

EUROPEAN MEDIA & COMMUNICATION LAW



Elena Poddighe, Pieremilio Sammarco,
Vincenzo Zeno-Zencovich

Consumatori
e Mercato

14



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Dipartimento di Giurisprudenza

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Il dialogo multidisciplinare e multiculturale diviene infatti una componente indefettibile nell'ambito di una materia caratterizzata da un assetto disciplinare ormai maturo tanto nelle prassi applicative del mercato quanto nel diritto vivente. L'attenzione viene in particolare rivolta al contesto del diritto europeo, matrice delle scelte legislative e regolamentari degli ordinamenti interni, e allo svolgimento dell'analisi su piani differenti (per estrazione scientifica e punti di osservazione) che diano conto della complessità ordinamentale attuale.

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Introduction

The aim of this work is to offer to teachers and students an open access primer on European media and communications law. 'Media and communications' is a rather vague notion. Digitalisation and the ubiquity of telecommunications networks have rendered obsolete the partitions that were common until the end of the 20th century, and which were used until recently, in particular between the traditional information outlets, on one side, and personal communications on the other side; and the distinction between regulation of the container (print, airwaves, cables) and of the content (information, entertainment, sports etc.). In contemporary societies communication, any form of digital communication, can aim at the general public; information is no longer the business of a few enterprises; any individual can produce content; there are still media that intermediate with their public but there are new, powerful, entities which through their platforms collect and redistribute communications or access to digital content.

A further clarification must be made. The term "European" refers to the common set of rules that are effective in most European countries, and which stem from the supranational legislative texts and case-law that will be analysed further. It is clearly impossible – and frankly does not appear to be necessary – to present the state of the law in all the European countries. Suffice it to note that by and large the presentation that will be made in this work is applicable in all the different States, albeit with some distinctive features that will be highlighted where relevant..

In this first edition we have preferred to focus on five aspects which we feel are essential to understand this new environment and which are profoundly influenced by European law and jurisprudence, i.e.

- I) The basic principles set out by the European Convention of Human Rights (ECHR) and by the Charter of Fundamental Rights of the EU (CFREU).
- II) The archaic (in its ideological foundations), but still in force, regulation of broadcasting.
- III) Digital communication.
- IV) Data protection.
- V) Various and transversal aspects of content regulation, such as hate speech, fake news, human dignity, etc.

This text is supplemented by a broad selection of decisions of the Strasbourg and Luxembourg courts aimed at putting the law in context and offering useful materials for teacher and student classroom presentations.

We are well aware of the fact that on the market there are excellent handbooks dedicated to these topics authored by distinguished scholars and printed by prestigious publishers.

This primer cannot compete with such works, but its authors wish to make the point that European universities, paid for by the general taxpayer, should transfer the results of their research to the community at large, without extracting levies (which are mostly pocketed by a few powerful publishers) from their students. Open access means, therefore, taking advantage of the disintermediation that digital technologies offer us and ensuring the widest dissemination of academic products free of any charge.

This work is the result of many years of common research and discussions between the Authors. In the breakdown of its various parts, Chapter 4 and para. 5.2 are to be attributed to Elena Poddighe; Chapter 3 and para. 5.3 to Pieremilio Sammarco; and Chapters 1 and 2 and paras. 5.1. and 5.4 to Vincenzo Zeno-Zencovich.

CHAPTER I

FUNDAMENTAL PRINCIPLES

SUMMARY: 1. The European Convention on Human Rights –
2. The Charter of Fundamental Rights of the European Union.

The foundation of a European media and communications law can be found, essentially, in two texts:

1. The European Convention on Human Rights (ECHR), signed in Rome in 1950.
2. The Charter of Fundamental Rights of the European Union (CFREU), originally signed in Nice in 2000 and subsequently, in 2007, incorporated in the EU Lisbon Treaties.

One should clarify that although the two texts present many similarities, there are many differences that need to be set out preliminarily in order to avoid misunderstandings which are quite common among non-lawyers.

- a) The ECHR is one of the basic documents of the Council of Europe, a supranational organisation, founded in 1949 and based in Strasbourg, whose 47 member states cover practically all Europe and certain countries which are debatably geographically qualified as European, such as Turkey, Armenia, Azerbaijan and Georgia.
- b) For the topic here examined one will focus mostly on the decisions taken by the European Court of Human Rights (ECtHR), the body, which sits in Strasbourg, entrusted with settling the complaints of individuals and entities who claim a signatory state has violated the ECHR. One will also consider some other documents issued by the Council of Europe.
- c) The CFREU, instead binds only the 27 member states of the European Union (after the exit of the United Kingdom as of January 1, 2021). All domestic courts are empowered (and obliged) to enforce its provisions and any doubts on its interpretation and actual thrust are demanded of the Court of Justice of the EU (CJEU), based in Luxembourg. However, the CFREU lives in a very complex normative context where media and communications are regulated by dozens of

directives and regulations.

d) As to their content, there are significant differences between the two texts (ECHR and CFREU), which is quite natural considering that between the two there is a half-century span and one has passed from so-called 'first generation' fundamental rights, enshrined in the ECHR, to so-called 'third generation' fundamental rights which are laid out in the CFREU.

e) Finally, one should consider that while the decisions taken by the ECtHR are on a case-by-case basis and ascertain, *ex post*, if a country has complied or has violated the principles set out in the ECHR, the CFREU, on the basis of the primacy of EU law, imposes itself on member states, and therefore has *ex ante* effects, strengthened by the preliminary interpretative decisions of the CJEU, which are binding for all members states.

1. The European Convention on Human Rights

The main provision of the ECHR concerning media and communications is contained in its article 10 devoted to 'Freedom of expression' according to which:

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

2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

One must however take into account other provisions, some of which are ancillary to Article 10 (in the sense that they presuppose it, or are a consequence of it), such as Article 9 ('Freedom of thought, conscience and religion'):

1. *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.*
2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.*

Or article 11 ('Freedom of assembly and association'):

1. *Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
2. *No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.*

Some others, instead, create limits to the principle of freedom of expression such as Article 8 ('Right to respect for private and family life'):

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *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.*

Over the last 60 years the Strasbourg Court has issued over 800 decisions concerning alleged violations, by national courts or national authorities, of Article 10.

These appear to be the most important established points.

a) The medium of dissemination

In a general way the Strasbourg court has applied the guarantees of

Article 10 to all mediums of dissemination, including, speech, forms of symbolic expression, and digital communications. There are however two opposite exceptions. On the one extreme, one should remember that Article 10 expressly vouchsafes state licensing of broadcast activities, following an ideological aversion to electronic media, that will be analysed in Chapter 2.

On the other extreme, the Court has elevated to a superior protective level ‘the press’, by such meaning generally the printed press, both as business entity – enterprises publishing newspapers and periodicals – and as individuals, *i.e.* journalists. This preference is manifestly the result on the one hand of the circulation of the ‘First Amendment’ model that comes from the USA (*‘Congress shall make no law abridging the freedom of speech, or of the press’*) and that places that provision as the cornerstone of the American constitutional system. On the other hand, there has been a significant lobbying of media enterprises and journalistic associations that have contributed to tilt in their favour a provision – Article 10 – which following an age-old European tradition – attempts to balance the various rights and interests at stake.

In this sense the ECHR has, repeatedly, stated that:

‘The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog.’ (Thoma v. Luxembourg, 2001).

b) Freedom of expression

The Court has always provided – in line with a general tendency of national courts - a broad notion of ‘expression’ including, as we have seen, forms of symbolic expression, and statements of the most various kinds, in particular fact reporting and opinions, which are both, and equally, protected. But the main step forward has been when the ECtHR has comprised in the range of Article 10 not only forms of active expression, but also the other side of the communication, *i.e.* the right to receive information and other people’s expressions.

This is the result of a general expansion in the catalogue of fundamental rights. One should recall article 19 of the International Covenant on Civil

and Political Rights, signed in New York in 1966 and entered into force ten years later, which updates the UN Universal declaration on human rights of 1948. According to this instrument:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
 - (a) *For respect of the rights or reputations of others;*
 - (b) *For the protection of national security or of public order (ordre public), or of public health or morals.*

This expansion is relevant because it brings on the scene not only the individual or the entity that is expressing an opinion, and the individual, entity or institutions which feels it has been damaged by such expression, but also a general, public, interest which is often considered over-riding.

c) The case-law of the European Court of Human Rights

The decisions of the Strasbourg Court follow a rather standard format, verifying a certain number of hypothetical questions:

- i. If the challenged national decision (generally judicial, but sometimes administrative) constitutes an interference in the freedom of expression of the applicant.
- ii. If the interference is 'prescribed by law' and has a 'legitimate aim'.
- iii. If the interference was 'necessary in a democratic society'.

