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Distinguishing Journalism from other Sources of Information

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Executive summary

The task of this study is to identify criteria for the distinction between journalism and other forms of communication on the basis of European case law. For this purpose, we analysed selected judgements and decisions of the European Court of Human Rights, the European Court of Justice and national Austrian and German courts.

The courts focus on the right to freedom of expression and information, which according to Article 10 European Convention on Human Rights is regarded as a fundamental pillar of democracy and may only be restricted on substantial grounds. Although neither the freedom of media nor the freedom of the press is particularly mentioned in Article 10, various cases deal with these subjects specifically. The courts mainly focus on two aspects, namely the public interest and ethical considerations, in order to distinguish journalism from other forms of communication.

In various rulings the courts assert the essential role of the press as a “watchdog” in a democratic society. The courts do not provide a clear definition of journalists or journalistic content but interpret the terms in a broad way, including a wide variety of activities that provide relevant information to the public. The term “public interest” typically concerns issues the public has a legitimate interest to be informed about. In this context it is important that the published information, opinions or ideas contribute to a public debate. Journalists, who report on issues of general interest, are granted a high level of protection, if they act in good faith and in accordance with the ethics of journalism. This requires a constantly alert sense of responsibility towards the public. The major objective of due diligence of responsible journalism is the reduction of risk that damage might be caused by incorrect reporting. Journalists have to look for the truth and endeavour to provide reliable and precise information. The national courts apply these concepts to various cases but do not introduce new elements to the established doctrine.

As the internet plays an important role in enhancing the public’s access to news and in facilitating the dissemination of information, the Court has further noticed that bloggers and popular users of social media may be regarded as “watchdogs” in so far as the protection provided by Article 10 is concerned. The same principles apply to journalists and other persons involved in public debate. In this respect, it is not so important which persons or media convey the messages. Nevertheless, the relevance of journalists and the press is as high today as it has been in the past due to the technology- enabled fragmentation of information consumption, the often unintentional spread of misinformation and the need for reliable sources of information.

List of Abbreviation

BGH	Bundesgerichtshof (German Federal Court of Justice)
DSG	Datenschutzgesetz (Austrian Data Protection Act)
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
GDPR	General Data Protection Regulation
JournG	Journalistengesetz (Austrian Law on Journalists)
MAR	Market Abuse Regulation
MStV	Medienstaatsvertrag (German Media State Treaty)
NGO	Non-governmental Organisation
OGH	Oberster Gerichtshof (Austrian Supreme Court)
OVG	Oberverwaltungsgericht (Higher Administrative Court, Germany)
para	Paragraph
VfGh	Verfassungsgerichtshof (Austrian Constitutional Court)
VGH	Verwaltungsgericht (Administrative Court, Germany)

1. Context and the Scope of the Study

1.1 Background Information

Although there is no precise definition for the term **journalism** [1] it is generally understood as “the activity of gathering, assessing, creating, and presenting news and information” [2]. It is also widely accepted that journalism can be distinguished from other forms of communication by certain identifiable characteristics and practices such as truthfulness, public interest, independence, comprehensiveness and a sense of ethics and responsibility. [3] Ethics, a fundamental pillar of journalism, requires⁴ a clear distinction between news and opinions and is characterised by honesty and impartiality in presentation and the provision of verified information. [5] Conveyed through the media, information has decisive importance for the development of the individual and society. [6]

As diversity of opinions, tolerance and open-mindedness are particularly important in a democratic society, **the right to freedom of expression and information**, which is highlighted by the case law of the European Court of Justice and the European Court of Human Rights that's relates to Article 10 of the European Convention on Human Rights [7], constitutes an essential foundation of democracy.

The Council of Europe promotes an encouraging environment for freedom of expression, and supports it by legal guarantees for **independence and diversity of media as well as safety of journalists** and other media actors. The right to freedom of expression, which is protected by Article 10 of the European Convention of Human Rights, is a cornerstone of democratic security in Europe and must only be restricted on substantial grounds.

Until a few decades ago, the limits and restrictions of freedom of expression were determined by national states and their own domestic judicial authorities without any further external control. With Article 10 of the Convention, this situation has significantly changed in Europe. [8] National authorities of the Member States of the Council of Europe are now supposed to better respect freedom of public debate, political expression and critical journalism and promote media pluralism and internet freedom.

[1] For an Austrian media studies approach see for example Medienhaus Wien, Qualitätsbestimmung im Journalismus. Analyse des internationalen Forschungsstandes und neuer Ansätze in der digitalen Ära, Vienna 2018 [<http://www.mhw.at/cgi-bin/file.pl?id=503>, accessed 30. April 2023], 8 et seq.

[2] American Press Institute, Journalism Essentials. [<https://www.americanpressinstitute.org/journalism-essentials/>, accessed 14. April 2023].

[3] Ibid.

[4] It is, however, well known that it has become more and more complex to clearly draw the distinction. One of the consequences of this is the demand of more transparency, allowing the user to set the journalistic work into some context (“Transparency is the new objectivity”).

[5] cf Council of Europe Parliamentary Assembly, Ethics of journalism (Recommendation 1215) (1 July 1993).

[6] Ibid.

[7] Ibid.

[8] Dirk Vorrhoof, The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society (2014), p.5.

Unless prescribed by law, national states and authorities should not interfere with freedom of speech and freedom of the press. [9] Although neither the freedom of media nor the freedom of the press are particularly mentioned in Article 10, a number of cases specifically deal with these subjects. Journalism is privileged in gathering news and information, even information that is held by public authorities. A high level of protection is also granted to journalistic sources and whistleblowers as well as to journalistic freedom of expression and information in online media and on the internet. [10]

1.2 Scope of the Study

In the light of the above mentioned privileges it is important to find out how the European Court of Justice and the European Court of Human Rights as well as different national courts **interpret the term “journalism” and distinguish it from other information sources and communication activities.**

The objective of this study is to analyse how these two European courts deal with the outlined issues. Judgements of Austrian and German national courts will also be evaluated as examples for local courts in member states. First, the paper will present a survey of the relevant cases of the European Court of Human Rights and the European Court of Justice as well as of national courts in Austria and Germany and analyse selected judgements and decisions in the area of journalism. Second, based on the identified judiciary, criteria for the identification of journalistic content will be developed and their interaction will be evaluated.

2. Journalism in European, German and Austrian Court Decision and Judgements

2.1 The European Court of Human Rights (ECtHR)

Article 10 of the European Convention on Human Rights (hereafter called the ECHR) is devoted to freedom of expression and freedom of information. According to Article 10 para 2 any restriction on the freedom of expression must be prescribed by law and has to be necessary in a democratic society. [11] Furthermore, it is required that any restriction on freedom of expression must pursue one of the aims recognised as legitimate: national security, territorial integrity or public safety, protection of health or morals, prevention of disorder or crime, the protection of the reputation or rights of others, the prevention of the disclosure of information received in confidence or the maintenance of the authority and impartiality of the judiciary.

Although neither the freedom of media nor the freedom of the press is particularly mentioned in Article 10, various cases deal with specifically these subjects.

[9] Ibid, p 1.

