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THE LUXEMBOURG DRAFT LAW ON FREEDOM OF EXPRESSION IN THE MEDIA

by

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The following comments are mainly made from the perspective of international human rights standards concerning freedom of expression and justifiable limitations. However, I took the freedom to make some comments about details which caught my eye as an interested reader.

General: It is not clear from the draft whether, and if so to what extent, information of a commercial character is covered by it. The definitions of "*publication*" and "*information*" in Article 3 are very general. The definition of "*ligne éditoriale*" also includes "*information dans le domaine économique*", but that, of course, does not necessarily imply that commercials are also included.

The Explanary Memorandum states in its comments on Article 3 of the draft that the definition of "*information*" "*englobe à la fois les faits, les idées, les opinions et les commentaires, personnels et individuels. Ni le mode ou la forme d'expression employé, ni la valeur en soi de l'information pour le public ou l'intérêt du public pour celle-ci n'est pris en compte*". This indicates that "*information*" has to be understood in a very broad sense.

Possibly, a restriction in this respect is implied in the fact that the future law will apply to information of a journalistic nature and in the definition of "*journaliste*" in Article 2 of the draft.

Since in several legal systems, and in legal practice, commercial information is treated differently, and the Strasbourg case-law also attributes some relevance to the difference by leaving a broader margin of appreciation to the domestic authorities in setting limitations if commercial information is involved (*Jacubowski* judgment of 23 June 1994, A. 291), it would seem advisable to clarify the issue, at least in the Explanatory Memorandum.

Article 2: The text to a large extent reflects the wording of the second paragraph of Article 10 of the European Convention on Human Rights (hereafter: the Convention) as interpreted and developed in the Strasbourg case-law. However, the second paragraph of Article 10 of the Convention contains a *limitative* list of the public and private interests whose protection, under certain conditions, may justify a limitation of the freedom of expression, whereas Article 2 of the draft only speaks in that respect of "*poursuivre un but légitime*". This would seem to have been overlooked, also in the comments on Article 2 in the Explanatory Memorandum.

One could, of course, argue that a purpose cannot be legitimate under Luxembourg law, if it is not covered by the second paragraph of Article 10 of the Convention, but it would seem advisable to copy the limitative list of that provision. This would do justice to the intention referred to in the comments on Article 2 in the Explanatory Memorandum: "*il a été jugé opportun de rappeler dans le corps de la future loi les trois conditions, afin de souligner l'importance qui est attachée au respect de ces principes et de porter la teneur de cette disposition à la connaissance de tout un chacun*".

Article 6: The first paragraph, by referring to "*le droit de recevoir et de rechercher des informations*", gives rise to the question of whether, and if so to what extent, this right implies an obligation on the part of public authorities to provide policy relevant information or make it accessible. The Strasbourg case-law has not (yet) read a positive obligation to that effect in Article 10 of the Convention (*Guerra* judgment of 19 February 1998, Reports no. 64), but in accordance with Article 53 of the Convention, the Contracting States may provide further guarantees than have been laid down in the Convention.

It may well be that the publicity and accessibility of government documents and information finds regulation in another Act. In that case it may be advisable to refer to the relevant Act in the Explanatory Memorandum.

Article 7: Although there may be good reasons to extend the right not to reveal one's sources to other authors than journalists - as is mentioned in the Explanatory Memorandum, Recommendation R (2000) 7 of the Committee of Ministers of the Council of Europe proposes a broader category of beneficiaries - the restriction to the circle of journalists and those who through their professional connection with a journalist have knowledge of information which may lead to the identification of the journalist's source is fully justifiable in light of the purpose of the protection of sources, which is not the impunity of the person who has provided the information but rather the protection of the free flow of information to journalists to enable them to perform their essential function in a democracy.

It would seem to be preferable to refer in Article 7 to the exceptions regulated in Article 8, in the same wording as has been done in Articles 12, 14 and 16: "*en dehors des cas prévus à l'article 8*".

Article 8: The text should reflect the requirements of necessity and proportionality as laid down in Article 2 of the draft. Even though Article 2 will cover the whole of the future law, and consequently the conditions of necessity and proportionality have to be take into account in each instance of the application of the law, these conditions should be repeated in each provision which allows for limitations, a system also followed in the case of the Convention itself. It will then, of course, be left to the domestic authorities - under the supervision of the European Court of Human Rights - to evaluate the necessity and proportionality on a case-to-case basis.

In this respect, the part of the comments on Article 7 in the Explanatory Memorandum dealing with the Strasbourg case-law concerning limitations, would be better placed in the comments on Article 8.