In the following paragraphs one will try to extract the principles generally applied by the Court when answering to these hypos and concluding that there has or has not been a violation of Article 10.

i) Matters of public interest

Looking at the general interest of the community in receiving information and ideas, the court has attempted to develop some criteria to establish what can be considered privileged areas of debate. Clearly, matters of a political and

economic relevance are included, so too judicial proceedings, and in general when the information contributes ‘to a debate of general interest’. However, in one extremely publicised case (the *Caroline of Monaco von Hannover, 2004 case*) the Court substantially granted the Article 10 guarantees also to tabloid and popular magazines preying on the private life of celebrities stating that there is a contribution to a debate of general interest ‘not only where the publication concern(s) political issues or crimes, but also where it concern(s) sporting issues or performing artists’. One can therefore conclude that, with very few exceptions covered by Article 8 ECHR, practically all matters are, or can be, qualified as of public interest.

ii) Public figures

The Court has also elaborated the notion of ‘public figure’ (another import from US 1st Amendment jurisprudence), who are – and must be – subject to increased scrutiny by the media and therefore must accept wider criticism and whose legitimate expectation to the protection of their private life is reduced. The actual extension of the category and when it borders with that of ‘private individuals’ is however left to a case-by-case decision.

iii) Prescribed by law

The Court has – in all its jurisprudence – consistently given a broad and substantive notion of ‘law’, including not only formal acts of Parliament, but also sub-primary sources and case-law. This last clarification is very important because not only does it allow an evaluation of legal systems (such as the British and the Irish) where case-law is, in this field, the primary source of the law, but also it takes into account that the law in action – *i.e.* the law that is actually applied – is established by two elements: the written legal provision and its application by the courts.

“As regards the words ‘in accordance with the law’ and ‘prescribed by law’ which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term ‘law’ in its ‘substantive’ sense, not its ‘formal’ one; it has included both ‘written law’, encompassing enactments of lower ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. ‘Law’ must be understood to include both statutory law and judge-made ‘law’. In sum, the ‘law’ is the provision in force as the competent courts have interpreted it.” (Sanoma Uitgevers v. Netherlands, 2010)

At any rate the guiding principle is that prescriptions or limitations to freedom of expression should be foreseeable, and therefore should ensure the principle of certainty of the law.

iv) Protection of journalistic sources

Among the privileges that the ECtHR has created is that of the right for journalists not to reveal their sources.

The privilege is recognised in many European jurisdictions and over the years there has been a frequent interplay between the case-law of the latter and of the former. The argument expressed in *Goodwin v. UK* (1996) is that:

“Protection of journalistic sources is one of the basic conditions for press freedom.... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.”

The privilege has been expanded in further decisions which have qualified authorities’ seeking materials held by journalists as a violation of article 10:

“Even if unproductive, a search conducted with a view to uncover a journalist’s source is a more drastic measure than an order to divulge the source’s identity. This is because investigators who raid a journalist’s workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist.” (*Roemen v. Luxembourg*, 2003).

v) Media pluralism

An obvious example of the expansionist interpretation of article 10 of the ECHR is given by the decisions of the Strasbourg court which have stated that the provision guarantees also “media pluralism”. Although the term pluralism has been forged in a rather different context and with a different meaning (necessity in a democracy for a multitude of intermediate

entities – parties, trade unions, associations, groups – between the State and the individual), the Strasbourg court has promoted the principle of a state obligation to ensure an effective plurality of media outlets. This is required especially when the number of media players is limited and there is an economic oligopoly:

“To ensure true pluralism in the audiovisual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed” (Di Stefano v. Italy, 2012).

Further on this line the Court has set rules in order to ensure that public broadcasters transmit impartial, independent and balanced views and allow a plurality of opinions to be expressed:

“The Court considers that, in the field of audiovisual broadcasting, the above principles place a duty on the State to ensure, first, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting inter alia the diversity of political outlook within the country and, secondly, that journalists and other professionals working in the audiovisual media are not prevented from imparting this information and comment” (Manole v. Moldova, 2009).

vi) Legitimate aims

Para. 2 of article 10 lists a series of possible limits to freedom of expression such as national security and territorial integrity; public safety and prevention of disorder and crime; protection of health and of morals; protection of reputation or rights of others; preventing the disclosure of confidential information and maintaining the authority and impartiality of the judiciary. In principle the multiplicity of countervailing interests should have brought to an attentive balancing. However, the absolute pre-eminence of the first paragraph of Article 10 in the expansive interpretation given to it by the Court is confirmed by the rather limited application of the second paragraph. The various cases do not allow to set a clear guidance and one frequently finds decisions with opposite results. In *Müller v. Switzerland* (1988) the Court upheld a fine for a public exhibition of sexually explicit

paintings. In *Open Door Counselling v. Ireland* (1992) it struck an Irish ban on information about abortion services abroad. In *Mouvement Raelien Suisse v. Switzerland* (2012) it upheld the ban of an advertising campaign purportedly commissioned by extraterrestrials. In *Otto-Preminger Institut v. Austria* (1994) the Court upheld the seizure of a film considered offensive by the Roman-Catholic church. In the *Sunday Times v. UK* case (1979) the Court struck a British contempt of court order which had sanctioned a newspaper for having reported certain facts under judicial scrutiny concerning the so-called thalidomide drug scandal.

vii) Necessary in a democratic society

Instead, the Court has inflated the requirement concerning the ‘democratic’ necessity of the limitations imposed on freedom of expression. In practice in most of the cases that find that there has been a violation of article 10.

While recognising that the State has acted in conformity with its law and in the pursuit of legitimate aims, the Court establishes however that the decision taken by the national courts was not ‘necessary in a democratic society’. Setting aside the absolute vagueness of the notion, one can see that the principle is applied in two ways: Or considering that the limitation was *per se* incompatible; or considering that the limitation in its content (the sanction, the fine, the damage award) was excessive and therefore had a ‘chilling effect’ of freedom of expression.

“The Court must determine whether the reasons adduced by the national authorities to justify the interference were ‘relevant and sufficient’ and whether the measure taken was ‘proportionate to the legitimate aims pursued’.... In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10.” (Cumpănă v. Romania, 2004).

And the same decision states that:

“The imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.”

From this last point of view the court has stated that the sanction should bear a reasonable relationship of proportionality with the injury that has been brought. In the *Tolstoy Miloslavsky v. UK* case (1995) the Court struck a £ 1,500,000 damage award, holding that the actual damage award was entirely excessive and that the British legal system lacked mechanisms to redress excessive awards.

In addition, repeatedly the Court has concluded that even modest fines (a few hundred Euros) have a ‘chilling effect’:

“Although the penalty imposed on the author did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be likely to discourage him from making criticism of that kind again in future.... In the context of the political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its tasks as purveyor of information and public watchdog” (*Lingens v. Austria*, 1986).

d) Other texts adopted by the Council of Europe

While the ECHR remains the central document from which the ECtHR elaborates its case-law, the Council of Europe (CoE) has issued over the years several Recommendations focusing on various aspects of media and communication.

In particular, the CoE has adopted texts in the fields of so-called “hate speech” (R-1997-20), of depiction of gratuitous brutality and violence (R-1989-7; R-1992-19; R-1997-20); on media pluralism (R-1999-1; R-2018-1); on right of reply (R-2004-16); on information to the media relating to criminal proceedings (R-2003-13).

Occasionally such texts are used in its decisions by the ECtHR, but their role appears to be, on the whole, secondary.

2. The Charter of Fundamental Rights of the European Union

The structure of the CFREU is similar to that of the ECHR, however its content reflects the changes in perception and in the priorities which have developed over the decades.

The leading provision, in this field, is Article 11 (Freedom of expression

and information):

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*
2. *The freedom and pluralism of the media shall be respected.*

Around it one can find several other provisions some of which are ancillary (in the sense that they presuppose it, or are a consequence of it), such as Article 10 ('Freedom of thought, conscience and religion'):

1. *Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.*
2. *The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.*

Or Article 12 (Freedom of assembly and of association):

1. *Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.*
2. *Political parties at Union level contribute to expressing the political will of the citizens of the Union.*

Some others, instead, create limits to the principle of freedom of expression such as Article 7 ('Right to respect for private and family life'):

Everyone has the right to respect for his or her private and family life, home and communications.

And Article 8 (Protection of personal data):

1. *Everyone has the right to the protection of personal data concerning him or her.*
2. *Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
3. *Compliance with these rules shall be subject to control by an independent authority.*

The first difference which is immediately perceivable is the significant

dissimilarity in the structure and content of Article 11 CFREU in contrast with Article 10 ECHR: while the latter follows a traditional model (the first paragraph states the content of the right; the second paragraph indicates the exceptions to the right), the former is expressed in an absolute way, and apparently there are no limits mentioned (no reference to national security, territorial integrity, prevention of crime, protection of health, morals, reputation or rights of others, authority of the judiciary), and the second paragraph reinforces the first introducing as a fundamental right that of media pluralism.

a) CJEU case-law

The principle of media pluralism which one has seen is implicit in para. 2 of Article 11 CFREU and has been recognised by the ECtHR, has been the object of various decisions by the CJEU.

