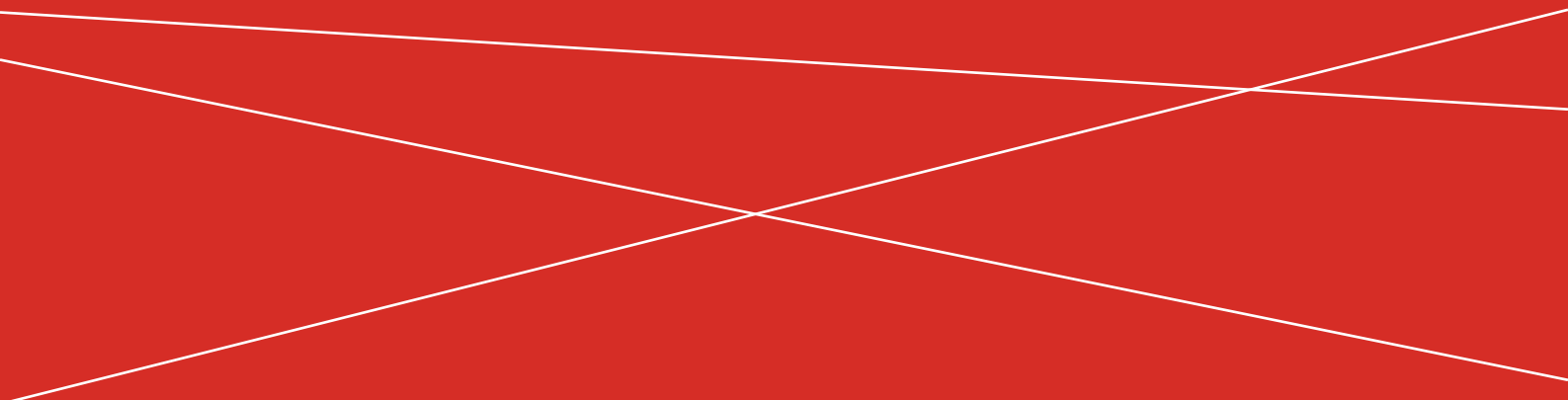




The need to strengthen the protection of the right to freedom of expression and information through legal reforms in Italy

Legal briefing

December 2022



ARTICLE 19 Europe works for a region where all people everywhere can freely express themselves and actively engage in public life without fear of discrimination. We do this by working on The Freedom to Speak and The Freedom to Know. ARTICLE 19 Europe speaks with one voice, through courts of law, through global and regional organisations, and through civil society wherever we are present.

© **ARTICLE 19 Europe, 2022**

This work is provided under the Creative Commons Attribution-Non-Commercial-ShareAlike 3.0 licence. You are free to copy, distribute and display this work and to make derivative works, provided you:

- 1) give credit to ARTICLE 19 Europe;
- 2) do not use this work for commercial purposes;
- 3) distribute any works derived from this publication under a licence identical to this one.

To access the full legal text of this licence, please visit:

<https://creativecommons.org/licenses/by-sa/3.0/legalcode>

ARTICLE 19 Europe's research is part of the Media Freedom Rapid Response (MFRR), which tracks, monitors, and responds to violations of press and media freedom in EU Member States and Candidate Countries. This project provides legal and practical support, public advocacy, and information to protect journalists and media workers. The MFRR is organised by a consortium led by the European Centre for Press and Media Freedom (ECPMF) including ARTICLE 19 Europe, the European Federation of Journalists (EFJ), Free Press Unlimited (FPU), International Press Institute (IPI), and CCI/Osservatorio Balcani Caucaso Transeuropa (OBCT). The project is co-funded by the European Commission.

www.mfrr.eu



co-funded by



Contents

Defamation	4
Criminal defamation	4
Defence of truth in defamation proceedings	6
Recommendations	7
<hr/>	
Strategic litigation against public participation (SLAPPs)	7
Recommendations	10
<hr/>	
Protection of journalistic sources	11
Protection is provided only to ‘professional journalists’	12
Orders to disclose confidential sources	13
Other interference with protection of sources	13
Recommendations	14
<hr/>	
Protection of journalists	14
Recommendations	15
<hr/>	
Access to information and protection of whistleblowers	16
The Italian legal framework: the FOIA and the right to access public information	16
Nature of the oversight body over access to information	16
Ratification of the Tromsø Convention	17
Protection of whistleblowers	18
Recommendations	19
<hr/>	
Protection of human rights: The creation of a National Human Rights Institution	20
Recommendation	20
<hr/>	
End notes	22

This briefing provides an analysis of the current Italian legislation that must be brought into full compliance with international freedom of expression standards. The brief also offers an overview of relevant international freedom of expression standards, including the decisions of international and regional human rights courts as well as the authoritative interpretation of international human rights law by the UN Human Rights Committee and the UN Special Rapporteur on Freedom of Opinion and Expression, that should guide the necessary legal reforms.

