

REPORT ON PRIVACY AND CRIMINAL LAW IN CROATIA—CRIMINAL OFFENSES AGAINST PRIVACY IN THE CROATIAN LEGAL SYSTEM



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1. Introduction

Technology is fabulous. It develops rapidly. Everything is available. In many ways, this is a good thought, but then again we are exposed. “Technology has transformed both the economy and social life.”¹ Therefore, technology has also a dark side. Technology’s gadgets (e.g., applications on smartphones for recording audio and video) are available to everyone. The possibility of easy recording and easy and fast storage of data, but also their transfer, increases the risk of invasion of privacy and violating the right to privacy. “The scale of the collection and sharing of personal data has increased significantly.”²

Furthermore, when we are using various platforms, e.g., Facebook, Instagram, etc., or just searching something on Google, the providers are collecting data. All sorts of data are available including the one about us—personal data. Our personal data are available to almost everybody who is interested. “Technology allows both private companies and public authorities to make use of personal data on an unprecedented scale to pursue their activities.”³ Various social networks on the web are

1 Recital 6 of the GDPR.

2 Recital 6 of the GDPR.

3 Recital 6 of the GDPR.

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providing more people with insight into the privacy of individuals. Therefore, the right to privacy of the individual is increasingly threatened in all its forms.

It is also the fact that individuals very often give their personal data voluntarily (on different social platforms), publicly, and globally, while there is also a movement to the protection of the right to privacy. It is called the “privacy paradox.”⁴ Where is the line?

Of course, when someone voluntarily gives his or her information, this is different from someone else collecting private information of the individual. Collecting the information of other individuals without their knowledge is spying. Connected to this is the problem of the publication of private data.

Those facts and developments suggest the need for stronger and more coherent data protection. Individuals should have guarantees and better control of their own personal data with better legal and practical certainty.⁵

Therefore, privacy and right to privacy must be protected at the international and national (constitutional and legislative) level because it forms a sort of the shield from intrusion of other people as well as the state and in that way protects the individuals and his/her rights. Its infringement must be prohibited and some sanctions must exist for its violation.

As *Archard* states, “the right to privacy serves principally as a constraint upon abuses of state power,”⁶ but also from abuses of all other legal or physical persons. *Boban* states that privacy has absolute effect *erga omnes*; therefore, it has a vertical relationship toward state authorities, and a horizontal relationship toward everybody else.⁷

Privacy, the right to privacy, and private space are different terms that should not be understood as synonymous. *Privacy* is a term that each state defines in its own way (even each legal area has its own definitions). *The right to privacy* is the right of an individual to exercise privacy, and various international documents and national constitutions and laws protect it. *Private space* is a space “into which no one has the right to enter”⁸ and in which the individual has the right to enjoy one’s privacy. A private space is one “that no one has the right to enter,”⁹ and any intrusion into that space could potentially constitute (among other violations) a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (“Convention”).¹⁰ It is understood quite broadly, because it is considered not only the home, but also the space outside the home, correspondence, but also other

4 For more see Kokolakis, 2017, pp. 122–134.

5 Recital 7 of the GDPR.

6 Archard, 2006, p. 14.

7 Boban, 2012, pp. 575–598.

8 Harris, O’Boyle and Warbric, 2009, p. 367.

9 Ibid.

10 The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 [Online] Available at: https://www.echr.coe.int/documents/convention_eng.pdf (Accessed: 15 March 2022).

relationships, such as tapping telephone lines, which is an intrusion into an individual's private space. This understanding is based on the Anglo-Saxon principle that the individual has the right to keep for him- or herself everything one is and does, and even actions in public places can be considered private life, provided they are not harmful to society or the rights of others.

This privacy issue started in 19th century in the United States,¹¹ when judge Louis Brandeis and attorney Samuel Warren developed this notion which comprehends the right of an individual to be left alone. However, it must be noted, what they invented as *Glancy* notes is the *right* to privacy and not privacy itself.¹²

Unlike in Europe, where privacy is a guaranteed right of its citizens, in the US, "privacy" does not exist in the Constitution or Bill of Rights.¹³ In one famous case *Griswold v. Connecticut* decision (381 U.S. 479) in the 1965 the Supreme Court found the right to privacy of the individual hidden in some provisions of the Constitution, especially the Fourth Amendment protection against search and seizure.¹⁴ Hence, privacy is not explicitly stated in the Constitution, "it falls to Congress and the courts to determine the scope of that 'penumbra.'"¹⁵

Today, privacy is guaranteed with many international, regional, and national documents, e.g., the Universal Declaration of Human Rights (1948),¹⁶ the Covenant on Civil and Political Rights (1966),¹⁷ the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the Declaration on Mass Communication Media and Human Rights ("Declaration on Mass Communication"),¹⁸ the Charter of Fundamental Rights of the European Union,¹⁹ the Treaty on the Functioning of the European Union (TFEU),²⁰ the Treaty on the European Union

11 Warren and Brandeis, 1890, p. 2.

12 *Glancy*, 1979, p. 1.

13 Information [Online] Available at: <https://www.brookings.edu/blog/techtank/2018/07/05/suspected-criminals-get-privacy-rights-what-about-the-rest-of-us/#:~:text=In%20the%201965%20Griswold%20v,protection%20against%20search%20and%20seizure.> (Accessed: 15 April 2022).

14 *Ibid.*

15 *Ibid.*

16 Universal Declaration of Human Rights 1948 (OG-MC-12/09) [Online] Available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (Accessed: 17 February 2022).

17 Art. 17 of The International Covenant on Civil and Political Rights (1966) [Online] Available at: <https://humanrights.gov.au/our-work/commission-general/international-covenant-civil-and-political-rights-human-rights-your> (Accessed: 15 March 2022).

18 Council of Europe Declaration on Mass Communication media and Human Rights, Resolution 428 (1970) [Online] Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15842&lang=en>. (Accessed: 15 March 2022).

19 Charter of Fundamental Rights of the European Union (2012/C 326/02) OJ C 326 [Online] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN> (Accessed: 30 March 2022).

20 Consolidated Version of The Treaty on the Functionign of the European Union OJ C 326/2012, 26.10.2012. [Online] Available at: http://data.europa.eu/eli/treaty/tfeu_2012/oj (Accessed: 30 March 2022) and [Online] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN> (Accessed: 30 March 2022).

(TEU),²¹ Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector,²² the General Data Protection Regulation (GDPR),²³ etc.

In the Republic of Croatia, the right to privacy is guaranteed by the Constitution²⁴ and the provisions of ratified conventions, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms,²⁵ and European union legislative e.g., General Data Protection Regulation (GDPR),²⁶ and Implementation of the General Data Protection Regulation Act (IGDPRA).²⁷ Privacy is also protected by various national laws such as the Labor Act (LA),²⁸ Media Act

21 Treaty on the European Union, OJ C 326/2012, 26.10.2012. [Online] Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF (Accessed: 30 March 2022) and [Online] Available at: http://data.europa.eu/eli/treaty/teu_2012/oj (Accessed: 30 March 2022).

22 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002. [Online] Available at: <http://data.europa.eu/eli/dir/2002/58/oj> and at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002L0058> (Accessed: 15 March 2022).

23 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016. [Online] Available at: <http://data.europa.eu/eli/reg/2016/679/oj> and at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN> (Accessed: 15 March 2022).

24 Constitution of the Republic of Croatia, Official Gazette, 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

25 The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 [Online] Available at: https://www.echr.coe.int/documents/convention_eng.pdf (Accessed: 15 March 2022).

26 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016 [Online] Available at: <http://data.europa.eu/eli/reg/2016/679/oj> and at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN> (Accessed: 15 March 2022).

27 Implementation of the General Data Protection Regulation Act, Official Gazette, 42/18.

28 The Labor Act, Official Gazette, 93/14, 127/17, 98/19 provides in Art. 29 protection of the privacy of the employee.

(1) Personal data of employees may be collected, processed, used and delivered to third parties only if this is determined by this or another law or if it is necessary for the exercise of rights and obligations arising from employment, or in connection with employment.

(2) If the personal data referred to in para. 1 of this Art. need to be collected, processed, used or provided to third parties to exercise rights and obligations arising from the employment relationship, ie in connection with the employment relationship, the employer must determine in advance which data collect, process, use or deliver to third parties for this purpose.

(3) Personal data of employees may be collected, processed, used and delivered to third parties only by the employer or a person specifically authorized by the employer.

(4) Incorrectly recorded personal data must be corrected immediately.

(5) Personal data for the storage of which legal or factual reasons no longer exist must be deleted or otherwise removed.

(MA),²⁹ Electronic Media Act (EMA),³⁰ Consumer Protection Act (CPA),³¹ Electronic Communications Act (ECA),³² and of course if there is no adequate protection of this right, in other spheres of law, with the Penal Code (PC)³³ as “*ultima ratio*.”

Hence, the primarily goal of this report is to provide an insight into the criminal law regulation of protection of privacy by stipulated criminal offences.

2. Privacy and the right to privacy in international and regional documents and in Croatia

The right to privacy is regulated in different international and regional documents. To this day, there is no generally accepted definition of privacy nor right to privacy. *Marmor* notes there are “differing views about the scope of the right and the kind of cases that fall under its purview.”³⁴ Therefore, different documents but also countries define these notions in different ways, which vary depending on the context and circumstances prevailing in a particular society.

Archard defines privacy “as limited access to personal information.”³⁵ By personal information, *Archard*³⁶ means someone’s age, address, phone number, income, race, purchasing habits, ethnic origin, fingerprints, DNA, medical history, blood type, sexual orientation, religion, education, or political assimilation, etc., and by some decisions of the Court of Justice of the European Union (CURIA or CJEU or

(6) An employer who employs at least twenty workers is obliged to appoint a person who must enjoy the trust of the worker and who is authorized to supervise whether personal data are collected, processed, used and delivered to third parties in accordance with law.

(7) The employer, the person referred to in para. 6 of this Art. or another person who learns the personal data of the employee in the course of his / her duties, must keep these data permanently confidential.

29 The Media Act, Official Gazette, 59/04, 84/11, 81/13.

30 The Electronic Media Act, Official Gazette, 111/21.

31 The Consumer Protection Act, Official Gazette, 19/22.

32 The Electronic Communications Act, Official Gazette, 73/08, 90/11, 133/12, 80/13, 71/14, 72/17.

33 The Penal Code, Official Gazette, 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21.

34 *Marmor*, 2015, p. 1. at: https://d1wqtxts1xzle7.cloudfront.net/54794920/viewcontent-with-cover-page-v2.pdf?Expires=1652266275&Signature=KR3YwOgXHp-5Gc9rv9symxWbtn-C0umn33CFPMPX8y3NtTMZBecJ57kOowNDArHrehqUYKXJEHwSRyEvHeowbkhVnkxfgB1wDW4lpcc9HzHzK0nVhKAEoFHyZRdMTH-mKWzhejE7yiHmyGP0yBeuPawp0c-dt0eQPknAqlvLy5hdPaQns5HbPY-pUBhdxp8nSwH9zZxq9zLYi90oqHhP3zFgzWDwyV670inBltPHXQr3ZsMn8Ja46hjr-nOpLPunCm6AJklgFaffXF37djRKYcP8w~w2MqLz-cVUwmCeubPfiQV6kCVmNAr7ELOU2a-xPasQgUQ6zOeBrgxCfc2xA__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA (Accessed: 16 April 2022).

35 *Moor* (no date) cited in *Archard*, 2006, p. 16.

36 *Ibid*.

ECJ or Court of Justice)³⁷ even answers submitted by a candidate at a professional examination and any examiner's comments with respect to those answers constitute personal data, within the meaning of Art. 2(a) of Directive 95/46³⁸.

Moor defines the *right to privacy* as the “right to limit public access to oneself and to information about oneself.”³⁹ Therefore, generally speaking, the right to privacy is the limitation of public access to information about someone.

The right to privacy has several forms: the right to a personal and family life, home, dignity, secrecy of correspondence and personal data, including photographs etc.

2.1. *International documents*

The right to privacy is protected from encroachment by the state or other individuals and legal entities, by various fundamental international documents. Art. 12 of the Universal Declaration of Human Rights (1948) stipulates that “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation” and that “everyone has the right to the protection of the law against such interference or attacks.”⁴⁰

Also, Art. 17 of the International Covenant on Civil and Political Rights (1966) also regulates this right,⁴¹ which is identical in content to Art. 12 of the Universal Declaration of Human Rights.

2.2. *Regional instruments*

2.2.1. *Documents of Council of Europe and European Court of human rights case law*

The and the Declaration on Mass Communication and the protection of the right to privacy and its implementation monitors the ECtHR with its case law.

37 Judgment of 20 December 2017, *Nowak* (C-434/16, EU:C:2017:994) at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=198059&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8059397>.

38 Court of Justice of the European Union, Fact sheet- Protection of personal data, p. 13. [Online] Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-10/fiche_thematique_-_-donnees_personnelles_-en.pdf (Accessed: 6 May 2022). See Judgment of 20 December 2017, *Nowak* (C-434/16, EU:C:2017:994), para. 62. [Online] Available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=198059&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=8059397> (Accessed: 15 May 2022).

39 See Archard, 2006, p. 17.

40 Universal Declaration of Human Rights 1948 (OG-MC-12/09); [Online] Available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (Accessed: 17 February 2022).

41 Art. 17. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; Everyone has the right to the protection of the law against such interference or attacks. the International Covenant on Civil and Political Rights (1966). [Online] Available at: <https://humanrights.gov.au/our-work/commission-general/international-covenant-civil-and-political-rights-human-rights-your> (Accessed: 15 March 2022).

Therefore, the Convention guarantees this right by Art. 8, according to which everyone is guaranteed the right to respect for his private and family life, home, and correspondence.

The following paragraph (2) prohibits public authority from interfering with or encroaching on the rights referred to in para. 1 unless such encroachment is necessary in a democratic society for the interests of national security, public order, economic welfare, prevention of disorder or crime, protection of health or morals or rights, and freedom of others.⁴² This is an exclusion clause with content of the restriction of certain fundamental rights and freedoms. Provision speaks of the possibility of government interference to restrict certain human rights to protect certain legitimate interests.

The provision of Art. 17 of the Convention prohibits the abuse of rights in the sense that nothing stated in the Convention may be interpreted as destroying or restricting the rights and freedoms recognized by the Convention largely than provided for in the Convention.

The ECtHR has also decided the scope of the right to privacy, which in *Niemietz v. Germany (1992)*⁴³ took a position on the concept of private life: that private life does not include only the so-called “inner circle” of an individual, but also other connections with the environment and relationships with other people.⁴⁴ This is because private life includes the freedom to establish connections with others, and which is a social continuation of the fundamental inner circle of the individual. In *McFeeley v. The United Kingdom (1980)*, the Commission emphasized the importance of relationships and connections with other people, concluding that prisoners also have the right to privacy and need to be given some degree of relationship with others.⁴⁵

The Court has held that surveillance of persons in public places by the use of photographic means does not, as a rule, constitute an invasion of an individual’s privacy and interference with his or her private life, but recording, storing or using such information may violate Art. 8 of the Convention.⁴⁶ Therefore, the Court wanted to make a distinction “between the monitoring of an individual’s acts in a public place for security purposes and the recording of those acts for other purposes, going beyond what the person could possibly have foreseen”⁴⁷ to establish the strict boundary of private life as guaranteed under Art. 8. In *Peck v. the United Kingdom*,⁴⁸ there was

42 Art. 8, para. 2 of the Convention.

43 ESLJP case of *Niemietz v. Germany* (Appl. no. 13710/88), 16 December 1992. [Online] Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22NIEMIETZ%20v.%20GERMANY%20%22%2C%22itemid%22:%5B%22001-57887%22%22%7D> (Accessed: 15 March 2022).

44 Harris, O’Boyle and Warbric, 2009, p. 364.

45 Harris, O’Boyle and Warbric, 2009, p. 364.

46 Harris, O’Boyle and Warbric, 2009, p. 265.

47 Guide to the case law of the of the European Court of Human Rights—Data protection (last updated on 31 December 2021), p. 33.

48 ESLJP case *Peck v. the United Kingdom* (App.no. 44647/98), 28 January 2003 (28.04.2003), §§59–62. [Online] Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22Peck%20v.%20the%20United%20Kingdom%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22:%5B%22001-60898%22%22%7D> (Accessed: 15 May 2022).

a violation of Art. 8, even though the plaintiff had attempted to commit suicide by cutting his wrists in public place and was recorded by street surveillance camera, of which he was not aware at the time.⁴⁹

In ECtHR case law, personal data is defined as:

any information relating to an identified or identifiable individual....such data cover not only information directly identifying an individual (the “data subject”), such as surname and forename (*Guillot v. France*, 1996, §§21-22; *Mentzen v. Latvia* (dec.), 2004; *Güzel Erdagöz v. Turkey*, 2008, §43; *Garnaga v. Ukraine*, 2013, §36; *Henry Kismoun v. France*, 2013, §25; *Hájovský v. Slovakia*, 2021 §§11-12 and 41), but also any element indirectly identifying a person such as a dynamic IP (Internet Protocol) address (*Benedik v. Slovenia*, 2018, §§107-108).⁵⁰

Personal data by ECtHR case law can take different forms, e.g., cellular samples and DNA profiles or fingerprints; data on the birth and abandonment of an individual, including information needed to discover the truth about an important aspect of personal identity; Internet subscriber information and specific IP addresses; recordings as voice samples; information on banking documents, data on Internet and messaging usage by an employee in the workplace, obtained through surveillance; electronic data seized in a law firm, even though it had not been deciphered, transcribed, or officially attributed to their owners; data collected in the context of non-covert video surveillance in a university; information on the taxable income and assets of a large number of individuals etc.⁵¹

49 Afterward, one Media House used a photograph of the incident involving the applicant on its front page to accompany an article on the use and benefits of the CCTV system and the applicant’s face was not specifically masked—Case *Peck v. the United Kingdom*, paras. 9–14.

