Organization for Security and Co-operation in Europe

Office of the Representative on Freedom of the Media

ANALYSIS OF THE DRAFT LAW

OF THE REPUBLIC OF ITALY

"On Standards on the subject of telephone, data transmission and environmental interceptions. Modification of the discipline on the subject of the judge and of the deeds of inquiry. Integration of the discipline on the administrative responsibility of legal entities." (No 1415-C)

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RECOMMENDATIONS AND INFORMATION ABOUT THE ANALYSIS

Recommendations

- Various human rights often conflict. Privacy rights must be carefully balanced against the right of individuals to be informed so as to not infringe unduly on freedom of expression.
- There should be no general restriction in law on publishing non-secret information of public interest obtained through electronic surveillance or that relates to court proceedings.
- Journalists should not face prison sentences for publishing information in the public interest.
- Journalists should not be required to join the National Order of Journalists to qualify for protections within the law.
- Journalists should be free to choose how to conduct investigations responsibly and in the manner they deem fit.
- The right of correction that applies to traditional media should not be generally extended to Internet sites as this may have a chilling effect on free expression.
- No one should be punished because of "possessing" secret information.

Explanatory Notes

1.There are three versions of the legislation: the Chamber of Deputies' version which was approved on 11 June 2009, the Senate's version of 10 June 2010, which modified the Chamber of Deputies' version, and the version promulgated by the Commission on Transport, Post and Telecommunications which is referred to, at times, as the latest version. In totality and for ease of reference, the latest version is sometimes referred to as the Draft Law.

2. No definitions of terms are contained in the Draft Law. Terms that are unduly vague and thus subject to the discretion of prosecutors and courts are set off by quotation marks.

3. All references to statutory provisions of the law can be found in a document titled "Chamber of Deputies No. 1415-C," which is attached and incorporated in this review by this reference.

4. This analysis has been carried out by Dr. Katrin Nyman-Metcalf, Professor and Chair of Law and Technology of the Tallinn University of Technology, together with the Office of the OSCE Representative on Freedom of the Media.

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I. OSCE MEDIA FREEDOM COMMITMENTS

1.1 International freedom of expression standards

Freedom of Expression has a fundamental importance for the functioning of democracy, is an essential condition for the realization of other rights and therefore is an inalienable aspect of human dignity.

Italy is a member of the international community, the United Nations (UN), and the Organization for Security and Co-operation in Europe (OSCE), and has thus taken upon itself obligations that apply equally to all states.

The Universal Declaration of Human Rights, which was adopted by the UN General Assembly in 1948 as the basic document on human rights, protects the right to freedom of expression in the following formulation of Article 19:

> "*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*."[1]

The European Convention for the Protection of Human Rights and Fundamental Freedoms**,** ratified by Italy, also guarantees the right to freedom of expression in Article 10:

> "*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*" [2]

[1] Resolution 217A (III) of the General Assembly of the United Nations, adopted on December 10, 1948. A/64, p. 39-42. http://www.un.org/Overview/rights.html#a19

[2] European Convention for the Protection of Human Rights and Fundamental Freedoms http://conventions.coe.int/treaty/en/Treaties/Html/005.htm

1.2 OSCE Commitments relevant to this analysis

The right to freedom of expression is unbreakably linked with the right to freedom of the media. Freedom of the media is guaranteed by many OSCE documents, which Italy agreed to when it became a participating State of the OSCE.

The OSCE is the world's largest regional security organization, including 56 participating States from Europe, Asia and North America. Arising from the Final Act of the Conference on Security and Cooperation in Europe (1975), the organization has the task of conflict prevention and resolution. Protecting human rights, developing democratic institutions and monitoring elections are among the main means by which the organization ensures security and fulfils its basic tasks.

The Helsinki Final Act states: "*the participating States will act in conformity with the purposes and principles of the Universal Declaration of Human Rights*."[3]

The Concluding Document of the Copenhagen Meeting of the CSCE on the Human Dimension[4] states:

> "*Everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards. In particular, no limitation will be imposed on access to, and use of, means of reproducing documents of any kind, while respecting however, rights relating to intellectual property, including copyright.*"[5]

The Document of the Moscow meeting also states that the CSCE participating States:

> "*will, in conformity with international standards regarding freedom of expression, take no measures aimed at barring journalists from the legitimate exercise of their profession other than those strictly required by the exigencies of the situation*."[6]

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[3] Part VII of the Final Act.