Defamation

The Italian defamation legislation has not been reformed in the last decades and remains a key area of concern about the protection of freedom of expression in Italy. Defamation cases against journalists and media in Italy can be brought under both civil and criminal law, read in conjunction with rules related to the press that can be found in the Press Law.

Criminal defamation

- Defamation is a criminal offence under Article 595 of the Penal Code. The penalty is a fine of up to EUR 1.032 or imprisonment for up to one year. If the act of insult or defamation consists in the allegation of a specific fact, the potential penalty is increased to imprisonment for up to two years or a fine of EUR 2.065. If defamation targets a political, administrative or judicial body, the penalty is increased by one-third.
- Defamation through the press is considered an aggravated form of defamation under the Penal Code as well as in relevant provisions of the Press Law. Article 595 of the Criminal Code establishes that 'If defamation is committed through the press or any other means of advertising, or with public act, the penalty shall be a fine of at least EUR 516 or imprisonment from six months to three years.' Under Article 13 of the Press Law, defamation committed through the press is punishable by a fine of no less than EUR 516 or imprisonment from one to six years. In order for defamation to be liable under the Press Law, it must involve an accusation of a specific fact and must be committed via the press. This provision is a mere repetition of Article 595 of the Penal Code but the

Press Law provides stricter penalties. Both provisions set only the minimum amount of fine, while the cap on fines is set in other provisions (Article 24 of the Penal Code).¹ Under certain conditions, the fine can be transformed into a prison sentence.²

These provisions do not comply with the emerging standards under international freedom of expression standards. Under these standards, free expression may be limited to protect individual reputations, but defamation laws, like all restrictions, must be proportionate to the harm done and not go beyond what is necessary in the particular circumstances. In general, a particular measure will not be regarded as necessary where a less restrictive means could be employed to achieve the same end or where the sanction itself is so overwhelming that it cannot be regarded as a proportionate response to the harm done. Criminal defamation provisions breach the guarantee of freedom of expression both because less restrictive means, such as civil law, are adequate to redress the harm and because the sanctions they impose are not proportionate to the harm done.

The penalty of imprisonment for defamation has been found to be a disproportionate interference with the right to freedom of expression on several occasions by the European Court of Human Rights that condemned Italy for violation of Article 10 of the European Convention on Human Rights.³ In *Sallusti v. Italy*, the European Court held that it considered 'the imposition of a custodial sentence for a media-related offence, albeit suspended, compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention can only be in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence. In this connection, the Court notes the recent legislative initiatives by the Italian authorities aimed, in line with the recent rulings of the Court against Italy, at limiting the use of criminal sanctions for defamation, and introducing, as a notable positive step, the removal of imprisonment as a sanction for defamation.'⁴

The Italian Constitutional Court came to similar conclusions. In its June 2020 decision, the Constitutional Court held that Article 595 (3) of the Criminal Code and Article 13 of the Press Law – as far as it provides for the penalty of imprisonment for press defamation – were unconstitutional and incompatible with Article 10 of the European Convention on

Human Rights.⁵ The Constitutional Court stressed out that the legislative reform was necessary and should be undertaken by the Parliament, not by the Constitutional Court. The Court effectively postponed its decision for one year, stipulating that if Parliament had not passed legislation to amend the law by 22 June 2021, then the Court itself would have to abolish prison sentences. The Court also temporarily suspended the proceedings for criminal defamation in the cases under examination by the Court.⁶

Subsequently, several bills were discussed and put forward in the Parliament but none of them resulted in actual legislation.⁷ Hence, on 22 June 2021, the Constitutional Court issued a follow-up decision⁸ declaring Article 13 of the Press Law not compliant with the Constitution. The Court has however declared that Article 595(3) of the Penal Code, which provides for a sentence between six months and three years of prison or the payment of a fine, compliant with the Constitution, as it allows the judge to order imprisonment only in cases of 'exceptional severity'. The Court renewed its call on Parliament urging the promotion of a reform that could adequately balance the 'freedom of expressing one's own thought and (the) protection of individual reputation'.⁹

The lack of parliamentary initiative in pushing for comprehensive reform of the defamation legislation in Italy is a long-standing issue that contributes to the erosion of a free and independent press and an increase in SLAPPs against journalists (see more below).

Defence of truth in defamation proceedings

In defamation cases, defendants can rely on a number of defences – including that the publication in question was 'true' (defence of truth). In civil cases, defendants can plead that an allegation was, or was reasonably believed to be, true.

In criminal cases, the defence of truth is available only in cases concerning public officials and the exercise of their duties, or if criminal proceedings have been opened in relation to the allegations (Article 596 of the Penal Code). Otherwise, the court may consider the truthfulness of the allegations only upon request of the complainant, besides the possibility for the parties to agree and refer the matter to a jury of honour.

Importantly, under the current legislation, there is no possibility to consider the correction of the original publication as a means to avoid criminal liability. This is an important gap considering that the offence of defamation is a crime that by definition is always considered committed with intention (*cum dolo*).