50 Guide to the Case Law of the of the European Court of Human Rights—Data protection (last updated on December 31, 2021), p. 7. Also see *Amann v. Switzerland* [GC], 2000, Art. 65; *Haralambie v. Romania*, 2009, para. 77.

51 Guide to the Case law of the of the European Court of Human Rights—Data protection (last updated on 31 December 2021), p. 7. also see *Amann v. Switzerland* [GC], 2000, para. 65; *Haralambie v. Romania*, 2009, Para. 77. Personal data can take very different forms. For example:

- Internet subscriber information associated with specific dynamic IP addresses assigned at certain times (*Benedik v. Slovenia*, 2018, paras. 108–109).
- Recordings taken for use as voice samples, being of a permanent nature and subject to a process of analysis directly relevant to identifying a person in the context of other personal data (*P.G. and J.H. v. the United Kingdom*, 2001, para. 59).
- Cellular samples and DNA profiles (*S. and Marper v. the United Kingdom* [GC], 2008, paras. 70–77) or finger prints (*Ibid.*, para. 84) which, notwithstanding their objective and irrefutable character, contained unique information on the individual concerned and allowed his/her precise identification in a wide range of circumstances (*Ibid.*, para. 85).
- Information on a given individual obtained from banking documents, whether involving sensitive details or professional activity (*M.N. and Others v. San Marino*, 2015, paras. 51 *et seq.*).
- Data on the occupation of an identified or identifiable individual collected and stored by the police (*Khelili v. Switzerland*, 2011, para. 56).

ECtHR assures protection as regards Art. 8 (right to respect for their private life), not only to a physical person, individuals, but also the legal persons and entities (*Société Colas Est and Others v. France*),⁵² if they are directly affected by a measure that breaches their right to respect for their “correspondence” or “home,” e.g.: where a company had been ordered to provide a copy of all data on a server shared with other companies⁵³ or where the Ministry of Defense, under a warrant, had intercepted the communications of civil liberties NGOs (*Liberty and Others v. the United Kingdom*, 2008, paras. 56–57).⁵⁴

Hence, it must be noted how for Art. 8 to be applied the personal data and its processing must have a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life.⁵⁵ In one case where Croatia was involved (*Vučina v. Croatia*)⁵⁶ within this context, the ECtHR rejected as incompatible *ratione materiae* a complaint about the publication of a photograph in a women’s magazine *Gloria*, under an erroneous title which had referred to the applicant

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- Data on Internet and messaging (Yahoo) usage by an employee in the workplace, obtained through surveillance (*Bărbulescu v. Romania* [GC], 2017, paras. 18, 74–81).
 - A copy of electronic data seized in a law firm, even though it had not been deciphered, transcribed or officially attributed to their owners (*Kırdök and Others v. Turkey*, 2019, para. 36).
 - Data collected in the context of non-covert video surveillance in a university (*Antović and Mirković v. Montenegro*, 2017, paras. 44–45).
 - Information on the taxable income and assets of a large number of individuals, notwithstanding the fact that the public could access such data under certain conditions (*Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], 2017, para. 138).
 - Data on the birth and abandonment of an individual, including information needed to discover the truth about an important aspect of personal identity (*Gaskin v. the United Kingdom*, 1989, Art. 39; *Mikulić v. Croatia*, 2002, Arts. 54-64; *Odièvre v. France* [GC], 2003, paras. 28–29).
 - Data included in a divorce settlement, comprising details as to the division of matrimonial assets, the custody and residence of minor children, the alimony agreement, and an overview of the assets/income of the applicant (*Liebscher v. Austria*, 2021, paras. 31 and 68). Guide to the Case law of the of the European Court of Human Rights—Data protection (last updated on 31 December 2021), p. 8.

52 See Judgment ECtHR, *Société Colas Est and Others v. France*, (Appl. no. 37971/97), 16th April 2002 (final 16/07/2002), para. 40; [Online] Available at: <https://hudoc.echr.coe.int/eng#%7B%22furltext%22:%5B%22Soci%C3%A9t%C3%A9%20Colas%20Est%20and%20Others%20v.%20France%20%22%22itemid%22:%5B%22001-60431%22%5D%7D> (Accessed: 28 March 2022).

53 *Bernh Larsen Holding AS and Others v. Norway*, 2013, para. 106.

54 Guide to the Case Law of the of the European Court of Human Rights—Data protection (last updated on 31 December 2021), p. 8. It was difernnet in a case concerning measures involving the protection of personal data of members of a religious organisation and respect for their “private life,” the organisation was not directly affected, and was thus not a “victim” within the meaning of Art. 34 of the Convention (*Avilkina and Others v. Russia*, 2013, para. 59).—Guide to the Case Law of the of the European Court of Human Rights—Data protection (last updated on 31 December 2021), p. 8. See also *M.L. and W.W. v. Germany*, 2018, para. 88.

55 Guide to the Case Law of the of the European Court of Human Rights—Data protection (last updated on 31 December 2021), p. 11.

56 For more see Judgment ECtHR *Vučina v. Croatia* (Appl. no. 58955/13), 31 October 2019. para. 50. [Online] Available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-198384%22%5D%7D> (Accessed: 29 March 2022).

as someone else. In the Court's view, the low degree of seriousness of that error and the very limit inconvenience caused was not sufficient for Art. 8 to be engaged.⁵⁷

ECHR and ECtHR allow in some situation and under strict conditions an interference with the right in Art. 8 of the Convention.⁵⁸ It is so called the “three-part test.” It is fulfilled if an interference:

- (1) Is “in accordance with the law”;
- (2) Must pursue a “legitimate aim”; and
- (3) Must be “necessary in a democratic society.”⁵⁹

In the Declaration on Mass Communication,⁶⁰ the right to privacy is defined as “the right to live one's life with minimal interference” by others.⁶¹ This right includes private, family, and domestic life, psychological and moral integrity, honor and reputation, protection against defamation, non-disclosure of irrelevant and unpleasant facts, protection against publishing private photographs without consent, and protection against publishing information given or received in confidence.⁶² The Declaration on Mass Communication notes how protection of the Art. 8 of the Convention extends not only to an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media, so “national legislations should comprise provisions guaranteeing this protection.”⁶³ In Croatia this issue is regulated with the Media Act (MA), the Electronic Media Act (EMA), the Electronic Communications Act (ECA), and the Consumer Protection Act (CPA).

It also elaborates on issues and dangers like problems that arise for the persons in public life. “The phrase “where public life begins, private life ends” is inadequate to cover this situation.”⁶⁴ It is explicitly stated that: private lives of public figures are entitled to protection, save where they may have an impact upon public events and the fact that an individual figure in the news does not deprive him of a right to a private life.⁶⁵

The Declaration on Mass Communication also recognizes the problem of obtaining the information “by modern technical devices (wiretapping, hidden microphones, the

57 Guide to the Case Law of the of the European Court of Human Rights—Data protection (last updated on December 31, 2021), p. 11.

58 “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” (Art. 8, para. 2).

59 Guide to the Case Law of the of the European Court of Human Rights—Data protection (last updated on 31 December 2021), p. 24.

60 Council of Europe Declaration on Mass Communication Media and Human Rights, Resolution 428 (1970), [Online] Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15842&lang=en>. (Accessed: 15 March 2022).

61 Art. 16 of the Declaration on Mass Communication.

62 Art. 16 of the Declaration on Mass Communication.

63 Art. 21 of the Declaration on Mass Communication.

64 Art. 17 of the Declaration on Mass Communication.

65 Art. 17 of the Declaration on Mass Communication.

use of computers, etc.), which infringe the right to privacy”; it concludes, “Further consideration of this problem is required.”⁶⁶

2.2.2. *The European Union*

The Charter of Fundamental Rights of the European Union⁶⁷ regulates right to privacy in its Art. 7 (respect for private and family life), Art. 8, (protection of personal data), Art. 9 (right to marry and start a family) and Art. 10 (freedom of thought, conscience, and faith), while the TFEU⁶⁸ in its Art. 16 states how “everyone has the right to the protection of personal data concerning them.”⁶⁹

The TEU⁷⁰ in its Art. 39 states that all Member States shall have to make “rules relating to the protection of individuals with regard to the processing of personal data”⁷¹ which was the basis for today’s GDPR.⁷²

European Union Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, which was passed in 2002,⁷³ also refers to privacy through private life and restricts collecting of that data, so it notes that the data relating to subscribers,

66 Art. 18 of the Declaration on Mass Communication.

67 Charter of Fundamental Rights of the European Union (2012/C 326/02) OJ C 326; [Online] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN> (Accessed: 30 March 2022).

68 Consolidated Version of the Treaty on the Functioning of the European Union OJ C 326/2012, 26.10.2012.; [Online] Available at: http://data.europa.eu/eli/treaty/tfeu_2012/oj (Accessed: 30 March 2022) and [Online] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN> (Accessed: 30 March 2022).

69 Art. 16, para. 1 of the TFEU.

70 Treaty on the European Union, OJ C 326/2012, 26.10.2012. [Online] Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF (30.03.2022.) and at: http://data.europa.eu/eli/treaty/teu_2012/oj (Accessed: 30 March 2022).

71 Art. 39 of TEU: “In accordance with Art. 16 of the Treaty on the Functioning of the European Union and by way of derogation from para. 2 thereof, the Council shall adopt a decision laying down the rules relating to the protection of individuals with regard to the processing of personal data by the Member States when carrying out activities which fall within the scope of this Chapter, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.”

72 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016. [Online] Available at: <http://data.europa.eu/eli/reg/2016/679/oj> and at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&from=EN> (Accessed: 15 March 2022).

73 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002. [Online] Available at: <http://data.europa.eu/eli/dir/2002/58/oj> and [Online] Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002L0058> (Accessed: 15 March 2022).

processed in electronic communications networks to establish connections and transmit information, contain information on the private life of natural persons. Legal persons have a right to the privacy their correspondence or their legitimate interests. Such data may only be stored to the extent that is necessary for the provision of the service for billing and for interconnection payments, and for a limited time.⁷⁴

It also prohibits further processing of data that the provider of the publicly available electronic communications services may want to perform, for the marketing of electronic communications services or for the provision of value-added services,⁷⁵ unless the subscriber has agreed to this based on accurate and full information given by the provider of the publicly available electronic communications services about the types of further processing it intends to perform and about the subscriber's right not to give or to withdraw his/her consent to such processing.⁷⁶

Today, the GDPR explicitly notes how this regulation applies to the processing of personal data wholly or partly by automated means, and to the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system,⁷⁷ and respects all fundamental rights and observes the freedoms and principles recognized in the charter as enshrined in the treaties, in particular the respect for private and family life, home, and communications, the protection of personal data, freedom of thought, conscience, and faith, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious, and linguistic diversity.⁷⁸

2.2.3. Regional documents in the world

In 1990, the UK Committee on Privacy and Related Issues adopted a definition of privacy as “the right of an individual to be protected from intrusion into his or her private life and affairs, or the life and affairs of his or her family, by physical means or disclosure.”⁷⁹ The Human Rights Act 1998 incorporates the rights set out in the ECHR into domestic British law, and guarantees them to

74 Para. 26 of the Directive 2002/58/EC.

75 Para. 26 of the Directive 2002/58/EC.

76 Para. 26 of the Directive 2002/58/EC.

77 Art. 2, para. 1 of the GDPR.

78 Recital 4 of the GDPR.

79 Report of the Committee on Privacy and Related Matters; Chairman, 1990, cited in Marshall, 2009 and cited in Maralayan, 2012, p. 5. [Online] Available at: <https://law.aua.am/files/2012/03/PAPER.pdf> (Accessed: 15 April 2022). For comparison of the Protection of Private Life of Public Officials and Public Figures Guaranteed by the Constitution of the United States and European Convention for the Protection of Human Rights and Fundamental Freedoms, see Maralyan, 2012, pp. 20–24.

every citizen in the UK.⁸⁰ The Data Protection Act 2018 is the UK's implementation of the GDPR.⁸¹

Right of privacy is, “in US law, an amalgam of principles embodied in the federal Constitution or recognized by courts or law-making bodies concerning what Louis Brandeis, citing Judge Thomas Cooley, described in an 1890 paper (co-written with Samuel D. Warren) as ‘the right to be let alone.’”⁸² Therefore, in the literature, *Warren and Brandeis* was the first case to use that term.⁸³

The Australian Privacy Charter (1994)⁸⁴ defines this right as “the autonomy of the individual and as a restriction on the right of the state and private organizations to encroach on that autonomy” which is guaranteed in a free and democratic society. This term includes the right of an individual to the privacy of his or her body, private space, privacy of communications, personal data, and the right to freedom of control.⁸⁵

2.3. Legislative situation in Croatia

In Croatia, as it was mentioned before, there is no unique definition of privacy or right to privacy. The right to privacy is guaranteed by the Constitution of the Republic of Croatia in various provisions, but also in the aforementioned regulations. Protection of various rights and freedoms is regulated in Art. 14 of the Constitution, which states that everyone in the Republic of Croatia, regardless of their social origin, sex, race, religion, and other characteristics has rights and freedoms, and all are equal before the law.

Furthermore, those rights and freedoms are not absolute. The Croatian Constitution in Art. 16 allows the possibility of some restrictions of the guaranteed rights and freedoms: only laws may restrict the rights and freedoms of citizens to protect the freedoms and rights of others, the rule of law, public morals, and health, and any

80 The Human Rights Act came into force in the UK in October 2000. [Online] Available at: <https://www.equalityhumanrights.com/en/human-rights/human-rights-act#:~:text=The%20Human%20Rights%20Act%201998%20sets%20out%20the%20fundamental%20rights,the%20UK%20in%20October%202000>. (Accessed: 2 April 2022).

81 The Data Protection Act 2018 [Online] Available at: <https://www.legislation.gov.uk/ukpga/2018/12/contents/enacted> (Accessed: 30 March 2022). More information [Online] Available at: <https://www.gov.uk/data-protection#:~:text=The%20Data%20Protection%20Act%202018%20is%20the%20UK's%20implementation%20of,used%20fairly%2C%20lawfully%20and%20transparently> (Accessed: 30 March 2022).

82 Encyclopaedia Britannica [Online] Available at: <https://www.britannica.com/topic/rights-of-privacy> (Accessed: 11 March 2022).

83 See Warren and Brandeis, 1890, p. 205.

84 Australian Privacy Charter (1994) [Online] Available at: <https://www.privacy.org.au/About/PrivacyCharter.html> (Accessed: 15 February 2022).

85 Australian Privacy Charter (1994) “A free and democratic society requires respect for the autonomy of individuals, and limits on the power of both state and private organizations to intrude on that autonomy.” “People have a right to the privacy of their own body, private space, privacy of communications, information privacy (rights concerning information about a person), and freedom from surveillance..”

restriction of these rights and freedoms must be proportionate to the nature of the need for restriction in each case.

Therefore, any encroachment on the rights and freedoms of other people must be justified from the aspect of Art. 16 of the Constitution, the right to privacy also among other rights.

The right to privacy, as it was stated before, takes several forms and different constitutional provisions guarantee its protection, e.g., Art. 34 guarantees the inviolability of the home, as a form of privacy. Art. 35 guarantees everyone the right to personal and family life, dignity, honor, and reputation, while Art. 36 prescribes the freedom and secrecy of correspondence and all other forms of communication. Art. 37 guarantees the security and confidentiality of personal data, and Art. 40 the right to religion and religious beliefs. All the above articles of the Constitution guarantee various forms of privacy and point to the need to protect them by law. Interpretation of the above provisions of the Convention and the Constitution of the Republic of Croatia leads to the interpretation that no one (government or other persons) may take actions that would limit the rights of others as provided by the relevant provisions of these documents.