In the *Seven One Media case* [C-555/19] the Court stated that the German law which prohibited national broadcasters to insert advertisements limited to a regional level was compatible with EU principles inasmuch it was set “for securing the attainment of protecting media pluralism at regional and local level”.

And in the *Vivendi decision* [C-719/18] the Court stated that *ex ante* ownership limitations set by Italian broadcasting law were not compatible with EU law inasmuch that they were not aimed, specifically, at ensuring media pluralism.

In the *Playmedia decision* [C-298/17] the Court stated that a French “must carry” obligation imposed on a website that offered live streaming programmes was justified as it was aimed at promoting cultural and linguistic diversity and media pluralism (and before that see the *Kabel Deutschland Vertrieb decision*, C-336/07).

Therefore, at least on its face, the only limit appears to be in Article 8, which states the right to personal data protection. The actual relevance of such provision will be analysed in detail in Chapter 4.

A further distinction must be considered. While the implementation of the ECHR is generally found in the decisions of the ECtHR – some of which have been seen above – the effects of the CFREU and its interpretation must be analysed in the first place in the continuous legislative provisions taken by the EU institutions, and subsequently by the decisions of the EU Court of Justice.

And while the ECHR is, substantially, a stand-alone text placed in the context of fundamental rights, EU legislation covers a multitude of aspects, mainly of an economic nature, and aims at regulating a sector of the

industry. One must remember that when it was founded in 1957 the supranational organisation was named as European Economic Community, and only in 2000, with the approval of the Nice Charter, did it focus also on fundamental rights. In its action there is therefore, necessarily, a constant interplay and balancing between the traditional role of the EU and the protection of fundamental rights.

b) Limitations to the content of communication: Commercial and financial communication.

It is worth noting that in the field of commercial communication, EU law – and in particular the CJEU – while paying lip-service to Article 11 CFREU stating that it applies also to business when promoting their goods and services, has made it clear that significant restrictions can legitimately be imposed in order to protect human health and consumer well-being.

In the *Philip Morris case* [C-547/14] in which the major world tobacco producers joined forces in order to try to overthrow EU legislation [Directive 2014/40] on the packaging of cigarettes, the companies claimed that imposing large warnings such as “Smoking Kills-Quit Now” on the packet infringed their freedom of expression protected under Article 11 CFREU.

The Court answered that both the CFREU and the TFEU require that a high level of protection of human health be ensured in the Union’s policies and activities and that the aim of reducing the consumption of tobacco products, which contains “pharmacologically active, toxic, mutagenic and carcinogenic” compounds, outweighs the freedom to disseminate information in pursuit of commercial interests.

The main area of legislative intervention of the EU is in the field of broadcasting and of audiovisual communications which will be presented in detail in Chapter 2.

Article 10 of the ECHR and Article 11 of the CFREU establish the principle of freedom of expression. Surely natural persons are the holders of such fundamental rights and with them the multiplicity of legal entities (political parties, trade unions, associations, etc.) which represent the wide and diverse fabric of a democratic society.

The reason is that freedom of expression is essentially a political freedom which is indispensable in order to be an effective member of the body politic and to be able to influence its orientations and decisions.

It is, however, seriously debatable that when legal entities such as businesses promote their products and services or the reputation of their trademarks, they are exercising some kind of “freedom of expression”.

Commercial communication is, in the economic reality, simply an

element in the process of production/provision of a good or a service and as such is included in its costs which determine the price paid by the final consumer/user.

Commercial communication has – must have – one and only one aim: increase the sale of the product/service and the market reputation of the brand. Businesses are not selling “ideas” but simply looking – as is quite natural for an economic enterprise – for a profit.

This approach is confirmed by the vast EU legislation in the fields of health and consumer protection and financial markets.

The basic idea behind this pervasive regulation is that personal and economic choices are made on the basis of the information which is available.

Those businesses who wish to enter a market must provide to the various other actors of the market (intermediaries, distributors, consumers, users) all the information of which they dispose of, and which is relevant for the decisions that must be made.

This idea is repeatedly expressed in the TFEU which indicates that EU legislation in the fields of health, environment, and consumer protection of consumers should be based on “a high level of protection” (Articles 114, para 3; 168, para. 1; 169, para. 1) and the same provisions indicate that correct information is the means to attain such goal.

These references are even more binding when they concern the protection of human health (Article 9, TEU).

Consequently, there has been a deluge of primary legislation (Directives and Regulations) and of sub-primary norms establishing in detail what, how and where information must be provided by businesses when marketing their products/services.

The foremost text is the full-harmonisation 2011/83 Directive on consumer rights which establishes (Article 5) all the information that must be provided by a trader to consumers before the conclusion of a contract. This obligation is strengthened (Article 6) in the case of distance and off-premises contracts in which it is assumed that the consumer is unable to materially inspect the good which is the object of the contract. Article 7 adds that the information must be “legible and in plain, intelligible language”.

A Directive 2011/83 has now been amended by Directive 2019/2161 in order to update it to the most common digital commercial and marketing practices.

Directive 2005/29 on unfair commercial practices is aimed, in a significant part, at regulating communications of enterprises concerning their products/services. Therefore (Article 6) on misleading information is sanctioned, and

by “misleading” one includes any information, or omission of information that “is likely to cause the consumer to take a transactional decision that he would not have taken otherwise”.

The best example of how EU law considers commercial communications as part of the product/service can be found in the 2015/2302 Directive on package tours which states (Article 6) that all advertisement of package tours and any precontractual information on the nature, price, and conditions of the package “shall form an integral part of the package travel contract”.

Even more drastically Article 88 of the consumer rights Directive (2011/83) states that advertising of prescription-only medicines to the general public is prohibited.

As to financial products and services it should be reminded that financial markets are, quintessentially informational markets, in the sense that the value of any asset (shares, bonds, currencies, etc.) that is traded on it depends on the amount and on the quality of the information that is available. In order to ensure that financial markets work properly it is therefore indispensable that the principles of transparency and full disclosure be rigorously implemented.

In application of such principles, it is natural that Directive 2008/48 on credit agreements of consumers states the mandatory content of any advertising concerning credit agreements, in particular with reference to interest rates or the cost of credit.

The direct effect of such notions is the extremely detailed legislation which covers not only so called “insider trading” (the use for personal profit of privileged and confidential information concerning a financial product) but also “market manipulation”. Article 12 of Regulation 2014/596 on financial markets abuse makes it an offense to disseminate information through the media, including the internet, which is likely to give false or misleading signals which can alter the demand or the price of a financial product.

To all this one must add the specific legislation – which will be presented in Chapter 2 – concerning advertising on audiovisual media service providers.

In summary this general overview indicates that European legislation on freedom is far-from being homogenous and presents significant differences based on who is the speaker, what is the content of the speech and to whom it is addressed. Further differences, which will be analysed in the next chapters, depend on the medium used and on competing rights and regulations.

CHAPTER II

BROADCASTING

SUMMARY: 1. From state monopoly to a regulated market – 2. The Audiovisual Media Services Directive (AVMS) – 3. CJEU case-law – 4. Video-sharing platforms – 5. The Electronic Communications Code.

1. From state monopoly to a regulated market

The regulation of broadcasting is the central object of EU intervention in the field of traditional media.

The Council Europe has also produced several texts on this area (noticeably a 1988 Recommendation on transborder broadcast) but they are amply superseded – at least in the 27 EU member states – by the Unionist legislation.

A preliminary clarification is needed. “Broadcasting” is a technical means of dissemination of content (first audio, and later visual) to a community. It starts being developed at the beginning of 20th century, moving on from the recent invention of wireless point-to-point communication. Broadcasting is “broad” because the message is directed from one transmitter (the broadcaster) to a multitude of receivers. This communication, however, is one-way. Receivers can only receive and may not reply to the messages or relay them on.

Originally, broadcasting was performed only through the airwaves, *i.e.* using a certain frequency which allows messages to reach the listeners/viewers.

This has implied a significant regulation of the activity to avoid interference between broadcasters. The issue already became central in the USA in the 1920/30s with the creation of the Federal Communications Commission whose foremost task was that of licensing broadcasters and allocating, in exclusivity, frequencies on the radio-spectrum. The European solution – championed by Great Britain – was significantly different, reflecting two prevalent arguments of the time. The first was that the pervasive and overpowering nature of radio (and later of television) required stringent public control in the form of a State regulated broadcaster. The second, related to the first, was that there was a “scarcity of frequencies” which did not allow the operation of private broadcasters. Therefore, all the airwaves were to be reserved for the State.

The debatable nature of the second argument became manifest as broadcasting technologies developed and, in many countries, audiovisual programmes could be delivered only not through the airwaves but also via cable or satellite.

Starting from the 1970's, gradually, private enterprises started to set up broadcasting stations, first via radio and on a local basis, and then via television to ever wider territorial audiences.

This move often received the green light from the Courts which rejected restrictive orders and defended the freedom to broadcast on the basis of freedom of expression and freedom of economic initiative.