Recommendations

- In order for defamation to be fully decriminalised, provisions of Article 595 of the Penal Code and Article 13 of the Press Law should be abolished.
- In the interim, until criminal defamation is abolished, public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if they are a senior public official. Prison sentences, suspended prison sentences, and criminal fines should not be imposed as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement is.
- Article 596 of the Penal Code should also be abolished, following the decriminalisation of defamation.
- Decriminalisation of defamation should be accompanied by a reform of civil defamation legislation to ensure that it fully complies with international freedom of expression standards and protection of reputation.

Strategic litigation against public participation (SLAPPs)

SLAPPs are a form of legal harassment against journalists, human rights defenders, environmental activists, political opponents and other critical voices in society. Typically, critical voices, are pursued by powerful individuals (such as public officials, public figures or politicians) and other powerful entities who seek to avoid public scrutiny. The aim of SLAPPs is not necessarily to win a case in a court of law but rather to drain the target's financial and psychological resources and chill public participation. Those targeted by costly civil lawsuits are often ill-equipped to defend themselves.

In Italy, the use of SLAPPs is widespread. Defamation – both civil and criminal (as outlined above) – is the most commonly-employed legal tool to instigate SLAPP cases. However,

the right to privacy and the right to be forgotten are also misused to prevent the disclosure of inconvenient information. Often, legal threats even precede the publication of the investigation, triggering mechanisms of self-censorship. According to the statistics of the Italian National Statistics Institute (Istat), in 2017, a total of 9,479 proceedings for defamation were initiated against journalists, of which 60% were dismissed after preliminary investigation and 6.6% went to trial. Plaintiffs are often public figures – politicians, businessmen, or individuals involved in organised crime.

The SLAPPs proceedings in defamation cases can be **extremely protracted**:

- In criminal defamation proceedings, preliminary investigations can take up to 18 months.¹⁰ This stage is not public, and the defendant is generally not involved. In recent years, around two-thirds of complaints brought against journalists and the media have been closed at the end of this phase, suggesting that the vast majority of complaints that are filed against them are without merit.¹¹
- In civil defamation cases, under Article 2043 of the Civil Code, may be brought up to five years after publication,¹² making the statute of limitation excessively long. Civil cases typically last up to three years for the initial trial; up to another three years for an appeal; and up to five years for a final appeal to the Court of Cassation. If during the course of proceedings, a media outlet goes out of business, the individual journalist or editor may be held jointly liable for all damages.

Defendants in SLAPPs cases also face limited chances to have the **proceedings dismissed in the early stages** of the proceedings:

- In criminal defamation cases, Article 408 of the Code of Criminal Procedure stipulates that the prosecutor may request the judge to dismiss the case if it finds the complaint to be unfounded. Although this provision may help prevent meritless claims, it is hardly used in general and never in defamation cases and the complainant also has the opportunity to oppose any dismissals on the basis of this provision. In addition, Article 409 of the Code of Criminal Procedure also allows the judge to refuse the prosecutor's decision not to press charges and order the proceedings to continue. The decision not to press charges may also be opposed by the complainant, with a request directed to

the judge to order the investigation to continue with an indication of the relevant elements to be further investigated.

Costs in SLAPPs cases also have a chilling effect on freedom of expression. Legal fees in civil cases are generally agreed in writing between the parties and their lawyers. In the absence of such an agreement, the scope of the fees is set in the law and legal costs depend on the amount claimed. For example, for a case where sought damages are between EUR 260,000 and 520,000, the fees are generally EUR 38,400 at first instance; EUR 34,400 for an appeal; and EUR 18,400 for a cassation appeal.¹³

- Civil procedure law provides generic remedies to vexatious litigation, which typically involves a court order to pay costs plus additional damages suffered as a result of the litigation.¹⁴ For such an order to be made, the defamation case must have been dismissed in its entirety, and the defendant in the defamation case needs to prove that the claimant should have been aware that the case was wholly without merit and that the damages sought were suffered as a result.¹⁵ This is a high threshold. In criminal proceedings, a successful defendant in a defamation case may be awarded their legal fees, as well as, in case of gross negligence by the complainant, vexatious litigation damages.
- Even relatively small awards can become insurmountable obstacles, especially for freelance journalists and small media outlets. In many cases, even if journalists are acquitted and found innocent, they are still obliged to pay for their legal defence as freelancers and local journalists cannot count on the support of publishers and outlets in their defence, or do not have outlets with sufficient resources or expertise to support their cases.

All of these problems individually and collectively contribute to the fact that SLAPPs are a serious threat to media freedom in Italy. According to the President of the Order of Journalists, the sheer volume of cases represents ‘a democratic emergency’ in Italy.¹⁶ The European Commissioner for Human Rights has also observed that the extremely high damage awards being sought in many cases have a chilling effect on freedom of expression.¹⁷

The urgent need to undertake reform to prevent SLAPPs in Italy should also be propelled by the forthcoming EU Directive on SLAPPs with cross-border implications.¹⁸ The Directive proposes a series of measures, including an early dismissal mechanism, a regime of sanctions, and protective measures for those targeted by SLAPPs. The Italian Government will eventually have to transpose the Directive into domestic law. However, the necessary reforms do not need to await this supra-national legal instrument and comprehensive safeguards against SLAPPs – both on legislative and enforcement levels – should be adopted as a matter of urgency.

