

2. Belgium

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1. Questions 1. – 4.

There is no particular legislation regarding the use of illegally or improperly obtained information. However Belgium has a law on the protection of journalistic sources (at the federal level) since 2005³⁵⁹. This law allows journalists to conceal their source. They do not have to reveal the identity of the person(s) who provided them with information. According to Article 2 of the 2005 Act, the right of journalists not to disclose their sources of information applies to "any person and any legal person, directly contributing to the gathering, writing, production or dissemination of information through media for the public". Initially the scope of this law was more restricted in that it only benefited professional journalists. Following an action for annulment lodged by bloggers (who are not professional journalists), the Constitutional Court has modified the original definition to widen its scope³⁶⁰.

Article 5 of the 2005 Act prohibits any request for information or any investigative action that would seek to obtain information about the journalists' sources. However, the journalists' right to silence their sources and the prohibitions outlined in Article 5 are not absolute. Indeed, Article 4 of the Act sets out the circumstances under which, at a judge's request, journalists will be obliged to disclose their source (i. e. when there is a clear threat to the physical integrity of some persons). Finally, the law specifies that the failure to disclose sources may not lead to prosecution based on the criminal act of handling stolen goods (Article 505 of the Criminal Code). Similarly, a failure to reveal one's sources when the information results from a breach of professional secrecy cannot lead to the journalist's prosecution for his/her involvement in the secrecy breach.

The 2005 Act was adopted as a follow-up to the European Court of Human Rights decision in *Ernst and others v. Belgium*³⁶¹. The Court found a violation of Article 10 of the European Convention on Human Rights (ECHR). Stressing that "protection of journalistic sources is one of the basic conditions for press freedom"³⁶², the Court considered the searches and seizures conducted at the homes of the claimants as well as their workplace (newsrooms of several Belgian newspapers) as an unjustified interference with the freedom of expression. The European Court of

Human Rights reached the same conclusion in another case involving similar facts. The judgment in the case *Tillack v. Belgium* addresses searches and seizures, both at home and at the applicant's work premises, which were intended to determine who had supplied the reporter with confidential documents leaked from the European Anti-Fraud Office (OLAF)³⁶³.

Although they are not specifically applicable to the media sector, two articles of the Criminal Code may also be mentioned here as they restrict the journalists' possibility to conduct their research for information and sources.

Article 314bis deals with offences relating to the secrecy of private communications and telecommunications. Intentional listening, awareness of, and recording of private communications are classified as criminal offences. The mere holding, divulgement or disclosure of the content of such communications is also an offense. A Belgian court has recently relied on this provision to conclude that nothing can justify a violation of a person's private correspondence (in this case, an exchange of email messages with a representative from the press). Thus the protection of the journalist's sources can derive from the protection of the secrecy of the emails directly addressed to the journalist³⁶⁴.

Article 460ter of the Criminal Code prohibits any use of the information obtained by getting access to a criminal file which aims at, or has the effect of, "impeding the progress of the investigation, infringing the privacy, physical or moral integrity or property of a person named in the criminal record". This provision of the Criminal Code was the subject of a ruling by the Belgian Supreme Court in a dispute relating to the dissemination of information contained in a criminal file³⁶⁵. For the Court, the condemnation of a journalist as the co-author of the criminal offence defined by Article 460ter satisfies the conditions of Article 10 § 2 ECHR. In particular, the court of appeal had correctly balanced the various interests and adequately taken into account "the detrimental effect of increasing media pressure on the defendants and civil parties in order to obtain a copy of a criminal file as quickly as possible". Ruling that the journalist is not guilty would risk to "jeopardise the confidentiality of information related to the

³⁵⁹ Law of April 7, 2005 relative à la protection des sources journalistiques, M.B., 27 April 2005. This act largely reflects the Recommendation (2000)7 on the right of journalists not to disclose their sources of information.

³⁶⁰ Constitutionnel Court, 7 June 2006, n° 91/2006.