[4] Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990. See in particular points 9.1 and 10.1. http://www.osce.org/documents/odihr/2006/06/19392_en.pdf

[5] ibid.

[6] Points 28.9 of the document of the Meeting of the CSCE Conference. http://www.osce.org/publications/rfm/2008/03/30426_1084_en.pdf .

The OSCE Charter for European Security (1999), states that:

> "*We reaffirm the importance of independent media and the free flow of information as well as the public's access to information. We commit ourselves to take all necessary steps to ensure the basic conditions for free and independent media and unimpeded transborder and intra-State flow of information, which we consider to be an essential component of any democratic, free and open society*."[7]

The Mandate of the OSCE Representative on Freedom of the Media, states:

> "*Based on OSCE principles and commitments, the OSCE Representative on Freedom of the Media will observe relevant media developments in all participating States and will, on this basis, advocate and promote full compliance with OSCE principles and commitments regarding free expression and free media. In this respect he or she will assume an early-warning function. He or she will address serious problems caused by, inter alia, obstruction of media activities and unfavourable working conditions for journalists*."[8]

1.3 Acceptable Limitations on Freedom of Expression

The right to freedom of expression is not absolute: in a few specific instances, it may be subject to restrictions. Due to the fundamental nature of this right, however, any restriction must be precise and clearly defined according to the principles of a state governed by rule of law. In addition, restrictions must serve legitimate purposes and be necessary to the well-being of a democratic society.

The limits to which the legal restrictions on freedom of expression are permissible are set forth in paragraph 2 of Article 10 of the European Convention on Human Rights:

> "*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of*

[7] See point 26 of the Charter for European Security, adopted at the Istanbul Summit of the OSCE, 1999. http://www.osce.org/documents/mcs/1999/11/17497_en.pdf

[8] Mandate of the OSCE Representative on Freedom of the Media, 1997, see Point 2. http://www.osce.org/pc/40131

national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[9]

This regulation is interpreted as establishing a threefold criterion requiring that any restrictions be 1) prescribed by law, 2) serve a legitimate purpose, and 3) are necessary in a democratic society. This also implies that vague and unclearly formulated restrictions or restrictions that may be interpreted as enabling the State to exercise sweeping powers are incompatible with the right to freedom of expression.

[9] European Convention for the Protection of Human Rights and Fundamental Freedoms http://conventions.coe.int/treaty/en/Treaties/Html/005.htm

II. ANALYSIS OF THE DRAFT LAW

"On Standards on the subject of telephone, data transmission and environmental interceptions. Modification of the discipline on the subject of the judge and of the deeds of inquiry. Integration of the discipline on the administrative responsibility of legal entities."

2.1 Background on the Draft law

The Draft Law, which is comprised of amendments to the Code on Penal Procedure in most instances, and popularly called "the Wiretap Bill," was originally proposed and approved by the Chamber of Deputies in 2009. The Senate modified it in 2010. Further modifications are proposed in the current draft, promulgated by various concerned commissioners. The approval or "Favourable Opinion" of the Draft Law by the Commission on Transport, Post and Telecommunications is explicitly conditioned on amending the Draft Law regarding the right of corrections on websites. The Commission only favours the right of corrections for web-sites of a periodical nature and subject to the registration requirement. At the time of drafting this analysis, the next steps regarding the Draft Law are not clear – there have been suggestions of further changes – and possibly reverting, in some instances, to earlier versions of the draft.

This analysis considers only provisions relating to the mandate of the OSCE Representative on Freedom of the Media. The Copenhagen[10] and the Moscow[11] meetings of the Conference of the Human Dimension of the CSCE, as well as the Paris[12] and Budapest[13] CSCE summits, reaffirmed the importance of freedom of expression. Participating states have recognized that independent media is essential to a free and open society and an accountable system of government. At the 1996 Lisbon Summit[14] it was clearly said that freedom of the press and media are among the basic prerequisites for truly democratic and civil societies. The reaffirmation of the importance of free media led to the decision to

[10] June 1990
[11] October 1991
[12] November 1990
[13] 1994
[14] Lisbon

create the Institution of the OSCE Representative on Freedom of the Media, which was established in 1997. One of the key tasks of the Representative is to provide early warning regarding any obstruction of the work of journalists.[15]

The Representative does not comment on other human rights issues, such as the need for a fair and independent judiciary, except when such issues are woven into matters relating to freedom of expression and free media. The Representative recognizes, however, that all human rights and fundamental freedoms are linked and the protection of one should not lead to the infringement of another.