Recommendations

- New provisions setting reasonable and proportionate caps for the amount of damages and interest in cases concerning defamation through the press should be introduced to the Press Law. The Law should also stipulate that in defamation cases, the proportionality assessment must take into account multiple claims brought from the same claimant against the same defendant.
- Article 2947 of the Civil Code should be amended: The statute of limitation for bringing civil defamation claims should be reduced from 5 years to 6 months. It should commence at the moment the statement was made or published.
- A new type of summary proceedings should be introduced into the Code of Civil Procedure, aimed at ascertaining the abusive nature of a lawsuit brought in relation to a behaviour integrating a form of public participation on matters of public interest. Key features of such summary proceedings should include:
 - the possibility to obtain a declaration of inadmissibility of the lawsuit qualified as abusive with an early dismissal;
 - possibility of inversion of the burden of proof on the claimant once determined that the information has been published in the public interest;
 - the possibility for the defendant to be awarded damages as a result of such declaration of inadmissibility;
 - the possibility to reverse the burden of proof on the claimant once determined that the information has been published in the public interest;

- mechanisms of financial and legal support for victims of SLAPPs, including through a dedicated fund and/or an insurance scheme for journalists to cover legal and financial costs associated with such legal proceedings;
 - the imposition of sanctions for claimants who initiated SLAPPs to serve as a deterrent and punitive measure.
- Apart from legal measures, the Government should also raise awareness about the negative impact of SLAPPs on freedom of expression. In particular, it should promote, in cooperation with media and journalists' associations, general and specialist training to increase the awareness and technical knowledge of judges and legal professionals on SLAPPs. Regular training should be provided and should reflect the evolving standards under the European Court of Human Rights case law;

Protection of journalistic sources

The right of journalists to have their sources protected is an essential element of freedom of expression, as the media routinely depend on contacts for the supply of information on issues of public interest. Individuals come forward with secret or sensitive information relying upon the reporter to convey it to a wide audience in order to stimulate public debate. In many instances, anonymity is the precondition upon which the information is conveyed from the source to the journalist. When sources are unsure whether they will be protected, they keep silent and the public loses its access to critical information. The European Court of Human Rights has repeatedly recognised the protection of journalistic sources as one of the important safeguards of freedom of speech under Article 10 of the Convention.¹⁹

In Italy, the right of protection of journalistic sources is protected in several pieces of legislation:

- Article 2 (3) of Law 69/1963 regulating the journalistic profession further elaborates that journalists have the right of having their sources protected; the Law also establishes sanctions for those journalists who contravene their duty to protect their sources (Article 48).

- Professional secrecy is enshrined in Article 622 of the Penal Code.²⁰ Article 200 (3) of the Code of Criminal Procedure recognises the right of ‘professional’ journalists to have their sources protected in criminal trials. However, it gives the judge the authority to order the journalist to give testimony and to reveal their sources when it is absolutely necessary during criminal investigations meaning the ‘information is unavailable by other means and the disclosure of a journalist’s source is the only way to prove facts that allow the trial to ascertain the criminal responsibility of the investigated crime’.

Despite this legislative protection, there are numerous issues with the current state of protection of sources in Italy.

Protection is provided only to ‘professional journalists’

The wording of the legislation is clear – only ‘professional’ journalists can benefit from the protection. Limiting the protection of sources to ‘professional’ journalists goes against international freedom of expression standards.

Under international standards, the right to protect sources is not limited to traditional media. For instance, the Council of Europe has been careful to formulate a very wide definition of ‘journalist’, covering anyone who serves as a conduit of information to the public, regardless of whether they would normally be perceived as ‘journalists’.²¹ It also specifically stated that ‘in the new media ecosystem, the protection of sources should extend to the identity of users who make content of public interest available on collective online shared spaces which are designed to facilitate interactive mass communication (or mass communication in aggregate); this includes content-sharing platforms and social networking services.’²²

There are currently 105,000 working journalists in Italy, only 25,000 (17%) are registered in the Order of Journalists (ODG) as ‘professional’ journalists, the rest being registered as ‘publicists.’ This means that, according to Article 200 of the Penal Code, many cannot utilise the right to journalistic confidentiality and privacy afforded to ‘professionals.’ Many experts and legal practitioners in Italy consider the protection of journalistic sources to be only a ‘limited right.’

Orders to disclose confidential sources

The current text of Article 200 of the Penal Code that affords a stronger protection to 'professional journalists' leaves room for an inconsistent application from judges in criminal proceedings.