The inevitable normative disorder that ensued among member states prompted the EU to adopt, in 1989, a first comprehensive Directive (n. 552). Its structure is relevant because it will become the framework of subsequent Directives and of present-day regulation.

The starting point is that 40 years after the creation of the European Community, broadcasting falls among those services which are free to be provided – like all other economic services – throughout the EU. Therefore, State monopolies are no longer justified. This implies not only a liberalisation within member States, but also a right to re-transmit to other States. However, once the market has been opened, the content of what can be broadcast is strictly regulated:

- a) Broadcasters must reserve a majority of their broadcasting time to European audiovisual productions.
- b) Broadcasters may not broadcast cinematographic productions until after the elapse of 2 years since their being shown in cinemas.
- c) Television advertising must be recognisable, cannot be discriminatory, deceptive offensive or promote harmful conducts, and broadcasters must not use subliminal or surreptitious techniques.
- d) Stricter regulations are set for the advertising of medical products and alcoholic beverages.
- e) On the whole, advertising may not exceed 15% of the daily transmission-time.
- f) Broadcasters must not broadcast programmes which highly impair the natural and moral development of minors.

Subsequently, further limitations have been introduced to prohibit the advertising and sponsorship of tobacco products.

2. The Audiovisual Media Services Directive (AVMS)

After more than thirty years of EU legislative intervention, the current framework, though still maintaining the original content regulation, is much more complex, as can be seen analysing the main and updated texts.

- i. The original 1989 Directive has been replaced by the Audiovisual Media Services Directive (2010/13), subsequently amended by Directive 2018/1808.
- ii. Owing to the development of digital technologies, broadcasting activities are, inevitably, influenced by the more general regulation of telecommunication networks. The Audiovisual Media Services (AVMS) Directive is an extremely complex text (its provisions are preceded by a preamble of over 100 recitals).
- iii. The main distinction it introduces is between “linear audiovisual media services” and “nonlinear audiovisual media services”. The former are services provided for a simultaneous viewing of programmes on the basis of a programme schedule. The latter are services provided for the viewing of programmes at the moment chosen by the user and at their individual request on the basis of a catalogue. The obligations imposed on the two types of broadcasters are significantly different.

Some however are common:

- a) Prohibition of AVMS that contain incitement to hatred based on race, sex, religion or nationality
- b) Accessibility of programmes to people with a visual or hearing disability
- c) Transmission of cinematographic works only in periods agreed with rights holders
- d) Commercial communications must be readily recognisable as such and must not use subliminal techniques
- e) Commercial communications must respect human dignity, must not promote discrimination based on sex, race, ethnic origin, nationality, religion, disability or sexuality
- f) Advertising of tobacco and of prescription drugs is prohibited, and that of alcoholic beverages must follow specific rules
- g) Advertising directed to minors must not exploit their inexperience or credulity

- h) Advertising of food and beverages in children's programmes must follow nutritional guidelines
- i) Product placement is allowed in films, tv series, sports programmes and light entertainment, excluding tobacco or prescription drugs

Linear AVMS are subject to further requirements. The most important is the limitation of the amount of advertising time.

Films and children's programmes must not be interrupted more than once every 30 minutes and anyhow the proportion of television advertising spots and teleshopping spots may not exceed 12 minutes every given clock hour. Broadcasters must reserve a majority of their transmission time for European productions, excluding the time devoted to news, sports events, games and advertising. Programmes that include pornography or gratuitous violence must be banned, and programmes that are likely to impair the development of minors can be broadcast only in late hours.

Finally, the Directive imposes a duty to ensure that people damaged in their reputation and good name have a right to reply.

a) Licensing

As already mentioned, until the end of the 20th century broadcasting activities were, in most European countries, conducted by state monopolies and only very few exceptions were admitted.

With the acknowledgement that audiovisual services fall among other services, its provisions should be free in accordance with Article 56 TFEU. This however implies a significant amount of regulation, both on the establishment of a broadcasting enterprise and on the content of the services provided.

The first, and foremost, rule is that if audiovisual service providers use airwaves (such as in traditional radio and TV broadcasts), the exclusive use of such frequencies requires a prior license.

One must point out the difference between "license" and "authorisation" in the EU regulatory system. A license to conduct a certain business activity is granted when the business complies with numerous prior requirements concerning its financial and managerial capacity, its technical resources and its good repute. This procedure is commonly adopted in the provision of services of general economic interest (*e.g.* transport, energy, financial services).

In some cases, when there is an objective scarcity of resources (*e.g.* frequencies, "slots" in an airport or a railway station) the number of licenses can be limited and they must be released under fair, transparent and non-discriminatory principles.

An authorisation, instead, permits an enterprise to start a business by notifying its intention to do so. The authorities may deny it within a short time from the request, for public policy (safety, security) reasons.

What are the implications of this distinction for the provision of audiovisual media services? While enterprises that use radiofrequencies must obtain a license, those that provide the same services through a cable network (generally leasing digital transmission capacity from an existing telecommunications network operator) need, much more simply, an authorisation. And in certain cases – *e.g.* a newspaper that on its website provides news in printed, audio and visual form – not even that is required. According to Article 4 of the e-commerce Directive (2000/31/EC), member States must ensure that the activity of an information society service provider is not subject to prior authorisation or any other requirement with an equivalent effect.

b) National Regulatory Authorities

The further, and very important, regulatory step is that of establishing national regulatory authorities (NRAs) in the field of audiovisual services. Such authorities already existed in most countries, but on the basis of domestic law. Now they are mandated by Article 30 of the AVMS Directive and therefore most comply with the strict EU rules in this field and are coordinated, at a Union level, by the European Regulators Group for Audiovisual Media Services (ERGA).

The establishment of regulatory authorities is a common feature of EU law, and one finds them in most regulated sectors: Data protection, transport, energy, financial services, telecommunications and now in audiovisual media services.

The tendency, furthermore, is that of an increasing role of European coordination bodies (such as the ERGA) in setting common rules, with national authorities acting as EU decentralised agencies.

The theoretical grounds for the liberalisation of broadcasting services has been the fact that audiovisual services should be considered, as all other services of economic interest, freely providable by private business. Additionally, there is the fact that enabling access to non-State audiovisual service providers enhances competition: Broader offer of programmes; higher quality in transmission technologies and in content; beneficial effects on upstream (*e.g.* creative industries, sports) and downstream (*e.g.* hi-tech receivers, technical assistance, advertising) sectors.

If one compares today's offer of audiovisual services with that of 30 years ago one can see that most of these expectations have been fulfilled, and that

the promotion of competition has produced positive effects also in this sector.

c) The primacy of public service broadcasting

There are, however, some peculiarities that need to be highlighted:

- a) While in other liberalising sectors (*e.g.* transport, energy, telecommunications) one of the main objectives of the EU institutions has been that of creating a “level playing field” for all the actors in the new competitive environment, gradually cutting and eliminating the privileges of the State controlled monopolist, in the broadcasting sectors the traditional public broadcasting service providers (BBC in the UK, ORTF in France, RAI in Italy) have maintained a special status.
- b) This status is enshrined in a “Protocol on the system of public service broadcasting in the member States” annexed to the Lisbon Treaty according to which “the system of public broadcasting in the Member States is directly related to the democratic, social and cultural need of each society and to the need to preserve media pluralism”. Therefore “the provision of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting organisations insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account”. The Protocol is consistent with Article 106, para. 2, TFUE which contains a similar provision addressed to all services of general economic interest upon which special public objectives are conferred.
- c) The main result is that while privately owned broadcasting enterprises are financed through subscriptions and advertisement revenues, public broadcasting enterprises are financed by taxpayers, generally through a fee collected from any owner of a TV receiver, and, in some states, also through advertisement fees (see *e.g.* the [Südwestrundfunk case C-492/17](#)). To this, one can add other privileges, among which so-called “grandfather rights” over radio frequencies.
- d) Protection of printed media and of the European audiovisual industry.

The regulation set out by the AVMS Directive has various, explicit and implicit, aims.

- i. Protect printed media financial resources, especially by limiting the overall hourly advertising time of broadcasters. The rationale was that if a ceiling was put on TV advertising, a significant quota of the advertising budget would spill-over to more traditional media. The intention has however been entirely thwarted by the progressive move of advertising from press and TV to digital online services which appear to be much more effective and allow a very detailed profiling of the recipients of the commercial ads, something not possible with either the press or with broadcasting.
- ii. Regulate an important – from an economic, social and political point of view – sector in line with the EU tradition. In particular all sectors that over the years have been liberalised – transport, energy, telecommunications – passing from State monopoly to competition have seen an enormous output of regulatory measures aimed at ensuring the public policy objectives set by the EU institutions.
- iii. Protect the European film and audiovisual industry through two measures: the first is the embargo on broadcasting films before a certain time has passed from their distribution in cinemas. The second is the quota of European audiovisual products that must be broadcast. The aim of the first limitation is that of giving “breathing space” to cinemas, which play not only an economic role but also a social one, as theatres are generally placed in an urban context where people gather for entertainment, shopping and leisure. The aim of the second measure is that of safeguarding European audiovisual products and producers from the otherwise irresistible economic and creative strength of US competitors, noticeably the Hollywood “majors”. The latter are favoured by economies of scale due to the fact that their products generally have a global market and therefore can rely on a much higher budget and on much higher profits. There is a further, non-economic, aim of the quota provision. Audiovisual products are intrinsically the expression of the culture of those who produce them. US culture, which surely is wide and diverse, is however different from European culture, which needs to be distinct and should not – according to the Directive – be “colonised” by American films and tv series.