³⁶¹ ECHR, 15 July 2003, *Ernst et autres v. Belgium*. See the case law pre-dating the ECHR decision: Court of Cassation, 1^{er} April 1996, Pas., 1996, I, p. 255; Court of Cassation, 21 June 1995, J.T., 1996, 26.

³⁶² ECHR (Gd ch.), 27 March 1996, *Goodwin v. United Kingdom*, § 39).

³⁶³ ECHR, 27 November 2007, *Tillack v. Belgium*. See the Belgian decision in this case: Court of Cassation (2nd ch.), 1^{er} December 2004, Pas., 2004, p. 1892.

³⁶⁴ Brussels (Court of Appeal), 29 October 2014, *Journal des Tribunaux*, 2015, p. 381.

³⁶⁵ Court of Cassation (2nd ch.), 7 December 2004, *Revue de droit pénal*, 2005, p. 1265, note G. Rosoux. See also: Ghent (Court of Appeal, 4th ch.), 25 May 2004, *Auteurs & Media*, 2004/4, p. 363; Corr. Ghent (19th ch.), 25 June 2003, *Auteurs & Media*, 2004/1, p. 79.

presumed innocence of an accused person".

The codes of ethics contain provisions relating to the collection of information by journalists. The Code of Ethics drawn up by the Council for the Ethics of Journalists (Conseil de déontologie journalistique), responsible for French and German language media, states that journalists, facing the argument that they should respect the secrecy in certain public or private affairs, can only agree not to disclose for grounds of public interest duly justified and "provided that these restrictions do not create unjustified obstacles to the freedom of information" (Art. 2). This Code, as well as the Code of Ethics codified by the Raad voor de Journalistiek (responsible for Flemish language media), require that journalists act with loyalty, in particular that they make clear they operate as journalist when collecting information³⁶⁶. Article 17 of the Code of Ethics from the Council for the Ethics of Journalists³⁶⁷ underlines in this respect that "[t]he journalists must use fair methods to collect and process information, photos, images and documents. The commission of criminal offences, the concealment of journalistic status, the use of deception regarding its purposes, the use of false identities, clandestine recording, provocation, blackmail, harassment and remuneration of sources of information are considered unfair methods". However, the same provision adds that "[i]f these methods are not considered as unfair if all the following conditions are met: - the information sought is of general interest and is of importance to society; - it is impossible to obtain the information by other means; - the risks faced by journalists and by third parties are proportionate to their purpose; - the methods used are permitted or, where applicable, validated by the chief editor, except unforeseen exceptional circumstances"³⁶⁸.

There is no legislation on the use of hidden cameras by the media and the case law in this area is scarce. A Brussels Court has already considered that when the journalists use hidden cameras "it cannot be argued that the filmed persons tacitly agreed to being filmed [...] The diffusion of the image and voice of another person without his/her prior consent breaches his/her right to one's own image and by itself constitutes gross negligence"³⁶⁹. The court thus agrees that the reporter can conceal the use of a recording

³⁶⁶ Article 17 of the Code of Ethics from the Raad voor de Journalistiek. See a decision applying this article: Civ. Brussels (20th ch.), 27 March 2012, Auteurs & Media, 2012/6, p. 602.

³⁶⁷ See also Article 15 of the Code of Ethics from the Raad voor de Journalistiek.

³⁶⁸ See also Article 40 of the Internal Regulation relating to the Treatment of Information and the Ethics of the Staff, adopted by the RTBF (the French-speaking public broadcaster in Belgium).

³⁶⁹ Civ. Brussels (réf.), 18 December 2007, Auteurs & Media, 2008/6, p. 488.

See also Civ. Brussels (33rd ch.), 19 May 2000, Auteurs & Media, 2000/3, p. 338.

device, but in the particular case, it "does not appear that the use of a sequence captured by hidden camera filmed was [...] of major interest to the public once it was established that, had the information been obtained lawfully, it could have been communicated to the public by the journalist himself, without broadcasting images or voices" of the persons involved. Thus, to reveal the content of an interview "does not violate the freedom of expression of the persons interviewed nor the right to remain silent" "when they could not ignore the interviewers were journalists. The prohibition of the dissemination of images taken with a hidden camera, when the information is not of major public interest, does not prevent a public debate which could restrict freedom of expression in accordance with the principle of proportionality required by Article 10 § 2 of the European Convention on Human Rights". For the Brussels Court of First Instance, there must be a compelling reason for recording with a hidden camera. The decision to use some hidden recording device to obtain information "must not be taken lightly, as the use of a hidden camera always results in a serious breach of privacy and integrity"³⁷⁰.