On the one end, many judges have started applying the guarantees of Article 200 also to publicists and did not order them reveal their sources.²³ On the other end, there have been other instances where even professional journalists were called during trials to give testimony and the judge ordered them to reveal their sources subsequently.²⁴ As the Union of Journalists and the National Federation of the Press has kept raising, this inconsistent practice impairs the ability of journalists to bring information to the public and ultimately, has a chilling effect on freedom of expression.²⁵

Other interference with protection of sources

The Italian authorities have also often taken various measures to bypass traditional protection afforded to journalistic sources. Instead of directly demanding that journalists to identify their sources, measures in the context of criminal investigation proceedings are employed, including secret surveillance and searches of homes and offices. This is despite the legislation prohibiting such surveillance. Under Article 271 (2) of the Code of Criminal Procedure wiretapping of categories of professionals enjoying professional, including journalists, is prohibited.

However, as documented by research, during criminal investigations, that are covered by secrecy, prosecutors have ordered to wiretap journalists to look for information from their activities and sources to ascertain facts and look for proof of criminal liability. For instance, it was revealed that the Prosecutor in Trapani (Sicily) that was investigating the smuggling and human trafficking of migrants in the Mediterranean sea, had ordered the wiretapping of journalists who had been reporting on migration.²⁶ At a later stage in the proceedings, when court documents become available to the parties and the public, on several occasions journalists have found out they had been wiretapped for months by the police and court files included mention of their sources (fifteen reporters' sources were disclosed

in the court files).²⁷ The prosecutors have argued that this was lawful as the journalist was not a party in the proceedings, authorities were not prosecuting them and their activities were not impaired showing a serious lack of knowledge on the impact that such investigative activities have on the concerned journalists' work.²⁸

The lack of sanctions for prosecutors running these practices and for judges authorising them prevents the legal prohibition of journalistic sources to be effective in practice. Besides, the prohibition should better clarify that wiretapping of a journalist as well as the order to search and seize in their homes or offices, should only happen when the journalist is under investigation themselves for reasons not related to their journalistic activity.

Recommendations

- Article 200 of the Penal Code should be amended. All journalists (not only 'professional' ones) should benefit from the protection of their sources during a criminal trial.
- Article 271 of the Code of Criminal Procedure should be effectively applied by the police and prosecutors during criminal investigations. Those wiretapping journalists' conversations without a valid court order should be subject to sanctions for violation of the right. Courts also must make sure that any materials or testimony obtained in violation of the principle in Article 271 should not be admissible as evidence in any proceedings.

Protection of journalists

Over the last several years, the growing number of attacks and intimidation of journalists in Italy has been a subject of concern for civil society organisations.

The concerns over the safety of journalists have also been shared by the Coordination Centre on Acts of Intimidation against Journalists (the Centre), a public body which conducts monitoring, analysis, and prevention work to improve journalists' safety and functions as a protection mechanism.²⁹ Every year the Centre publishes data on recorded harassment, intimidation, attacks, and more towards journalists that it has received from the police. The records show that various forms of attacks are on increase. For instance:

- In 2020, the Centre's report showed that police forces recorded 163 verified incidents of intimidation against journalists.³⁰ These incidents ranged from physical aggression and verbal threats including death threats to threatening letters or online harassment on social media networks or by email.
- The 2021 report shows a further increase of verified incidents as 232 incidents of violence, harassment, intimidation etcetera against journalists were recorded.³¹ This shows an increase of 42% compared to 2020. Organised crime was still responsible for a significant number of threats; around 11% in 2021. Yet, political issues became the main motivation for acts of violence against journalists (49%). Nearly half (44%) of the incidents of intimidation occurred online (via Facebook, email, Instagram, Twitter, and Whatsapp), with the lockdown accentuating and exacerbating this trend, the report said, with 24% of all threats made against women journalists and 67% against men. The remaining 9% are directed to media or journalistic structures. As in previous years, in 2021 the region Lazio and the northern region Lombardy, but also Sicily, Toscana, and Emilia-Romagna recorded the highest number of incidents.

While the creation of the Centre to monitor and analyse attacks against journalists has been a commendable effort to strengthen the protection of journalists also functioning as early warning to ensure journalists facing death risks receive timely police protection, there are several pitfalls in this mechanism which require improvement. Primarily, the Centre should also improve the way of collecting and processing information about threats and attacks. Currently, when collecting data, it relies only on sources in the police reports while there are many threats that are unreported and this system might not be able to detect attacks perpetrated by the police or security forces in general. Importantly, the Centre is not independent as it operates under the Ministry of Interior which raises concerns about its political independence.

Recommendations

- The Centre should improve the accuracy of data on attacks against journalists, in particular, it should rely on a variety of sources and not only police reports. They should also monitor threats appearing on social media platforms. The monitoring should also

include cases of legal intimidation and SLAPPs brought against journalists. The Centre should collaborate with civil society organisations that are monitoring attacks against journalists on the ground and set up an accreditation and exchange of information system like the Council of Europe Platform on the Safety of Journalists;

- The Government must strengthen the independence of the Centre and avoid its effectiveness depending on changes in political leadership.