Article 11: The text raises the question whether the obligation it contains is not formulated in too absolute a way. A newspaper, for example, publishes much information everyday, of which several details may not be phrased in an exactly correct way or may later on prove to be not exactly correct. To require rectification of all those details, may put too heavy a burden on the editors. The time and expenses involved might make them careful to a degree which might frustrate the function of a newspaper to bring the news at a moment on which not all details may be known.

Should the obligation of correction not be limited to inaccuracies and mistakes which are of a certain importance and/or have done some harm?

Article 12: Would it not be appropriate to add a provision to the effect that, even after a person has been convicted by final judgment, he or she should be indicated in any publication only by initials, while and his or her identity as a convicted person should be disclosed only if the public interest justifies such an infringement of the respect of privacy, as indicated in the comments on Article 12 in the Explenary Memorandum?

Indeed, this aspect no longer concerns the principle of presumption of innocence, but a provision of the kind would exclude an argument *a contrario* that after conviction there is no right of protection anymore.

Article 13: The first exception to the obligation to respect the principle of presumption of innocence is that of authorization by the person concerned. However, the principle not only serves the interests of the person concerned but also the public interest of a good administration of justice. Therefore, even in the case of authorization, the author of the publication has to make it clear that the qualification of "*convaincue*" or "*coupable*" does not reflect his or her own opinion but is based upon information, the publication of which the person concerned has authorized. It would be advisable to qualify the provision in that respect.

The second exception seems also too broad. In the case of a request by the judicial authorities, it is primarily up to the latter to respect in their formulation the principle of presumption of innocence. However, the editor or journalist is not subordinated to the judicial authority concerned and should take his or her own responsibility by formulating the request in such a way that it no longer conflicts with the principle. It is to be noted in this respect that in the second paragraph of Article 6 of the Convention the principle of presumption of innocence is formulated in absolute terms. Moreover, it is difficult to imagine that any "*intérêt prépondérant du public*" may justify portraying a person as guilty who has not been convicted. The *De Haes and Gijssels*, judgment of 24 February 1997, quoted in the comments on Article 13 of the Explanatory Memorandum, does not relate to the principle of presumption of innocence but to accusations of bias relating to judges and an Advocate-General. The judgment would, therefore, seem to be more relevant for Articles 17 and 21 of the draft.

Given his or her responsibility in using the right of free expression, complete impunity of the editor or journalist would seem not to be justified in all circumstances. He or she has the obligation not to contribute to the damage done.

The same would seem to hold good for the third exception: impunity would seem justified only if and to the extent that the editor or publicist cannot reasonably be expected to reformulate the quotation in a way that does justice to the principle of presumption of innocence.

The fourth exception, that of communications during direct broadcasting, seems evident: the person responsible for the broadcasting cannot be held responsible for the direct communication, provided that he or she has acted with due diligence in preparing the broadcasting.

Articles 15: To some extent, and *mutatis mutandis*, the same comment would seem to apply to the exceptions listed in this article: the editor or journalist is under the obligation to avoid any damage for third parties. Here, the person concerned may, of course, authorize a publication which affects his or her private life. But in the case of a request by a judicial authority and in that of a quotation, those who make use of their right to free expression, carry with them a certain responsibility, also in relation to the private life of others and cannot hide behind their source in all circumstances. However, different from the principle of presumption of innocence, the right to protection of one's privacy is not absolute; the interest of the person who claims protection of his or her privacy may have to yield for "*un intérêt prépondérant du public*".

Article 17: Here the same comment applies as was given on Article 15. The specific nature of defamation entails that it is highly relevant whether the information concerned has been verified.

Article 18: The question arises why the protection aimed at, is in all respects provided to minors only. Should not, for instance, also the identity be covered of an adult who has committed suicide?

Article 19: Here the same comment would seem to be at place in connection with quotations, as was made in relation to previous provisions dealing with exceptions.

Article 24: Is the obligation to previously ask the person concerned for his or her opinion not formulated in too absolute terms, thus limiting the freedom of expression beyond necessity? Should this obligation not be restricted to cases where, given the character, contents or source of the information, the author or journalist could reasonably be deemed to anticipate that the opinion of the person concerned could shed some new light on the information concerned? In this respect, it is pointed out that Article 10 of the draft speaks of "*eu égard à leur véracité, leur contenu et leur origine, dans la mesure raisonable de ses moyens et compte tenu des circonstances de l'espèce*".

Article 35: In view of the function and duties of the "*Commission des Plaintes*" and given the fact that the fifth member is appointed from outside the membership of the professions involved, it is suggested that the draft law prescribes that the fifth member acts as chair of the Commission. The qualities of neutrality and impartiality which the fifth member should have according to the comments in the Explanatory Memorandum, should be mentioned in the draft law itself. In addition, it is suggested that the requirement is also included that the fifth member be a jurist by profession, to guarantee that he or she is well placed to direct and supervise the fairness of the procedure according to legal criteria.

