the test which serves to determine whether the individual can obtain any redress for invasion of privacy. The latest ruling under this question is that of the English Court of Appeal, in the decision publishes on 7 May 2008 (*David Murray v. Big Pictures (UK) limited*). In this

[87] Bríd Jordan, on behalf of Reynolds Porter Chamberlain LLP, and the University of the Basque Country.

decision, the court of appeal established the following test to determine whether ECHR art. 8 has been violated or not:

1. Firstly it is necessary to ask if a reasonable expectation of privacy exists for the information or image subject to complaint.

- This is an objective and broad test; all the factual circumstances of the case must be considered.
- The court establishes that the characteristics of the party seeking protection must be taken into account (e.g. relevant notoriety, if the information refers to an adult or a minor), the nature of the activity the person was engaged in at the time and place the event happened, the nature and purpose of the intended use of the information by the party intending to use it, the presence or absence of consent by the party seeking protection, the effect on the party seeking protection and the circumstances in which the party wishing to use the information came to be in possession of it.
- This is not an exhaustive list of factors to be taken into consideration, rather it should be considered a roadmap designed to help the parties when considering if there has been a violation of ECHR art. 8 or not.

2. If a reasonable expectation of privacy is established, the next step shall be to determine how to balance individuals' right to privacy under ECHR art. 8 and the editor's right to freedom of expression under ECHR art. 10. In this instance, the matter shall be determined with due attention paid to the facts of the specific case. The weight to be given to the various considerations is a question of fact and degree.

The test is regularly refined and developed, its application depending on the facts of the particular case presented to the courts. It is thus impossible to create a definitive list of the questions to be considered, or to predict with any certainty how the law will develop in future. The incorporation of ECHR art. 8 and the obligations contained in the HRA will continue to force common law to recognise and protect the right to privacy but, in the absence of statutory intervention, the extent of said protection will depend on the specific facts of each case.

With regard to jurisprudence the following cases should be emphasised:

1. *Campbell v. MGN Limited (2004)*: the model Ms. Campbell complained that the publication of an image alleging to show her leaving a meeting of "Narcotics Anonymous" and the article on her drug use comprised an infringement of ECHR art. 8. The House of Lords recognised that Ms. Campbell's complaint did not fit easily with the traditional analysis of

complaints over invasion of privacy. In turn, it recognised that the values of ECHR articles 8 and 10 form part of the reformulated action on infringement of confidentiality. It declared that the touchstone of private life is that with respect to facts revealed, the person in question has a "reasonable expectation of privacy". The House of Lords viewed the publication of the images of Ms. Campbell as a violation of ECHR art. 8 but only awarded minimal damages.

2. *HRH Prince of Wales v. Associated Newspaper Limited (2007)*: Highlights the importance of taking the facts of the case into consideration. This case dealt with the publication in a national newspaper of diary extracts from a trip made by the Prince of Wales that were distributed in a limited manner amongst friends, on the basis of confidentiality. The newspaper obtained the information after it was leaked by a former employee. This employer was subject to an express contractual obligation as well an implicitly confidential relationship. The Court considered that this circumstance affected both the "reasonable expectation of privacy" and the "balance test". The existence of a contractual relationship can make even inoffensive information private. It may also weigh heavily in favour of art. 8 in the balance test. The court did not consider that art. 10 or the public interest in the diary outweighed the Prince's rights in accordance with art. 8.

3. *McKennitt v. Ash (2007):* refers to the action lodged by Ms McKennitt (a Canadian folk singer) motivated by the publication of private information both true and false by Ms Ash in a book she wrote about the time she spent with Ms McKennitt. In the case, the Court of Appeal identified two key questions developed in *David Murray v. Big Pictures (UK) limited* which should be answered when a complaint refers to the illicit publication of private information. The court considered that Ms McKennitt's rights were not limited to truthful private facts but also covered false information.

2. Rules of Conflict

In English law no conflict rules exist on a legal basis with reference to the applicable law in cases of defamation. In fact, the *Private International Law (miscellaneous Provisions) Act 1995, Part. III*, on *Choice of Law in Tort and Delict*, in *section 13*, excludes claims for defamation. This precaution declares that:

> "*1. Nothing in this Part applies to affect the determination of issues arising in any defamation claim.*
> *2. For the purposes of this section "defamation" claims means –*
> *a. Any claim under the law of any part of the United Kingdom for libel or slander or for slander of title, slander of goods or other malicious falsehood and any claim under the law of Scotland for verbal injury; and*

b. Any claim under the law of any country corresponding to or otherwise in the nature of a claim mentioned in paragraph (a) above."

However, the question which arises is whether all instances of infringements against the rights of the person are placed within the exclusion of section 13. If instances of defamation or slander, verbal injuries or instances of a similar nature are also counted in the infringements caused by the media, it is not clear if these cover all possible instances.

The exclusion has lead jurisprudence to give concrete responses.