A Brussels court found that it cannot sanction a normally prudent journalist for reporting on an ongoing judicial inquiry (or disclosing the names of the persons concerned) when public figures acting in the course of their duties are involved, "as long as the usual precautions are respected, the truth is not manipulated and mere suspicions are not presented as certainties"³⁷¹. The journalist is not responsible when the press article contains no firm accusation, when the conditional tense is used in the text of the article and the matter is presented honestly, when the journalist stresses that the person involved in the proceedings "categorically denies" the allegations, when this person is presented as being simply "suspected" of having committed some misdeeds and/or when no responsibility for the offence has been formally established.

The mere fact of covering a court case does not undermine the principles of a fair trial or the presumption of innocence benefiting the persons involved. Belgian media law does not expressly impose an obligation to respect the defendants' presumed innocence³⁷². But it is a fundamental principle for criminal proceedings that journalists must respect. Respect for objectivity in the processing and dissemination of information implies, de facto, to take the presumption of innocence seriously. This might require to remain reserved and discreet³⁷³. The press cannot portray a person

³⁷⁰ Civ. Brussels (20th ch.), 27 March 2012, Auteurs & Media, 2012/6, p. 602.

³⁷¹ Civ. Brussels (14th ch.), 27 October 2009, Auteurs & Media, 2010/1, p. 124.

³⁷² See J. Englebert, La procédure garantie de la liberté de l'information, Limal, Anthemis, 2014, pp. 135 à 171, n° 163 à 212.

³⁷³ S. Hoebeke, B. Mouffe, Le droit de la presse. Presse écrite. Presse

presumed innocent as guilty, until a final verdict has been issued. The presumption of innocence cannot lead to muzzling the freedom of the press which is considered in the Constitution as one of the basic principles of democracy. When a media covers a judicial case, the presumption of innocence requires to apply the requirements of objectivity and impartiality more strictly.³⁷⁴

Media hype

Whatever the source of information and its dissemination, the judicial authorities cannot be held responsible for any media hype around the current proceedings.³⁷⁵ A violation of the presumption of innocence by the press does not lead to a violation of the presumption of innocence by the court. Thus, the Supreme Court ruled that the violations through a media campaign or through the reproduction in the press of certain extracts of the criminal file does not mean "that the jury or the Criminal Court judges were not impartial or have disregarded the presumption of innocence".³⁷⁶ Similarly, the fact that when an investigation is opened, many media might have a bias against some defendants does not necessarily influence the judiciary and does not automatically affect the presumption of

³⁷⁴ audiovisuelle. Presse électronique, 3rd éd., Limal, Anthemis, 2012, p. 473, n° 689.

³⁷⁵ Liège, 30 June 1997, Revue de Jurisprudence de Liège Mons et Bruxelles, 1998, p. 9. See also Brussels (Court of Appeal, 4th ch.), 31 May 2005, Auteurs & Media, 2005/4, p. 322; Civ. Brussels (14th ch.), 25 June 2002, Auteurs & Media, 2004/4, p. 367; Brussels (9th ch.), 9 November 2001, Algemeen Juridisch Tijdschrift, 2001-02, p. 707; Auteurs & Media, 2002/6, p. 527; Journal des Tribunaux, 2002, p. 167; Revue de Jurisprudence de Liège Mons et Bruxelles, 2002, p. 418. Other decisions condemn the media for violating the presumption of innocence: Liège (20th ch.), 30 June 2010, Revue Régionale de Droit, 2009, p. 416; Journal des Tribunaux, 2010, p. 579; Auteurs & Media, 2010, p. 551; Revue de Jurisprudence de Liège Mons et Bruxelles, 2011, p. 511 (confirmed by Court of Cassation (1st ch.), 27 June 2014, Revue de Jurisprudence de Liège Mons et Bruxelles, 2014, p. 1947); Civ. Brussels (14th ch.), 16 December 2003, Revue de Jurisprudence de Liège Mons et Bruxelles, 2004, p. 793.

