



BRUSSELS, 17 - 18 November 2016

Session IIb: Whistle-blowers and investigative journalism

Journalists depend on others to provide the information they report to the public. They often rely upon, and thus promise confidentiality to, sources who risk retaliation or other harm if exposed. The right to access information and the confidentiality of communication with sources are essential for the effective exercise of their profession.

In particular, protecting whistle-blowers from retaliation encourages people to expose corruption and wrongdoing, and enhances openness and accountability in government and corporate workplaces. According to a recent study analysing more than 2 400 cases of fraud in 114 countries, about 40 per cent of all detected fraud cases are uncovered by whistle-blowers.¹

There are significant gaps in the protection of whistle-blowers against retaliation, which can have a chilling effect on potential whistle-blowers, restricting both their freedom of expression and the public's right to access information. Based on the principles established by the European Court of Human Rights, the Council of Europe² has developed recommendations to guide States in setting legal frameworks to protect from retaliation individuals who disclose information on threats or harm to the public interest which they reasonably believe to be true.

International human rights law has developed principles protecting the confidentiality of journalistic sources, and several national legal systems have adopted such norms.³ However, a rising global problem seems to be the pressure on journalistic sources as a result of targeted surveillance and big data analysis — a concern shared across the categories of respondents in the public consultation carried out in preparation for the Colloquium. The respondents underlined the detrimental impact that increasing surveillance on journalists' communications has on their privacy, safety, independence and protection of their sources. This concern was also highlighted in a 2013 PEN study.⁴ Respondents to the public consultation stressed the importance of ensuring that communication between journalists and whistle-blowers can take place in a safe and secure way (e.g. via 'drop boxes'). Best practices included training for journalists on how to use technology to protect sources or the creation of mechanisms and institutions enabling whistle-blowers to report wrongdoings anonymously, such as the 'House for whistle-blowers' set up in the Netherlands.

¹ Association of Certified Fraud Examiners, *Global Fraud Study 2016*. Summary available online at <http://www.acfe.com/rtn2016/about/executive-summary.aspx#>.

² Most recently in Recommendation CM/Rec(2014)7 on the protection of whistle-blowers [https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2014\)7E.pdf](https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2014)7E.pdf).

³ Report of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/361.

⁴ https://pen.org/sites/default/files/Chilling%20Effects_PEN%20American.pdf.

Recent evaluations⁵ reveal that only a few EU Member States have dedicated whistle-blower protection laws. The majority of Member States tend to have provisions scattered across different laws, leaving significant legal gaps (for instance by not covering employees in the private sector), whilst some provide only very limited protection. Respondents to the public consultation pointed to the need for comprehensive protective legal frameworks at national or EU level, whilst mentioning examples of protective rules recently adopted in some Member States which could be disseminated throughout Europe.

Journalists must have the right to access information if they are to give effect to the public's 'right to know'. Respondents highlighted the difficulty for investigative journalists to access and report information due to certain legislative frameworks such as defamation laws. They underlined the need to train journalists on techniques for accessing information and to foster cross-national and cross-media collaborations.

At the same time, in addition to their general responsibility to verify the accuracy of the information they receive from their sources before making it public, journalists need to comply with the applicable EU and national implementing rules on data protection when they are processing personal data.⁶ Furthermore, journalists need to comply with rules on the protection of confidentiality of trade secrets. Directive 2016/943⁷ entitles holders of trade secrets to apply for judicial procedures to obtain redress for the unlawful disclosure of their trade secrets. However, the Directive exempts people (e.g. journalists) who unlawfully disclose a trade secret from such civil proceedings if they do so to exercise the right to freedom of expression and information.

These issues also raise the question of the resources needed for thorough and qualitative investigative journalism. In the public consultation, a majority expressed concern about the loss of investigative journalism in an environment where popular and fast content is on the rise and resources for a high-cost investigation are scarce. Crowdfunding was given as an example to explore.

The **aim of the session** is to look at:

- how to enhance the protection of the right to access information and the consequent protection of confidentiality of sources and whistle-blowers;
- the role of States, civil society actors and journalists themselves;
- the role of whistleblowing for media freedom and democracy;
- the challenges arising from the financial constraints linked to investigative journalism.

Indicative questions to steer the discussions:

1 – What can be done to promote the training of journalists in digital security and raise public awareness about the availability of secure communication channels? Do you see a need to complement source protection with whistle-blower legislation?

2 – Investigative journalism remains necessary but it is cost-intensive and reserved for those media players which have financial resources. Please share your ideas on how investigative journalism can be supported and opened up to those journalists who do not have solid financial means.

⁵ Transparency International, 'whistleblowing in Europe', 5 November 2013, available at http://www.transparency.org/whatwedo/publication/whistleblowing_in_europe_legal_protections_for_whistle-blowers_in_the_eu

⁶ 'Personal data' is 'any information relating to an identified or identifiable natural person'; cf. Article 2(a) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Article 9 of Directive 95/46/EC and Article 85 of Regulation (EU) 2016/679 (the 'General Data Protection Regulation') require Member States to reconcile by law the right to the protection of personal data with the right to freedom of expression and information, including processing for journalistic purposes.

⁷ See Article 5 of Directive 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.