An analysis of the Draft Law highlights how different human rights may conflict. The right to privacy is a basic human right. Wiretapping is a serious infringement on the right to privacy. However, such forms of electronic surveillance are important tools in the effort to combat crime. It is accepted in nations governed by the rule of law that human rights can be restricted in the interest of preventing and combating crime, provided limitations are set out explicitly in law and proportional to the need to be addressed. It is essential that use by authorities of techniques that entail serious infringements of privacy are linked with guarantees against possible abuse.

Relevant provisions

The Draft Law envisions changes in legislation that would affect journalists and media outlets on four fronts: 1) reporting on court-ordered electronic surveillance, 2) recording and photographing persons without their permission 3) reporting on court proceedings and 4) extending the duty of corrections to websites.

[15] Decision No. 193 of the Permanent Council, 5 November 1997on the establishment of the OSCE Representative on Freedom of the Media.

2.2 Restrictions on information obtained through electronic surveillance

Summary

- The latest version of the Draft Law allows for publishing, in summary form, information obtained through electronic surveillance before the end of preliminary court proceedings.
- Publishing information obtained through illegal electronic surveillance is prohibited.
- Information obtained through electronic surveillance that does not relate to a crime is covered by secrecy.
- Information obtained through illegal electronic surveillance that relates to a crime is secret until the end of preliminary court proceedings but is covered by secrecy if it does not relate to a crime.
- All information arising from electronic surveillance is prohibited if it has been ordered by a court to be destroyed.
- The penalty for publishing information obtained through electronic surveillance before the conclusion of preliminary court proceedings and in violation of the Draft Law is imprisonment from 6 months to 3 years.

General considerations about information obtained through electronic surveillance

The Draft Law affects both the work of the judiciary and that of journalists, entailing changes to existing practices related to the use of information collected by electronic surveillance in preliminary legal proceedings. Some provisions can be seen as restrictive to the media, others as restrictive to the judiciary. This analysis does not deal with the question from the viewpoint of the judiciary. Although strict rules for surveillance are good from a protection of privacy viewpoint, the importance of such techniques for law enforcement must not be forgotten. Thus, a careful balance needs to be struck among the competing interests of law-enforcement authorities' legitimate use of crime-prevention tools, an individual's right to privacy and the right of media to report on matters of public interest. Reporting on public

issues is the cornerstone of media freedom which, in turn, is essential for democratic government.

Electronic surveillance has been instrumental in conducting high-profile investigations of leading political and business figures in Italy. It is necessary to analyze the Draft Law in light of the heightened societal and political significance given to undercover investigations to root out criminals, including organized-crime figures.

Judges have warned that organized crime may be emboldened by the restrictions in the Draft Law.

It is agreed that legal safeguards are necessary to protect peoples' privacy rights when electronic surveillance is being considered. The Draft Law must allow for quick decisions regarding decisions to wiretap. But sufficient protections written into the law, along with competent and objective decision-makers, should provide adequate safeguards to the process, regardless of the speed of the procedures.

It is therefore positive that the Draft Law requires records be kept of surveillance ordered, because transparency helps prevent abuse of the process.

(Among other provisions, see point 10(h) and point 11 on pages 18-19, amendments of Articles 267 and 268 Code of Penal Procedure.)

The Chamber of Deputies' version prohibited publication in any form of wiretapped conversations. That provision has been deleted in the current version of the Draft Law, which is an improvement. Under the latest version of the Draft Law, journalists are allowed to publish the transcripts of wiretapped conversation in summary form.

Allowing publication of the fruits of electronic eavesdropping is important in contemporary Italian society because the press, in its watchdog role, has been instrumental in bringing to light scandal and corruption at all levels of government[16].

[16] Compared to other democratic nations, Italian officials' use of electronic surveillance to discover and prosecute crimes is unparalleled. According to figures published by the International Press Institute, there are more than 100,000 authorized wiretaps in Italy each year (for a country with a population of 58 million.) In comparison, there were 1,700 wiretaps in the United States, which has a population of 285 million. In practice, Italian journalists rely upon leaked wiretaps as an essential source for their investigative reporting.

(*Point 5 of the earlier drafts, page 7, amendment of Article 114 of the Code of Penal Procedure, deleted in the latest version of the draft.)*

Detailed restrictions on publishing information obtained through electronic surveillance

Publishing information collected by illegal electronic surveillance is prohibited. This provision highlights how conflicting needs – of law enforcement, the media and individuals – are balanced against each other to reach a result that protects fundamental rights of privacy and free media as well as the societal need to combat crime.