English jurisprudence has traditionally used the cumulative application criterion of *lex loci delicti* and the *lex fori* (*double actionability rule*) in instances of extracontractual responsibility. In time this criterion has been replaced by that of *lex loci delicti;* clearly since the adoption of Part III of the *Private International Law (miscellaneous Provisions) Act 1995* (although defamation cases remain explicitly excluded).

Today, this cumulative criterion (*lex loci delicti* and the *lex fori*) or the common law rule of double actionability is used during disputes over responsibility in the area of defamation cases, being excluded by section 13[88]. Accordingly, the cumulative application of the law on place of circulation and the *lex fori* is called for.

The common law double actionability rule itself is highlighted in section 10 of the *Private International Law (miscellaneous Provisions) Act 1995* which anticipates its abolition: "a) *require actionability under both the law of the forum and the law of another country for the purpose of determining whether a tort or delict is actionable; or b) allow (as an exception from the rules falling paragraph (a) above) for the law of a single country to be applied for the purpose of determining the issues, or any of the issues, arising in the case in question*".

The double actionability rule is applied to those claims made before English courts for harmful actions carried out abroad by the defendant. Where the defendant's actions giving rise to the harm have taken place in the United Kingdom no problems of applicable law arise under United Kingdom law, including in those circumstances with substantial foreign connections. For the double actionability rule to be satisfied the plaintiff must prove that the defendant would have been responsible under internal Law had the event taken place in England and that by his or her conduct he or she has incurred civil responsibility under the law of the place where the illicit act was committed. However, this rule may be subject to flexible interpretation those cases where its application could lead to an injustice, applying in such a case the Law which

[88] C.G.J. Morse, "Torts in Private International Law: A New Statutory Framework", *ICLQ*, vol. 45, no. 4, 1996, pp. 889.

displays the most significant connection to the event, thus establishing the responsibility of the defendant[89].

The main motive for exclusion of matters concerning personal rights of the *Private International Law (miscellaneous Provisions) Act 1995* seems to have been the fear that freedom of expression (particular of the press) would be seen to be harmed by application of the new conflict rules[90]. This cumulative application of the two rules favours the editor of the publication. Under it, it is hoped that freedom of expression is saved as provided for by English laws in the face of potential application of foreign Laws which are more restrictive with regards to said freedom.

3. Case Law on Rules of Conflict

We have seen that disputes over alleged defamation are governed by common law; that is, by the double actionability rule. This rule was established in the matter of *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1 (Exch.). However, this rule has been modified by the ruling of *Lords Wilberforce and Hodson* in the case of *Boys v. Chaplin* (1971) AC 356 and by the Privy Council in the matter of *Red Sea Insurance v. Bouygues SA* (1994) 3 All ER 749 (CA)[91]. The rule presented in section 10 of Part III of the *Private International Law (miscellaneous Provisions) Act 1995*, should be understood, therefore, in light of the interpretation of the aforesaid judicial decisions.

4. Special Courts

Special courts do not exist as such, but defamation cases are normally submitted to specialist judges on the *Queen's Bench Division of the High Court of England and Wales*. Privacy cases are normally submitted to the same Division, but not exclusively. Privacy cases, particularly urgent matters such as petitions to halt a specific publication, are frequently resolved by non-specialist judges.

[89] P. Rogerson, "Choice of Law in Tort: A Missed Opportunity?", *ICLQ*, vol. 44, no. 3, 1995, p. 650.
[90] C.G.J. Morse, "Torts in Private International Law...", *loc. cit.*, p. 891.
[91] *Vid.* with respect to jurisprudential evolution P. Rogerson, "Choice of Law in Tort...", *loc. cit.*, pp. 650-658; A. Mayss, "Statutory Reform of Choice of Law in Tort and Delict: A Bitter Pill or a Cure for the Ill?", *Web Journal of Current Legal Issues*, 1996, available at http://www/ncl.ac.uk/~nlawwww/1996/issue2/mayss2.html; a more complete look at the jurisprudential evolution where the double actionability rule has its origins is to be found in P.M. North, "Reform, But Non Revolution", *R. des C.*, t. 220, 1990-I, pp. 206 on.

5. Directive 95/46/EC

The Data Protection Act 1998 uses the same criteria of application as the Directive itself. To this end art. 5 (*application of Act*) stipulates:

"*(1) Except as otherwise provided by or under section 54, this Act applies to a data controller in respect of any data only if—*
(a) the data controller is established in the United Kingdom and the data are processed in the context of that establishment, or
(b) the data controller is established neither in the United Kingdom nor in any other EEA State but uses equipment in the United Kingdom for processing the data otherwise than for the purposes of transit through the United Kingdom.
(2) A data controller falling within subsection (1)(b) must nominate for the purposes of this Act a representative established in the United Kingdom.
(3) (…)".

Thus, the criteria of application found in the Directive are reproduced in English Law.

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