[10] Ibid, p.3.

[11] Article 10(2) ECHR.

The European Court of Human Rights has held that “freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man” [12].

The case law of the ECtHR has significantly advanced the protection of freedom of expression and access to information. The Court's legal principles have enhanced the safeguarding of freedom of expression, the freedom of the press and media, and the public discourse across member states of the Convention. The European Court of Justice has also played a crucial role in defining the complex and flexible concept of what constitutes a "necessary" restriction on the freedom of expression and information in a democratic society. [13]

This study outlines general principles of the ECtHR, which have been emphasised on several occasions in relation to the freedom of the press and journalism as well as closely related actors. The analysis of numerous cases is supposed to build a better basis for an understanding of recent court decisions.

2.1.1 The ECtHR's interpretation of Article 10 ECHR and the Freedom of the Press

2.1.1.1 *The importance of a '(Public) Watchdog'*

Watchdog journalism is critical in a democracy. It aims to increase transparency and accountability of public figures and institutions. Based on information by journalists, citizens should be able to make informed decisions and have a better understanding of what is happening.

On several occasions, the Court emphasises that Article 10 is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. [14] Without these demands for pluralism, tolerance and broadmindedness there would be no “democratic society”. [15]

As the public has a right to receive such information and ideas, the press has the task of sharing information. Otherwise, the press would be unable to play its vital role of **‘public watchdog’**. [16]

The ECtHR strengthened the freedom of political expression and the role of the press as “public watchdog”. [17]

[12] Handyside v. the United Kingdom app no 5493/72 (ECtHR 7 December 1976), § 49.

[13] Cf Dirk Vorrhoof, *The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society* (2014), p.2.

[14] Handyside v. the United Kingdom app no 5493/72 (ECtHR 7 December 1976), § 49.

[15] Handyside v. the United Kingdom app no 5493/72 (ECtHR 7 December 1976), § 49; *Observer and Guardian v. the United Kingdom* app no 13585/88, (ECtHR 26 November 1991), § 59. *Sunday Times* (No. 1) app no 6538/74 (ECtHR 26 April 1979), §59.

[16] *Observer and Guardian v. the United Kingdom* app no 13585/88, (ECtHR 26 November 1991), § 59

[17] Dirk Vorrhoof, *The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society*, p.2-3.

The ECtHR confirmed that the freedom of the press is crucial if state activities are confidential. The conviction of a journalist for disclosing secret information may keep others from informing the public on matters of public interest. Consequently, the press may no longer be able to play its vital role as a “public watchdog” and the capability of the press to provide accurate and reliable information may be adversely affected. [18]

In this respect, the Court has consistently held that under Article 10 para. 2 of the Convention, there is little scope for restrictions on political speech or on the debate of issues of public interest. [19] The Court has recognised a prevailing interest of the public in being informed, for example, about the medical condition of a candidate for the highest office of State [20], sporting issues [21]; or performing artists [22], criminal proceedings in general [23], crimes committed [24] or a “sex scandal” within a political party, involving certain members of the Government. [25] [26]

In spite of the public’s right to be informed, articles or television programs, presenting the details of a person’s private life and aiming solely at satisfying the curiosity of a particular audience, cannot be regarded as contribution to any debate of general interest to society. [27] Consequently, the Court accepted (proportionate) interferences in the freedom of expression, when journalists report about confidential information in a sensationalist way [28] or if the revealed documents are not relevant for the public debate or spy only on people’s private lives. [29]

2.1.1.2 Duties and Responsibilities of Journalists

When exercising its right to freedom of expression, the press must observe its **duties and responsibilities**, as required by Article 10 para 2. These duties and responsibilities become especially important when the shared information is likely to have a serious impact on the reputation and rights of private individuals. Furthermore, the protection provided to journalists by Article 10 is subject to the condition that they act in **good faith in order to provide reliable and precise information in accordance with responsible journalism**. [30]

[18] Stoll v. Switzerland [GC] app no. 69698/01 (ECtHR 10 December 2007, see also Goodwin v. the United Kingdom [GC] app no 17488/90, (ECtHR 27 March 1996) and Fressoz and Roire v. France app no 29183/95 (ECtHR 21 January 1999).

[19] The Lingens v Austria app no 9815/82 (ECtHR 8 July 1986), Castells v. Spain app no 11798/85 (ECtHR 23 April 1992), § 43; Wingrove v. the United Kingdom app no 17419/90, § 58.

[20] Éditions Plon v. France app no 58148/00 (ECtHR 18 August 2004), § 44.

[21] Nikowitz and Verlagsgruppe News GmbH v. Austria app no 5266/03 (ECtHR 22 February 2007), § 25.

[22] Sapan v. Turkey app no 17252/09 (ECtHR 20 September 2011), § 34.

[23] Dupuis and Others v. France app no 1914/02 (ECtHR 12 November 2007), § 42; July and SARL Libération v. France app no 20893/03 (ECtHR 14 February 2008), § 66.

[24] White v. Sweden app no 42435/02 (ECtHR 19 December 2006), § 29; Egeland and Hanseid v. Norway app no 34438/04 (ECtHR 16 July 2009), § 58.

[25] Kaçki v. Poland app no 44034/11 (ECtHR 4 November 2014), § 55.

[26] Council of Europe, Guide on Art 10 ECHR, §148 (31 August 2022).

[27] Von Hannover v. Germany (no. 2) [GC] app no 40660/08 and 60641/08 (ECtHR 7 February 2012), § 59; Couderc and Hachette Filipacchi Associés [GC] app no 40454/07 (ECtHR 10 November 2015), § 42.

[28] Stoll v. Switzerland [GC] app no. 69698/01 (ECtHR 10 December 2007).

[29] Leempoel and S.A. Ciné Revue v. Belgium app 64772/01 (ECtHR 9 November 2006) and Marin v. Romania app no 30699/02 (ECtHR 3 February 2009).

It is key that the public interest is not reduced to an audience's inclination for sensationalism or voyeurism.

The concept of “responsible journalism” [31], as a professional activity which enjoys the protection of Article 10, is not confined to the contents of information which are collected and/or disseminated by journalistic means. That concept also embraces, inter alia, the lawfulness of the conduct of a journalist, including his or her public interaction with the authorities when exercising journalistic functions. The question whether a journalist has violated the law plays an important role for the decision whether he or she has acted responsibly. [32]

Due to the influence wielded by the media in contemporary society, these considerations play an especially important role nowadays. Journalists do not only inform, they also exert influence by the way they present the information. In a world, in which the individual is confronted with vast quantities of information stemming from a continuously growing number of players and are circulated through traditional and electronic media, compliance with journalistic ethics becomes more and more important. [33] In its more recent decisions, the Court also notes that user-generated expressive activity on the internet provides an unprecedented platform for the exercise of freedom of expression. [34]

The Court has accepted that the methods of objective and balanced reporting may vary considerably and depend, among other things, on the media in question. [35] However, it is always crucial that journalists systematically and formally distinguish between their own statements and quotations by others. [36]

2.1.1.2 Recent Relevant Judgements

The following two recent cases are very important in various ways: The Court reiterates several general principles, which assess the role of journalists in a democratic society. They also shed light on related duties and responsibilities as well as the importance of public interest in relation to journalistic work. It is a challenging task for the Court to find the proper balance between freedom of expression and the right to privacy.