The GDPR has direct application,⁸⁶ and it is (also) stated by Implementation of the General Data Protection Regulation Act (IGDPRA). Therefore, it is part of the internal legal order. IGDPRA specifically regulates the founding of the Croatian Personal Data Protection Agency,⁸⁷ its powers and everything related to Agency.⁸⁸ It also regulates the National Accreditation Body, personal data processing in special cases (especially when child is in question), etc. The Agency is in charge for monitoring of the application of the GDPR, headed by the director of the agency.⁸⁹ By GDPR provisions everyone who collects the data (“collectors” or “processors”)⁹⁰ must appoint a data protection officer.⁹¹ Anyone who considers that a right guaranteed by GDPR has been violated, can lodge a complaint and may submit a request to the Agency for rights violation.⁹² The Agency submits an annual report on the work of the personal data protection agency to the Croatian Parliament.⁹³

86 “Consequently, on April 27, 2018, the Republic of Croatia adopted the Act on the implementation of the General Data Protection Regulation which entered into force on 25 May 2018 (OG 42/18)” and the Agency as a supervisory body is founded by that Act—information available at [Online] Available at: <https://azop.hr/rights-of-individuals/> (Accessed: 28 March 2022).

87 For more information see [Online] Available at: <https://azop.hr/naslovna-english/> (Accessed: 15 March 2022).

88 See Arts. 6–18 of the IGDPRA.

89 For more information see [Online] Available at: <https://azop.hr/organizacijska-struktura/> (Accessed: 15 March 2022).

90 Art. 4 dots. 7 and 8 of the GDPR.

91 Arts. 13, 14 and 30 of the GDPR.

92 For more information see [Online] Available at: <https://azop.hr/rights-of-individuals> (Accessed: 15 March 2022).

93 Annual report on the work of the personal data protection agency for the period from 1 January 2020 to 31 December 2020. [Online] Available at: https://www.sabor.hr/sites/default/files/uploads/sabor/2021-04-01/134202/GODISNJE_IZVJESCE_AZOP_2020.pdf (Accessed: 20 March 2022), also see Art. 17 of the IGDPRA.

The MA defines privacy as family and personal life and right to live by one's own choice.⁹⁴ Its Art. 7 regulates the right to privacy of everyone,⁹⁵ even a person performing public service or duty "except in cases related to public service or duty performed by a person."⁹⁶ This is in line with the case law of the European Court of Human Rights, which provides protection to public and "relatively" public figures from invading their privacy, if the recordings made are not related to the function they perform. The legislature distanced himself from special cases when a person attracts public attention with his statements, behavior, and other acts from personal or family life, so he prescribed that in such cases these persons cannot "demand the same level of privacy as other citizens."⁹⁷ Also, the MA provides the situation when there is no violation of the right to privacy if, in terms of information, a legitimate public interest prevails over the protection of privacy in relation to the activity of journalists or information.⁹⁸

The Electronic Media Act forbids publication of information that reveals the identity of a child under the age of 18 involved in cases of any form of violence, regardless of whether the witness, victim, or perpetrator or the child attempted or committed suicide, nor disclose details of the child's family relationships and private life,⁹⁹ and the personal data of minors collected or otherwise obtained by media service providers within the framework of technical measures for the protection of minors may not be processed for commercial purposes, such as direct marketing, profiling, and targeted behavioral advertising.¹⁰⁰

The Consumer Protection Act explicitly forbids the merchant the transfer of personal data to any third person contrary to the GDPR¹⁰¹ and obliges the merchant of data processing in accordance with GDPR (Art. 83, para. 5 and 6) while the Electronic Communications Act protects the privacy and personal data explicitly in its Arts. 5 and 42, (para. 1), 43, 44, and 99a.

If none of this is enough to protect the privacy, then comes the criminal law with its regulations. The criminal law names several crimes against privacy in the chapter "Criminal Offences against Privacy"—e.g., Violation of the Inviolability of the Home

94 Art. 2 of the MA.

95 Art. 7, para. 1 of the MA.

96 Art. 7, para. 2 of the MA.

97 Art. 7, para. 3 of the MA.

98 Art. 8 of the MA.

99 Art. 24, para. 5 of the EMA. "(5) It is not allowed to publish information revealing the identity of a child under the age of 18 involved in cases of any form of violence, regardless of whether the witness, victim or perpetrator or the child attempted or committed suicide, nor disclose details of the child's family relationships. and private life."

100 Art. 24, para. 6 of the EMA. "(6) Personal data of minors collected or otherwise obtained by media service providers within the framework of technical measures for the protection of minors may not be processed for commercial purposes, such as direct marketing, profiling and targeted behavioral advertising."

101 Art. 11 of the GDPR. It also regulates the protection of personal data in cases of determination of the contract (Art. 83).

and Business Premises¹⁰²; Violation of the Secrecy of Letters and Other Parcels¹⁰³; Unauthorized Audio Recording and Eavesdropping¹⁰⁴; Unauthorized Taking of Pictures¹⁰⁵; Abuse of Sexually Explicit Footage¹⁰⁶; Unauthorized Disclosure of a Professional Secret¹⁰⁷ and Unlawful Use of Personal Data¹⁰⁸.

Some criminal offences against privacy can be found in other chapters, as criminal offences against Marriage, Family, and Children (Violation of the Privacy of the Child; in Art. 178 PC), but also in chapter regulating criminal offences against judiciary (Disclosing the Identity of a Person at Risk or Protected Witness; in Art. 308 PC).

3. Criminal regulation of the right to privacy in the Republic of Croatia

Privacy in Croatia is protected, as was already mentioned, through a variety of different laws. When there is no adequate protection accomplished by other branches of law, then the protection of right to privacy is guaranteed and given by criminal law (as *ultima ratio*).

In 2011, Croatia got the a Penal Code, with new chapter “Criminal Offences against Privacy.” The object of protection is privacy, which, as stated, is not unanimously defined, but the private sphere of individuals includes the physical and mental interests of individuals, their sexual life, gender, and sexual orientation, personal data, reputation, and photographs.¹⁰⁹

Most of the criminal offences against privacy are in the special chapter entitled “Criminal Offences against Privacy.” Some other offences which can be found in other chapters of the Croatian Penal Code are also offences against privacy and they are protecting more than one legal good (e.g., privacy and child, etc.). Hence, Violation of the Privacy of the Child¹¹⁰ is in the chapter “Criminal offences against Marriage, Family, and Children,” and the Disclosing the Identity of a Person at Risk or Protected Witness¹¹¹ is in the chapter “Criminal Offences against the Judiciary.”

102 Art. 141 of the Penal Code.

103 Art. 142 of the Penal Code.

104 Art 143. of the Penal Code.

105 Art. 144. of the Penal Code.

106 Art. 144a of the Penal Code.

107 Art. 145. of the Penal Code.

108 Art. 146. of the Penal Code.

109 Munivrana Vajda, 2018, cited in Cvitanović et al., 2018, pp. 159–160; see also *Niemietz v Germany*.

110 Art. 178 of the Penal Code.

111 Art. 308 of the Penal Code.

3.1. Violation of the inviolability of the home and business premises

Violation of the Inviolability of the Home and Business Premises¹¹² protects the privacy in home or in the business premises. A perpetrator is anyone who enters without authorization another person's home or business premises, or a closed or enclosed space belonging to the home or business premises, or who does not leave when requested to do so by the authorized person.¹¹³

Entering without authorization means any entry, despite the explicit opposition of an authorized person, and not leaving upon request means refusal to leave the dwelling. Therefore, this criminal offence can be committed by both act and omission.¹¹⁴

The act can be committed by anyone (the so-called *delictum communium*), but if it is committed by an official in the performance of service or a responsible person in the exercise of public authority, it will be a more serious, qualified form: aggravated offence. Criminal offence from para. 1 will be prosecuted upon request,¹¹⁵ and stipulated punishment is imprisonment for a term of up to one year.¹¹⁶

An aggravated form of the offence violates not only one's privacy, but also the trust that citizens have in institutions and the lawful and effective exercise of public authority.¹¹⁷ For aggravated forms, the person can be sentenced to imprisonment for a term not exceeding three years.¹¹⁸

Croatian legislature decided to protect the privacy of the business premises as well, although Art. 8 of the ECHR does not specifically mention business premises.¹¹⁹ The reason lies in ECtHR case law, which interpreted the notion of home dynamically and extensively, in such a way that it extended protection to those premises as well, i.e., premises used by an individual to earn a living.¹²⁰

In case of the ECHR's *Société Colas Est and Others v. France*,¹²¹ the Court stated that even the right of a legal person to respect its registered office, branch, and other business premises might fall under the protection of Art. 8 of the ECHR. Art. 34 of the (Croatian) Constitution also does not mention premises. It speaks only of the inviolability of the home, but the term can be stretched to include premises in which the addressees perform activities more permanently, such as business premises used

112 Art. 141 of the Penal Code.

113 Art. 141, para. 1 of the Penal Code.

114 Munivrana Vajda, 2018, cited in Cvitanović et al., 2018, p. 164.

115 Art. 141, para. 3 of the Penal Code.

116 Ibid.

117 Art. 141, para. 2 of the Penal Code If the criminal offence referred to in para. 1 of this Art. is committed by an official person in exercising its official duty, or public official in the exercise of public authority, he/she shall be sentenced to imprisonment for a term of up to three years.

118 Art. 141, para. 2 of the Penal Code.

119 Munivrana Vajda, 2018, cited in Cvitanović et al., 2018, pp. 165–166.

120 See ECtHR, *Niemietz v. Germany*, 1992, paras. 29–33.

121 See ECtHR, *Société Colas Est and Others v. France*, 2002, para. 40.

based on property or a legal basis.¹²² Croatian doctrine and literature has taken the standpoint about notion of home, which should be interpreted extensively and expended to all spaces used in the function of home even if there are different spaces, which do not have to be real estate. Therefore, by this interpretation, a home does not represent only the usual spaces for residence, e.g., houses, apartments, and cottages, but subtenant rooms, mobile homes, residential caravans, ship cabins, and even tents can also be considered as a home.¹²³ The legal text extends the protection to closed or fenced areas that belong to the home. These are spaces such as woodsheds, laundries, pantries, basements, yards, gardens, toilets, warehouses, basements, attics, etc.¹²⁴

However, it is debatable whether an uninhabited apartment can be considered a home in the sense of this incrimination in our criminal law theory and case law. According to the Apartment Rental Act (APA),¹²⁵ an apartment is a set of rooms intended for housing with much-needed ancillary rooms that form a single closed building unit and have a separate entrance.¹²⁶

The concept of “home” is in one sense broader than the concept of “apartment,” because it includes spaces that do not necessarily form a closed building unit; on the other hand, if we look to the functional definition of home, the concept of apartment can be considered more broadly. The reason for this is that the premises—which do not yet have the function of home, although they are intended for that function—are excluded from the notion of “home,” but not “apartment.”¹²⁷ Therefore, *Munivrana Vajda* considers that given the diverse nature of the space whose inviolability is protected by this incrimination, obviously their functional feature, the fact that they are used as a home, is essential. Such a conclusion, after all, is in line with the functional–subjective definition of the notion of home in criminal procedural law. Perhaps the most important argument in favor of a functional interpretation rests on a systematic–teleological interpretation of this norm, based on the protective object and the whole in which it is included, especially since January 1, 2013. According to the new Criminal Code, the group legal good that is protected by this chapter, and thus by this criminal offense, is privacy, and when it comes to an uninhabited, empty apartment, the private domain of an individual is not violated.¹²⁸

It can be also concluded how deciding upon the question whether something is home must be *quaestio facti* in each case. The mere fact that the tenant is absent from the home even for a long time does not deprive the space of protection from

122 Munivrana Vajda, 2018, cited in Cvitanović et al., 2018, p 161.

123 Ibid.

124 Ibid.

125 The Apartment Rental Act, OG, 91/96, 48/98, 66/98, 22/06, 68/18, 105/20.

126 Art. 2, para. 1 of APA.

127 Munivrana Vajda, 2018, cited in Cvitanović et al., 2018, p. 162.

128 Munivrana Vajda, 2018, cited in Cvitanović et al., 2018, p. 163.

the inviolability of privacy. Therefore, the spaces that an individual only periodically uses are also to be considered as home (e.g., holiday homes).¹²⁹

An authorized person is not necessarily the owner. It can also be a tenant, even in a relationship with the property owner, i.e., the owner of the apartment.¹³⁰ However, the person who has illegally occupied someone else's apartment does not enjoy protection of this Article.¹³¹

Business premises are according to the Lease and Sale of Business Premises Act (LSBPA),¹³² “an office building, business premises in narrow sense, garage and garage space.”¹³³ Business premises in a narrow sense are “one or more premises in a business or residential building intended for the performance of business activities which, as a rule, form an independent usable unit and have a separate main entrance.”¹³⁴ The business building is considered “a building intended for the performance of business activities if it is mostly used for that purpose.”¹³⁵

In Croatian criminal law case law, there was one interesting case. A neighbor rang the doorbell of a neighbor who lived immediately above to warn her of leaking water from her apartment. When he entered, he asked for a glass of water. The neighbor gave him the water. Then he grabbed her and dragged her to the bedroom. She begged him to stop and leave the apartment, which he refused to do. She started screaming than he ran out of the apartment and threatened to kill her if she reported it to the police. He was charged for Violation of the Inviolability of the Home and Business Premises¹³⁶ and Threat¹³⁷, and was convicted for both offences, for concurrence of offences and sentenced to seven months of suspended sentence with probation period of three years.¹³⁸ He was of diminished responsibility due to some psychiatric problems, which influenced the sentence.

In case *Khan v. the United Kingdom*¹³⁹ the ECtHR found a violation of Art. 8, although the applicant was not in his own apartment but in the home of the third person (who was also not aware of the surveillance), whom he had visited and in spontaneous conversation admitted he participated in a drug-related case—he was a drug dealer.

129 Ibid. p. 163.

130 Ibid. p. 64.

131 Ibid. p. 164.

132 The Law on Lease and Sale of Business Premises, Official Gazette, 125/11, 64/15, 112/18.

133 Art. 2, para. 2 of LSBPA.

134 Art. 2, para. 4 of LSBPA.

135 Art. 2, para. 3 of LSBPA.

136 Art. 141, para. 1 of the Penal Code.

137 Art. 139, para. 2 of the Penal Code.

138 Decision of the Municipal Criminal Court in Zagreb, no. K-129/19.

139 ECtHR case *Khan v. the United Kingdom* (Appl. no. 35394/97), May 12, 2000 (final 04.10.2000.), §§25–28. [Online] Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22Khan%20v.%20the%20United%20Kingdom%22%5D%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%22CHAMBER%22%5D%22itemid%22:%5B%22001-58841%22%5D%7D> (Accessed: May 15, 2022).

3.2. Violation of the secrecy of letters and other parcels

The Violation of the Secrecy of Letters and Other Parcels,¹⁴⁰ also protects the right to privacy. Written correspondence often contains private information that are intimate, personal, or deal with family life, etc. Such correspondence is private and in that context is considered secret. This does not mean that the information contained in that correspondence must be kept secret or classified as secret. The content of the correspondence must remain available only to the intended recipient. The secrecy in this crime comprehends this context. The protection of this secrecy is a prerequisite for free and secure communication, and its importance is guaranteed in a number of international documents.¹⁴¹ The right to correspondence and privacy in correspondence is guaranteed by the Universal Declaration of Human Rights¹⁴² and the European Convention for the Protection of Human Rights¹⁴³, and is also guaranteed by the Constitution of the Republic of Croatia (Art. 36—The right to secrecy of letters and consignments)¹⁴⁴

Criminal protection of letters and other parcels can be divided into two main directions. As *Grozđanić* points out, it can consist in (a) protecting the secrecy of the content whoever opens without authorization another person's parcel, letter, telegram, electronic mail or any other item of correspondence or otherwise violates his or her secrecy,¹⁴⁵ or (b) protecting the written communication¹⁴⁶ of persons from any who, without authorization, retain, conceal, destroy, or hand over without authorization to a third party another person's sealed parcel or letter, telegram, electronic mail, or any other item of correspondence.¹⁴⁷

The object of the action is a closed letter, parcels, telegram, e-mail or any other means of correspondence and the action on that object must be undertaken by a person who is not the addressee or is not intended for him.¹⁴⁸

The *modus operandi* includes three modes:

- a) opening;
- b) breach of secrecy in another way; and
- c) retaining, concealing, destroying, or handing it over to another.¹⁴⁹

140 Art. 142 of the Penal Code.

141 For more see Bojanić et al., 2011, p. 72.

142 Art. 12. See Universal Declaration of Human Rights [Online] Available at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (Accessed: 23.03.2022.).

143 Art. 8, para. 1. See European Convention for the Protection of Human Rights and Fundamental Freedoms p. 11. [Online] Available at: https://www.echr.coe.int/documents/convention_eng.pdf (Accessed: March 23, 2022).

144 Art. 36 of the Constitution of the Republic of Croatia "Freedom and secrecy of correspondence and all other forms of communication are guaranteed and inviolable. Only the law may prescribe restrictions necessary for the protection of security or the conduct of criminal proceedings."

145 Art. 142, para. 1 of the Penal Code.

146 Bojanić et al., 2011, p. 72.

147 Art. 142, para. 1 of the Penal Code.

148 For more see Bojanić et al., 2011, pp. 72–73.

149 Bojanić et al., 2011, p. 72.

Opening would mean any mechanical removal of obstacles to the contents of the letter, while the other way would include any way by which someone acquainted with the contents of letters, shipments, etc., without opening them, i.e., using existing scientific technology (e.g., infrared radiation, etc.).¹⁵⁰ The third mode encompasses the ways in which the object of action seems inaccessible to the addressee.