Article 36: Since the "*Commission des Plaintes*" is provided by law as an instrument of legal protection with the possibility to make recommendations and impose certain sanctions, the question arises whether the admissibility requirements and other procedural rules should not be regulated by law, or at least be subject to Ministerial approval to guarantee "due process".

Article 38: Here the question arises whether an unlimited right of reply or rectification does not hamper the freedom of expression to too large an extent and will not lead to self-censorship and undesirable restraint on the part of the editor to inform about actual issues. Should it not be advisable to set the limiting condition that the person concerned will have to indicate that the allegedly incorrect statement has done some material or immaterial harm to him? In the comments on Article 38 in the Explanatory Memorandum it is indicated that it is the intention of the drafters to put an end to the present situation in which the right of response exists "*même si l'information ayant engendré l'exercice de ce droit est favorable au requérant*". It is stated that the person concerned "*sera tenu à prouver l'existence d'un tel intérêt qui se traduira par un préjudice subi du fait de la diffusion d'une information fausse ou nuisible à la réputation ou l'honneur*" and that he or she "*doit, en se référant au texte incriminé, indiquer les raisons qui fondent cet intérêt légitime*". However, especially in respect of the right to rectification, this requirement of an interest is not sufficiently reflected in the text of the draft. It speaks merely of "*le concernant*".

Article 41: In conformity with the observations made in relation to Article 38, it is suggested that the request should also indicate the legitimate interest involved. Another possibility would be to include the lack of a well-founded interest among the grounds for refusal, listed in Article 42.

Article 44: The last sentence of Article 44 is not commented upon in the Explanatory Memorandum. Nevertheless, the restriction it contains for the freedom of expression of the media seems not to be self-evident and does not seem to reflect practice in other countries. Depending on the contents of the reply sent in by the person concerned, some reply or comment from the part of the editor may be justified to either correct elements of the reply, justify the original information or explain the incorrectness. This may add to a more balanced information of the public.

Article 46: The comments on Article 46 state that the reply should also not be read by "*l'auteur de l'information incriminée*". This in not reflected in the text of the article.

Article 40: According to the text, the President "*condamne l'éditeur à payer au requérant une astreinte*", while the comments say that he "*a le pouvoir*" to do so, which would seem to leave a discretion. In general, it is rather unusual to prescribe by law which decision a court has to make. And, indeed, in the second sentence of Article 40 it says that the editor "*peut être condamné*". See also the second paragraph of Article 86, which reads "*peut condamner l'éditeur à payer à la victime une astreinte".*

If the impression is correct that there is a difference between the text of the draft and that of the Explanatory Memorandum the two should be brought in line.

Articles 54-63: It should be explained in the Explanatory Memorandum why provisions comparable to Articles 50 and 52 are not included here.

Article 72: The obligation to publish the name of the author is formulated in too absolute terms. The possibility mentioned in the comments in the Explanatory Memorandum that the author may publish under a pseudonym, under the ultimate responsibility of the editor, should be reflected in the text of Article 72.

Article 74: In the comments on Article 74 of the Explanatory Memorandum it says that "*il s'agit en l'espèce d'une faculté de sorte que l'éditeur est libre de procéder à cette indication*", while the text of Article 74 is formulated as an obligation.

Article 80: Here applies the same observation with respect to authors who wish to publish under a pseudonym under the responsibility of the editor. This construction leaves the responsibility of the editor untouched, but should not result in punishment of the latter on the ground of not revealing the name of the author.

Article 87: Although the measure of seize of a publication is a very far-reaching interference with the freedom of expression, Article 87 still would seem to be drafted too restrictively. The only legitimate aim mentioned is the protection of the rights of the victim. In certain circumstances seize could also be necessary to protect health and morals (e.g. a publication promoting the use of hard drugs; a publication containing child pornography), or to protect national security. Article 10 of the Convention allows for such limitations as well.

Concluding observation

The draft law is of high quality. It regulates in a very detailed and well-balanced way the right of freedom of expression in the media and the situations in which and conditions upon which certain limitations may be set to this right. The text of the draft, and even more the Explanatory Memorandum, takes into account the relevant standards set by international instruments and the international case-law based thereupon, in particular the Strasbourg case-law, as well as resolutions and recommendations of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe.

Nevertheless, in the above certain comments have been made with the intention that they may help to even improve the draft in some respects and brings it even more in conformity with international standards.