³⁷⁶ See also B. Taevernier, « La présomption d'innocence et la médiatisation de la justice : une cohabitation difficile », Revue de droit pénal, 2005, pp. 33-85. Court of Cassation (2nd ch.), 15 December 2004, Journal des Tribunaux, 2005, p. 4; Nieuw Juridisch Weekblad, 2005, p. 766; Revue de droit pénal, 2005, p. 331, concl. R. Loop; Pasirisie, 2004, p. 1985, concl. R. Loop. See also Court of Cassation (2nd ch.), 27 February 2008, Pasirisie, 2008, II, p. 536; Rechtskundig Weekblad, 2008-2009, p. 960; Court of Cassation (2nd ch.), 19 February 2008, Nieuw Juridisch Weekblad, 2008, p. 256, note E. BREWAEYS; Nullum Crimen, 2008, p. 144; Pasirisie, 2008, II, p. 480; Tijdschrift voor Strafrecht, 2008, p. 110, note; Court of Cassation, 16 septembre 1998, Algemeen Juridisch Tijdschrift, 1998-99, p. 207; Journal des Tribunaux, 1998, p. 656; Revue de Jurisprudence de Liège Mons et Bruxelles, 1998, p. 1340; Revue de droit pénal, 1999, p. 106.

innocence.³⁷⁷ The Supreme Court further underscored that the presumption of innocence concerns "primarily the attitude of the judge called upon" to decide. Therefore, would an investigator's statement or a press report be false, malicious or of criminal origin, this would not automatically taint the judgment and result in a violation of Articles 6.1 and 6.2 ECHR.³⁷⁸

The recall of old legal cases

Criminal facts and condemnations cannot be recalled ad infinitum by the press. Invoking the right to be forgotten, judges have demanded the delisting as well as the anonymisation of older articles published in online archives.³⁷⁹ Thus, freedom of expression conflicts with the right of the condemned person to be forgotten after the passing of some time. This right relates to the right to privacy. To address these disputes, the courts carry out a proportionality analysis by applying the criteria initially established by case law³⁸⁰ and then confirmed by commentators.³⁸¹ For assessing whether the right to be forgotten can be claimed against the press, the courts rely on two cumulative conditions (a first lawful disclosure of information and a second disclosure consisting in the recall) and several criteria (the time between the two disclosures, the nature of the initial information whether it belongs to history and whether there is a duty towards memory, the existence of a contemporary interest in the

³⁷⁷ Brussels (11th ch.), 2 mai 2002, Revue de Jurisprudence Liège Mons et Bruxelles, 2003, p. 71, note.

³⁷⁸ Court of Cassation (2nd ch.), 16 juin 2004, J.L.M.B., 2004, p. 1137; Tijdschrift voor Strafrecht, 2005, p. 277, note S. VANDROMME; Revue de droit pénal, 2005, p. 106; Pasirisie, 2004, p. 1053.

³⁷⁹ Liège (20th ch.), 25 September 2014, Revue de Jurisprudence de Liège Mons et Bruxelles, 2014, p. 1952, note E. Cruysmans, Nieuw Juridisch Weekblad, 2015, p. 26, note P. van Eecke, Le Boudec, Civ. Liège (4^{ème} ch.), 3 November 2014, Revue de Jurisprudence de Liège Mons Bruxelles, 2014, p. 1961, note E. Cruysmans, Civ. Neufchâteau (2nd ch.), 25 January 2013, Auteurs & Media, 2013/6, p. 478, note; Revue de Jurisprudence de Liège Mons et Bruxelles, 2013, p. 1182.