[30] See *Fressoz and Roire v. France* app no 29183/95 (ECtHR 21 January 1999,)§ 54, *Bladet Tromsø and Stensaas v. Norway* [GC], app no. 21980/93 (ECtHR 20 May 1999), § 65 and *Times Newspapers Ltd (nos. 1 and 2) v. the United Kingdom*, app nos. 3002/03 and 23676/03 (ECtHR 10 March 2009, §42, *Axel Springer AG v. Germany* [GC] app no 39954/08 (ECtHR 7 February 2012), § 93.

[31] See *Fressoz and Roire v. France* app no 29183/95 (ECtHR 21 January 1999,)§ 54, *Bladet Tromsø and Stensaas v. Norway* [GC], app no. 21980/93 (ECtHR 20 May 1999), § 65 and *Times Newspapers Ltd (nos. 1 and 2) v. the United Kingdom*, app nos. 3002/03 and 23676/03 (ECtHR 10 March 2009, §42, *Axel Springer AG v. Germany* [GC] app no 39954/08 (ECtHR 7 February 2012), § 93.

[32] *Pentikäinen v. Finland* [GC] app no. 11882/10 (ECtHR 20 October 2015), § 90.

[33] *Stoll v. Switzerland* [GC] app no. 69698/01 (ECtHR 10 December 2007), § 104

[34] *Ahmet Yildirim v Turkey*, app no 3111/10 (ECtHR 18 March 2013) and *Times Newspapers Ltd (nos. 1 and 2) v. the United Kingdom*, app nos. 3002/03 and 23676/03 (ECtHR 10 March 2009), § 27.

[35] *Jersild v. Denmark* [GC] app no 15890/89, (ECtHR 23 September 1994), § 31.

[36] *Godlevskiy v. Russia* app no 14888/03 (ECtHR 23 October 2008), § 45; *Pedersen and Baadsgaard v. Denmark* [GC] app no 49017/99 (ECtHR, 19 June 2003), § 77; *Jersild v. Denmark* [GC] app no 15890/89, (ECtHR 23 September 1994), § 35

2.1.2.1. Case of Magyar Helsinki Bizottság V. Hungary (2016)

The Hungarian Helsinki Committee, a non-governmental organisation that monitors the implementation of international human rights standards in the country, requested information on the appointment of public defenders in Hungary. Two police departments refused to disclose the information, claiming that it was not of public interest. The Hungarian Helsinki Committee argued that the information is subject to disclosure as public defenders perform a public duty. The District Court ruled in favour of the NGO, but the decision was overturned by the Regional Court and this was later upheld by the Supreme Court of Hungary. The NGO then filed a case with the ECtHR, alleging a violation of its right to freedom of expression under Article 10 ECHR. The court concluded in its judgement that there has been a violation of Article 10. The arguments advanced by the Government, were not sufficient to show that the interference was necessary in a democratic society.

The Court recognised that the establishment of platforms for public discussion is not restricted to the media alone. It can also be carried out by non-governmental organisations, which play a vital role in an informed public discourse. In the course of these considerations the Court acknowledged – like several times before- that when an NGO highlights matters that are relevant to the public [37], it is performing a **(public) watchdog function**. Then it may be characterised as a social “watchdog” [38], whose significance is equal to that of the media. [39] In order to be able to evaluate the watchdog function, for the Court it is important that the person seeking access to the information does so with the intention to **inform the public**. [40]

As the internet plays an important role in enhancing the public's access to news and in facilitating the dissemination of information [41], the Court has further noticed **that bloggers and popular users of social media** may be regarded as “public watchdogs” in so far as the protection provided by Article 10 is concerned. [42] In this context, the Court has placed emphasis on whether the gathering of the information was a relevant preparatory step in journalistic or in other activities that create a forum for, or constitute an essential element of, a public debate. The Court also extends this high level of protection to academic researchers. [43]

[37] See also *Animal Defenders International v The United Kingdom* [GC], App no 48876/08 (ECtHR 22 April 2013), § 103, ECHR 2013.

[38] See also *Társaság a Szabadságjogokért v. Hungary*, App no 37374/05 (ECtHR 14 April 2009), § 36; *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlichen gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*, App no 39534/07 (ECtHR, 28 November 2013), § 35.

[39] *Magyar Helsinki Bizottság v. Hungary* [GC] App no 18030/11 (ECtHR, 8 November 2016), § 166.

[40] *Ibid.*

[41] See also *Delfi AS v. Estonia* [GC], app no. 64569/09 (ECtHR 16 June 2015), § 133; *Ahmet Yildirim v Turkey*, app no 3111/10 (ECtHR 18 March 2013), § 48, and *Times Newspapers Ltd v. the United Kingdom* app no 14644/89 (8 October 1991), § 27.

[42] *Magyar Helsinki Bizottság v. Hungary* [GC] App no 18030/11 (ECtHR, 8 November 2016), § 168.

[43] *Magyar Helsinki Bizottság v. Hungary* [GC] App no 18030/11 (ECtHR, 8 November 2016), §158 and also *Társaság a Szabadságjogokért v. Hungary*, App no 37374/05 (ECtHR 14 April 2009), §§ 27-28; and *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlichen gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*, App no 39534/07 (ECtHR, 28 November 2013), § 36.

The decision also confirms that Article 10 places duties on 'public watchdogs': Article 10 contains a safeguard for journalists who report on issues of general interest, but it is conditional that they act in good faith in accordance with the ethics of journalism. [44]

2.1.2.2. Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland (2017)

In the case Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland two companies had collected sensitive personal information of 1.2 million Finnish individuals, including their earned and unearned income and taxable net assets, and published the information through a newspaper and later via text messaging. Finnish courts and authorities prohibited the processing of personal tax data beyond legal limits. The European Court of Human Rights' Grand Chamber upheld the prohibition of the Finnish courts and found no violation of the right to freedom of expression.

The core question in this case was whether the interference with the applicant companies' right to freedom of expression was "**necessary in a democratic society**" [45] and whether the domestic courts had effectively weighed **this right against the right to privacy**. The test of necessity [46] in a democratic society needs to determine whether the interference addresses "**a pressing social need**, whether it was **proportionate to the legitimate aim pursued** and whether the [justifying] reasons given by the national authorities ... are relevant and sufficient". [47]

The Court identified a number of criteria in the context of balancing the competing rights such as the contribution to a **debate of public interest**, the **degree of notoriety** of the person affected, the **subject of the news report**, the prior conduct of the person concerned, the **content, form and consequences of the publication**, and, where it arises, the circumstances in which photographs were taken. [48]

A publication concerning an individual's private life can either just satisfy the curiosity of a specific audience or have relevance to a broader issue. In order to determine its true purpose, it is crucial to evaluate the entire publication and consider the context in which it is published. [49] The term "public interest" typically concerns issues that affect the public to a degree that guarantees its attention or influences citizens' well-being or communal existence.