Access to information and protection of whistleblowers

The Italian legal framework: the FOIA and the right to access public information

Italy has a comprehensive regime on access to information under Legislative Decree No. 97/2016 (also known as 'FOIA'). Guidance to public bodies on how to effectively support and facilitate the exercise of the right of access to information by public bodies under FOIA has been issued by the Minister of Public Administration in 2017 and 2019.³²

The FOIA guarantees public access ('accesso civico') to information and documents held by public authorities. This right is, however, limited as the FOIA contains a vast number of possible restrictions, aimed at protecting a number of public and private interests. While providing for exceptions is in line with international standards, the regime of exceptions is one of the most difficult issues in the implementation of the law. Civil society in Italy has raised concerns about the practices of public authorities particularly their lack of knowledge on how the exceptions should be properly interpreted and also their failure to respond to requests in a timely manner.³³

We understand that reversing public bodies' approach from a culture of secrecy to ensuring openness and transparency through access to information doesn't happen in one day. However, we call on Italian authorities to strengthen their efforts for a more effective implementation of the law across all public bodies, including local authorities like municipalities, hospitals, schools, prefectures and regional bodies.

Nature of the oversight body over access to information

The National Anti-Corruption Authority (ANAC) is tasked with an oversight role in the implementation of FOIA, including guidelines for public authorities on exceptions.³⁴ The Guidelines are not binding. ANAC is not an appellate body and does not issue decisions on appeals against denials of access to information.

There are also issues of whether ANAC is the most appropriate body to be tasked with oversight over access to information.³⁵ While ANAC is an independent and autonomous institution it was primarily set up as an 'anticorruption watchdog' rather than a body that would have a broad scope on access to information.

On the positive side, ANAC has put forward a number of initiatives to improve enforcement of the right. For instance, it proposed to create a National Platform for Transparency in the Public Administration, a platform that would collect all documents and information related to public bodies and activities that they are required to proactively publish under transparency laws. Currently, public bodies are already required to publish documents related to areas such as the administration, budget, decision-making or public procurement on their websites. However, these obligations have turned out to be particularly burdensome for small entities like small municipalities and they have failed to proactively publish this information. Sanctions issued against them have resulted in no effective improvement in their practices.³⁶ The new Platform will benefit both public bodies which will easily submit their documents in one virtual space, the central authorities that will have all information available and more promptly as well as citizens who will be able to access public information more easily.

Ratification of the Tromsø Convention

Italy still has not ratified the Council of Europe Convention on Access to Official Documents (so called Tromsø Convention),³⁷ the first binding international legal instrument which recognises a general right of access to official documents held by public authorities. The Convention establishes a set of minimum standards and aims to encourage its Parties to reinforce domestic provisions that allow a more extensive right of access to official documents, provided that the minimum core is nonetheless implemented. The Convention also includes review procedures for applicants for access to official

documents when access is denied. It further provides for limitations to this right but only in the narrowly circumscribed cases provided for in the Convention. By ratifying the Convention, Italy would demonstrate its commitment to promote the right to information in Italy by ensuring regional standards are adopted and enforced into domestic legislation.

Protection of whistleblowers

Whistleblowing in Italy is regulated by Law No. 179³⁸ and Legislative Decree No. 231³⁹ which provide protective measures for workers in both the private and public sectors.

Despite the clear positive of having specific legislation on the protection of whistleblowing, the protection in the private sector remains limited as it is based on voluntary compliance programmes. Under the Law, the protection scheme for whistleblowers is voluntary and applicable only to those companies where the employer has adopted an organisational model for crime prevention pursuant to Decree No. 231/2001 relating to corporate criminal liability. Only companies with more than 50 employees are required to set up a reporting system for the protection of whistleblowers.

ANAC is tasked with the implementation of the Law; it and can adopt specific regulations and guidelines, establish a system and receive whistleblowers' reports, issue sanctions, collaborate with the Data Protection Authority to ensure the protection of whistleblowers' privacy. However, in practice, the ANAC does not have the mandate to receive whistleblowing disclosures from private sector employees or to issue sanctions.

ARTICLE 19 further notes that Italy has been very late in transposing the EU Directive on Whistleblowing⁴⁰ into national legislation. While the deadline was originally set on 17th December 2021, a Ministerial Decree pursuant the enabling law ('legge delega') approved by the Chamber of Deputies of the Italian Parliament in summer 2022 was finally issued on 9th December 2022, almost one year later.⁴¹ The process of transposing the EU Directive has been opaque⁴² with no transparent and inclusive consultation process with stakeholders – under the ANAC or Ministry of Justice⁴³ – to ensure the new legislation will provide robust and effective protection.