Each of the actions must be unauthorized, i.e., without the authorization of the person for whom it is intended or without a legal basis. The legal basis is the reason for excluding unlawfulness. For example, the investigating judge may order the detention and delivery of letters, telegrams and parcels intended for the defendant in accordance with Art. 339 of the Criminal Procedure Act (CPA).¹⁵¹ In that case, a criminal offense will not be committed because it is not unlawful.

For the basic form of the offence, the stipulated punishment is imprisonment for a term of up to one year, or in other words, a fine or custodial sentence from three months to one year.

The aggravated form of the offence is when someone wants to buy others' information or to damage someone with information from the letters, parcels, or telegrams (etc.), or when someone, acting with the aim of acquiring pecuniary gain for himself/herself or another or of causing damage to another, discloses to a third party a piece of information that he/she came to know by violating the secrecy of another person's parcel, letter, telegram, electronic mail, or any other item of correspondence, or makes use of this secret.¹⁵²

In addition, for that form, the perpetrator can be punished with fine or imprisonment for a term of up to two years. For both forms of this criminal offence, the prosecution will begin upon request.¹⁵³

The most severe form of the offence is when either of the previous forms are committed by an official person in exercising its official duty or by a public official in the exercise of public authority, and such perpetrator can be punished with fine or imprisonment up to three years.¹⁵⁴

In Croatia, there were cases where the mail carrier opened the msil of senior citizens and stole their pensions.¹⁵⁵ Another case which was prosecuted on the Zagreb Municipal Court was when ex-husband looked at e-mail of his ex-spouse. He was acquitted because of the lack of evidence.¹⁵⁶

150 Ibid.

151 The Criminal Procedure Act, Official Gazette, 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19.

152 Art. 142, para. 2 of the Penal Code.

153 Art. 142, para. 4 of the Penal Code.

154 Art. 142, para. 3 of the Penal Code.

155 *Hrvatska: Poštar krivotvorio potpise a sebi uzimao penzije* (Postman forged signatures and took pensions to himself), Informer.ba, 02.08.2011. [Online] Available at: <https://informer.ba/tekstovi/vijesti/hrvatska-postar-krivotvorio-potpise-sebi-uzimao-penzije/> (Accessed: 30 March 2022).

156 Judgement of the Municipal Criminal Court in Zagreb K-238/2017 (12.3.2020.); and uphleding judgement of the County Court in Šibenik Kž-215/2020.

In the case of *Taylor-Sabori v. the United Kingdom*,¹⁵⁷ the ECtHR found a violation of Art. 8 when police intercepted the applicant's pager messages, which were the basis for a conviction because of the absence of any legal regulations on such interception.

3.3. Unauthorized audio recording and eavesdropping

Unauthorized Audio Recording and Eavesdropping¹⁵⁸ can be committed by one who audio records without authorization another person's privately uttered words or by means of special devices eavesdrops without authorization another person's privately uttered words that are not intended to be heard by him/her,¹⁵⁹ alternatively, whoever uses or makes available to a third party the recorded words referred to in para. 1¹⁶⁰ or whoever publicly reveals the eavesdropped words literally or in essential outlines.¹⁶¹

In other words, the perpetrator is the person who records non-publicly spoken words that are meant to him but not to others. Therefore, if someone records his conversation on the cell phone without knowledge and the consent of the other participant in the conversation, person who is recording is committing a criminal offence. However, when the perpetrator records a non-public statement intended for him, it will not necessarily be a criminal offense, if he/she is recording criminal offence e.g., threat. In that case it will represent the reasons for excluding unlawfulness (e.g., recording a threat).¹⁶²

The perpetrator must be aware of the lack of consent of the person being recorded or wiretapped, as well as the fact that the spoken words are not intended for the public (and in the case of wiretapping, the words are not intended for him or her), and must act with intent regarding this element.¹⁶³

For this criminal offence is important that the words are not meant for the public. Spoken words as *Martinović and Tripalo* state "are non-public when they are not directed or understandable to an unlimited number of persons or a wider circle of unrelated persons."¹⁶⁴

In addition, the perpetrator is a person who unauthorizedly eavesdrops "privately spoken words of another that are not intended for him or her" using special devices, or disseminates recorded or heard words.

157 ECtHR case *Taylor-Sabori v. the United Kingdom*, (Appl. no. 47114/99), 22 October 2002, (Final 22.01.2003), §§17–19. [Online] Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22Taylor-Sabori%20v.%20the%20United%20Kingdom%22%5D%2C%22documentcollection-id%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%5D%2C%22itemid%22:%5B%22001-60696%22%5D%7D> (Accessed: 15 May 2022).

158 Art. 143 of the Penal Code.

159 Art. 143, para. 1 of the Penal Code.

160 Art. 143, para. 2 of the Penal Code.

161 Art. 143, para. 2 of the Penal Code.

162 See Dragičević Prtenjača, 2014, p. 172.

163 Munivrana Vajda, 2018, cited in Cvitanović et al., 2018, pp. 169–170.

164 Martinović and Tripalo, 2017, p. 501.

Which sort of special devices can be used is not stated, but it is clear that “ordinary” eavesdropping on other people’s conversations (e.g., through closed doors, in public places, etc.) is not a criminal offense. For this form of criminal offence, it is important to establish that the words of the wiretapped person are not intended for either the perpetrator or the public. The perpetrator must know that the words were unauthorizedly sound recorded. It is not necessary for the person to whom the recording was made available to be truly acquainted with its contents, but it is enough for it to be made possible.

If someone disseminates heard words, it is not necessary to literally transmit another’s statement to the public. It would be sufficient that it is presented in essential outlines, i.e., the basic content. In this case, too, the perpetrator must be aware that someone else’s statement was obtained through unauthorized eavesdropping.

The sentence, which can be imposed, are fine and imprisonment for a term of up to three years.¹⁶⁵

Modus operandi constitutes four different ways: a) recording other people’s spoken words that are not intended for the public; b) eavesdropping on others with special devices; c) by using the recordings thus obtained or giving them to other persons; d) public disclosure of other people’s words obtained by eavesdropping.¹⁶⁶ For all these forms’ prosecution can start only if there is a valid request.¹⁶⁷

The aggravated form of this offence depends on the special characteristics of the perpetrator. Therefore, if this offence is committed by an official exercising his or her official duty, or by a public official in the exercise of public authority, then it is considered more serious and the sentence is imprisonment between six months and five years,¹⁶⁸ and is prosecuted on an *ex officio* basis.

The criminal offence of Unauthorized Audio Recording and Eavesdropping protects the privacy of another person. Therefore, by the decision of the Croatian Supreme Court,¹⁶⁹ when a person records himself, consciously or unconsciously there will be no such criminal offence.¹⁷⁰ In addition, it can be committed only against natural person.¹⁷¹

Recording or eavesdropping must be unauthorized. In the literature, the meaning of the term “unauthorized” is disputed, so some authors (*Pavišić, Grozdanić and Veić*) consider recording unauthorized primarily “when it is performed outside the

165 Art. 143, para. 1 of the Penal Code.

166 Munivrana Vajda, 2018, cited in Cvitanović et al., 2018, p. 168.

167 Art. 143, para. 5 of the Penal Code.

168 Art. 143, para. 3 of the Penal Code.

169 Decision of the Supreme Court of Republic of Croatia (VSRH), no. I Kž-1092/06 “The Supreme Court of the Republic of Croatia, as a court of second instance: the protection of privacy from interference with technical devices for audio-visual recording has been established to prevent unjustified intrusion into another person’s private life. Protection does not include actions taken by that person himself, knowingly or unknowingly, because such protection of privacy cannot be imagined.”

170 Dragičević Prtenjača, 2014, p. 173.

171 Munivrana Vajda, 2018, cited in Cvitanović et al., 2018, p. 168.

cases allowed by law¹⁷² and by some other authors (*Bačić and Pavlović*)¹⁷³ when it is recorded or eavesdropped upon without consent of the person. The author of this Chapter gives her own solution to the meaning of the “unauthorized,” combining those two stand points.¹⁷⁴ In any case, when the recorded or eavesdropped person gives his consent for the recording or eavesdropping, there will be no violation of his privacy, so the essence of the act will not be realized.¹⁷⁵

Croatian Penal Code knows the exclusion of the unlawfulness regarding this criminal offence. Therefore, there will be no criminal offense when the acts of unauthorized sound recording or wiretapping were committed in in the public interest or another interest prevailing over the interest to protect the privacy of the person being recorded or eavesdropped on.¹⁷⁶

This means although someone else’s privacy has been violated, there will be no criminal offence, due to the public interest or some other interest which prevails the interest of the recorded person. This is known as reason of exclusion of unlawfulness. In addition, it must be noted how there is no definition nor mutual understanding due to the notions of “the public interest or other interest.” However, such decision on prevailing interests should be assessed in concerto, weighing the interests in each case.

Unlawfulness can also be ruled out based on general provisions of the Croatian Penal Code, (necessity or self-defense), but also based on other laws as well, e.g., Criminal Procedure Act (CPA), the Police Act (PA),¹⁷⁷ the Police Affairs and Powers Act (PAPA),¹⁷⁸ the Security and Intelligence System of the Republic of Croatia Act (SISA)¹⁷⁹ and other laws, due to the unity of the legal order.¹⁸⁰ Therefore, the person who conducts a special action according to Art. 332 CPA will not be committing this criminal offence.¹⁸¹

All unauthorized recordings, as well as the special devices will be confiscated due to the special provision in this Art. (para. 6) although it could also be confiscated according to Art. 79. PC (provision in general part of the Penal Code), but due to the provision of this article, special devices and recordings will be mandatorily confiscated regardless of whether there is a danger of reuse of such recordings and devices. The *ratio* of these provisions, however, is the same as the *ratio* of the Art. 79 PC—to prevent new potential breaches of privacy by continuing use of such recordings.¹⁸²

172 Pavišić, Grozdanić and Veić, 2007, p. 369.

173 Bačić and Pavlović, 2004, p. 546.

174 Dragičević Prtenjača, 2014, pp 179–185.

175 Munivrana Vajda, 2018, cited in Cvitanović et al., 2018, p. 169.

176 Art. 143, para. 4 of the Penal Code.

177 The Police Act, Official Gazette, 34/11, 130/12, 89/14, 151/14, 33/15, 121/16, 66/19.

178 The Police Affairs and Powers Act, Official Gazette, 76/09, 92/14, 70/19.

179 The Security and Intelligence System of the Republic of Croatia Act, Official Gazette, 79/06, 105/06.

180 Munivrana Vajda, 2018, cited in Cvitanović et al., 2018, p. 169.

181 Ibid. p. 169.

182 Ibid. p. 170.

3.3.1. Case law

3.3.1.1. National case law—Constitutional court of the republic of Croatia

There was an interesting case where the Constitutional Court of the Republic of Croatia (U-III/244/1997) has quashed the Decision of the State Judicial Council and the Decision of the Sabor (Croatian Parliament), because the applicant was relieved of his duties as president and judge of the Supreme Court of the Republic of Croatia when he was caught in special evidentiary actions which were not intended to him.¹⁸³ The Constitutional Court found that the applicant's right to a fair trial¹⁸⁴, the right to privacy in the form of personal, family life, dignity, honor, and reputation¹⁸⁵, the right to privacy in correspondence and other forms of communication¹⁸⁶ and the right to privacy, security, and secrecy of personal data¹⁸⁷ had been violated.¹⁸⁸

3.3.1.2. European Court of human rights case law

The ECTHR decisions regarding this issue of unauthorized audio recording or eavesdropping, are mainly related to issues of procedural law and law guaranteed in criminal proceedings.¹⁸⁹ However, it is necessary to mention two key cases that have arisen before the Court; *Klass and Others v. Germany*¹⁹⁰ and *Malone v. the United Kingdom*,¹⁹¹ in which the ECtHR ruled on the quality of the law and the compatibility of its provisions with those of the Convention.

In *Klass and Others v. Germany*, the applicants argued that laws allowing the authorities to supervise individuals without informing them constituted a violation of Art. 8. The Court found that the law governing the supervision of individuals was sufficient, defined, and precise and that the procedure governing supervision and ensuring that all supervision measures are in accordance with the law and provisions of the Convention. Therefore, it concluded how there is no violation of Art. 8 of the Convention.¹⁹²

183 Decision of the Constitutional Court, no. U-III/244/1997., p. 3., also see Dragičević Prtenjača, 2014, p. 176.

184 Art. 29 of the Constitution.

185 Art. 35 of the Constitution.

186 Art. 36 of the Constitution

187 Art. 37 of the Constitution.

188 Dragičević Prtenjača, 2014, p. 176.

189 Dragičević Prtenjača, 2014, p. 174.

190 Judgement ECtHR *Klass and Others v. Germany* (Appl. no. 5029/71, 6 September 1978 <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22klass%22%22%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%22CHAMBER%22%22%22itemid%22:%5B%22001-57510%22%22%22%7D>) (Accessed: 29 March 2022).

191 Judgement ECtHR *Malone v. the United Kingdom*, (Appl. no. 8691/79), 2 August 1984; [Online] Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22malone%22%22%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%22CHAMBER%22%22%22itemid%22:%5B%22001-57533%22%22%22%7D>) (Accessed: 29 March 2022).

192 *Klass and Others v. Germany*, paras. 45, 46, 56.

He took a different position in *Malone v. the United Kingdom* in which he found a violation of Art. 8 because “surreptitious surveillance”¹⁹³ of applicants was carried out during the criminal investigation in the form of police interception of telephone conversations (tapping) and recording of calls (listing numbers dialed from a particular telephone).¹⁹⁴ The Court found that the legislation and regulation concerning police wiretapping, is not precise and specific enough to comply with Art. 8 of the Convention. Therefore, the wiretapping and recording of calls and the use of such information, without sufficient legislation governing such conduct or without the consent of the person whose calls are recorded, constitute unjustified invasion of privacy and violation of Art. 8 of the Convention.¹⁹⁵

The Court found a violation of Art. 8 of the Convention in a series of cases because the laws or bylaws that regulated the problem of wiretapping did not comply with the provisions of Art. 8 §2 of the Convention, for example in *Huvig v. France*,¹⁹⁶ *Kruslin v. France*,¹⁹⁷ *Khan v. the United Kingdom*¹⁹⁸ (2000), etc.

In *Craxi v. Italy* (no. 2) (2003),¹⁹⁹ the Court found a violation of Art. 8 of the Convention even in when information was obtained in a lawful manner, concerning the reading-out in court and the disclosure in the press of transcriptions of a politician’s telephone conversations, intercepted in the context of criminal proceedings for corruption. Information was released to the public but respect for the rights of the individual was not ensured because the authorities failed to prohibit journalists’ access to transcripts of private telephone conversations. Therefore, the ECtHR took position that the authorities had a positive obligation to prevent the release into the public domain of the private conversations.

In the *Kruslin v. France*,²⁰⁰ the court stated, *inter alia*, “recording and other forms of interception of telephone conversations (wiretapping) constitute a serious

193 *Malone v. the United Kingdom*, para. 39.

194 *Malone v. the United Kingdom*, paras. 67, 68, 87.

195 *Malone v. the United Kingdom*.

196 Judgement ECtHR *Huvig v. France* (Appl. no. 11105/84), 24 April 1990; [Online] Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22huvig%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22:%5B%22001-57627%22%5D%7D> (Accessed: 28 March 2022).

197 Judgement ECtHR *Kruslin v. France* (Appl. no. 11801/85), 24 April 1990, §35, [Online] Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22Kruslin%20v.%20France%22%2C%22itemid%22:%5B%22001-57626%22%5D%7D> (Accessed: 28 March 2022).

198 Judgement ECtHR *Khan v. the United Kingdom* (Appl. no. 35394/97), 12 May 2000, Final (04/10/2000); [Online] Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22khan%20v.%20united%22%2C%22documentcollectionid%22:%5B%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22:%5B%22001-58841%22%5D%7D> (Accessed: 29 March 2022).

199 Judgement ECtHR *Craxi v. Italy* (no. 2) (Appl. no. 25337/94), 17 July 2003 (final 17/10/2003, §§68–76; [Online] Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22Craxi%20v.%20Italy%22%2C%22itemid%22:%5B%22001-61229%22%5D%7D> (Accessed: 28 March 2022).