It should be recalled that according to Article 207 of the TFEU (devoted to the “Common commercial policy” of the EU) for the negotiation and conclusion of agreements in the field of trade in cultural and audiovisual services “whose agreement risks prejudicing the EU’s cultural and linguistic diversity” the EU council must act unanimously.

While the aim of protecting “cultural and linguistic diversity” is surely an important one, we must also consider that the quota system is mostly effective in those countries which have a developed audiovisual industry. For those – the majority – which do not have one, the result is that they are obliged to fill in the quota not with domestic productions, but with productions from other European countries. Apart from their artistic merits it is debatable that such measures can adequately preserve the cultural traditions of the member-State.

3. CJEU case-law

The aim of protecting cultural diversity, as well as media pluralism, has been re-affirmed several times by the CJEU.

In the *Baltic Media decision* [C-87/19] Lithuania had imposed on Baltic Media, an Estonian satellite pay-tv broadcaster, an obligation to re-broadcast Lithuanian programmes and in particular its public cultural channel.

The Court considered that the provision was compatible with EU law and its promotion of cultural and media pluralism provided that the re-broadcast covered a significant number of viewers and was freely available.

However, it must be reminded that, as with any provision that restricts the four fundamental freedoms on which the EU is founded (freedom of movement of goods, people and capital; and freedom of establishment) it must be proportionate.

The delicate balance is made clear in the *Commission v. Belgium decision* [C-134/10] where the Court had to grapple with the complex Belgian legislation aimed at ensuring coexistence between the three conflicting linguistic groups of that State (French, Flemish and German). The conclusion was that the “must carry” provisions were too vague and overbroad and therefore needed to be tailored.

The minute regulation of advertising, sponsorship and product placement is in line with the more general regulation of commercial communications set out by EU consumer law. The first aim is the protection of the health of viewers with the prohibition of tobacco advertising and limitations to

advertising of alcoholic beverages. On the same line are the indications concerning food advertising during children's programmes. The second aim is ensuring that audiovisual advertising, which is generally considered more effective, is not unfair and/or deceitful.

Conscious that non-linear and pay-per-view broadcasters are economically generally more endowed and therefore that they are able to hoard audiovisual services of significant appeal, the Directive allows any member State to draft a list of societally significant events “to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television”.

All member States have published their lists which include mostly sports events, musical festivals and other large audience events which are deemed to express the national cultural identity.

A further pro-free-to-air and pro-general viewers provision allows broadcasters to obtain from those who have acquired exclusive rights over an “event of high interest to the public” “short extracts” for the purpose of news reports.

The AVMS Directive was elaborated in a technological environment in which broadcasting was still the most widespread means of mass communication. The scenario however has rapidly evolved owing to a growing convergence between television and internet services, which has enhanced new forms of programming and enabled new players to enter the market.

In particular, video-sharing platform services that provide both user-generated content and commercial audiovisual products have become a major channel to access audiovisual content.

The fuzzy distinction between audiovisual services and self-promoting audio-visual channels is made clear in the *Peugeot Deutschland* decision [C-132/17].

Peugeot Deutschland, the German subsidiary of the French automobile company, has, like many other businesses, a YouTube channel on which it disseminates information concerning its products. According to German law, automobile producers must provide information on fuel and energy consumption and on Co² emissions of new passenger cars. This information was lacking in a video promoting the CRZ model. An environmental association raised the case in front of the German courts claiming violation

of the informational obligation. Peugeot Deutschland claimed the video was an “audiovisual media service”, on which the member States could not impose further obligations.

The CJEU was asked to rule preliminarily if the video fell under the definition contained in Article 11 of Directive 2010/13. The Court stated that a promotional video channel available on the YouTube platform could not be regarded as having as its principal purpose the provision of programmes in order to inform, entertain or educate the general public, but its sole purpose was to promote, for purely commercial purposes, the products or services of the company running the channel.

4. Video-sharing platforms

The result of this evolution was the enactment of Directive 2018/1808 which has amended the AVMS Directive “in view of changing market realities”.

The most important change has been that of setting specific rules for video-sharing platform services. The main, and very general, provisions are those concerning the protection of minors from audiovisual products that can impair their mental or moral development; the prohibitions of products containing incitement to violence or hatred; and aimed at preventing the dissemination of communications which constitute a criminal offense (typically incitement of terrorism, child pornography, racism and xenophobia).

Further, Directive 2018/1808 adds a long list of requirements that video-sharing platforms must comply with in their relations with their users.

In particular the Directive sets a series of obligations that must be inserted in the terms and conditions. In the first place, users must comply with the rules set out in the previous paragraph. Then they must declare if their video contains commercial communications. Viewers must be able to flag the content if they complain with the platform and parents must be able to exclude certain videos from the view of their children.

As to advertising on “linear services” the limits are no longer calculated on an hourly basis but contemplate three blocks: The proportion of television advertising spots and teleshopping spots within the period between 6.00 and 18.00 shall not exceed 20 % of that period. The proportion of television advertising spots and teleshopping spots within the period between 18.00 and 24.00 shall not exceed 20 % of that period, while from midnight to 6

am there are no limits. The new system allows broadcasters to concentrate advertising during prime time (*e.g.* from 7pm to 10pm) reducing the amount before and after, provided that the total is not more than 20%.

Audiovisual media services can be provided through at least three technical means of traditional airwaves, cable and satellite. The combination of the three mediums varies from country to country, depending on various factors, such as the orographic configuration (significant presence of mountains), technological development (cable networks vs. spectrum frequencies) or the pro-capita revenue (pay-per-view broadcasters vs. free-to-air ones).

5. The Electronic Communications Code

While the rules set out in the previous paragraphs apply to all forms of broadcasting, whatever the technological medium, clearly one must also consider the rules which allow audiovisual content to be disseminated to the audience.

EU legislation has progressively evolved over the last 30 years passing from a monopolistic situation which included not only broadcasters but also telecommunication operators, to a relatively open market for the creation of telecommunication networks. The main legislative reference is Directive 2018/1972 which establishes the “European Electronic Communications Code” (EECC) an extremely complex text with 126 Articles, over 300 recitals and a dozen Annexes which consolidates and updates the various directives issued over the years.

It also regulates networks used for radio and television broadcasting and cable television networks, irrespective of the content conveyed.

A considerable part of the EECC is devoted to the allocation and management of radio spectrum, which is qualified as “a public good that has important social, cultural and economic value” and therefore must be allocated on the basis of “objective, transparent, pro-competitive, non-discriminatory and proportionate criteria”.

While in the past frequencies used by broadcasters were quite distinct from those used by telecom operators (mostly for mobile phones), since the digitalisation of all communications, the two groups (broadcasters and telecoms) are competing for the use of the same spectrum. This has increased its value and the desire of governments to take advantage of the competition in order to raise revenue. This has over the last twenty years led to the growing practice of “spectrum auctions” through which frequencies are allocated to

the highest bidder.

The high cost – often in the range of billions of Euros – of frequencies clearly favours different means of transmission, especially through the existing cable networks, which are progressively upgraded, in the sense that they can carry high quality and high speed digital audiovisual productions.

From an economic point of view the advantage is obvious. A frequency-based network must be paid by the broadcasters and its creation and maintenance significantly erode its profits. A cable network – substantially the same used to access the Internet – is paid, instead, by the telecom operators, who recover the cost from the users, through a mostly “flat” fee.

The multiple uses that can be made of networks – which can provide most kinds of services (voice, e-mail, internet access, audiovisual works, television programmes) are well epitomised in the so-called 5G networks (where 5G stands for “Fifth generation”) which are able to deliver wireless – *i.e.* without the need of a fixed network – high quality mobile services.

Finally, the growing use of all the frequencies on the spectrum (from military and police uses, to civil aviation and other forms of transport, to mobile communication, to private user, to broadcasting) raise health concerns as to the consequences of prolonged exposure to radiofrequencies. Although the results of medical research are uncertain, the principle of precaution has suggested to limit the presence and the levels of transmission power of networks towers, including broadcasting ones.

CHAPTER III

DIGITAL COMMUNICATION

SUMMARY: 1. Information as a commodity – 2. Business and organisation communication – 3. Protection of minors – 4. Respect for the image and the human person – 5. The role of algorithms – 6. Internet presence: Domain names – 7. On-line databases – 8. Social Media Platforms – 9. The terms of use of platform services – 10. Legal qualification of user licenses – 11. Does consumer law apply? – 12. The internet service providers' contractual liability – 13. The internet service providers' extra-contractual liability – 14. European case-law – 15. More on the platform's liability and future developments.

