

European Court of Human Rights judgments on the right to freedom of expression

Bulletin V: USE OF COVERT RECORDING DEVICES

30 November 2012

Focus on ECHR and European constitutional decisions on the use of hidden recording devices for journalistic purposes

The use of hidden recording devices can be an important tool for journalists, particularly when doing investigative journalism. Some investigative reports justify the use of undercover means, typically those stories of real public interest where the journalist tries to expose suspected wrong-doing or to gain access to a clandestine world.

There is not much ECHR law on this topic; the closest decision is that of the European Court of Human Rights in *Radio Twist v. Slovakia*, application no. 62202/00, judgment of 19 December 2006. Judgment is awaited in a case dealing with the use of hidden cameras in a consumer television programme, *Haldiman v. Switzerland*, app. no. 21830/09.

Across Europe, practice varies.

The following paragraphs highlight the main ECHR decision and summarise case law in other European countries.

1. European Court of Human Rights decisions

- *Radio Twist v. Slovakia*, application no. 62202/00, judgment of 19 December 2006

This case concerned a radio company, which broadcast the recording of a telephone conversation involving the deputy Prime Minister and a senior civil servant at the ministry of Justice. The domestic courts held that even public figures had the right to have their privacy protected by law and found that the recorded and broadcast telephone conversation was private in nature and, therefore, should not have been broadcast.

The European Court of Human Rights disagreed. It noted that the telephone conversation in question was between two high-ranking government officials, and concerned a matter of public

interest – the management and privatisation of State-owned enterprises. The Court further observed that the domestic courts had attached decisive importance to the fact that the broadcast audio recording had been obtained by unlawful means, even though it had not been made by the journalists themselves. The court did not consider that the mere fact that a recording had been made and obtained illegally could deprive the journalists who broadcast it from the protection of the right to freedom of expression. It therefore found a violation of the right to freedom of expression.

2. Decisions by national European courts

For member States of the European Union, the position under the EU data protection directive will be important. Council Directive 95/46/EC ("the Data Protection Directive") creates a common set of rules regulating the gathering and processing of personal data, which includes the gathering of information by journalists. While films and recordings of individuals taken undercover constitute "personal data" under the Directive, it also provides an exemption for the gathering of data by journalists, in Article 9. In the case of *Tietosuojavaltuutettu* (Case C-73/07, 18 December 2008), the European Court of Justice confirmed that the journalistic exemption applies if the sole object of the document is the disclosure to the public of information, opinions or ideas.

Across Europe, national courts have taken different positions on this issue.

In **Spain**, the Supreme Court has taken a very strict approach towards at least the *use* of undercover filming materials, with the broadcast of such materials being taken as a *per se* interference with privacy rights (Decision of 18 December 2008). Very recently, on 30 January 2012, the Spanish Constitutional Court confirmed that the use of hidden cameras in journalism was unconstitutional, regardless of the public relevance of the investigation's purpose.

Bulgaria operates an apparently absolute approach pursuant to Article 32(2) of its Constitution, which prevents anyone being followed, photographed or filmed or recorded except where such actions are permitted by law. There is also a dedicated offence under Article 339a of the Penal Code criminalising the selling without a permit of a special technical device, a term that includes hidden cameras. In 2005, a journalist, George Buhnici, was convicted and fined pursuant to these provisions for using a camera hidden in sunglasses to film corrupt practices at state run duty free shops and in customs.

By contrast, in other countries, including the **United Kingdom, Germany, France** and **Greece**, the law recognises the place for proper, proportionate and responsible use of hidden recording devices by journalists in breaking and documenting news stories exposing corruption, criminality, abuse and other serious wrong-doing.

In **France**, the Regional court of Paris (17th civil chamber, 7 September 2009 - *R. Berghausen vs. France Télévisions S.A. et al.*) has considered a case involving the spokesperson for a pharmaceutical company, who was first interviewed with his knowledge – but shortly after was taped surreptitiously. The court held that, in this case, the need to inform the public was more important than the person's right to have control over the use made of his image. In the three disputed

sequences the court found that there was no disproportionate invasion of privacy. The images had been filmed and broadcast under conditions that were very similar to those under which he had agreed to be filmed a few seconds earlier, and the topics discussed were the same as those to which he had just given his authorisation. However, the spokesperson's attitude was very different from when he had been 'formally' interviewed. For example, although he had replied on-camera that he did not know whether the company was about to open in the Czech Republic, he gave a different answer when he thought he was off-camera; similarly, after a long explanation on-camera on the traceability of the origin of the medicines distributed by his company, he then said that medicines produced in other countries were also guaranteed by the manufacturers and that the system for checking pharmacies was ineffective. Therefore, the need to inform the public took precedence over any image rights or privacy rights.

In **Germany**, the Munich Court of Appeal (ruling of 20 January 2005 - case no.: 6 U 3236/04) in 2005 dismissed a complaint by a management consultancy company against a journalist. The plaintiff had made a claim for an injunction, information and damages because the defendant, while investigating an allegation of surreptitious advertising in an ARD evening series, had used business documents belonging to the plaintiff and a secretly filmed video. The video showed a female employee of the plaintiff in a sales meeting with syndicate representatives, offering to place certain themes or products in the series in return for payment.