[44] Magyar Helsinki Bizottság v. Hungary [GC] App no 18030/11 (ECtHR, 8 November 2016), §159 and also Goodwin v. the United Kingdom [GC] app no 17488/90, (ECtHR 27 March 1996), § 39, and Bladet Tromsø and Stensaas v. Norway [GC], app no. 21980/93 (ECtHR 20 May 1999), § 65.

[45] Article 10(2) ECHR.

[46] See also Handyside v. the United Kingdom app no 5493/72 (7 December 1976), Stoll v. Switzerland [GC] app no. 69698/01 (ECtHR 10 December 2007), § 101, Morice v. France [GC] app no. 29369/10 (ECtHR 23 April 2015), § 124, and Pentikäinen v. Finland [GC] app no. 11882/10 (20 October 2015), § 87.

[47] The Sunday Times v. the United Kingdom app no 6538/74 (ECtHR 26 April 1979), § 62.

[48] Von Hannover v. Germany (no. 2) [GC] app no 40660/08 and 60641/08 (ECtHR 7 February 2012), §§ 109-113; Von Hannover v. Germany (no. 3) app no 8772/10 (ECtHR 19 September 2013), § 46; Axel Springer AG v. Germany [GC] app no 39954/08 (ECtHR 7 February 2012), §§ 89-95.

This, as well, comprises topics concerning important social matters or the potential to cause relevant discussions. It also includes issues the public has a legitimate interest to be informed about. However, the public interest should not be reduced to a mere desire for information about the private lives of others or to an audience's inclination for sensationalism or voyeurism. [50]

2.2 The European Court of Justice (ECJ)

2.2.1 Processing Personal Data solely for Journalistic Purposes

The Data Protection Directive [51], which was in force from 1995 to 2018, regulated the processing of personal data in the European Union, including for journalistic purposes. The Directive aimed to protect the fundamental rights of individuals with respect to the processing of their personal data, thereby allowing the free flow of information and the freedom of expression.

Processing of personal data for journalistic purposes was exempt from certain provisions of the Directive, including the requirement to obtain consent from the data subjects for the processing of their personal data. However, this exemption was not absolute and was subject to certain conditions. For example, the processing had to be necessary for the purposes of journalism, and the journalist had to take appropriate measures to ensure the accuracy of the information. In addition, the Directive required Member States to provide appropriate safeguards in order to protect the rights of individuals in relation to the processing of their personal data for journalistic purposes.

Article 9 of the Directive states:

'Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.'

Similarly, Article 85 GDPR sets out provisions for the processing of personal data for journalistic purposes and the freedom of expression. Each Member State shall provide exemptions or derogations from certain provisions of the GDPR for such purposes, but only to the extent that it is necessary to reconcile the right to the protection of personal data with the right to freedom of expression and information.

[49] *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC] app no 931/13 (ECtHR 27 June 2017), § 171; see also *Couderc and Hachette Filipacchi Associés* [GC] app no 40454/07 (ECtHR 10 November 2015), § 102.

[50] *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC] app no 931/13 (ECtHR 27 June 2017), § 171; see also (with further references) *Couderc and Hachette Filipacchi Associés* [GC] app no 40454/07 (ECtHR 10 November 2015), §§ 101 and 103; *Von Hannover v Germany* app no 59320/00 (ECtHR 24 June 2004), § 65; *Standard Verlags-GmbH v. Austria* (no. 2) app no. 21277/05 (ECtHR 4 June 2009), § 52; *Prager and Oberschlick v. Austria* app no 15974/90 (ECtHR 26 April 1995) § 38; *Tammer v. Estonia* app no. 41205/98 (ECtHR 4 April 2011), §§ 59-63.

[51] Directive 95/46/EC.

In two important cases the European Court of Justice deals with notions, related to the right to freedom of expression and balances that right with the right to privacy. In Case C-73/07 the ECJ assessed the question whether activities in which data, related to the earned and unearned income and assets of natural persons, can be regarded as the processing of personal data carried out solely for journalistic purposes within the meaning of Article 9 of the directive. In 2017 the Court was confronted with a similar question, specifically, whether or not the filming of police officers during the performance of their official duties and the subsequent publication of the video on platform Youtube can be considered as a journalistic activity (Case C-345/17). In both cases the Court provided a set of elements useful to check whether an activity is undertaken solely for journalistic purposes.

Although both rulings deal with Article 9 of the Data Protection Directive, these rulings are also relevant today, as similar provisions can be found in Article 85 GDPR. In both cases the Court states that not only media but also every person can be engaged in journalism. [52] The exceptions and derogations at Member State level are not limited to professional journalists, either. [53]

In Case C-73/07 the Court clearly determines that the fact that the publication of data within the public domain is done for profit-making purposes does not exclude a publication from being an activity undertaken 'solely for journalistic purposes'. A degree of commercial success may even be essential to professional journalistic activity. [54]

The Court further takes the evolution and proliferation of methods of communication and the dissemination of information into account. The **medium (e.g. paper, radio or internet) used is not decisive to whether an activity is undertaken 'solely for journalistic purposes'**. [55] **Consequently, the Court concluded in Case C-345/17 that the publication of the video on a video website where users can send, watch and share videos, namely 'Youtube', can be considered as a journalistic activity.**

The Court concluded in both cases that an activity can be considered as journalistic if the **objective is the disclosure of information, opinions or ideas to the public, irrespective of the medium which is used to transmit them.** [56]

The Court further states that in order to balance the right to privacy and the right to freedom of expression the settled case law of the European Court of Human Rights must be taken into consideration. In this context, the Court references in C-345/17 to the above mentioned Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland Case. In this case the ECtHR has laid down a number of relevant criteria which must be taken into account: inter alia, the contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person

[52] C-73/07, § 58 and C-345/17, § 52.

[53] C-345/17, § 55.

[54] C-73/07, § 59.

[55] C-73/07, § 60, see also C-345/17, § 57.

[56] C-73/07, § 61, see also C-345/17, § 69.

concerned, as well as the content, form and consequences of the publication, and the manner and circumstances, in which the information was obtained and its veracity. [57]

2.2.2. Disclosure or Dissemination of Information in the Media

In the case C-302/20 the ECJ dealt with the question whether a disclosure by a journalist, to one of his or her usual sources of information, of information relating to the forthcoming publication of an article authored by him or her reporting a market rumour, can be considered to have been made "for the purpose of journalism," as required by the Article 21 of the Market Abuse Regulation.

The Market Abuse Regulation (MAR) is a regulation of the European Union that came into effect on 3 July 2016. It aims at combating insider dealing, unlawful disclosure of inside information, and market manipulation in the financial markets. It sets out rules for issuers, investors, and market participants to ensure that trading on EU markets is fair and transparent.

The Court emphasises the importance of the fundamental rights and freedoms enshrined in the Charter of Fundamental Rights of the European Union. Concepts related to those freedoms shall be interpreted broadly. In this context the Court references to the judgement C-345/17 and the definition of the purpose of journalism (see above).