1. Information as a commodity

In the contemporary era, information assumes the form of a commercial product, a commodity, and therefore of a legal property with utility for its holder and consequently with a significant economic value which constitutes the object of relevant legal interests. And information can be marketed either in its raw state, that is, in its data form without processing, or instead processed and combined even sequentially with other information entities of a different nature.

There are numerous entities formed by information that comport a different degree of processing: databases (which can be composed both of mere information data without any coordination and of organised collections of data according to logical and complex structures), software that uses a sequence of information that represents the instructions to be given to a computer, literary works, cinematographic works and television programs, musical works, all the way up to multimedia works.

Information, by its nature, belonging to the category of *res incorporales*, is devoid of form and structure. It materialises and becomes an object of attention of the law either when it is fixed or recorded on a medium that thus gives it the requisite of corporeality or when it is communicated externally, that is, published.

Information becomes the object of protection for its content (for example, personal data), for its container (for example, correspondence), for its function (in business activity for industrial rights, trade secrets, know-how

and in public administration), for the context in which it is communicated and learned (think of professional secrecy or insider trading in stock exchange contracts), for the quality of the subjects involved in the information circuit (for instance, in relations between public administrations), for the manner of their genesis (that is, when it is the subject himself who produces the information that is strictly relevant to his own person, or because he is endowed with an originality revealing the personality of the subject himself), for the modalities of his expressive form (in intellectual property rights) and finally for the time within which it can be used.

Therefore, information is generally not protected as such, but mediated, that is, when it assumes importance for the personality of the subject or rises to the rank of a different asset already protected by the legal system.

Information, precisely because of its original and intrinsic immaterial nature, can be transmitted through countless means and through the most varied forms and it is extremely difficult, if not impossible, to prevent this; moreover, the ease of its reproducibility means that, once the precept of non-communicability is violated, this can be repeated indefinitely. And as economists teach, any resource has value and, therefore, arouses interest in the law, as long as it is scarce and its exploitation can be controlled to some extent.

In the current economic system, not all information, whether simple or elaborate, is freely disseminated and used by the public; some, in fact, is protected and cannot circulate except with an authorisation from the holder, who has exclusive control over the use and distribution of such data. By virtue of this position, the holder of the information will be able to put it to good use in various ways, for example by inserting it in the information marketplace circuit and therefore granting it to the public only through onerous license, access or transfer agreements.

In order to control and to some extent stem the extreme ease of reproduction and circulation of information, recourse has been made in some cases to the scheme of industrial property rights, for example in the case of patents. In other cases, recourse has been made to the protection granted by the law on copyright to works composed of information, provided however that these have, through their aggregation, the requisite of creativity and originality. In still other cases, a *sui generis* right has even been created by the legislature (Directive 96/9/EC) which protects the subject creator of databases from the extraction and reuse of substantial parts of the contents of databases that do not receive copyright protection because of their lack of the requirements of originality and creativity.

On other occasions, the legislature seems to indicate or suggest to the

owners of the information to be protected to adopt technological measures to protect against unauthorised reproduction and circulation by others, as in the hypothesis described by art. 6 of Directive 2001/29 /EC, referring to digital works.

For information collected and organised within any type of container, against unauthorised reproduction or extraction for commercial use, the discipline that sanctions acts of unfair competition between entrepreneurs, of course, can always be usefully enforced.

From the observations made, it is clear that the legislature has taken care to protect and give legal protection to information, not only because it reveals and projects externally data relating to the personality and the intimate sphere of the person (such as confidentiality, honour, reputation and personal identity), but, above all, because it has a significant economic value, given that it takes on the role of primary resource in a society with an advanced tertiary sector that acts as such a fundamental element of the so-called digital economy. In fact, the digitisation process allows, to a certain extent, that information in a broad sense, from an ethereal entity, acquires its own consistency thanks to the process of transformation of data into machine language that allows it to reside in the memory, temporary or long-lasting as it may be, of the electronic processor.

We speak of a weightless economy, in which economic resources are collected and contained in digitised packages of information. The process of dematerialisation has been underway for some time: some goods, in particular intellectual works, will gradually be distributed and marketed to the public only in their digital nature and this through channels of telematic transmission. Information, both individually considered and aggregated with other information units, is in fact, in advanced tertiary sector society, the primary component to realise and satisfy economic interests in the community and therefore to build and increase value and wealth.

However, the inconsistency of the nature of information and the weakness of the supports in which it is incorporated, demonstrated by the increasingly refined techniques employed to evade the exclusivity constraints affixed by information owners, make the legislative provisions that sanction the hypothesis of non-proprietary rights incapable of safeguarding those who invest their resources in the information market.

2. Business and organisation communication

It is a common experience that the digital phenomenon and the Internet have represented a real social revolution for the community, bringing with them new forms of communication with an extraordinary potential. There are, in fact, countless possibilities both to draw and to offer information to anyone who participates in a network, and there are perhaps unlimited variants through which this distribution of information takes place.

The Internet medium has created an “Internet environment”, that is, a new aggregation of data, information, services and subjects all interconnected with each other that integrates with what was pre-existing, modifying it in all its various forms of expression and communication.

The social and economic impact of this new reality is impressive and perhaps unprecedented, comparable, probably, to that of the industrial revolution of the nineteenth century.

Whoever carries out an economic activity will necessarily have to face this new environment created thanks to the Internet and developed within it, and deal with the process of change with an innovative spirit with which to adequately interact with the complex of data, information and subjects that the Internet makes available. Any subject that intends to be part of this new and complex context and, even more so in the case of economic operators, will therefore have to organise its own visibility and a suitable communication system.

For companies, the Internet represents a tool for optimising sales processes, improving customer relations, using new marketing and advertising tools, simplifying payment methods, as well as expanding the geographical spread of their products and services.

For consumers, who access it from both computers and mobile devices, the Internet is a suitable tool to satisfy many needs: from the purchase of products and services, to finding news and information, entertainment, training, to the sharing, exchanging and creating of a new dimension and social identity.

Finally, the Internet helps bring government and public institutions closer to the public, fostering constant information interaction and ensuring greater efficiency and speed in service delivery.

In conclusion, it can be said that the entirety of business communication is now deeply changed: new forms of expression are added to the pre-existing ones, which are able to exploit the potential of the network; the Internet user in his wanderings in the digital context will not be able to escape the

many information requests of which the network is full. From the time he connects and accesses the online world, he is identified as a host on the network and every movement and click is traced (logged), recorded, studied and taken into account for future promotions. There is no effective way to escape this subjection, which is made up of increasingly refined and effective communication and marketing techniques.

In detail, the ways in which companies conduct their commercial communication in the online world are varied and heterogeneous. The use of digital tools in commercial communication has also led to the creation of new languages and new forms of expression, subject to a constant process of innovation to promote goods and services.

According to Directive 2006/114/EC, *advertising* means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations. In the information society, specifically in the Internet context, communication activities with promotional purpose are defined in Article 2 (f) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), which provides that, for the purpose of that directive, the following terms are to bear the following meanings: “commercial communication”: any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession. The following do not in themselves constitute commercial communications:

- information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address,
- communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, particularly when this is without financial consideration.

Article 4(12) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, retains a similar definition for the concept of “commercial communication”.

Therefore, any form of transmission of information that qualifies as an intentional and interested support of an economic activity, not necessarily of

an entrepreneurial nature, must be considered commercial communication, without the immediate aim of promoting sales being indispensable, as it is also sufficient that the message has the purpose of improving the global image of the operator from which it originates.

Basically, the characterising features of the notion of commercial communication end up being essentially two: the connection with an economic activity and the promotional purpose of the message.

Compared to traditional business communication, new ways of reaching potential consumers emerge thanks to digital technology or techniques already tested prior to the digital revolution are now consolidated and strengthened. On the Internet, there are, in fact, innovative communication techniques that companies adopt to embrace a greater number of subjects potentially interested in their products and services; these are communications that can be included in the definition of digital advertising or digital promotional communication, that refer to marketing communications, using digital interactive media intended primarily to promote products or to influence consumer behaviour. The term advertising or advertisement means any form of marketing communications carried by the media, usually in return for payment or other valuable consideration.

Marketing communications include advertising as well as other techniques, such as promotions, sponsorships and direct marketing, and should be interpreted broadly to mean any communications produced directly by or on behalf of marketers intended primarily to promote products or to influence consumer behaviour. There is a fine line between communication and editorial content that includes any content that informs, educates or entertains, provided its primary purpose is not to advertise.

Equally for digital marketing communications, the reference is to marketing communications, using digital interactive media intended primarily to promote products or to influence consumer behaviour.