200 Judgement ECtHR *Kruslin v. France* (Appl. no. 11801/85), 24 April 1990, §35, [Online] Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22Kruslin%20v.%20France%22%2C%22itemid%22:%5B%22001-57626%22%5D%7D> (Accessed: 28 March 2022).

interference with private life and correspondence and must therefore be based on particularly precise law.”²⁰¹ It is extremely important that there are clear, detailed rules on this issue, especially as available technology becomes more sophisticated,²⁰² and found a violation of Art. 8 of the Convention. The Court considered how “the legislation governing wiretapping was not clear and specific enough” and it did not provide sufficient protection rights from possible abuses, i.e., the applicant did not enjoy even the minimum degree of protection to which citizens in a democratic society would be entitled.²⁰³

In the case of *P.G and J.H. v. the United Kingdom*,²⁰⁴ the Court found a violation of Art. 8. The police kept special concealed audio recordings of persons answering police questions, and use them and the information obtained, for further analysis without informing those persons of the actions taken during that investigation process.²⁰⁵

3.4. Unauthorized taking of pictures

The unauthorized taking of footage includes taking pictures²⁰⁶ of another person located in a dwelling or an area especially protected from view without authorization, or uses or makes it available to a third party such a picture, thus violating the person’s privacy for which a prison sentence of up to one year is prescribed,²⁰⁷ and this primarily form shall be prosecuted upon request.²⁰⁸ The perpetrator can be anyone taking the picture or who uses or disseminates picture obtained in this way.²⁰⁹ Yet aggravated form of this offence must be committed by persons with the special characteristics e.g., “official person in exercising its official duty or by a public official in the exercise of public authority” and the perpetrator can be sentenced to imprisonment for a term of up to three years.²¹⁰

The act of committing this offence is proscribed alternatively; so, it consists of photographing another who is in an apartment or space protected from view, or from using the recording thus obtained, or from giving the recording thus obtained to another person.

To be protected from view, it must be filmed in an apartment or other space truly protected from view—a hotel room, a fenced yard, a shower cabin, bathroom, hatchery, solarium, etc., and even an outdoor pool on private property if it is protected

201 *Kruslin v. France*, §33.

202 *Kruslin v. France*, §33.

203 *Kruslin v. France*, §§33, 36.

204 Judgement ECtHR *P.G and J.H. v. the United Kingdom* (Appl. no. 44787/98), 25 September 2001, Final (25/12/2001); [Online] Available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-59665%22%5D%7D> (Accessed: 29 March 2022).

205 *P.G and J.H. v. the United Kingdom*, para. 63, see also: Dragičević Prtenjača, 2014, p. 175.

206 Art. 144 of the Penal Code.

207 Art. 144, para. 1 of the Penal Code.

208 Art. 144, para. 3 of the Penal Code.

209 Munivrana Vajda, 2018, cited in Cvitanović et al., 2018, p. 172.

210 Art. 144, para. 2 of the Penal Code.

from view.²¹¹ *Munivrana Vajda* believes that only filming that violates the right to privacy—primarily the right to privacy and family life²¹²—or only cases of violation of the most intimate sphere, should constitute a criminal offense,²¹³ and may be punishable. Therefore, by such interpretation, taking pictures of someone doing usual actions, e.g., cleaning or vacuuming in her/his home, would not constitute a criminal offense. The author disagrees with this view.

The crime must be committed with intent, and *Munivrana Vajda* believes that unauthorized does not refer to the will or knowledge of the person being filmed, but to “protection from view,” i.e., the space that is protected from view.²¹⁴ The method of recording is not relevant—it is only important that it is a visual recording.

The manner and content of the consent, but also the content of the recording, are of great importance not only for the existence of criminal offenses of unauthorized recording, but also for the issue of liability for damage under civil law regulations.

The Media Act (MA) prescribes the publisher’s liability for damages. The release of the publisher from liability for damage is regulated in Art. 21, para. 4

if the information with which the damage was done is a photograph of the injured party taken in a public place or a photograph of the injured party taken with his knowledge and consent for publication, and the injured party did not prohibit publication, i.e., limited the right of the author of the photograph to exploit the work.²¹⁵

It is evident from the cited provision that one of the exculpatory reasons is the fact that the photograph was taken in a public place. Any recording in a public place cannot be this offence.²¹⁶ There is a fiction that refers to it being shown in public, so it is considered that whoever is in a public place agrees to be filmed. This fiction is disputable, but that is current situation in Croatia, which is codified in the Unauthorized Taking of Pictures.²¹⁷ The MA wants to make a clear distinction between photographs taken in public places from photographs taken in non-public places or private photographs, the publication of which requires the prior consent and approval of the persons photographed.²¹⁸

What is considered a public place is a critical issue. In Croatia, there is no unique solution, nor is this issue regulated in any of the above-mentioned laws. In *Jelušić’s* opinion, a public place should be where anyone who wants to can access it freely, voluntarily, freely, and subject to certain conditions—for example, streets, squares,

211 *Munivrana Vajda*, 2018, cited in Cvitanović et al., 2018, p. 172.

212 *Ibid.* p. 173.

213 *Ibid.* p. 173.

214 *Ibid.* p. 174.

215 Art. 21, para. 4, al. 4 of MA.

216 *Munivrana Vajda*, 2018, cited in Cvitanović et al., 2018, p. 172.

217 For more see Dragičević Prtenjača, 2014, pp 164–199.

218 Dragičević Prtenjača, 2014, p. 182.

parks, public beaches, stadiums, cinemas, restaurants, etc.²¹⁹ Hence, *argumetnum a contrario*, non-public places should be all places of access that require prior approval or consent: home, private beaches, offices, etc.²²⁰ It is also possible that part of a building is public and part a non-public place, such as banks.²²¹

The assumption is that everyone who finds himself or herself in public places (public beach, stadium, theatre, park) loses the right to a part of his privacy. The reasoning for such comprehension is how there is a very high probability that person who is outside can be photographed due to the advance and available technology (cell phones etc.). This is however disputable. Also, in connection to the aforementioned standpoint there is another one regarding publishing the photographs taken in public place in the media without person's explicit consent. This reasoning is for reconsideration, but similar position was taken by the Constitutional Court in one of its decisions²²² expressing the legal view that photographs taken in public places may be freely published.²²³

It is proscribed that all pictures and special devices used for committing the criminal offence shall be seized.²²⁴

Sentence is lenient than for criminal offence of Unauthorized Audio Recording and Eavesdropping. *Munivrana Vajda* considers how the development of technology of video recording has become widespread phenomenon and, in many cases, an accepted phenomenon.²²⁵

3.4.1. Case law

3.4.1.1. National case law

In Croatian case law, a husband took photographs of his ex-wife while she was taking a shower with his cell phone, and then he threatened to send it to all her family. He said they will come to kill her because they are Muslims.²²⁶ The case was rejected because the injured party withdrew her request.

In another case, a telecommunications technician was provide service to a famous person in Croatia, according to the work order that stated the celebrity's name and address. When the technician arrived, he photographed the person on the couch and posted these pictures on Facebook together with the work order containing his

219 Jelušić, 2008, p. 79.

220 Jelušić, 2008, p. 79.

221 Dragičević Prtenjača, 2014, p. 183.

222 US RH, U-III / 4365/2005.

223 See Decision of the Croatian Constitutional Court no. US RH U-III/4365/2005.

224 Art. 144, para. 4 of the Penal Code.

225 Munivrana Vajda, 2018, cited in Cvitanović et al., 2018, p. 171.

226 Judgment of the Croatian Municipal Criminal Court in Zagreb, no. Kzd-121/2020; wife has given up further prosecution and the court brought a formal decision refusing prosecution, which was upheld by the County Court of Zagreb (no. Kžzd-199/2020).

personal data.²²⁷ He was found guilty for the Art. 144 PC (Unauthorized Taking of Pictures) and Art. 146 PC (Unlawful Use of Personal Data).

3.4.1.2. European Court of Human Rights case law

As stated above, the European Court of Human Rights has taken the standpoint in case *Niemietz v. Germany*²²⁸ that privacy has a broad meaning and encompasses various aspects of an individual's life. The right to physical and mental integrity, sexual life, gender and sexual orientation, personal data, reputation, name, photographs, and therefore any and even visual footage that includes neutral actions (cooking, reading, etc.) could be understood as a violation of the right to privacy, and can constitute a criminal offence.

Hence, its case law regarding issue of privacy in public places differs—especially when it is a private person in a public place. In some situations, the Court considers that person can have the right to protection of privacy.

In the above-mentioned case *Peck v. the United Kingdom* (in Section 2.2, Regional Instruments),²²⁹ the Court held there is a violation of Art. 8. The private person was recorded while attempting to commit suicide in a public place, and the Court considered since the footage is clearly focused on and related to one individual only,²³⁰ the CCTV operator who had alerted the police and observed their intervention could have made enquiries with the police to establish the identity of the applicant and thereby request his consent to disclosure.²³¹

In the case *Von Hannover v. Germany* (no. 2) (2012), the Court stated how even some public person recorded in a public place can have the right to protection of privacy and a recording may violate Art. 8 of the Convention if it was not recorded in the general/public interest, but only to entertain the reader: the reader's interest in being entertained generally carried less weight than that of protecting privacy, in which case the reader's interest did not merit protection.²³²

But in the end, the Court concluded there was not a violation of Art. 8 of the Convention,²³³ as national courts had carefully weighed in the balance the publishing

227 Judgment of the Croatian Municipal Criminal Court in Zagreb, no. K-36/2019 (3.6.2020.), which become final.

228 *Niemietz v. Germany*, para. 29.

229 *Peck v. the United Kingdom*, para. 87.

230 Guide to the Case Law of the of the European Court of Human Rights—Data protection (last updated on 31 December 2021), p. 53, paras. 133, 137, 234.

231 Guide to the Case Law of the of the European Court of Human Rights—Data protection (last updated on 31 December 2021), p. 53, para. 234.

232 See ECtHR Judgement *Von Hannover v. Germany* (no. 2) (2012.), (Appl. nos. 40660/08 and 60641/08), 7 February 2012; paras. 31, 32 [Online] Available at: [https://hudoc.echr.coe.int/eng/#{%22fulltext%22:\[%22%22CASE%20OF%20VON%20HANNOVER%20v.%20GERMANY%22%22\],%22itemid%22:\[%22001-109029%22\]}](https://hudoc.echr.coe.int/eng/#{%22fulltext%22:[%22%22CASE%20OF%20VON%20HANNOVER%20v.%20GERMANY%22%22],%22itemid%22:[%22001-109029%22]}) (Accessed: 29 March 2022).

233 *Von Hannover v. Germany* (no. 2), paras. 118, 125, 126. It considered that the Federal Court of Justice upheld the applicants' request to ban the publication of two photographs that it considered not to

company's right to freedom of expression on the one hand, and the applicants' right to respect for their private life on the other there is no violation of Art. 8.²³⁴

In one other more recent case of *Gaughran v. the United Kingdom*,²³⁵ in which the authorities had decided on the indefinite retention of the photograph of an individual convicted of driving with excess alcohol, in addition to his DNA profile and fingerprints,²³⁶ the Court found a violation of Art. 8.

The Court concluded that in deciding on that retention of personal data, without reference to the seriousness of the offence and in the absence of any real possibility of review, the authorities had failed to strike a fair balance between the competing public and private interests.²³⁷

3.5. Abuse of sexually explicit footage

Abuse of Sexually Explicit Footage²³⁸ is a new criminal offence introduced into the Croatian Penal Code with amendments in 2021. It was introduced because there were some cases, which were very serious but could not be qualified as any criminal offence. After the termination of the relationship, one ex-partner shared intimate photos or videos of the other ex-partner on the Internet, without the partner's consent and knowledge. They can then use the intimate footage to blackmail, belittle, or retaliate after the breakup, and can result in controlling and manipulation of the recorded person with the goal of embarrassing and humiliating the victim. This can be done in an existing relationship as well, with the goal not to determine the relationship or to manipulate with the person to do what another partner wants. In addition, many people publish such films on social networks, most often videos of ex-partners set up out of revenge. In the public, this criminal offence is known as "revenge porn."²³⁹

contribute to matters of general interest. However, he rejected the applicants' request to ban the publication of a third photo showing the application walking during a skiing holiday in St. Moritz and which was accompanied by an article on, among other things, the deteriorating health of Prince Rainer—Von Hannover v. Germany (no. 2), para. 117.

234 Guide to the Case Law of the of the European Court of Human Rights—Data protection (last updated on 31 December 2021), p. 20, para. 67.

235 See ECtHR Judgement *Gaughran v. the United Kingdom* (Appl. no o. 45245/15), 13 February 2020, Final (13/06/2020) [Online] Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22Gaughran%20v.%20the%20United%20Kingdom%22%2C%22itemid%22:%5B%22001-200817%22%5D%7D> (Accessed: 29 March 2022).

236 Guide to the Case Law of the of the European Court of Human Rights—Data protection (last updated on 31 December 2021), p. 19, para. 63.

237 Guide to the Case Law of the of the European Court of Human Rights—Data protection (last updated on 31 December 2021), pp. 19–20, para. 63.

238 Art. 144a of the Penal Code.

239 M.V., Osvetnička pornografija postaje kazneno djelo: Bivšim partnerima od života su napravili pakao, sada im prijete višegodišnji zatvor, Dnevnik.hr; od dana 22. prosinca 2022.; dostupno na. [Online] Available at: <https://dnevnik.hr/vijesti/hrvatska/osvetnicka-pornografija-novo-kazneno-djelo---688113.html> (Accessed: 15 March 2022).

Considering that, in July 2021, the Abuse of Sexually Explicit Footage was stipulated as criminal offence. The perpetrator can be anyone who abuses the relationship of trust and without the consent of the filmed person makes available to a third party a recording of sexually explicit content recorded with the consent of that person for personal use and thus violates that person's privacy.²⁴⁰

The proscribed sentence is imprisonment for up to one year. The same punishment is stipulated for other *modus operandi* when someone creates new (fake) footage or alters an existing recording of sexually explicit content and uses that recording as real, thereby violating the privacy of the person on that recording via computer system.²⁴¹ The aggravated form of the offence is when both offences (in paras. 1 and 2) are committed via a computer system or network or in any other way due to which the recording became available to a larger number of persons, and the perpetrator can be punished by imprisonment for up to three years.²⁴²

The criminal offence is committed when the consequence occur which consists of a violation of privacy. If there are no such consequences, and the perpetrator acts with intent which must include the fact of abuse of trust and consent of the person being filmed, it would be an attempt that is not punishable given the prescribed penalty.²⁴³ This incrimination refers also to the betrayal of trust, and confidence which must exist at the time when a picture was taken or a recording was made.

All forms of the offence are to be prosecuted upon request,²⁴⁴ and all recordings and special devices with which the criminal offense was committed shall be seized.²⁴⁵

There were such cases before the amendments in 2021, and it tried to be incriminated and prosecuted under the Art. 144 PC (Unauthorized Taking of Pictures). There were problems in the prosecution, and usually it did not end well for the victim because the victim her-/himself) agreed to the (video) recording or taking pictures, so charges for this incrimination were in the most cases rejected. If Art. 144 PC is to be applied, the consent of the victim must not exist.

There was one case where victim was unconsciousness and while she was unconsciousness, her ex-partner raped her with a vibrator and took pictures of the act, after which he sent it to all their friends via WhatsApp. Among other charges, he was charged for Unauthorized Taking of Pictures²⁴⁶, and the Municipal Criminal Court in Zagreb ruled against that charge, and the perpetrator of that act was found not guilty, but the appeals court in Dubrovnik upheld the verdict.²⁴⁷ This was the case where

240 Art. 144a, para. 1 of the Penal Code.

241 Art. 144a, para. 2 of the Penal Code.

242 Art. 144a, para. 3 of the Penal Code.

243 Vlada Republike Hrvatske, Prijedlog Zakona o izmjenama i dopunama Kaznenog zakona, s konačnim prijedlogom zakona, Zagreb, lipanj 2021, (Government of the Republic of Croatia, Final Draft of the Law on Amendments to the Criminal Code, Zagreb, June, 2021.) p. 18.

244 Art. 144a, para. 4 of the Penal Code.

245 Art. 144a, para. 5 of the Penal Code.

246 Art. 144 of the Penal Code.

247 Verdict of the Municipal Court in Zagreb, no. K-1156/2018 which was upheld by the County Court in Dubrovnik no. 75/2021.

there was no consent; it was done in the privacy of the ex-partner's apartment, in the bedroom, so from this fact, such a court ruling is very interesting, even then when at the time there was no special offence of the Abuse of Sexually Explicit Footage²⁴⁸.

It must be added that in 2004, the "Severina" case attracted a great deal of publicity because her intimate video recording had been made available to the public.²⁴⁹ She never got to criminal court, but today, the release of that intimate video would constitute a criminal offence: Abuse of Sexually Explicit Footage.

3.6. *Unauthorized disclosure of a professional secret*

The essence of this criminal offence is unauthorized disclosure of a professional secret²⁵⁰ by some persons of special profession. Therefore, certain persons to whom information on the personal or family life of another person has been entrusted in the performance of their profession can only commit it as an attorney-at-law, notary public, health worker, psychologist, employee of a welfare institution, religious confessor, or another person who discloses without authorization a piece of information about the personal or family life confided to him/her in the performance of his/her occupation,²⁵¹ and the perpetrator can be sentenced to imprisonment for a term of up to one year.²⁵²

The general clause regarding perpetrators of this offence ("another person" to whom secret information has been entrusted in connection with her profession will also be liable for this offense) has been retained,²⁵³ because it is impossible to predict all the professions in the future that may exist with this obligation.