In the case at stake, the Court defines the expression "for the purpose of journalism" [58] as the "disclosure of information the purpose of which is the activity of journalism and, accordingly, not necessarily just to disclosures of information consisting in the publication of information as such but also to disclosures of information which form part of the process leading to that publication". [59]

Furthermore, the Court states that it is the ultimate objective of journalistic activities to communicate information to the public. [60]

The Court concluded that if a journalist discloses information about his upcoming report on market rumour to a regular source, this can be considered "for the purpose of journalism" under Article 21 MAR, if the disclosure is essential for carrying out journalistic activities, including investigative work needed for publication. [61]

[57] C-345/17, § 66 and Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC] app no 931/13 (ECtHR 27 June 2017), § 165.

[58] Article 21 MAR.

[59] C-302/20, § 64.

[60] C-302/20, § 69.

[61] C-302/20, § 71.

2.3 Austria

In Austria the Supreme Court and the Constitutional Court both have handled cases relevant for the study at stake as they contribute to the debate to whether a content can be considered as journalistic.

2.3.1 The Austrian Supreme Court (Oberster - Gerichtshof - OGH)

2.3.1.1 *Due Diligence Expected in Responsible Journalism (60b168/97t)*

In case 60b168/97t, the Austrian Supreme Court dealt with the question, whether an accused journalist was obliged to carry out further research before he published allegations.

Section 29 (1) of the Media Act stipulates that the media owner (publisher) or a media employee should not be punished for a media content offense, for which proof of truth is permissible, if the proof of the truth has been provided. Furthermore, they should not be punished if there is an overriding public interest in the publication, and the required due diligence of responsible journalism has been exercised and there are sufficient reasons for him/her to believe the allegations are true.

The Court states that the failure to obtain possible information does not in itself constitute a breach of due diligence. However, depending on the circumstances of the individual case, there may well be an obligation to carry out further research on the correctness of the facts, about which the report is to be made. In any case, additional research will have to be carried out if the information is easily accessible and the planned publication is not unduly delayed as a result. Furthermore, the Court states that the main aim of due diligence of responsible journalism is to reduce the risk of sustained damage caused by incorrect reporting. The Court concluded that a journalist has to strive for the truth and the research obligation is higher, the more unreliable the source of information is.

2.3.1.2 *The Federal Law for Journalists (9ObA229/98m)*

In case 9ObA229/98m, the Austrian Supreme Court dealt with a labour law issue. In order to better understand the legal findings, it is crucial to shortly present the current legal framework in Austria, on which this decision is based.

It should be noted that the following definitions are primarily important for labour law issues. However, in the present case the Court defined the term journalists in more detail. Furthermore, some important aspects of the role of journalists are laid down.

In Austria the law on journalists ("Journalistengesetz - JournG") provides some information in relation to employed journalists and permanent freelancers. According to § 1 paragraph 1 the JournG applies to all employees of a newspaper company who are entrusted with the composition of a text or the drawing of pictures and who are employed with a fixed salary and do not just do this job as a side job. The term "newspaper company" is not defined in more detail in the JournG.

The amendment to Federal Law No. 158/1955 extends the scope of the JournG to so-called radio journalists and people who work in the film industry and are involved in the production of newsreels (§ 1 para. 2 JournG).

According to §16 JournG a permanent freelancer is someone who takes part in the content design of a medium or the communications of a media service as a journalist in a media company or media service (except in Austrian broadcasting within the meaning of the federal law BGBl. No. 379/1984) - without being in an employment relationship. The permanent freelancer must carry out this journalistic activity constantly and not just as a side job, and essentially performs it personally and not as an entrepreneur.

According to the Austrian Supreme Court a journalist is a media employee who writes or designs information content (in the political, economic, cultural and sporting fields) with reference to **current events for a larger group of people** in written, print, image (photo, film, electronic) or sound media. However, the areas are not to be seen as a thematic limitation of journalistic activity, but rather as examples of thematic diversity, which the Court of appeal correctly assumed.

With the JournG, the legislator pursued the purpose of providing journalists with the most effective possible protection in order to maintain an intellectually independent and morally resilient journalistic status in public life. It is one of the **most important tasks of a journalist** to give the **general public an objective insight into current events** and at the same time to adopt an evaluation-oriented unbiased point of view through the selection of the reports and their presentation or comments. The general public is therefore not only informed by the journalist, but also mentally and morally influenced to a considerable extent. In this way, journalists play a key role in forming public opinion.

The Court states that the understanding of the term '**current event**' should be expanded. The scope may not be limited to mere **topicality of the content of the reporting**. Current events can also be conceivable as part of entertainment programs, such as quiz or magazine programs. The Commission for the Compliance with the Broadcasting Act has repeatedly taken the view that the term 'current affairs of the day' should not be interpreted narrowly; it is sufficient that the content is presumably new to the target audience.

Furthermore, the Court states that journalists perform a **predominantly creative activity**, which requires **intellectual independence, moral resilience and a constantly alert sense of responsibility towards the general public**. [62]

[62] 9ObA229/98m.

2.3.1.3 *The Exaggeration in Journalism (6Ob77/02w)*

In case 6Ob77/02w the Austrian Supreme Court dealt with the claim of the plaintiffs against the defendant to desist from defamatory and credit-damaging allegations. In this context the Court also emphasised the settled case law of the ECtHR in relation to the freedom of the press. In particular, the Court assessed journalistic freedom in relation to exaggeration and provocation.

According to the case law of the ECtHR, freedom of expression is one of the most important pillars of a democratic society and one of the fundamental conditions for its progress and for the self-realisation of every human being. Under the limitations of paragraph 2 of Article 10 of the ECHR, which must be interpreted narrowly, it applies not only to 'news' or 'opinion' that is received positively or considered non-offensive or indifferent, but also to those that hurt, shock or worry. The ECtHR emphasised in various cases – as outlined above - that there is little scope under Article 10 para 2 of the ECHR for restrictions on political speech or for debates on issues of public interest. The press plays an important role in a democratic society. While respecting certain limits, particularly with respect to the honour and rights of others, it is nevertheless its duty to impart information and opinions on all matters of public interest in a manner consistent with its duties and responsibilities. Article 10 not only protects the **content of the communicated opinions and information**, but also **the form in which they are communicated**. Journalistic freedom also includes the possible resort to a degree of exaggeration or even provocation. When a statement amounts to **a value judgment**, the proportionality of an interference may still depend on whether there is **sufficient factual basis for the contested statement**, because a value judgment without any supporting factual basis can be excessive.

In the case at stake the defendants published a sharp, possibly polemically exaggerated criticism on a topic of **public interest on a perhaps narrow factual basis**. The overall context and impression of the statement conveyed had to be evaluated from the point of view of an unbiased average addressee of the statement. The Court regarded this criticism as legally permissible, because Article 10 ECHR also protects opinions that hurt, shock or disturb.