Below is a range of the major and most innovative promotional communication techniques that use digital technologies and telematics. All these forms of promotional communication, even the most innovative, must comply with the requirements of the law, namely: be recognisable as advertising or commercial communication, not offend the sensitivity of minors with messages relating to sex, drugs, violence or hate speech, not advertise tobacco or alcohol products, comply with the limitations for gaming or betting services. And lastly, the information message must be truthful.

a) Advergame

An electronic game to promote a product or a brand by the brand/product owner. As delineated above, technology is changing advertising: Consumers do not pay attention to just any message sent to them, so industries need to find ways to reach users without boring them. This is precisely the undertaking of the advergame: it engages the user with a simple and captivating game, in this way, it captures his attention in a non-intrusive and loyalty-inducing manner, to impress in his mind the brand being promoted. Unlike sites that offer free online games to merely increase user traffic therein, and those who sponsor themselves in video games (in-game advertising), those who use advergames do so to spread a message, to push their own brand, therefore advertising is the heart of the online game. With advergames the user can carry out marketing operations that allow the communication of the characteristics of a product or service, entertaining the user in synergy with traditional channels. In fact, the user can view a short commercial before being able to play on the Internet, or - during the game - can be exposed to the brand.

According to the law, the advergame must be able to be identified as such, unambiguously, in a clear and immediate way and this, before the execution of the game. When the advergame is mainly aimed at children and adolescents, it cannot harm them with messages that can disturb their serenity and emotional stability. Any elements that appear in an advertising game aimed primarily at children and adolescents must in no case refer to content that would be detrimental. Producers will take care not to use elements – visual, sound, verbal or written – making a game specifically attractive for children and teenagers, the content of which would be detrimental or dangerous for their psychological development.

The advergame must not be such as to mislead the consumer about the offer actually proposed and/or about the company behind the offer. Access to legal notices, corrections and information must be easily identifiable. These mentions must be immediately perceptible or with a direct access and must be legible or audible and intelligible.

b) Augmented reality

Augmented reality is an enhanced version of the real physical world that is achieved through the use of digital visual elements, sound or other sensory stimuli delivered via technology. This kind of communication uses the existing real-world environment and puts virtual information on top of it to enhance the experience. It is a growing trend among companies involved in mobile computing and business applications.

Any form of advertising noticeable through augmented reality must be clearly identified as such. When noticeable advertising through augmented reality is accessible from a physical medium constituting an advertising space, its advertising character is then considered as manifest. It is therefore not necessary to provide additional identification elements. If the advertising character is not clearly apparent, it is then recommended to add an explicit indication making it possible to identify the advertisement as such.

When perceptible advertising through augmented reality is accessible from a place mainly dedicated to children and adolescents, it can in no way prejudice them.

According to the law, when advertising perceptible through augmented reality is accessible from a service aimed primarily at children and adolescents it cannot in any way harm them or refer to content that would be harmful to them in the way indicated above.

c) Display Advertising

A form of online advertising where an advertiser's message is shown on a destination web page, generally set off in a box at the top or bottom or to one side of the content of the page.

Specifically, this is graphic advertising on Internet websites, apps or social media through banners or other advertising formats made of text, images, video and audio. The main purpose of display advertising is to deliver general advertisements and brand messages to site visitors. The display ad is usually interactive (i.e. clickable), which allows brands and advertisers to engage more deeply with users. The Internet allows these types of online advertising through several forms: the most common and widespread is the *banner*, a stripe image with the name or trademark of the company, often placed at the top of a web page of a respective website. Web banners work in the same way as traditional advertisements but differ in that the results of advertising campaigns can be tracked in real time and can be targeted to the viewer's interests. However, a banner has a lot of visual competition on the web today. A user receives more than 1,700 advertising banners per month and on the same web page they can find many banners advertising different things and not pay attention to the content of any banner. Because of this, banner clicks have a low user-to-customer conversion rate.

In the same category, there are *pop-up windows*, or elements of the graphical interface, such as windows or panes, which appear automatically during the use of an application and in certain situations to attract the user's attention. *Rich Media* is a digital advertising term for an ad that includes features such as video, audio or other elements that encourage users to interact and

engage with content. *Interstitial* and *superstitial* are web page advertisements very similar to television commercials and appear in a separate window when a web page requested by the user is being loaded.

Also, for this type of communication, which is immediately perceptible if not really invasive, the legal rules indicated above apply in terms of appropriateness and lawfulness of the information message. Thus, in particular, the information contained in the message must be truthful and content that is harmful to the rights of third parties or minors must be avoided.

d) Social Media Advertising

Social media can be defined as online services that allow users to create profiles and communicate with each other within a community, including through sharing information and content, such as text, images, videos and sound files. Companies and professionals use services made available by the platform owners to create their own profile from which to promote their products, maintain constant contact with the public, informing about the characteristics of the products, about the outgoing ones and in general to create a community whose members can be favoured with various discount campaigns and promotions.

Within social media it is not always so easy to distinguish an information message that falls within the freedom of expression from another one which has an advertising nature.

Like any advertising message, it must be clear, truthful and correct. Anyway, it is frequent to come across forms of hidden advertising within social networks, which take place whenever someone publishes information that does not clearly and unequivocally reveal the commercial purpose of the same to other users. A hidden advertising should be able to implant a false belief in the consumer and influence her purchasing choices.

As anticipated, there are many practices within social networks that can be dubious. In other words, it is difficult to understand when there is a promotional message or a manifestation of thought expressed in one of its multiple forms. Let's take for example messages posted by users who present a positive review of the quality of a product, the food consumed in a restaurant, the pleasant comfort of a hotel, or the display of a fashionable garment with the trademark or brand in full view. Is it an advertising message or a simple endorsement, that is, an appreciation expression unrelated to promotional purposes?

Social media's users might not know why another user is tagging an item of clothing and some might think he is doing so just because he likes the item and wants everybody to know about it. According to the rules

on advertising, this practice would require a clear disclosure if there is a relationship with the brand's owner, that could be without any payment in money, but would include payment in kind consisting of receiving the item as a gift, or free meals in the case of the restaurant or a free stay in a reviewed hotel. In these cases, it is required, according to the law, that the social media user be open and transparent with other users who read or view their posts about his relationship with the given brand.

e) Like Functionality

Like Functionality provided by more widespread social networks, it allows Internet users to recommend content/products/services or demonstrate agreement with commentary. This recommendation also serves to move popular content up in the news feed and search rankings.

Within social media and thanks to its technical potentiality and the high number of users, companies can launch viral promotional campaigns, i.e., any advertising that autonomously propagates generally due to the funny or shocking content it carries. In the digital media context it can be defined as a marketing technique that seeks to use pre-existing social networks to produce increases in brand awareness.

From a legal point of view, the like's expression represents a manifestation of the user's implicit will to appreciate a situation or a thought expressed by others. For the law, this manifestation of will thus expressed is not indifferent or without effects: there are rulings by courts of some European legal systems that condemn the user for having put a like to messages of incitement to racial hatred, or to a defamatory content.

f) YouTube Channel

YouTube is the largest video sharing platform in the world; even if it is losing ground with respect to new social media, it still remains a point of reference for companies and professionals. To date, YouTube has more than 30 million daily visitors and over 1 billion monthly users. Nearly 500 hours of video are uploaded every minute, with more than 2,400 channels reaching over 1 million subscribers. In particular, the videos are divided into channels managed by the subjects who upload them and this allows for better organisation and the possibility, through recommended videos (based on history and interactions), to show videos from the sector niche of interest.

Companies are determinately pursuing this opportunity to create audiovisual channels from which to reach a potentially endless audience of users and thus increasingly publish specific content specially designed by marketing experts to promote brands and products through audiovisual

means targeted and packaged with the best techniques of cinematography.

In this context, the question arises of whether the publication by a company of an audiovisual promotion of its own product can be considered an audiovisual commercial communication under Article 1(1)(h) Directive 2010/13 or should instead be subject to the specific rules on audiovisual media services of the same Directive and consider it comparable to television broadcasts. In other terms, it depends on whether the provision of a promotional video channel on YouTube constitutes an audiovisual media service within the meaning of Article 1(1)(a) of Directive 2010/13, which is a service as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union that is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of point (a) of Article 2 of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this paragraph or an on-demand audiovisual media service as defined in point (g) of this paragraph.

An audiovisual commercial communication instead is constituted by images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshopping and product placement.

In this context, even if this kind of video were to be regarded as a programme within the meaning of Article 1(1)(b), the principal purpose of that audiovisual commercial communication is, however, not the provision of programmes in order to inform, entertain or educate the general public, as required under Article 1(1)(a)(i). Instead, it has the aim to promote, for purely commercial purposes, the product or service advertised.