(Point 22, page 30, added Article 329b) to the Code of Penal Procedure)

The Draft Law prohibits disclosure of information obtained through electronic surveillance about people unrelated to the investigation, but the Senate version has softened the Chamber of Deputies version by requiring that the information be **exclusively** about those people. While such a restriction still impedes media in doing its job, the most recent version is an improvement over the Chamber of Deputies version.

(Point 11, page 22, amendment of Article 268 Code of Penal Procedure as well as point 12, page 22-23, added Article 268b) to the Code of Penal Procedure.)

The Draft Law sets out that "in any event the publication, even in partial or in summary form" of documents obtained through electronic surveillance can not be published that have been ordered by a court to be destroyed or that relate to persons unrelated to the enquiries. Even if the substance of the provision appears to be reasonable, the formulation is less suitable. By the words "in any event" and by specifically excluding partial or summary form, it becomes an extensive ban. One could imagine situations in which responsible media, exactly through summary form or partial publication, could bring out matters of public interest in these cases. A better balance must be reached between what should be kept secret and what should be made public.

(***Point 6, page 8, amendment of Article 114 of the Code of Penal Procedure)***

The Draft Law sets out guidelines regarding the obligation to keep secret communications intercepted by electronic surveillance. The latest version of the Draft Law states that information obtained through authorized electronic surveillance that does not relate to a crime, and therefore irrelevant to the court proceedings, is considered secret. When the information is obtained through illegal electronic surveillance, the Draft Law states that the information is secret if it does not relate to a crime. If it does, the information is considered secret until the end of preliminary court proceedings.

(Point 22 (1) and (2), Page 30, Article 329-b of the Penal Code.)

An improvement in the latest version of the Draft Law is that the mentioning of "images by means of photography" as something equal to electronic surveillance has been deleted. This is a welcome development because equating photography with electronic surveillance could restrict the traditional work of media.

(Point 9, pages 9-10, amendment of Article 266 of the Code of Penal Procedure)

The penalty in the Draft Law for publishing information obtained through electronic surveillance in violation of Article 114 of the Code of Penal Procedure is severe: prison sentences can range from 6 months to 3 years.

(Point 27(d) Page 36, Article 617 of the Penal Code.)

Recommendations:

- There should be no general restriction on publishing non-secret information of public interest obtained through electronic surveillance.
- Journalists should not face prison sentences for publishing information that is of public interest.

2.3 Restrictions on the use of electronic surveillance by journalists

Summary

- Under the latest version of the Draft Law, only journalists who are members of the National Order of Journalists and are providing "news commentaries "can wiretap or photograph without the consent of the target.

The Draft Law provides that anyone who carries out photography or records conversations in which he participates or to which he is present can be punished with imprisonment of up to three years if he makes use of these without the consent of the interested parties.

International standards clearly indicate that media need to be able to operate freely and journalists should not be penalized for their legitimate pursuit of their professional activities.[17] This would include using electronic devices to record conversations and take photographs.

The provision could be problematic, as it leaves room for possible abuse or unclear interpretation. Although the exception for journalists is positive, it only refers to journalists who are members of the National Order of Journalists and only to "news commentaries." In the modern media landscape, journalists should not be required to join what is, in essence, a guild, to obtain legal protection from the provisions of this section of the Draft Law.

In addition, the provision fails to define what are "news commentaries" which could lead to arbitrary interpretation of the provision.

(Point 27, page 35, added Article 616 b) to the Penal Code, as amended in the latest version of the Draft Law.)

[17] Vienna Follow-up meeting of 1986.

Recommendations:

- Journalists should not be required to join the National Order of Journalists to qualify for protections within the law.
- Journalists should be free to choose how to conduct investigations responsibly and in the manner they deem fit.
- Journalists should not face prison sentences for using electronic devices to record conversations in their professional capacity.

2.4 Court reporting restrictions

Summary

- It is prohibited to publish the name or image of a judge during criminal proceedings, except when the picture or name is an integral part of reporting a story (the Draft Law mentions "for purpose of freedom of the press").
- The publication of information related to a court case, however obtained, was prohibited before the conclusions of preliminary proceedings in the Code on Penal Procedure. The Draft Law now allows publication of information in summary form.
- The law penalizes those who come to possess secret information unlawfully – without defining what constitutes an unlawful activity.