2.3.1.4 *The Element of Contributing to a Debate of Public Interest (6Ob236/19b)*

In 2017 several well-known persons met in a house in Ibiza. The politicians assumed that it would be a confidential conversation. However, the meeting was entirely filmed with picture and sound. The footage was later offered to various media companies. Ultimately, the recordings and contents were partly published by well-known newspapers. The produced recording not only triggered a series of political consequences, but also sparked a new discussion about quality journalism, the role of private reporting in media freedom, and the relationship between the protection of privacy and the public interest in information in investigative journalism. On January 23, 2020, the Supreme Court had the opportunity to comment on some of these questions.

When publications are evaluated, a balance must be struck between the privacy protected by Article 8 ECHR and the freedom of expression guaranteed by Article 10 ECHR. Particular attention must be paid to the fact that the media must be able to fulfil their role as a 'public watchdog' in a democratic society. [63] This requires a comprehensive balance of interests on a case by case basis. The interest of the individuals must be contrasted with the interests of the general public. In the opinion of the Court, the defendant could not successfully argue that the secret video recordings pursued the aim of **contributing to a debate of public interest**. Rather, he arranged the recording to sell the video for a profit. By passing the videos to a very limited group of people, it does not constitute a contribution to a debate of public interest. Consequently, the recording of the video is not protected by Article 10 ECHR. [64]

However, the Court differentiated in its ruling between the recording and the publication of the video. The publication of the video - in the opinion of the Court – contributes to a debate of public interest. Consequently, this allows the general public to form its opinion about the personal integrity of the well-known politicians and to draw conclusions about their suitability for holding high political offices. The publication of the full footage is also considered by the Court as the mildest means of achieving the purpose. In the present case, the information relevant for the debate of public interest cannot necessarily be only concluded by transcripts of the conversation as the whole setting and external circumstances are relevant. [65]

Consequently, the publication of the video recordings provided a large contribution to a debate of public interest. [66] The essential element in this relation is to make the video available to a larger audience. The Court concluded that the contribution to a debate of public interest is to be weighted higher than the plaintiff's interest in maintaining the confidentiality of the conversation that took place. [67]

2.3.2 The Austrian Constitutional Court (VfGH) on Exemptions for Journalism in the Austrian Data Protection Law (G 287-288/2022)

In 2022 the Austrian Constitutional Court dealt with the question whether it is constitutional to completely exempt data processing by **media companies for journalistic purposes** from certain data protection rules. Section 9 (1) of the Data Protection Act (DSG) stipulates that the DSG and specified parts of the EU General Data Protection Regulation (GDPR) do not apply to journalistic data processing by media owners, publishers and employees of a media company or media service. The Austrian provision was enacted on the basis of the opening clause of Article 85 of the GDPR.

[63] Austrian Supreme Court 6 Ob 236/19b, 4.1.

[64] Austrian Supreme Court 6 Ob 236/19b, 2.6.

[65] Austrian Supreme Court 6 Ob 236/19b, 3.5.

[66] Austrian Supreme Court 6 Ob 236/19b, 3.8.

[67] Austrian Supreme Court 6 Ob 236/19b, 3.8.

The decision was triggered, among other things, by a man's complaint to the data protection authority, His business card had not been blacked out in an article and in pictures of a house search on the homepage of a media company. The data protection authority rejected the complaints against the publication of personal data by media companies due to their lack of competence. The man complained about the rejection at the Federal Administrative Court and then applied to the Constitutional Court.

The Austrian Constitutional Court emphasised the rulings of the ECtHR and states that in a democratic society, the media play a central role in the public interest as a **'public watchdog'**. The freedom of opinion and information therefore requires exceptions to data protection if the data protection provisions would not be compatible with the specifics of carrying out journalistic work. [68]

However, excluding the media from the application of the DSG in principle contradicts the fundamental right to data protection. Interference with the right to data protection is only permitted by law if the intervention is necessary to protect overriding legitimate interests of another. Due to the fundamental right to data protection, the legislature is therefore always required to weigh up the interest of the person concerned in the protection of his or her personal data and the opposing legitimate interests of another (e.g. a media company).

The Constitutional Court concluded that it is unconstitutional to completely exempt data processing by **media companies for journalistic purposes** from the provisions of the Austrian Data Protection Act. It was found, this **undifferentiated exclusion** ("media privilege") would violate the fundamental right to data protection. Consequently, the fundamental right to data protection does not allow that the freedom of expression and information categorically takes precedence over the protection of personal data by excluding the applicability of all data protection regulations of a content and procedural nature according to the GDPR and the Data Protection Act in their entirety for activities for journalistic purposes. [69]

The repeal of this provision will be effective as of June 30, 2024. Until then, the legislature has time to make a correspondingly differentiated new regulation.

2.4 Germany

In Germany several judgements provide information on what qualifies as journalistic content. The following subsection will outline the main facts relevant for this study.

The main goal of journalistic content is to contribute to a public debate. [70] This requires a certain distribution of the information. However, also publication with a limited audience and smaller group of addressees can be qualified as journalistic. [71]

[68] See Austrian Constitutional Court G 287-288/2022, § 60.

[69] See Austrian Constitutional Court G 287-288/2022, § 63.

[70] VGH Baden-Württemberg, NJW 2014, 2667; VG Schwerin, CR 2015, 55.

[71] VGH Baden-Württemberg, NJW 2014, 2667; VG Schleswig-Holstein, Beschl. v. 2.11.2015 – 11 B 1/15; OVG Sachsen, MMR 2017, 716.

It is crucial that the information is provided with the intention of reporting with a clear journalistic purpose in order to contribute to the formation of a public opinion. [72] In a case on reporting on ongoing criminal proceedings and naming, the German Federal Court of Justice ruled that it is important whether the reporting serves solely to satisfy the curiosity of the public or whether it contributes to the formation of opinion in a democratic society so that the press fulfils its function as a 'public watchdog'. [73]

It is essential that sufficiently careful research on the truthfulness of information is carried out before the statement is made or disseminated. This obligation depends on the available possibility to clarify uncertainties. [74] However, actors can only be asked to exercise the 'press-like' diligence that can be observed with their possible means. [75]

It should be noted that a new Media State Treaty (Medienstaatsvertrag - MStV) came into force in 2020. The MStV takes the changes in the media landscape in Germany into account. To this end, it established a whole series of obligations for providers of digital media platforms and for the creators and distributors of their own digital media offerings. The MStV contains a number of specific obligations for the various players in the area of media. However, the MStV does not provide a definition of journalism or journalistic content. [76]

3. Analysis of Criteria for Journalistic Work and Content

The case law of the ECtHR and the ECJ as well as the judgments of the national courts in Germany and Austria, **do not give a definition of journalism**. However, the courts refer to the journalistic pursuit of public interests and a wide range of contributions to public debate. It highlights the freedoms that are essential to the role of a "public watchdog" and the duties and responsibilities associated with this role. Based on the analysed cases, criteria for the differentiation between journalistic content and other sources of information and communication activities were identified and are outlined below.

3.1 Role as of a 'Public Watchdog'

In various rulings the ECtHR asserted the essential role played by the press as a "watchdog" in a democratic society. [77] The Court connected the task of the press to imparting information and ideas on all matters of public interest to the public's right to receive them.⁷⁸

[72] Spindler/Schuster, Recht der elektronischen Medien 4. Auflage (2019), see also OVG Sachsen, MMR 2017, 716, VG München, Urt. v. 17.12.2015 – M 17 K 14.4369.