The Court decided that the allegation of surreptitious advertising could only be substantiated by means of an undercover investigation. It decided, therefore, that the claim for an injunction should be rejected. In situations where there was no other way of verifying a suspicion, the right to freedom of expression and newsgathering therefore included the use of hidden recordings. Since public service broadcasting was financed by means of the licence fee, it was particularly important for the public interest that abuses connected with illegal surreptitious advertising should be brought to light.

In several countries, self-regulatory systems operate alongside legislative provisions and are used as a measure of first resort for those who wish to complain about the use of Undercover Techniques. For example, in **Belgium** the Press Council has adopted a specific "*Ethical Directive on Undercover Journalism*". Under this Directive, Undercover Techniques should be used in accordance with four criteria:

- (1) the information obtained should be of significant societal importance;
- (2) it should not be possible to obtain the information via conventional journalistic methods;
- (3) the risks related to this method should be in proportion to the results pursued; and
- (4) the decision to use the undercover method and the realisation of the report should only occur after deliberation with and under the responsibility of the editors in chief.¹

¹ Vereniging van de Raad voor de Journalistiek, *Code of Ethics*(2010), <http://www.rvdj.be/journalistieke-code>. See also recent decisions of the Flemish Press Council on this issue: Flemish Council for Journalism Ethics, Backx and others v NV VRT, 10 September 2009 (reported at <http://merlin.obs.coe.int/iris/2009/10/article5.en.html>) and Flemish Council for Journalism Ethics, Thierry V. v. NV VRT, 13 January 2011 (reported at <http://merlin.obs.coe.int/iris/2011/3/article8.en.html>).

Similar Codes operate in **the Netherlands**² and in **the UK**. For example, **the BBC's Editorial Guidelines** contain a lengthy section setting out the BBC's rules and procedures on the making and subsequent use of 'secret recordings'. The BBC Guidelines provide that:

"Normally, the BBC will use secret recording only ... as an investigative tool where:

- *there is clear existing prima facie evidence of behaviour, or intention to carry out behaviour, that it is in the public interest to reveal, and*
- *the recording is necessary to prove the behaviour, and*
- *there is no viable, alternative means of gathering the evidence that proves the behaviour."*

Additionally, the BBC Rules state that secret recordings may be made " *to obtain material outside the UK where a country's laws make the normal and responsible gathering of material extraordinarily difficult or impossible*" or " *as a method of consumer, scientific or social research in the public interest, where no other methods could naturally capture the attitudes or behaviour in question*".³

As regards subsequent broadcast, the BBC Guidelines state that "*[t]he results of the research should be edited to provide a fair and accurate representation of the research. Consent should normally be obtained retrospectively from individuals or organisations to be included in our content, or their identities should be appropriately obscured. Any proposal in these circumstances to identify individuals or organisations without their consent should be referred to Editorial Policy.*"⁴

3. Montenegro

In Montenegro, the crime of Breach of Secrecy of Letters and Other Correspondence warrants a fine or up to one year of imprisonment, or up to three years if committed by a person acting in an official capacity (Art. 172). The same penalties are envisaged for the crimes of Unauthorised Wiretapping and Recording (Art. 173), Unauthorised Photographing (Art. 174), Unauthorised Publication or Presentation of Another's Written Text, Portrait or Recording (Art. 175) and Unauthorised Collection of Personal Data (Art. 176).

With the exception of Unauthorised Disclosure of a Secret (Art. 171), the articles on the other offences do not provide for an exception in case of an overriding general interest, which would enable for an exception for journalists or other to act to, for example, prevent the commission of a crime or identify the criminal offender.

On the other hand, the civil law does not provide for provisions detailing protection of the right to privacy, which is particularly important for the work of the media.

The Code of Journalists of Montenegro provides in point 6 that "[f]or recovery of information in any form, a journalist should use professionally honourable and legally allowed methods. The exception from this rule is allowed only in cases when those methods are not enough, and information one

² Leidraad van de Raad voor de Journalistiek, Section 2.1.6, September 2010:
<http://www.rvdj.nl/rvdj-archive//docs/Leidraad%20RvdJ%20-%20september%202010.pdf>

³ BBC Editorial Guidelines, Section 7: Privacy / Secret Recording,
<http://www.bbc.co.uk/guidelines/editorialguidelines/page/guidelines-privacy-practices-secret-recording/#approval-of-secret-recording>

⁴ Ibid., section 7.4.16.

needs to reach is exceptionally important for the public.” However, this Code may not protect journalists from potential criminal liability.

Hence, HRA advocates for supplementing both the Criminal Code and Media Act of Montenegro.⁵

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⁵ For more information, see the Proposal of Reform of Liability for Breach of Honour and Reputation in Montenegro, http://www.hracion.org/wp-content/uploads/reform_proposal-3.pdf