Recommendations

- The Italian Government should establish an independent and autonomous oversight body to oversee the implementation of the FOIA.
- The Government should create the National Platform for Transparency in the Public Administration (proposed by ANAC) to allow public bodies to directly upload documents whose publication is required under transparency laws and ensure it is easily accessible to the general public in a machine-readable and reusable format.
- The Government should undertake a series of measures to raise awareness about the right of access to information under FOIA. This should include general and specialist training to increase the awareness and technical knowledge of public officials on the FOIA and how to assess requests including denials and the exemption regimes (harm and public interest tests).
- Italy should ratify the Council of Europe Convention on Access to Official Documents (Tromsø Convention) and transpose the EU Directive on whistleblowing with no delay;
- When transposing the EU Directive, the Italian Government should undertake a comprehensive approach. Whistleblowing protection law should have a wide application and should cover a wide variety of information in the public interest, including violations of laws, rules and ethical norms, abuses, mismanagement and mispending, failures to act, and threats to public health and safety. It should apply to all public and private sector employees, and also those who may face retribution outside the employer-employee relationship e.g. consultants, former employees, temporary workers, volunteers, students, benefit seekers, family members and others. It should also apply to national security cases.
- The Law on the protection of whistleblowing should set up reasonable requirements to encourage and facilitate internal procedures for the disclosure and reporting of wrongdoing. The procedures should be straightforward and easily allow for disclosure to external organisations, such as higher bodies, legislators and the media in cases where it is likely that the internal procedure would be ineffective. There should be easy access to legal advice to facilitate disclosures and minimise instances of misunderstanding. Public disclosures should sometimes be allowed in the first instance in order to protect

the right of the public to be informed on matters of overriding public interest. The balancing between the interests of organisations and the interests of the public must consider other democratic principles such as transparency, the right to information and freedom of expression.

- Implement the transposed EU Directive on Whistleblowing without delay ensuring the involvement of all relevant stakeholders, including civil society.

Protection of human rights: The creation of a National Human Rights Institution

At present, Italy does not have a dedicated human rights institution (NHRI) – that is an institution with a broad constitutional or legal mandate to protect and promote human rights at the national level. Italy has two institutions dealing with specific areas of human rights – the National Authority (Garante nazionale) for the rights of persons deprived of liberty and the Authority for Children and Adolescents. However, NHRIs typically address the full range of human rights, including civil, political, economic, social and cultural rights and so also the right to freedom of expression and access to information.

The lack of a dedicated NHRI continues to be the subject of criticism by international human rights bodies.⁴⁴ There have been legislative attempts to create the National Commission for the Promotion and Protection of Human Rights and the Fight against Discrimination.⁴⁵ In May 2022, a draft law on the creation of such an institution was discussed in the Parliament which was strongly opposed by right-wing parties.⁴⁶

The establishment of NHRIs will strengthen the promotion and protection of human rights in Italy and its expertise as well as independence could make it the body to incorporate the Coordination Centre for the monitoring of attacks against journalists as well as function as an oversight body of the FOIA.

Recommendation

- Italy should expeditiously establish a national human rights institution (NHRI) in compliance with the principles relating to the status of national institutions for the promotion and protection

End notes

- ¹ Article 24 of the Penal Code states that the amount of a fine cannot exceed 50,000 EUR.
- ² See Article 102 of the Law No 689 of 24 November 1981.
- ³ European Court of Human Rights (European Court), *Belpietro v. Italy*, App. No. 43612/10, 24 September 2013; and *Ricci v. Italy*, App. No. 30210/06, 08 October 2013.
- ⁴ European Court, *Sallusti v. Italy*, App. No. 22350/13, 07 March 2019, para 59.
- ⁵ Constitutional Court, [order 132/2020 of 9th June 2020](#).
- ⁶ ARTICLE 19, [Italy: Constitutional Court refers decision on abolishing prison sentences for criminal defamation to Parliament, 10 June 2020](#).
- ⁷ See e.g. [Draft Law on the initiative of Senator Caliendo](#), Amendments to the Law of 8 February 1948, n. 47, to the Penal Code, the Code of Criminal Procedure, the Code of Civil Procedure and the Civil Code, in matters of defamation, defamation by the press or other means of dissemination, insult and conviction of the plaintiff as well as professional secrecy, and provisions for the protection of the defamed subject.
- ⁸ Constitutional Court, [Decision of 22 June 2021 n 150](#).
- ⁹ ARTICLE 19, [Italy: Defamation laws must be reformed](#), 23 June 2021.
- ¹⁰ Code of Criminal Procedure, Article 407.
- ¹¹ Around 67% of the criminal complaints pursuant to Law No. 47/1948 (defamation committed by means of the press, consisting of the allegation of a specific fact) were archived at the conclusion of the preliminary investigations in 2011 (3057 out of 4524) and 2017 (6357 out of 9479). See OBC Transeuropa, Dossier: SLAPP, the lawsuit threatening freedom of expression.
- ¹² Civil Code, Article 2947(3).
- ¹³ Decree of the Ministry of Justice No. 55/2014.
- ¹⁴ Code of Civil Procedure, Article 96; Code of Criminal Procedure, Article 427.
- ¹⁵ Court of Cassation No. 23341/2019; Court of Cassation No. 24158/2017; Court of Cassation No. 7409/2016; Court of Cassation No. 19583/2013.
- ¹⁶ Order of Journalists, [President Carlo Verna's speech during conference](#) with Prime Minister Conte, 28 December 2018.
- ¹⁷ Commissioner for Human Rights, [Time to take action against SLAPPs](#), 27 October 2020.
- ¹⁸ Proposal for a Directive of The European Parliament and of The Council on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ('Strategic lawsuits against public participation') COM/2022/177 final.
- ¹⁹ For a complete list, see the European Court, [Factsheet - Protection of journalistic sources](#).
- ²⁰ Article 622 of the Penal Code stipulates that 'Whoever, having knowledge, by reason of his state or office, or of his profession or art, of a secret, discloses it, without just cause, or uses it for his own or others' profit, shall be punished, if the fact harm may result, with imprisonment up to one year or with a fine ranging from sixty thousand to one million lire. The offence is punishable on complaint by the injured party.'
- ²¹ Council of Europe, Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, Adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministers' Deputies).
- ²² Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, adopted on 21 September 2011.
- ²³ See e.g. Molise Order of Journalists, [Also publicists have the right to have their sources protected](#), 25 October 2016.
- ²⁴ See e.g. Siena Free, [Judge orders professional journalist to reveal his source during testimony in a trial](#), 24 February 2017.
- ²⁵ Ordine dei Giornalisti, [Odg and FNSI: call for protection of professional secrecy and journalistic sources](#), 16 September 2022.
- ²⁶ See e.g. Lorenzo Tondo, [Italy investigates claims of wiretapping linked to migration reporting](#), The Guardian, 06 April 2021.
- ²⁷ *Ibid.*