³⁸⁰ Voy. Civ. Namur (1st ch.), 17 November 1997, Revue de Jurisprudence de Liège Mons et Bruxelles, 1998, p. 781, note A. Strowel, Auteurs & Media, 1998/3, p. 269; Journal des Tribunaux, 1998, p. 187; Journal des procès, 1997/337, p. 29; Civ. Brussels (14th ch.), 30 June 1997, Journal des Tribunaux, 1997, p. 710.

³⁸¹ See A. Strowel, « Le droit à l'oubli du condamné : après le moment du compte rendu, vient le temps du silence », in P. Gérard, F. Ost, M. van de Kerchove (dir.), L'accélération du temps juridique, Brussels, Publications des FUSL, 2000, pp. 737 à 748; A. Strowel, « Liberté de rappeler des faits contre droit au silence : les contretemps de la presse », note under Civ. Namur (1st ch.), 17 November 1997, Revue de Jurisprudence de Liège Mons et Bruxelles, 1998, pp. 785 à 791.

information, the exposure to the public of the involved person, the type of information recalled, the interest in the re-socialisation of the condemned person). The judge-made right to be forgotten constitutes therefore a limit to the press freedom.

2. Liability in the editorial chain

With regard to print media, Article 25 § 2 of the Belgian Constitution organises a layered system of liability: "where the author is known and resident in Belgium, the publisher, printer or distributor may not be prosecuted." This system limits the liability of certain persons when other persons can be made accountable (system of "successive and isolated accountability")³⁸². Thus, when the author is known and has a residence in Belgium, the other persons mentioned in Article 25 § 2 benefit from a liability exemption, whether in civil or criminal cases³⁸³. The author – and therefore freedom of expression – enjoys the special protection granted by this provision: the layered liability prevents those assisting the author from refusing to publish, print and/or distribute the author's work out of fear of being convicted³⁸⁴. However, when the publisher, printer or distributor themselves commit a fault, they may be sued in court for this separate fault. Similarly, if one of those assistants in the publishing process is involved in the drafting of the press article, he will be considered as a co-author and can end up in court.

While this system is not applicable to broadcasting, the question of its applicability to internet remains controversial. Some commentators and

³⁸² E. Montenero, H. Jacquemin, « La responsabilité civiles des médias », in Responsabilités – Traité théorique et pratique, titre II, 26ter, vol. 3, Brussels, Kluwer, 2004, p. 7, n° 166 ; F. Tulkens, M. Verdussen, « La radio et la télévision, le délit de presse et le droit de réponse », *Annales de droit de Louvain*, 1987, p. 59 ; S. Hoebeke, B. Mouffe, *Le droit de la presse*. Presse écrite. Presse audiovisuelle. Presse électronique, 3^{ème} éd., Limal, Anthémis, 2012, p. 655, n° 909 ; M. Hanotiau, « La responsabilité en cascade en matière civile », note under Court of Cassation (1st ch.), 31 May 1996, *Revue Critique de Jurisprudence Belge*, 1998, p. 361, n° 1.

³⁸³ See Court of Cassation (1st ch.), 31 May 1996. Auteurs & Media, 1996/3, p. 362, note F. Jongen, *Journal des Tribunaux*, 1996, p. 567; *Chroniques de Droit public* – *Publiekrechtelijke Kronieken*, 1997, p. 412, note A. Schaus, *Revue Critique de Jurisprudence Belge*, 1998, p. 357, note M. Hanotiau, *Rechtskundig Weekblad*, 1996-1997, col. 565 ; Court of Cassation, 24 janvier 1863, Pasirisie, 1863, I, p. 110 ; *Bulletin Juridique*, 1863, p. 262.

³⁸⁴ F. Jongen, C. Dony, « La liberté de la presse », in M. Verdussen, N. Bonbled (dir.) *Les droits constitutionnels en Belgique*. Les enseignements de la Cour constitutionnel, du Conseil d'Etat et de la Cour de cassation, vol. 2, Brussels, Bruylant, 2011, p. 857 ; K. Lemmens, *La presse et la protection juridique de l'individu*. Attention aux chiens de garde !, Brussels, Larcier, 2004, p. 343, n° 474.

judges refuse to extend this system to the internet³⁸⁵. Others are more favourable to its transposition to the digital networks³⁸⁶, but the list of accountable persons must then be adapted to this new medium.