General restrictions

Prohibiting the publication of the names and images of magistrates in criminal proceedings stems from the actions of organized-crime figures. There have been serious problems with intimidation of and violence against judges. Thus, it is legitimate to take measures to protect judges. But, exceptions can be made for "freedom of the press" issues, among other, thus trying to strike a balance between the protection of the legal process and free media.

(Point 5 page 8, amendment of Article 114 of the Code of Penal Procedure)

Court reporting restriction about secret information

Freedoms of expression and access to information principles do not preclude keeping certain information secret. The participating States of the OSCE have recognized the importance of free and wide dissemination of information.[18] At the same time, secrecy in ongoing criminal investigations is not unusual and is part of a responsible attitude to access to information, helping to strike a balance between the need not to cause damage to individuals or hinder

[18] Helsinki Final Act 1975 (Section IV Chapter II) creating the CSCE, later to become the OSCE, and several subsequent documents of the OSCE.

investigations and the need for the public to access information. However, there should be no reason to restrict media from reporting on information that is not secret.

According to the Code of Penal Procedure, even non-secret information may not be published until the end of preliminary proceedings. The latest version of the Draft Law amends the Penal Code by making it possible to publish non-secret information in summary form, which is an improvement on the existing law.

(*Point 4 page 7, amendment of Article 114 Code of Penal Procedure)*

The Draft Law punishes with prison sentences from 1 to 6 years anyone who reveals or in any way facilitates knowledge of secret information related to a court proceeding.

(Point 27 (a), page 34, amendment to Article 379b) of the Penal Code, amended by the Senate.)

The Draft Law makes illegal the act of unlawfully obtaining secret information about a "penal proceeding" and sets punishment at a term of 1 to 3 years in prison. What constitutes unlawfully obtaining information is not defined in the Draft Law. This penalization appears unduly harsh as possessing information does not cause harm.

(Point 27, page 36, added Article 617g) to the Penal Code, amended by the Senate to make it even harsher for civil servants.)

Recommendations:

- There should be no restrictions on publishing non-secret information related to court proceedings.
- The Draft Law should set forth a "public interest test" to ensure journalists do not face prison for disclosing information in good faith and in the public interest.
- No one should be punished because of "possessing" secret information.

2.5 The Internet and the obligation to publish corrections

Summary:

- The duty to publish corrections is extended to media on the Internet.
- The law shifts the responsibility to publish corrections from editorial to management personnel.

The Chamber of Deputies version of the Draft law extended the obligation of publishing corrections to all website publications within 48 hours of receiving notice from those offended by articles appearing on the site. The Chamber of Deputies version did not specify which websites could be affected, meaning such a provision could extend to all Internet content, which is not in accord with Internet freedom principles. As well, the provision would be difficult to apply since who would be responsible for making the correction is not clearly stated, as it is for other forms of media.

(Point 28, page 38-39, amending Article 8 of the law of 8 February 1948 no. 47 as proposed by the Chamber of Deputies)

The Senate version specifies the requirement of correction for websites and includes daily newspapers and periodicals distributed by "data transmission media". Data transmission media is not defined in the Draft Law. So the Senate does not intend to exclude bloggers and other new forms of media on the Internet from the requirement of correction.

(Point 29 (a), page 38-39, amending Article 8 of the law of 8 February 1948 no. 47 as amended by the Senate)

The latest version of the Draft Law also extends the obligation to correct to "non-periodical press". The term "non-periodical press" is not defined. Such publications are required to publish corrections in two national daily newspapers. This obligation appears to be far-reaching, financially prohibitive and an extension of a requirement that has no place in contemporary journalism. Although the duty to publish correction has an established place in print media, its application to new media is unwarranted and has a chilling effect on free expression.

(Point 29 (c), page 39, adding a new section to Article 8 of the law of 8 February 1948 no. 47)

The Draft Law states that the managing director of media subject to the requirement of correction is the person responsible for making sure it is carried out. This provision changes an established principle of media management because, traditionally in Italy, such an obligation would be fulfilled by editorial staff.

(Point 29, page 40, amendment to Article 8 of the law of 8 February 1948 no. 47, as amended by the Senate with respect to the Internet publications.)

Recommendation:

- The requirement to publish corrections that applies to traditional media should not be generally extended to Internet sites. There should not be any undue extension of the right to correction for any media, as this may have a chilling effect on freedom of expression.