Every behavior of the person by whom a secret is transmitted, expressed, or made available to another, breaking professional secrecy, constitutes this offence. Professional secrecy can be revealed not only by verbal testimony, but as *Munivrana Vajda* notes also by (intentionally) "leaving an unprotected secret document in a place where it is available to unauthorized third parties, publishing information in professional or scientific work and in other ways."²⁵⁴

Every piece of information on personal or family life entrusted to the perpetrator of this offence in the performance of his profession is considered a professional secret.²⁵⁵

248 Art. 144a of the Penal Code.

249 Fotografije gole Severine preplavile su Internet, a seksi kadrovi mnoge su podsjetili na skandal iz 2004. godine kada je u javnost procurila snimka seksa pjevačice i njezinog tadašnjeg partnera, 21.08.2018, Net.hr [Online] Available at: <https://net.hr/hot/zvijezde/severina-opet-na-udaru-nakon-objave-pornica-bila-je-u-depresiji-sada-joj-je-ponovno-zadan-udarac-2a26e85a-b1c3-11eb-94cc-0242ac14001e> (Accessed: 21 March 2022). Severina is famous Croatian singer.

250 Art. 145 of the Penal Code.

251 Art. 145, para. 1 of the Penal Code.

252 Art. 145, para. 1 of the Penal Code.

253 Munivrana Vajda, 2018, cited in Cvitanović et al., 2018, pp 175–176.

254 Ibid. p. 175.

255 Ibid. p. 175.

Data comprehend any written, photographed, drawn, recorded document by any means or unwritten communication by any other means or record of data, or spoken word.²⁵⁶

By this incrimination, as well as other incriminations in this chapter the right to privacy is protected, specifically the right of citizens to the secrecy of data on personal and family life. It must be also noted how this incrimination indirectly protects the proper functioning of certain services and activities based on a relationship of trust.²⁵⁷ Therefore, the duty to keep confidential information is prescribed by other laws and regulations governing the performance of these activities. Therefore, according to Art. 13 of the Advocacy Act (AA),²⁵⁸ a lawyer is obliged, in accordance with the law, to keep secret everything that the party has entrusted to him or that he has learned in another way in representing the party,²⁵⁹ and other persons who work or have worked in a law office are also obliged to keep attorney–client confidentiality.²⁶⁰

Similarly, in Medical Act stipulates the obligation of a doctor to keep everything he learns about a patient who seeks medical help in connection with his health condition must be kept as a medical secret and may be disclosed.²⁶¹

This criminal offence is committed when the disclosure of secrets is unauthorized, and primarily indicates the lack of consent of the person to whose personal and family life the information provided relates.²⁶² Also, other persons may be authorized to give consent for their disclosure, e.g., a doctor may disclose a medical secret unless otherwise provided by a special law, only with the approval of the patient, parent, or guardian of minors, and in the event of mental incapacity or death, with the approval of the patient's immediate family, guardian, or legal representative.²⁶³

The perpetrator must act with intent and must be aware of the confidential nature of the information as well as the possibility of his behavior revealing that information to another person, and he must at least agree to it. Indirect intent is not enough, and a person who reveals a secret by accident or negligence does not commit a criminal offense under this article.²⁶⁴

The PC stipulates a special reason for excluding unlawfulness. VAs it does in the criminal offense of Unauthorized Audio Recording and Eavesdropping²⁶⁵, it states that there shall be no criminal offence referred to in paragraph 1 of this article if the secret was disclosed in the public interest or the interest of a third party, which prevails over the interest of keeping the secret.²⁶⁶

256 Ibid. p. 175.

257 Ibid. p. 176.

258 The Advocacy Act (AA), Official Gazette, 09/94, 117/08, 50/09, 75/09, 18/11, 126/21.

259 Art. 13, para. 1 of AA.

260 Art. 13, para. 2 of AA.

261 Art. 21 of MA.

262 Munivrana Vajda, 2018, cited in Cvitanović et al., 2018, p. 176.

263 Art. 21 of MA.

264 Munivrana Vajda, 2018, cited in Cvitanović et al., 2018, p. 177.

265 Art. 143, para. 4 of the Penal Code.

266 Art. 145, para. 2 of the Penal Code.

However, unlike Art. 143, para. 4 PC, which deals with the general interest, Art. 145, para. 2. PC speaks about the interest of another person, which is more important than the interest of secrecy or protection of privacy. *Munivrana Vajda* states how “an example of the public interest is the interest in detecting a criminal offense, while the interest of another person is, for example, its protection from a dangerous contagious or sexually transmitted disease.”²⁶⁷ Therefore, the conflicting interest of the public or another person on the one hand and the secrecy on the other should be considered in each case *in concerto* depending on the circumstances of the individual case.

Giving the fact that unlawfulness can be excluded if there is a consent of the person whose data are in question as well as if there is a consent of another person who is authorized to give the consent in the name of that person, unlawfulness can also be excluded when other laws prescribe such possibility.²⁶⁸ This necessarily stems from the unity of the legal order.²⁶⁹ This criminal offence as many other for this chapter is to be prosecuted upon request.²⁷⁰

In another case, an attorney gave a client’s letter to the prosecution (state attorney’s office) in which the client threatened to kill another attorney representing him in come civil law cases. His attorney represented him in a civil law case as well. Both the municipal and the county court in Varaždin decided there was not breach of law and the criminal offence under Art. 145. Unauthorized Disclosure of a Professional Secret was not committed. Reasoning was that his lawyer was only for civil law cases, and the sever threat is one of the reasons from Art. 145. para. 2 PC.²⁷¹

3.7. Unlawful use of personal data

Unlawful Use of Personal Data²⁷² criminalizes the actions anyone who “in contravention of the conditions set out in the Act, collects, processes, or uses personal data of physical persons,” and the stipulated sentence for this basic form of the offence is fine or imprisonment for a term of up to one year.²⁷³ This is the most frequent offence in our case law²⁷⁴.

The object of protection is personal data, i.e., the inviolability of personal data, which may not be used outside the purpose established by law without the authorization of that

267 *Munivrana Vajda*, 2018, cited in Cvitanović et al., 2018, p. 177.

268 E.g., “A doctor is obliged to report to the police or the state attorney’s office when, during the performance of medical activity, he suspects that a person has died or was injured by force. The doctor is also obliged to submit the report referred to in para. 1 of this article when he suspects that the health or condition of a minor or infirm person is seriously endangered by neglect or abuse.”—Art. 22, paras. 1–2 of MA.

269 *Munivrana Vajda*, 2018, cited in Cvitanović et al., 2018, p. 177.

270 Art. 145, para. 3 of the Penal Code.

271 Decision of the Municipal Court in Varaždin, Kž-48/18-4 (30.1.2018.).

272 Art. 146 of the Penal Code.

273 Art. 146, para. 1 of the Penal Code.

274 See chapter 4. Statistical Analyses.

person.²⁷⁵ Personal data is any information relating to an identified natural person or the natural person who can be identified. Personal data is defined in the GDPR, and concerns any information relating to an identified or identifiable natural person (“data subject”); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.²⁷⁶

By *Pavišić and Grozdanić* a person can be identified if his identity can be established directly or indirectly based on one or more characteristics specific to his physical, psychological, mental, economic, cultural, or social identity.²⁷⁷ The protection is for personal data of any natural person, regardless of the fact whose citizen it is.²⁷⁸

The ECJ in *Nowak*²⁷⁹ concluded that personal data consist of the answers of the candidate at a professional examination, and comments of the examiner’s regarding those answers.²⁸⁰

In *Buivids*²⁸¹ the ECJ stated that the recorded images of police officers in a police station constitute personal data; therefore, it concluded that it is possible to see and hear the police officers in the video in question, so those recorded images of persons constitute personal data within the meaning of Art. 2(a) of Directive 95/46.²⁸²

The processing of data comprehends different actions. The GDPR defines it as any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination, or otherwise making available, regarded as alignment or combination, restriction, erasure, or destruction.²⁸³

ECJ case law in *Buivids*²⁸⁴ “processing of personal data,” is defined in Art. 2(b) of Directive 95/46 as “any operation or set of operations which is performed upon personal data...such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or

275 Pavišić, Grozdanić, and Veić, 2007, p. 371.

276 Art. 4(1) of the GDPR.

277 Pavišić, Grozdanić and Veić, 2007, p. 371.

278 Konačan prijedlog Kaznenog zakona s obrazloženjem, Vlada Republike Hrvatske, Zagreb, [Final proposal of the Criminal Code with explanation, Government of the Republic of Croatia] p. 189. [Online] Available at: https://sabor.hr/sites/default/files/uploads/sabor/2019-01-18/080229/PZE_866.pdf (Accessed: 25 March 2022).

279 C-434/16, EU:C:2017:994.

280 Judgment of December 20, 2017, *Nowak* (C-434/16, EU:C:2017:994), para. 62; See also paras. 27–62.

281 C-345/17, EU:C:2019:122. Judgment of February 14, 2019, *Buivids* (C-345/17, EU:C:2019:122) [Online] Available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=210766&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=52616> (Accessed: 15 May 2022).

282 Judgment of 14 February 2019, *Buivids* (C-345/17, EU:C:2019:122), para. 32.

283 Art. 4(2) of the GDPR.

284 C-345/17, EU:C:2019:122.

destruction.” In the context of a video surveillance system, the Court has held that a video recording of persons which is stored on a continuous recording device—the hard disk drive of that system—constitutes, pursuant to Art. 2(b) and Art. 3(1) of Directive 95/46, the automatic processing of personal data²⁸⁵.

Therefore, the ECJ concluded that the video recording which was stored in the “memory of the camera used by the applicant constitutes a processing of personal data and the act of publishing a video recording, which contains personal data, on a video website on which users can watch and share videos, constitutes processing of those data wholly or partly by automatic means.”²⁸⁶

The aggravated form of the offence is when personal data are transferred outside of the Republic of Croatia for further processing, or are made public or in some other way available to a third party, or if it is acquired significant pecuniary gain for himself/herself or another, or causes considerable damage,²⁸⁷ or if it is committed against a child or on whoever, in contravention of the conditions set out in the act, collects, processes, or uses personal data of physical persons on the racial or ethnic origin, political views, religious or other beliefs, trade union membership, health, or sex life or the personal data of physical persons on criminal or misdemeanor proceedings.²⁸⁸

The perpetrator can be sentenced to fine or to imprisonment for a term of up to three years.²⁸⁹

It is considered as a special aggravated offence when all the mentioned forms are committed by an official person in exercising its official duty or by a public official in the exercise of public authority.²⁹⁰ Stipulated punishment is more severe than for other forms, so the perpetrator can be sentenced to imprisonment for a term of between six months and five years.

This criminal offense is very closely connected to the previous Personal Data Protection Act and today’s GDPR because it depends on its provisions, but also on provisions of other acts, e.g., the Media Act, Electronic Media Act, Consumer Protection Act, Electronic Communications Act, etc., which very often indicate the application of GDPR.

By its nature, this offence is a so-called *blanket criminal offence*, because its essence cannot be known unless other laws or regulation are consulted. If there were some special reasons in the GDPR (or other laws) that allow the collecting of data in some special cases to which this incrimination refers, that would constitute the reason for excluding the unlawfulness.

Unlike most other offenses in this chapter, criminal proceedings for this offense are initiated *ex officio*.

285 See to that effect, judgment of December 11, 2014, *Ryneš*, C-212/13, EU:C:2014:2428, paras. 23, 25.

Judgment of 14 February 2019, *Buivids* (C-345/17, EU:C:2019:122), paras. 33 and 34.

286 Court of Justice of the European Union, Fact sheet — Protection of Personal Data, pp. 16–17.

287 Art. 146, para. 2 of the Penal Code.

288 Art. 146, para. 3 of the Penal Code.

289 By Art. 40 of the Penal Code. When a prison sentence up to three years is prescribed, then a provision should be read that a fine or sentence of three months to three years can be imposed.

290 Art. 146, para. 4 of the Penal Code.

3.7.1. Case law — National courts

According to conducted research at the Zagreb Municipal Criminal Court, the author found there are many these criminal offences that were in concurrence of the offence²⁹¹ with others; e.g., fraud²⁹² or some offences of forgery (e.g., Forging of Documents Art. 278. PC or Forging Official or Business Documents Art. 279 PC, etc.). From conducted research at Zagreb Municipal Court as well as from data of the Croatian Bureau of Statistics (CBS; see Chapter 4), it is obvious that this crime is very common in practice.

In one case, a person was stopped by the police for drunk driving²⁹³ and presented a false personal data identity card—that of his brother (and the brother did not give permission for usage). After that, he signed the arrest report and the notice of the misdemeanor with his brother's name. He was accused and convicted for Concurrently Adjudicated Criminal Offences (Concurrence of Offences) of Unlawful Use of Personal Data²⁹⁴ and forging documents²⁹⁵. He was sentenced to unique sentence of 10 months' imprisonment; he was given a suspended sentence with two years' probation time.²⁹⁶ Therefore, instead of only committing the misdemeanor, by giving the false personal data he committed not one, but two criminal offences. Also, it must be noted, in the author's opinion, there has been a wrong qualification of the offense. Therefore, instead of the Art. 146. it should be qualified as another criminal offense Misuse of identity document Art. 280.

In another case, someone committed the Continuing Criminal Offence of Unlawful Use of Personal Data^{297,298} and Fraud^{299,300}. A perpetrator got personal data

291 Art. 51 of the Penal Code. Concurrently Adjudicated Criminal Offences (Art. 51 of the Penal Code). “(1) If the perpetrator commits by one act or more acts several criminal offences for which he/she is tried concurrently, the court shall first fix the sentence for each criminal offence and then, based on its assessment of the perpetrator's personality and the committed criminal offences in their totality, impose upon him/her an aggregate sentence.

(2) The aggregate sentence shall be set by increasing the highest individual sentence incurred. It must, however, be less than the sum of individual sentences and must not exceed the maximum limit for long-term imprisonment or a fine.

(3) Where individual sentences of long-term imprisonment the sum of which exceeds fifty years have been imposed for two or more criminal offences, the court may pronounce an aggregate sentence of long-term imprisonment for a term of fifty- years.

(4) Where sentences of imprisonment and fines have been imposed as individual sentences, the court shall pronounce an aggregate sentence of imprisonment and an aggregate fine.

(5) Where paragraphs 2 and 4 of this Art. are being applied, the sentence of juvenile imprisonment shall be equated with the sentence of imprisonment.”

292 Art. 236 of the Penal Code.

293 Judgement of the Municipal Criminal Court in Zagreb, K-1496/2020, 20. 08. 2020, p. 1.

294 Art. 146, para. 1. of the Penal Code.

295 Art. 278, para. 1, 3. of the Penal Code.

296 Judgement of the Municipal Criminal Court in Zagreb, K-1496/2020, 20. 08. 2020, p. 2.

297 Art. 146, para. 1. of the Penal Code.

298 There was seven such offences which were decided to be prosecuted as one continuing criminal offence.

299 Art. 236 of the Penal Code.

300 There were five offences of fraud which was decided to be prosecuted as one continuing criminal offence.

from the vehicle sales contract between his father and another person. He ordered several smartphones in the name of the third person, with 24-month contracts, pocketing 47 thousand KN (approx. 6 thousand euros or USD \$6,500). He was sentenced to one-year imprisonment with Community Service^{301, 302}

One case with the similar *modus operandi* was in K-2045/18 where the perpetrator was as an employee of a telephone company in Croatia, and used the same approach to order several cell phones.³⁰³ He was accused and convicted for the concurrence of the continuing offence of the Unlawful Use of Personal Data³⁰⁴, continuing offence of the Abuse of Position and Authority³⁰⁵ and continuing offence of the Forging Official or Business Documents³⁰⁶. He got 11 months of imprisonment modified into the Community Service.³⁰⁷

The most interesting case was the one with more than 20 criminal offences, which were qualified as the offence of the continuing Unlawful Use of Personal Data³⁰⁸, continuing offence of the Abuse of Position and Authority³⁰⁹ and continuing offence of the Forging Official or Business Documents^{310, 311}. There were three perpetrators acting in organization of these offences but not always together. Usually there were two of them. One of them was the employee of one Telecommunication Company, which procured the data of the subscribers, and then transferred that data to the other person, which called the telecommunication company and made subscription contracts to the names of the others. All perpetrators got suspended sentence or Partial suspended sentence.³¹²

301 Art. 55 of the Penal Code.

302 Judgement of the Municipal Criminal Court in Zagreb, K-729/17, 2.11.2017.; The Judgement was final on December 20th, 2017.

303 Judgement of the Municipal Criminal Court in Zagreb, K-2045/18, 28.2.2020.

304 Art. 146, para. 1 of the Penal Code.

305 Art. 291, para. 1 of the Penal Code.

306 Art. 279, para. 1 of the Penal Code.

307 Judgement of the Municipal Criminal Court in Zagreb, K-2045/18, 28.2.2020, p. 2.

308 Art. 146, para. 1 of the Penal Code.

309 Art. 291, para. 1 of the Penal Code.

310 Art. 279, para. 1 of the Penal Code.

311 Judgement of the Municipal Criminal Court in Zagreb, K-1522/16, 27.02.2018. which was upheld by County Court in Split Kž-363/2018.