[73] BGH, 31 May 2022, VI ZR 95/21, 21.

[74] Ibid, 22.

[75] BGH, 12 May 1987 - VI ZR 195/86.

[76] Martin Gerecke/Gabriele Stark, Ein neues Medienrecht für Deutschland, GRUR 2021, 816.

[77] Council of Europe, Guide on Article 10 of the ECHR, §298 (31 August 2022).

[78] Ibid.

While this role was mainly played by journalists and the press in the past, it is now increasingly being played by other actors. Therefore, the ECtHR often uses the term ‘social watchdog’ [79] in connection with ‘watchdogs’ other than the press. With growing importance of public platforms, the task of disseminating information and ideas is no longer the sole responsibility of the press. The ECtHR states in several rulings that non-governmental organisations (NGOs) can also play a role similar to that of a ‘public watchdog’ by drawing attention to matters of **public interest**. [80] They must therefore be given protection similar to that of the press.

Furthermore, the Court reiterates that a high level of protection also extends to **academic researchers**. In more recent decisions the Court has further noted that, given the important role played by the internet in enhancing the public’s access to news and facilitating the dissemination of information [81], **bloggers and popular users of the social media** may – as far as the protection granted by Article 10 is concerned – also be regarded as ‘public watchdogs’.⁸² Therefore, publications of citizen journalists who publish their content on the internet can also be subject to this protection.

ECJ also clearly states in C-73/07 (*Satamedia*) and C-345/17 (*Buivids*) that not only media but also **every person can be engaged in journalism**. [83] Moreover, the exceptions and derogations at the Member State level are not limited to professional journalists. [84]

Furthermore, the **medium (e.g. paper, radio or internet) used is not decisive**. [85] **Consequently, the Court concluded in** Case C-345/17 that the publication of a video on a video website on which users can send, watch and share videos, namely ‘Youtube’, can be considered a journalistic activity.

The Austrian Constitutional Court as well as the German case law also emphasise that in a democratic society, journalism plays a central role in the public interest as a ‘**public watchdog**’. In this context, the freedom of opinion and information may require exceptions to data protection if the data protection provisions would otherwise not be compatible with the journalistic work. [86]

In order to take account of the importance of the right to freedom of expression in every democratic society, recital 153 of the GDPR stresses that it is necessary to interpret notions relating to that freedom, such as journalism, broadly. This is in line with the case law of the ECtHR and ECJ outlined above.

[79] See also *Társaság a Szabadságjogokért v. Hungary*, App no 37374/05 (ECtHR 14 April 2009), § 27; *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlichen gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*, App no 39534/07 (ECtHR, 28 November 2013), § 34.

[80] *Animal Defenders International v The United Kingdom* [GC], App no 48876/08 (ECtHR 22 April 2013), § 103.

[81] See also *Delfi AS v. Estonia* [GC], app no. 64569/09 (ECtHR 16 June 2015), § 133; *Ahmet Yildirim v Turkey*, app no 3111/10 (ECtHR 18 March 2013), § 48, and *Times Newspapers Ltd v. the United Kingdom* app no 14644/89 (8 October 1991), § 27.

[82] *Magyar Helsinki Bizottság v. Hungary* [GC] App no 18030/11 (ECtHR, 8 November 2016), § 168. 83 C-73/07, § 58 and C-345/17, § 52.

[84] C-345/17, § 55.

[85] C-73/07, § 60, see also C-345/17, § 57.

[86] See Austrian Constitutional Court G 287-288/2022, § 61 and Article 85 GDPR.

However, albeit the role of a ‘public watchdog’ is increasingly being played by other actors as well, the relevance of journalists and the press is as high today as it was in the past due to the technology- enabled fragmentation of information consumption, the often unintentional spread of misinformation and the need for reliable sources of information.

3.2 Pursuit of Public Interest

The ECtHR has consistently held that there is little scope under Article 10 para. 2 of the Convention for restrictions on political speech or on the **debate on issues of public interest**. [87] In this respect, the ECtHR showed a strict attitude towards interference by national authorities in the freedom of expression on matters of public interest. [88] Otherwise, this would significantly prevent journalists from fulfilling the vital role of a watchdog. [89]

The ECJ also states in its ruling C-345/17 (*Buivids*) that the **objective of a journalistic activity is the disclosure of information, opinions or ideas to the public**. [90]

As discussed in the Austrian case 6 Ob 236/19b, the contribution to a debate of public interest is a key characteristic. Sharing information to a very limited group of people, does not constitute a contribution to a debate of public in the opinion of the Court. [91] Content must be brought to the attention of a **“larger group of people”**. [92] However, the German case law states that information provided to a limited audience and smaller group of addressees can qualify as journalistic content. [93]

Similarly, the concept of ‘public’ in the EU Copyright law refers to an indeterminate number of potential recipients and implies, moreover, a fairly large number of persons. However, this means that a work should be perceptible in any appropriate manner to people in general and is not restricted to specific individuals belonging to a private group. [94] This requirement also applies to journalistic content.

Both these definitions of the ‘public’ are narrower as the term ‘general public’ used in the definition of the ‘audiovisual media service’ and ‘video-sharing platform service’ under the EU Audiovisual Media Services Directive. [95]

As shown above journalistic content is **characterised by the author’s contribution to the public debate by disclosure of information, opinions or ideas**.

[87] The *Lingens v Austria* app no 9815/82 (ECtHR 8 July 1986), *Castells v. Spain* app no 11798/85 (ECtHR 23 April 1992), § 43; *Wingrove v. the United Kingdom* app no 17419/90, § 58.

[88] Dirk Vorrhoof, *The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society*.

[89] *Observer and Guardian v. the United Kingdom* app no 13585/88, (ECtHR 26 November 1991), § 59. 90 C-345/17, § 69.

[91] Austrian Supreme Court 6 Ob 236/19b, 1.7.

[92] Austrian Supreme Court 9ObA229/98m.

[93] VGH Baden-Württemberg, NJW 2014, 2667; VG Schleswig-Holstein, Beschl. v. 2.11.2015 – 11 B 1/15; OVG Sachsen, MMR 2017, 716.

[94] See e.g. C-637/19 (BY), §§ 26ff and the case-law cited.

[95] Article 1 para 1 lit a and lit aa Directive 2010/13/EU as amended by Directive (EU) 2018/1808.