²⁸ Valigia Blu, *Wiretapped Journalists: protection of journalistic sources denied, a disaster for the right of access to information*, 17 April 2021.

²⁹ Coordination Centre for the monitoring of attacks against journalists, [Scope and mandate of the Centre](#), 23 April 2021.

³⁰ Coordination Centre for the monitoring of attacks against journalists, [Report 2020](#).

³¹ Coordination Centre for the monitoring of attacks against journalists, [Report 2021](#).

³² See Guideline n. [1/2019](#) Implementation of FOIA provisions (FOIA) and previous circolare FOIA n. 2/2017.

³³ Liberties, [True Freedom of Information Remains Elusive in Italy](#), 28 April 2017.

³⁴ ANAC, [Guidelines](#) on exceptions to access to information as outlines in Art. 5 p. 2 of Legislative Decree 33/2013.

³⁵ OHCHR, [Report of the Office of the United Nations High Commissioner for Human Rights on good practices for establishing national normative frameworks that foster access to information held by public entities, A/HRC/49/38](#), January 2022.

³⁶ ANAC, [Annual Report](#) to the Parliamentary Assembly on activities, 23 June 2022.

³⁷ Council of Europe [Convention](#) on Access to Official Documents (CETS No. 205).

³⁸ [Law No. 179 of 30 November 2017](#), Provisions on the protection of whistleblowers who report crimes or misconduct of which they become aware in the context of private or public employment (17G00193).

³⁹ Legislative Decree 8 June 2001, no. 231, Regulation on administrative responsibility of legal entities, companies and associations, including those not having legal personality, according to art. 11, Law 29 September 2000, no. 300.

⁴⁰ EU, [Directive \(Eu\) 2019/1937](#) of the European Parliament and of the Council of 23 October 2019.

On the protection of persons who report breaches of Union law.

⁴¹ [Ministerial Decree](#), Presidency of the Council of Ministers, Draft legislative decree implementing the directive (EU) 2019/1937 concerning the protection of whistleblowers infringements of Union law and laying down provisions concerning the protection of people who report violations of provisions national regulations (N.10), Articles 1 and 13 of Law n.127 of 4 August 2022, 9 December 2022

⁴² For instance, in January 2022, ANAC President announced that the transposition of the Directive was a priority and he hoped it would be urgently completed. Whilst he announced a draft text of the law was available there has been no hearings and no consultation on that proposal. See e.g. Transparency Italia, [Whistleblowing: Meglio Una Legge Buona Che Una Legge Subito](#); WIN, EU Whistleblowing [Monitor](#), Italy.

⁴³ In January 2022, the Ministry of Justice addressed Parliament on the need to transpose the Directive. The Ministry was granted the official mandate to transpose the Directive for several months last year however they did not schedule any meetings or consultations and nothing has been published to date. See e.g. Minister Marta Cartabia's [address](#) to the Parliament on 19 January 2022.

⁴⁴ E.g. the Human Rights Committee, in the [Concluding observations](#) on the sixth periodic report of Italy, stated 'The Human Rights Committee last observations said 'The State party should expeditiously establish a national human rights institution in compliance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles)'. See also the Human Rights Council in the Universal Period Review ([UPR](#)).

⁴⁵ See e.g. Establishment of the National Commission for the Promotion and Protection of Fundamental Human Rights and the Fight against Discrimination, proposed laws C. 1323 Scagliusi, C. 855 Quartapelle Procopio e C. 1794 Brescia, p. 57; or FRA, [Establishing a National Human Rights Institution in Italy](#), FRA's Director was in Italy for a series of meetings on 19-20 October to discuss setting up Italy's National Human Rights Institution.

⁴⁶ Repubblica, A [national authority for human rights](#). The Law Italy has postponed for 29 years. Parliament is restarting discussion, 12 May 2022.