312 Partial suspended sentence is when perpetrator must serve one time of the custodial sentence in prison, and other part of the sentenced is like plain, regular suspended sentence (Art. 57 of the Penal Code). Partial Conditional Sentence:

“(1) The court may impose upon a perpetrator sentenced to a fine or a term of imprisonment of a minimum of one year and a maximum of three years a conditional sentence for only a part of the sentence if it deems that there is a high degree of probability that even if the entire sentence is not executed, the perpetrator will commit no further criminal offences.

(2) The unconditional part of a prison sentence shall not be less than six months nor more than one half of the pronounced sentence term.

(3) The unconditional part of a fine shall not be less than one fifth nor more than one half of the pronounced sentence.

(4) The provisions on parole shall not apply to the unconditional part of the prison sentence.

(5) The provisions of Articles 56, 58, 62, 63 and 64 of this Act shall apply accordingly to the conditional part of the sentence..”

In accordance with the above, we can indeed ask ourselves what is the purpose of punishment in the mentioned cases and whether it is achieved.

3.8. Other criminal offences regarding violation of the right to privacy in other chapters of the Croatian Penal Code

In Croatian criminal law and the Penal Code, there are some other criminal offences which directly or indirectly protect the right to privacy and can be found in other chapters of the PC than the chapter “Criminal Offences against Privacy.” One of these offences is Violation of the Privacy of the Child³¹³ which is in the chapter “Criminal Offences against Marriage, Family, and Children”; and other is Disclosing the Identity of a Person at Risk or Protected Witness³¹⁴, which is in the chapter “Criminal Offences against the Judiciary”.

3.8.1. Violation of the privacy of the child

Child privacy is under special protection by the Convention on the Rights of the Child³¹⁵ and other international and regional documents which guarantee privacy rights of all people. Croatian Penal Code also protects the privacy of the child as a special criminal offence by its Art. 178.

This criminal offence of violation of the child’s privacy may commit anyone (even parents) if they disclose or transmit something from the child’s personal or family life, publish a child’s photograph or reveal the child’s identity contrary to regulations, which caused the child anxiety, ridicule of peers or other persons or otherwise endangered the child’s welfare.³¹⁶

The perpetrator can be punished (for this basic form) by imprisonment for a term not exceeding one year.³¹⁷

If it is done in public or in such manner that privacy of the child becomes available to a larger number of people, it constitutes the aggravated form of the offence and a stipulated sentence is imprisonment for up to two years.³¹⁸ Another aggravated form which is even more serious is if it is done by an official person or in the performance

313 Art. 178 of the Penal Code.

314 Art. 308 of the Penal Code.

315 Art. 16: 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation.

2. The child has the right to the protection of the law against such interference or attacks.—Art. 16 of Convention on the Rights of the Child (1989) [Online] Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> (Accessed: 5 May 2022).

316 Art. 178, para. 1 of the Penal Code.

317 Art. 178, para. 1 of the Penal Code.

318 “Whoever commits the act referred to in para. 1 of this Art. through the press, radio, television, computer system or network, at a public gathering or in any other way due to which it has become accessible to a larger number of persons, shall be punished by imprisonment for up to two years.” — Art. 178, para. 2 of the Penal Code.

of a professional activity, and stipulated sentence is imprisonment for a term not exceeding three years.³¹⁹

It must be noted how many parents are not thinking about what can happen when they are putting pictures of their children without their “consent”³²⁰ on Facebook, Instagram, or other platforms. By such doing, they can violate the right of the privacy of their children. Of course, not every violation of the child’s privacy is automatically criminal offences, but in some cases, it can constitute one. Some actions if it leads to the child anxiety, ridicule of peers or other persons or otherwise endangered the child’s welfare can have constituted this criminal offence (Violation of the Privacy of the Child).

In Croatian case law by data of the Croatian Bureau of Statistics (CBS) in period 2016–2020 there has been only nine convictions.³²¹

There was an interesting case in the ECtHR case law regarding the privacy rights of the child who was a victim of the criminal offence. The ECtHR case *Kurier Zeitungsverlag und Druckerei GmbH v. Austria*, 2012³²² protected the right to privacy and personal data of victims private and family life. In this case prevailed the protection of private life guaranteed in Art. 8 (right to respect for private and family life) over Art. 10 (freedom of expression). The applicant in the present case published two articles in its newspaper with a lot’s of personal data about the case³²³ and minor victim who has been sexually abused by her father and her stepmother who were convicted of aggravated sexual abuse of minors, deliberate aggravated bodily harm and ill-treatment of minors and sentenced them to fifteen years’ imprisonment. Therefore, the minor victim filed a claim for compensation on the ground that the articles by the applicant company had revealed her identity as the victim of a crime. The national Austrian courts ruled in her favor, so the ECtHR has found no violation of Art. 10.

319 “Whoever commits the act referred to in paragraphs 1 and 2 of this Art. as an official person or in the performance of a professional activity, shall be punished by imprisonment for a term not exceeding three years.” — Art. 178, para. 3 of the Penal Code.

320 It is for a debate can the children give consent, and from which age. In Croatian criminal law when children are the victims, the person is considered to be a child by the age of the 18.—Art. 113, para. 2 of The Juvenile Courts Act, Official Gazette, 84/11, 143/12, 148/13, 56/15, 126/19.

321 Database 2016–2020, Information [Online] Available at: <https://dzs.gov.hr/> (Accessed: 5 April 2022). Remark: there has been an enormous change regarding this site, and the interface of the Croatian Bureau of Statistics, and for a great deal of time there was a different link, and data were available in different forms and reports than today.

322 *Kurier Zeitungsverlag und Druckerei GmbH v. Austria*, (Appl. no. 3401/07), 17 January 2012 (Final 17/04/2012), paras. 13–21. and 47–56. [Online] Available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-108689%22%5D%7D> (Accessed: 15 May 2022).

323 Kurier gave detailed descriptions of the circumstances of the case and revealed victims identity by mentioning her first name, the full names of her father and stepmother, their family relation and publishing photographs of them.

3.8.2. *Disclosing the identity of a person at risk or protected witness*

This criminal offence is primarily regulated for the protection of the efficiency of the criminal proceedings (“*Criminal Offences against the Judiciary*”), and secondary because of the violation of the privacy of the person. Yet it remains the fact that private data and personal life must be protected. A perpetrator of this offence is

- whoever imparts or hands over to another or publishes without authorization information on the identity of a person at risk, or
- a person who has been or will be questioned as a protected witness, or
- with respect to whom the procedure for inclusion in the witness protection program pursuant to a special act has been instituted, or
- who has been included in the witness protection program, or
- whoever takes any other action with the aim of disclosing information on the identity of this person or with the aim of tracking down this person.³²⁴

Therefore, the modality of the offence is the publication or dissemination of personal information regarding the identity of the person at risk or protected witness with the goal to find that person or reveal data which could lead to revealing her/his identity. That could be any sort of action with any means, to reveal the identity of the person, and to make a disturbance in the criminal proceedings and the evidentiary process, and in the ends in trial and has an effect on the verdict and judgement. Sentence is imprisonment for a term of between six months and five years.³²⁵

By the data of the Croatian Bureau of Statistics, there has not been any convictions for this criminal offence in the observed period (2016–2020).

4. Statistical analysis

Some statistical data needs to be presented and analyzed. The Croatian Bureau of Statistics were consulted for 2016–2020, regarding criminal offences against privacy and violation of the privacy of a child³²⁶ to observe the situation at national level. In parallel, the author conducted the research at the Zagreb Municipal Court regarding criminal offences in the chapter “Criminal Offences against Privacy” in the same period (2016–2020) to see and compare figure trends at both the local and national level.

324 Art. 308 of the Penal Code.

325 Art. 308 of the Penal Code.

326 Art. 178 of the Penal Code.

4.1. Data of the Croatian Bureau of Statistics

Data from the Croatian Bureau of Statistics (CBS) in (2016–2020) will be observed in relation to criminal offences against privacy³²⁷ and Violation of the Privacy of the Child³²⁸ and the imposed sentences. Abuse of Sexually Explicit Footage³²⁹ has been a criminal offence since July 2021; as of this writing, there has not yet been any case law.

According to the analyzed data, the most frequently reported crime in the observed period is Unlawful Use of Personal Data³³⁰, followed by Violation of the Inviolability of the Home and Business Premises³³¹, and almost the same pattern can be seen for accused persons³³², and convicted persons³³³.

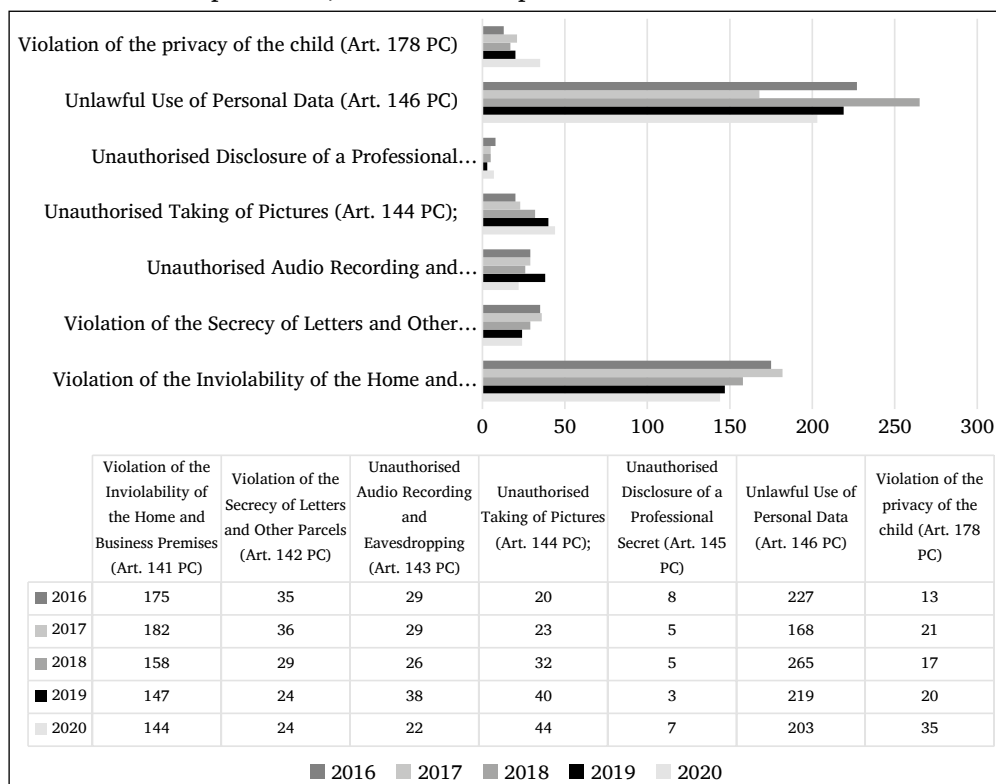


Figure 1: Reported adult persons by criminal offences (Arts. 141–146 PC and Art. 178 PC) for 2016–2020

327 Arts. 141–146 of the Penal Code.

328 Art. 178 of the Penal Code.

329 Art. 144a of the Penal Code.

330 Art. 146 of the Penal Code.

331 Art. 141 of the Penal Code; See Figure 1.

332 See Figure 2.

333 See Figure 3 and Table 1.

Figure 1 shows that there is no clear trend line among all criminal offences. However, criminal offences that are decreasing are Violation of the Secrecy of Letters and other parcels³³⁴, Unauthorized Audio Recording and Eavesdropping³³⁵ with the exception of 2019, while Unauthorized Taking of Pictures³³⁶ and Violation of the Privacy of the Child³³⁷ increased from 2016 until 2020. The least represented criminal offence is Unauthorized Disclosure of a Professional Secret³³⁸.

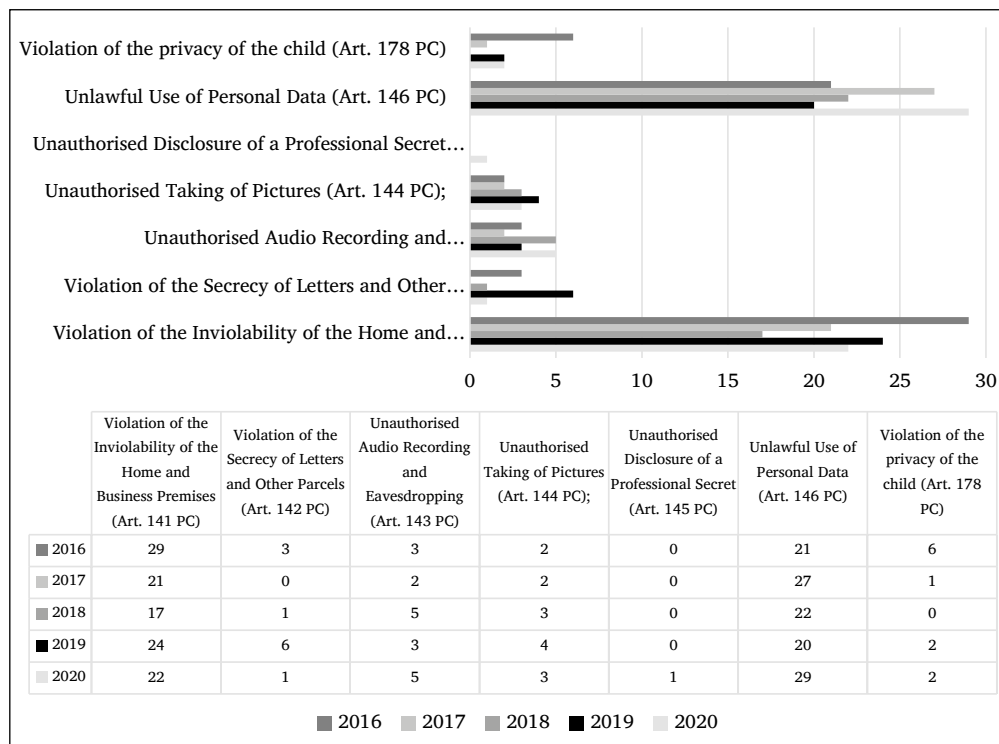


Figure 2: Accused adult persons by criminal offences (Art.141–146 PC and Art. 178 PC) for 2016–2020

The same distribution can be seen among reported and accused person for selected criminal offences. Most frequent criminal offences are Unlawful Use of Personal Data³³⁹ and Violation of the Inviolability of the Home and Business Premises³⁴⁰. All other criminal offences are represented in a very small share if any, as in the case

334 Art. 142 of the Penal Code.
 335 Art. 143 of the Penal Code.
 336 Art. 144 of the Penal Code.
 337 Art. 178 of the Penal Code.
 338 Art. 145 of the Penal Code.
 339 Art. 146 of the Penal Code.
 340 Art. 141 of the Penal Code.

of Unauthorized Disclosure of a Professional Secret (Art. 145 PC, only one accused in 2020). There is high difference in absolute numbers between reported and accused person for the represented criminal offences³⁴¹.

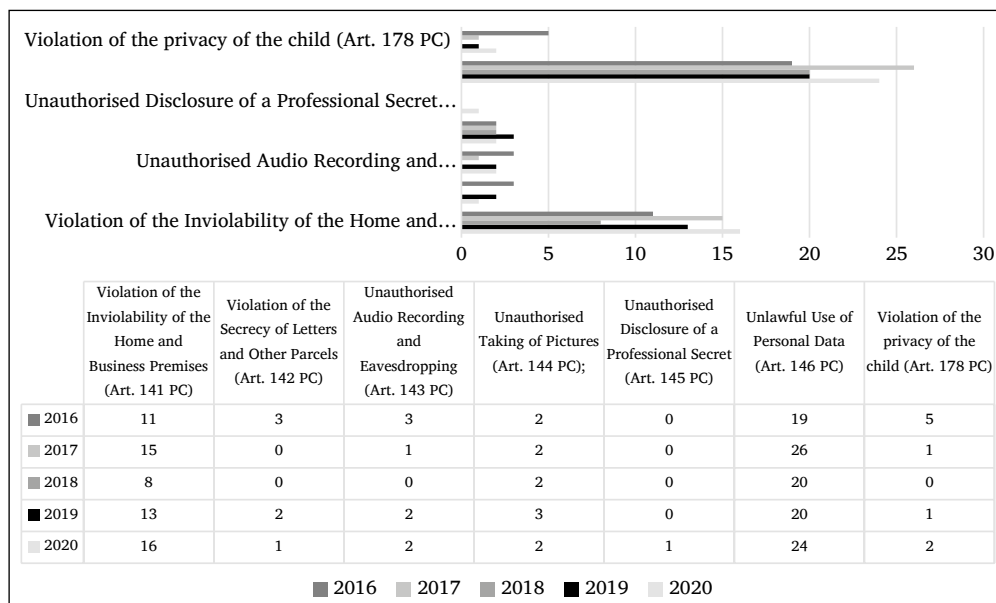


Figure 3: Adult persons convicted of criminal offences (Arts. 141–146 PC and Art. 178 PC) for 2016–2020

Figure 3 presents the number of convicted adults for selected criminal offences for 2016–2020. The trend is almost the same as for the reported and accused persons. The most frequent offence is Unlawful Use of Personal Data³⁴², followed by Violation of the Inviolability of the Home and Business Premises³⁴³. Other criminal offences are represented with very small shares. Only for Unauthorized Taking of Pictures³⁴⁴ is there at least one convicted person in each year. In total, there have been 198 convicted persons for criminal offenses against privacy³⁴⁵ plus nine (9) for Violation of the Privacy of the Child³⁴⁶ in 2016–2020 in Croatia. Altogether there have been 207 convicted persons.