The right of reply

A federal law organises the right of reply for the written and audio-visual press³⁸⁷. These legal provisions, whilst different in some respects, are unsatisfactory. In addition, they are rightly criticised for not taking into account the situation of the new (online) media. Jurisprudence and commentators do not agree on a possible application of the provisions to the online press³⁸⁸, which in any case would require a series of adaptations³⁸⁹.

3. Conclusion and perspectives

In Belgium, there is no specific framework for investigative journalism. Investigative journalists enjoy rights and have obligations under the constitutional provisions and the laws on the protection of sources and the right of reply. They are also subject to ethical obligations. These rules, however, make no direct reference to investigative journalism. On some issues, case law fills the gaps by balancing the interests slightly differently when investigative journalists (and information of public interest) are involved. The lack of specific rules is not optimal, it implies that the freedoms of expression and of the press and the general principles (proportionality) as interpreted by European and Belgian case law are

³⁸⁵ For example, Brussels Court of Appeal, 12th ch., 23 January 2009, Auteurs & Media, 2009/6, p. 639.

³⁸⁶ S. Hoebeke, B. Mouffe, op. cit., pp. 667 and f., n° 926 and f. ; D. Voorhoof, « De regel van de getrapte verantwoordelijkheid : van de 19de naar de 21ste eeuw ? », note under Court of Cassation (1st ch.), 31 May 1996, *Récents arrêts de la Cour de cassation*, 1996, pp. 387 and f. ; *Corr. Brussels* (54th ch.), 23 June 2009, *Revue de Jurisprudence de Liège Mons et Bruxelles*, 2010, p. 123, note F. Jongen, *Civ. Brussels* (14^{ème} ch.), 23 January 2007, A&M, 2008/1, p. 78; Brussels, 25 May 1993, *Journal des Tribunaux*, 1994, p. 104, note F. Jongen, Brussels, 19 February 1985, *Rechtskundig Weekblad*, 1985-86, col. 806, note J. Ceuliers.

³⁸⁷ See the law of 23 June 1961 « relative au droit de réponse », M.B., 8 July 1961 and the law of 4 March 1977 providing for a right to reply in the audiovisual sector, M.B., 15 March 1977.

³⁸⁸ Pour la jurisprudence semblant admettre cette interprétation large see *Civ. Brussels* (44th ch.), 30 Octobre 2009, Auteurs & Medias, 2010/5-6, p. 573 ; *Civ. Brussels* (14th ch.), 13 April 2010, Auteurs & Media, 2010/5-6, p. 583. For decisions refusing such interpretation, see *Civ. Brussels*, 9 December 2008, A&M, 2009/4, p. 454; *Corr. Brussels* (45th ch.), 14 November 2007, *Journal des Tribunaux*, 2008, p. 198.

³⁸⁹ See E. Cruysmans « La presse en ligne et le droit », in A. Degand, B. Grevisse (dir.) *Journalisme en ligne. Pratiques et recherches*, Coll. Info Com, Bruxelles, De Boeck, 2012, pp. 225-228.

relied upon.

Several rules applicable in Belgium should be modernised and clarified, in particular with regard to their application to the internet. For example, Article 25 of the Constitution has not been amended since 1831 and the guarantees it offers only apply to the *printed* press. Legislation on the right of reply also has to be adapted for the digital environment. Despite the need of modernisation, the political parties do not want to engage in a challenging exercise that would lead to major legislative changes in the legal framework applicable to the press.

3. Bulgaria

Evgeniya Scherer



Comparative Study on Investigative Journalism

The third volume of the EMR/Script series deals with a specific area of press and media freedom on the European level and in the national legal frameworks of all EU Member States and candidate countries. This comparative study on investigative journalism was conducted by the EMR as institutional member of the European Centre for Press and Media Freedom (ECPMF) and is part of the Centre's work that aims at the protection of freedom of the press and media in Europe.

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