3.3 Duties and Responsibilities Connected to the Function of Journalists

The protection granted by Article 10 ECHR to journalists in relation to reporting on issues of general interest is subject to the condition that they are acting in **good faith in order to provide reliable and precise information in accordance with responsible journalism**. [96] The same principles apply to persons other than (professional) journalists involved in public debate. [97]

The concept of **“responsible journalism”** [98] is not confined to the contents of information which is collected and/or disseminated by journalistic means. That concept covers all journalistic activities and also embraces, inter alia, the lawfulness of the conduct of a journalist, including his or her public interaction with the authorities when exercising journalistic functions. The fact that a journalist violated the law plays an important role in the decision of whether he or she has acted responsibly. [99] However, the ECtHR has always hesitated to indicate to the press how it should perform its tasks, what matters it should investigate or how far it should go in its criticism. [100]

Due to the influence of the media these considerations play an especially important role in our society today. As individuals are confronted with a lot of information, which is disseminated by traditional and electronic media alike and involves a lot of different actors, **compliance with journalistic ethics is essential**. [101] In its more recent decisions, the ECtHR also says that expressive activity on the internet, which is generated by users, provides an unprecedented platform for the exercise of freedom of expression. [102]

Journalistic freedom also includes the possible resort to a degree of exaggeration or even provocation. When a statement amounts to a **value judgment**, the proportionality of an interference may still depend on whether there is **sufficient factual basis for the contested statement**, because even a value judgment without any supporting factual basis can be excessive. [103]

[96] See *Fressoz and Roire v. France* app no 29183/95 (ECtHR 21 January 1999), § 54, *Bladet Tromsø and Stensaas v. Norway* [GC], app no. 21980/93 (ECtHR 20 May 1999), § 65 and *Times Newspapers Ltd (nos. 1 and 2) v. the United Kingdom*, app nos. 3002/03 and 23676/03 (ECtHR 10 March 2009, § 42, *Axel Springer AG v. Germany* [GC] app no 39954/08 (ECtHR 7 February 2012), § 93.

[97] *Braun v Poland* app no 30162/10 (ECtHR 4 November 2014), § 40.

[98] See *Fressoz and Roire v. France* app no 29183/95 (ECtHR 21 January 1999), § 54, *Bladet Tromsø and Stensaas v. Norway* [GC], app no. 21980/93 (ECtHR 20 May 1999), § 65 and *Times Newspapers Ltd (nos. 1 and 2) v. the United Kingdom*, app nos. 3002/03 and 23676/03 (ECtHR 10 March 2009, § 42, *Axel Springer AG v. Germany* [GC] app no 39954/08 (ECtHR 7 February 2012), § 93.

[99] *Pentikäinen v. Finland* [GC] app no. 11882/10 (ECtHR 20 October 2015), § 90.

[100] *Stoll v. Switzerland* [GC] app no. 69698/01 (ECtHR 10 December 2007), Dissenting Opinion Of Judge Wildhaber, Joined By Judges Borrego Borrego and Šikuta.

[101] *Stoll v. Switzerland* [GC] app no. 69698/01 (ECtHR 10 December 2007), § 54.

[102] *Ahmet Yıldırım v Turkey*, app no 3111/10 (ECtHR 18 March 2013) and *Times Newspapers Ltd (nos. 1 and 2) v. the United Kingdom*, app nos. 3002/03 and 23676/03 (ECtHR 10 March 2009), § 27.

[103] Austrian Supreme Court 6Ob77/02w.

The Austrian Supreme Court emphasises in its ruling 9ObA229/98m that journalists perform a predominantly creative activity, which also needs intellectual independence and moral resilience. This requires a constantly **alert sense of responsibility towards the public**. The Court says that neglecting a strict investigation does not in itself constitute a breach of due diligence. However, depending on the circumstances of the individual case, there may be a duty for further research on the facts the report is based on. In any case, additional research will have to be carried out if the information is easily accessible and the planned publication is not unduly delayed as a result. Furthermore, the Court states that the major objective of due diligence of responsible journalism is the reduction of risk that damage might be caused by incorrect reporting. The Court concluded that a journalist always has to look for truth and that the obligation for further research is higher, the more unreliable the source of information is. [104]

It is essential that sufficiently careful research on the truthfulness of information is carried out before an assertion is made or disseminated. This obligation depends on the available possibility to clarify uncertainties. [105] However, actors can only be asked to exercise the **‘press-like’ diligence** that is to be observed with their possible means. [106]

On the basis of the above, it can be concluded that journalistic content is distinguished from other sources of information and communication activities by **authors observing the standards of responsible journalism** as outlined in the relevant case law. This means in particular that they act in good faith and with due diligence in order to provide reliable and precise information to the public.

4. Conclusion

This study develops criteria by which journalism can be distinguished from other forms of information activities. An evaluation of various judgements and decisions of the European Court of Human Rights, the European Court of Justice and national Austrian and German courts provides an insight in the principles the courts mainly follow. The case law of the ECtHR builds the fundament of all the other cases examined. ECJ as well as national courts consistently reference to ECtHR cases and the principles developed therein.

Neither European courts nor the national courts provide a definition of the term journalism. They mainly focus on the right to **freedom and information** enshrined in Article 10 ECHR and agree that these rights are fundamental to democracy and can only be restricted on substantial grounds.

Although freedom of media or the freedom of the press is not explicitly mentioned in Article 10, a number of ECtHR cases deal with these subjects.

[104] Austrian Supreme Court 6Ob168/97t.

[105] BGH, 31 May 2022, VI ZR 95/21, 21.

[106] BGH, 12 May 1987, VI ZR 195/86.

For the courts the ultimate objective of journalistic activities is to communicate information to the **public**. The term 'public interest' typically concerns issues the public has a right to know. In various rulings the courts stress the important function of the media as a 'watchdog' in a democratic society. Nonetheless, it should be noted that the public interest is not reduced to an audience's inclination for sensationalism or voyeurism. As the internet plays an important role in enhancing the public's access to news and in facilitating the dissemination of information, the recent case law does not limit the personal scope of journalism and/or journalistic content to the press or institutionalised media. The courts have clarified that bloggers and popular users of social media may be regarded as **'watchdogs'**. In this respect, it is not so important which persons or media convey the messages. As the courts interpret the term journalism broadly and include a wide variety of activities that provide relevant information to the public, the same principles apply to journalists and other persons involved in public debate. However, the technology-caused fragmentation of information consumption, the often unintentional spread of misinformation and the need for reliable sources of information underline the importance of journalists and the press.

The ECtHR emphasises that Article 10 does not guarantee a fully unrestricted freedom of expression to the press, even if serious public concerns are covered. When exercising its right to freedom of expression, the press must observe its **duties and responsibilities**. Journalists must act in **good faith in accordance with responsible journalism**. This role requires a constantly alert sense of responsibility towards the public. Journalists have to look for the truth and endeavor to provide reliable and precise information. The major objective of due diligence of responsible journalism is the reduction of risk that damage might be caused by incorrect reporting. However, the ECtHR has always hesitated to indicate to the press how it should perform its tasks, what matters it should investigate or how far it should go in its criticism. Building upon the fundamental principles developed by the ECtHR, the national courts apply these concepts in various cases, but do not introduce new elements to the established doctrine.

It can be concluded that the courts mainly focus on two areas, namely public interest and ethical aspects, in order to distinguish journalism from other forms of communication. Journalism is viewed from a broad perspective, including all different kinds of media activities, even blogging and whistle blowing, with public interest as the lowest common denominator. In this context it is crucial that the published information, opinions or ideas contribute to a public debate. While pursuing journalistic activities, journalists shall act in good faith and with due diligence in order to provide reliable and precise information to the public. The risk of sustained damage caused by incorrect reporting must be reduced.