In 2020 there is at least one person convicted for all observed criminal offences. There is a significant representation of criminal offence of Unlawful Use of Personal

341 See Figure 1 and 2.

342 Art. 146 of the Penal Code.

343 Art. 141 of the Penal Code.

344 Art. 144 of the Penal Code.

345 Arts. 141–146 of the Penal Code.

346 Art. 178 of the Penal Code.

Data³⁴⁷. It makes more than 50% of the convictions for privacy criminal offences. Violation of the Inviolability of the Home and Business Premises³⁴⁸ makes up more than 30% of the convictions for those criminal offences, and only those two criminal offences make more than 80% of all convictions for privacy criminal offences. The privacy criminal offences account for less than 0.4% (46 in total) of all convictions of adult perpetrators in 2020 (in total 11,634).

Table 1: Convicted persons for criminal offences against privacy (Art. 141–146. PC and Art. 178 PC) in 2016–2020 in Croatia

Criminal offence / Year	2016	2017	2018	2019	2020	In total
Violation of the Inviolability of the Home and Business Premises (Art. 141 PC)	11	15	8	13	16	63
Violation of the Secrecy of Letters and Other Parcels (Art. 142 PC)	3	0	0	2	1	6
Unauthorized Audio Recording and Eavesdropping (Art. 143 PC)	3	1	0	2	2	8
Unauthorized Taking of Pictures (Art. 144 PC);	2	2	2	3	2	11
Unauthorized Disclosure of a Professional Secret (Art. 145 PC)	0	0	0	0	1	1
Unlawful Use of Personal Data (Art. 146 PC)	19	26	20	20	24	109
Violation of the Privacy of the Child (Art. 178 PC)	5	1	0	1	2	9

It is obvious from the presented data in Figure 4, how there has been the most suspended sentences for the Unlawful Use of Personal Data³⁴⁹ in total 96 suspended sentences which is in line with the general data of the CBS on convictions. It is followed by suspended (imprisonment) sentences for Violation of the Inviolability of the Home and Business Premises³⁵⁰ with 55 in total. There were fewer than ten imprisonment sentences for other criminal offences against privacy.

347 Art. 146 of the Penal Code.

348 Art. 141 of the Penal Code.

349 Art. 146 of the Penal Code.

350 Art. 141 of the Penal Code.

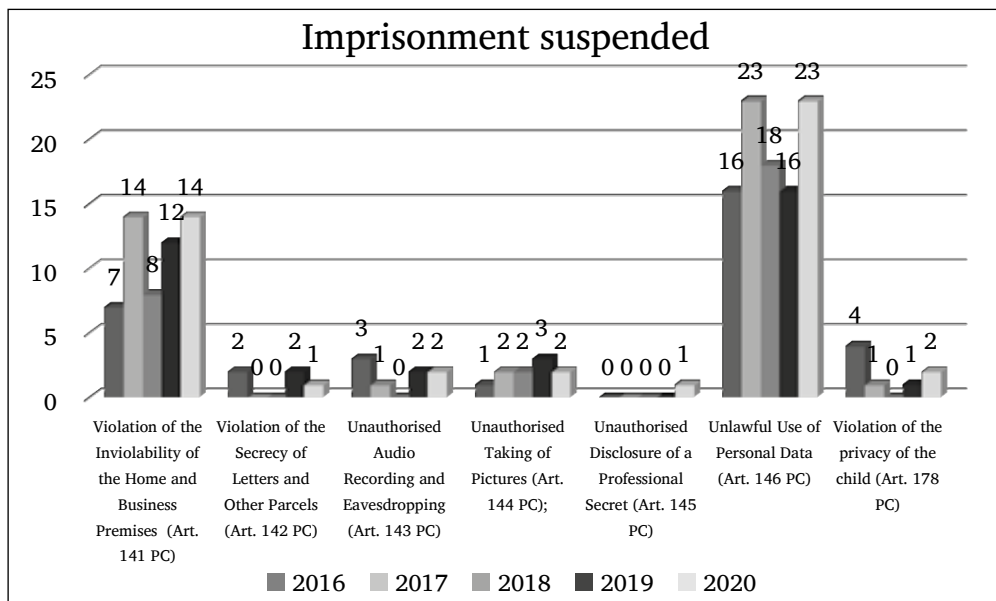


Figure 4: Convicted adult persons by pronounced imprisonment suspended (suspended imprisonment sentence) for criminal offences (Arts. 141–146 PC and Art. 178 PC) for 2016–2020

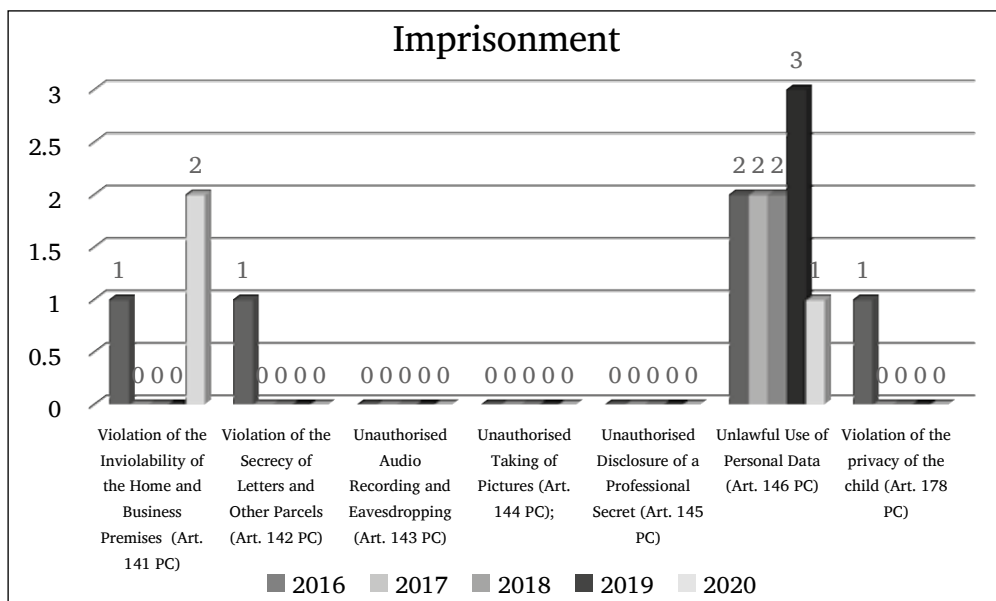


Figure 5: Convicted adult persons by pronounced imprisonment for criminal offences (Art. 141–146 PC and Art. 178 PC) for 2016–2020

Figure 5 presents pronounced imprisonments for selected criminal offences from 2016 until 2020. Convicted adult persons were sentenced to imprisonment only for Violation of the Inviolability of the Home and Business Premises³⁵¹ and Unlawful Use of Personal Data³⁵², with exception in 2016 in which one person was sentenced to imprisonment for Violation of the secrecy of letters and other parcels³⁵³. Therefore, for selected criminal offences the most frequent penalty is suspended imprisonment in all five years.

4.2. Research — Zagreb Municipal Criminal Court

The author of the report conducted the research at Zagreb Municipal Criminal Court for criminal offences against privacy³⁵⁴ for 2016–2020. There have been 16 cases of offences against privacy.

Table 2: Cases of criminal offences against privacy (Art. 141–146 PC) in 2016–2020—Zagreb Municipal Criminal Court³⁵⁵

Criminal offence / Year	2016	2017	2018	2019	2020	In total
Violation of the Inviolability of the Home and Business Premises (Art.141)	1	0	0	0	1	2
Violation of the Secrecy of Letters and Other Parcels (Art.142)	0	1	0	0	0	1
Unauthorized Audio Recording and Eavesdropping (Art.143)	0	0	0	0	0	0
Unauthorized Taking of Pictures (Art.144)	1 ³⁵⁶	1	0	0	1 ³⁵⁷	3
Unauthorized Disclosure of a Professional Secret (Art.145)	0	0	0	0	0	0
Unlawful Use of Personal Data Art.146	0	1	3	0	6	10

351 Art. 141 of the Penal Code.

352 Art. 146 of the Penal Code.

353 Art. 142 of the Penal Code.

354 Arts. 141–146 of the Penal Code.

355 Art. 144a of the Penal Code is criminal offence since June 2021, therefore there is no decisions of the courts yet.

356 Kzd-121/2020.

357 In case K-36/19 one perpetrator is convicted for concurrence of the offence of the Arts. 144 and 146 of the Penal Code; therefore there is one judgment for two criminal offences.

Hence, there have been 12 convictions, but 11 persons were convicted. The reason lies in fact that one person was convicted in one judgement for concurrence of the two offences against privacy³⁵⁸.³⁵⁹ There have also been two acquittals at Zagreb Municipal Criminal Court, for Art. 144 PC in the case K-1156/2018 and for Art. 142 in the case K-238/2017. Two formal decisions (Verdict Dismissing the Charges)³⁶⁰ were made in case Kzd-121/2020 for Art. 144 PC and in case KMp-105/2016 for Art. 141 PC.

The most common criminal offense at Zagreb Municipal Criminal Court is Unlawful Use of Personal Data (Art.146) which constitutes 83% of all convictions for criminal offenses against privacy.

Table 3: Convicted persons for criminal offences against privacy (Arts. 141–146 PC) for 2016–2020 in the Zagreb Municipal Criminal Court³⁶¹

Criminal Offence / Year	2016	2017	2018	2019	2020	In total
Violation of the Inviolability of the Home and Business Premises (Art. 141)	0	0	0	0	1	1
Violation of the Secrecy of Letters and Other Parcels (Art. 142)	0	0	0	0	0	0
Unauthorized Audio Recording and Eavesdropping (Art. 143)	0	0	0	0	0	0
Unauthorized Taking of Pictures (Art. 144)	0	0	0	0	1 ³⁶²	1
Unauthorized Disclosure of a Professional Secret (Art. 145)	0	0	0	0	0	0
Unlawful Use of Personal Data Art. 146	0	1	3	0	6	10

358 Art. 144 and Art. 146 of the Penal Code.

359 In case K-36/19.

360 Similar are Dismissing Judgement and Judgement Refusing a Charge.

361 Art. 144a of the Penal Code is criminal offence since June 2021, therefore there is no convictions of the courts yet.

362 In this case one perpetrator is convicted for concurrence of the offence of the Arts. 144 and 146 of the Penal Code (K-36/19).

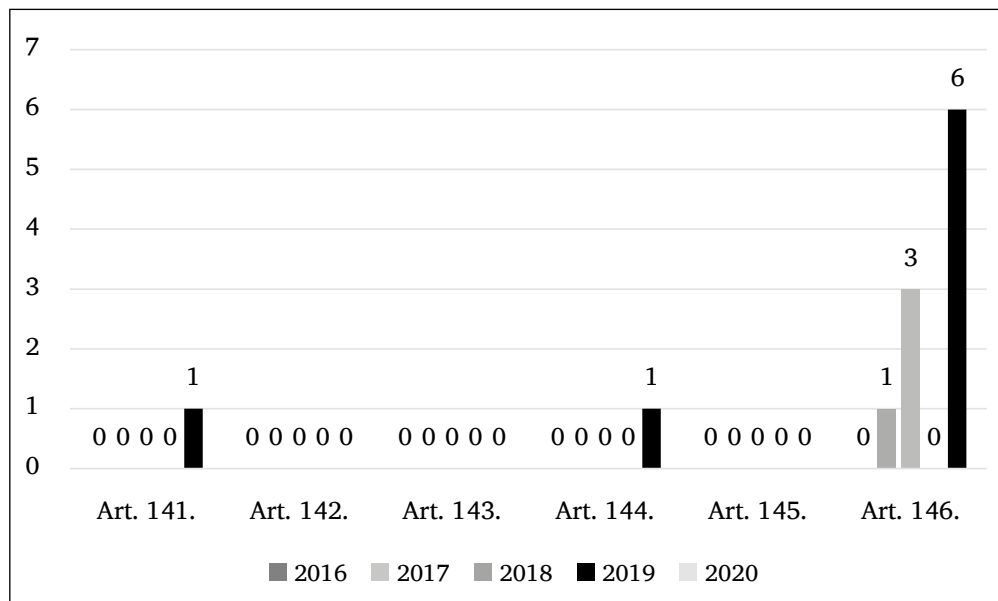


Figure 6: Convicted persons for criminal offences against privacy (Arts. 141–146. PC) for 2016–2021 at the Zagreb Municipal Criminal Court

Some of the offences against privacy in the research were in concurrence of the offences with some other offences e.g., Fraud³⁶³ and Forging Documents³⁶⁴ or Forging Official or Business Documents³⁶⁵. Only in one case, at the Zagreb Municipal Criminal Court, there has been the concurrence of the two criminal offences against privacy^{366, 367}. Distribution of data show the similar pattern as on the national level. The most frequent criminal offence is Unlawful Use of Personal Data³⁶⁸ which is followed with Violation of the Inviolability of the Home and Business Premises³⁶⁹ and Unauthorized Taking of Pictures³⁷⁰.

363 Art. 236 of the Penal Code.

364 Art. 278 of the Penal Code.

365 Art. 279 of the Penal Code.

366 Art. 144, 146 of the Penal Code.

367 As it was mentioned in case K-36/19.

368 Art. 146 of the Penal Code.

369 Art. 141 of the Penal Code.

370 Art. 144 of the Penal Code.

5. Final remarks

Collecting on other people's data, without their knowledge is actually spying. This is the right word to use for describing what is happening. Many people do not think about these aspects—maybe they do not want that, maybe they are not aware of the danger that is present in every day visit to Internet or by doing some legal actions (e.g., conclusion of the contract when they are providing their personal data). Maybe they do not want to think about it. But want it or not, the danger is present, and we are leaving our (personal) data signature about are habits, wishes, interests in everyday life to all sorts of persons (physical or legal) and entities. Banks are collecting our data, as are news portals, websites, journals, almost everybody. All use that information for different purposes, unilaterally deciding to store, sort, and even “sell it to the highest bidder.”

The people, the law, the regulators have recognized this (collecting personal data of another which is in the essence of the privacy), as a problem. They are trying, if not to prevent it, then at least regulate it, as better as it is possible. It is done in different areas e.g., civil law but also criminal law as well. The GDPR is trying to regulate issue of the collection of our personal data, but many of us willingly give or share our personal data on various platforms. Its general goal is to protect the personal data of natural persons, to provide citizens with control over their personal data and to create a high and uniform level of data protection.³⁷¹

Croatia deals with this issue of protection of the right to privacy and established a special agency (the Croatian Personal Data Protection Agency) for monitoring the application of the GDPR. The criminal law comes at the end as *ultima ratio*, when adequate protection was not accomplished in other legal branches and by other laws. Therefore, criminal offences exist. In Croatian criminal law, one chapter contains most of the privacy criminal offences. In that regard author wanted to see how many such criminal offences were committed in the period 2016–2020. By data collected both by the Croatian Bureau of Statistics and by research conducted at the Zagreb Municipal Criminal Court, the most frequent criminal offence is Unlawful Use of a Personal Data³⁷² which is represented in more than 50% of the convictions for criminal offences against privacy (by CBS data) and 83% by research at the Zagreb Municipal Criminal Court. It is followed by Violation of the Inviolability of the Home and Business Premises³⁷³, around 30% by CBS data, but not so much according to our research at the Zagreb Municipal Court (only 0.8%). In the CBS data the convictions of Unauthorized Taking of Pictures³⁷⁴ constitute around 5% of the convictions. Interestingly, there are no data in the observation period for Disclosing the Identity

371 Information [Online] Available at: <https://azop.hr/osnovne-informacije-za-organizacije/> (Accessed: 25 April 2022).

372 Art. 146 of the Penal Code.

373 Art. 141 of the Penal Code.

374 Art. 144 of the Penal Code.

of a Person at Risk or Protected Witness³⁷⁵. Abuse of Sexually Explicit Footage³⁷⁶, also known as “revenge porn,” is still a “young” criminal offence (since July 2021), so it is understandable that there is no data for convictions for that criminal offence.

In the end despite the commendable effort of the different regulators, documents, and even legislation the great responsibility is on us. We must be careful in leaving our personal trace in everyday life, especially on Internet, because we can become victims of criminal offences and perpetrators.

375 Art. 308 of the Penal Code.

376 Art. 144a of the Penal Code.

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