In this context, there is an interesting ruling by the EU Court of Justice case (21 February 2018, case C-132/17, *Peugeot Deutschland GmbH v. Deutsche Umwelthilfe*) about the interpretation of Article 1(1)a of Directive 2010/13/EU concerning the provision of audiovisual media services. The case concerns the publication by a famous car producer on its YouTube channel of a short video about a new passenger car model without providing information in that video on the official fuel consumption and official CO₂ emissions of that model. According to this grounds, the Court ruled that Article 1(1)(a) of Directive 2010/13/EU of the European Parliament and

of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (the Audiovisual Media Services Directive) must be interpreted as meaning that the definition of audiovisual media service covers neither a video channel, such as that at issue in the main proceedings, on which internet users can view short promotional videos for new passenger car models, nor a single video of that kind considered in isolation.

g) Influencer marketing

This is a form of marketing based on individuals with customer influence (influencers). The content produced and published by influencers can be considered a form of advertising where the influencers play the role of potential consumers, or as third parties relative to other producers in the field, i.e. consumers. The influencer is paid by sponsors to carry, out usually via videos, photos and posts on social networks, a dissimulation of the advertising itself, where the products appear within a continuous narrative that implicitly suggests their use in an attractive context, often creating an association with success or an enviable lifestyle, without this being perceived as real advertising by the influencer's target. This mechanism is sneaky and sly because it bypasses the critical mental process a consumer is likely to undertake when fully aware that someone is trying to induce him to think, do or buy something. Instead, the influencer undercuts this psychological barrier, creating in the process an addiction to this same mechanism.

It is important to define influencer communication based on criteria which allow to decide when the influencer's activity on social media is a commercial communication as opposed to pure editorial content protected by the right to freedom of expression.

If companies or brand owners approach influencers to generate content in exchange for payment or other reciprocal arrangements, and have control of the content, then this would need to be clearly identified as marketing or commercial communication.

So, the presence of these two conditions - payment (or other reciprocal arrangements) and editorial control - allow to identify an influencer's message as a marketing or commercial communication.

Editorial control can be understood broadly and to include different elements ranging from more inclusive to more strict definitions. Examples of inclusive definitions are the advertisers' suggestion or proposal for the tone, structure and/or direction of the message; for example, requests for a positive review, requests for a specific number of posts on a certain social media

channel mentioning the service/product or requests to show the product in a social media post. The concept of editorial control can also be defined more strictly, including thus a dominant control with a pre-suggested message script, scenario or speech for the influencer prepared by the advertiser with additional requests for validation of the content before its publication.

Compensation for the marketing communication shared by the influencer can also take different forms ranging from formal contractual agreements defining monetary payments to a mere provision of free goods or other reciprocal commitments for the benefit of the influencer. While a contract and/or a monetary remuneration by the advertiser or its representative is undoubtedly the clearest and most straightforward way to establish the commercial relation between the brand and the influencer, other types of arrangement should also be considered as compensation. For example, compensation in kind, such as the provision of free products/services or discounted products/services might be considered as compensation for influencer's messages. However, some exemptions might be made to the products/services of particularly low value, i.e. "free samples". In fact, involvement is sometimes authentic in nature and the influencer can post a spontaneous opinion that has not been imposed by the brand. For example, when the influencer receives a free product or service in order to communicate a review and then receives information about the product or service, but where the message was not written by the brand and the brand does not have the right to endorse the message. In this case, the content of the influencer is not considered as a commercial communication but as a personal opinion or judgement. Therefore, if the product is offered for free, but without waiting or asking for a positive review (this means that the brand does not have control of the content that is published afterwards), there is no doubt that this case is excluded from commercial communications.

Finally, an employee of a company who shares the communication of this company on social networks with friends, acquaintances, etc, given his loyalty to this company, is not considered an online influencer who is paid to broadcast a commercial communication. The salary has no connection with the diffusion or not of a communication of the company.

Content created by social media influencers is viewed and followed by an increasing number of people, particularly young people and minors. For some it is even a part of their daily lives and an important source of information. Therefore, it is vital to clearly distinguish between genuine unbiased opinions shared by such influence holders and those that instead have a commercial or promotional intent. However, since influencer marketing is closely linked to the concept of user generated content, i.e., information communicated

or posted on social media by individuals, it can be difficult to define the difference between traditional advertising and freedom of expression, a circumstance that could subsequently mislead consumers.

As for traditional media, some forms of online commercial communication, including influencer communication, require dedicated disclosure making sure that the audience clearly recognises a promotional communication as opposed to pure editorial content.

So, this kind of communication created by influencers should also be clearly distinguishable as such, whatever their form and whatever the medium used and should be presented in such a way that it is readily recognisable and identifiable as an advertisement and where appropriate, labelled as such.

Disclosure of commercial intent of the influencer's message could be made in a variety of ways, but, most importantly, it should appear instantly. A proposal could consider a sort of labelling of disclosure (such as particular hashtags as a clear identification of marketing communications). As with any commercial communication, the influencer's activity must be recognisable as such and whoever places the post, i.e. the online influencer himself, is responsible for breaches of these recommendations. In addition, companies that ask to place advertising posts, networks, agencies, platforms and other parties involved in marketing on social networks can also be held liable for violations.

h) MMS Advertising Multimedia Messaging Service

Traditional mobile phone messaging has also undergone a major transformation as a result of the Internet. In fact, there is a growing phenomenon of messages from companies which, once opened, contain multimedia objects with promotional messages linked to websites, apps, advergames, images, audio and videos.

According to EU law, the sending of unsolicited commercial communications by any electronic means may be undesirable for consumers and information society service providers and may disrupt the smooth functioning of interactive networks; the question of consent by recipients of certain forms of unsolicited commercial communications is addressed by Directive 97/7/EC and by Directive 97/66/EC. In member states which authorise unsolicited commercial communications by electronic mail, the setting up of appropriate industry filtering initiatives should be encouraged and facilitated; in addition it is necessary that in any event unsolicited commercial communities are clearly identifiable as such in order to improve transparency and to facilitate the functioning of such industry initiatives; unsolicited commercial communications by electronic means should not

result in additional communication costs for the recipient.

Member states which allow the sending of unsolicited commercial communications by electronic means without prior consent of the recipient by service providers established in their territory have to ensure that the latter consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.

Article 6 of the European Directive 2000/31/CE provides that member states shall ensure that commercial communications which are part of, or constitute, an information society service comply at least with the following conditions:

- (a) the commercial communication shall be clearly identifiable as such;
- (b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable;
- (c) promotional offers, such as discounts, premiums and gifts, where permitted in the member state where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously;
- (d) promotional competitions or games, where permitted in the member state where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

And in addition to other requirements established by EU law, member states which permit unsolicited commercial communication by electronic means shall ensure that such commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously as such as soon as it is received by the recipient.

Without prejudice to Directive 97/7/EC and Directive 97/66/EC, member states shall take measures to ensure that service providers undertaking unsolicited commercial communications by electronic means consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves (art. 7).

i) QR Code

The QR code is an evolution of the bar code. Its name derives from the English “Quick Response Code” because it has a high reading speed. This

code allows you to easily access information through a mobile device, such as a smartphone. For some years the use of these has grown dramatically and companies have turned to the use of QR codes by printing them on the pages of newspapers, on brochures or on billboards in order to quickly transmit addresses, information content in general and hyperlinks. The company that invented them has granted the public a free license and so anyone can use them as an additional information communication tool. It is a form of communication used by companies and now also by the public administration (think of the green health pass that certifies vaccination against Covid-19) which, at the request of the user, allows the release of various kinds of information, but in the business world, are mostly linked to commercial products, their characteristics and purchasing methods.

This kind of commercial message is not subject to the rules of communication sent by the company by e-mail or other electronic means, because the information message that appears by scanning the QR code is requested directly by the user and does not come from the company in an unsolicited manner.

Likewise, this message shall not be identifiable clearly and unambiguously as such as a commercial or promotional one because it is generated on request by the user.

j) Paid search

This form of advertising exploits the enormous potential of search engines which are indispensable and irreplaceable for Internet users struggling with a huge mass of information from which without the help of search engines it is almost impossible to orient oneself. When an Internet user types something into a search engine, it presents a list of results called SERP (the search engine results page) which shows both relevant results and paid results. Paid search results have a disclaimer that informs it is a result of an advertisement, generally represented with a small green box with the word “ad” before the listing; This happens when a company pays to display their web page at the top of the search engine output list. Paid search works to drive traffic to the company’s website through relevant ads. So, through payment formulas, companies pay search engine owners to list or link their website or domain name to a specific search word or phrase.

For the legal principles already expressed, it is essential that the disclaimer regarding the promotional nature of the information output produced by the search engine be highlighted and differentiated from the results that have not been the subject of a commercial agreement. This is because in the European legal system, the principle is in force according to which the

promotional message, of whatever nature it may be, as well as being clear, truthful and representing the product or service in its entirety and therefore without significant omissions, must also be transparent and clear, therefore always recognisable as such. This is precisely a fundamental point placed to protect the recipient of the information, who must always be aware of the nature of the message, because only in this way does he activate the so-called advertising consciousness, which consists in adopting the necessary precautions to decode the message correctly to avoid excessive suggestibility.

3. Protection of minors

The ease of access to information, the interactivity of the media used by digital communication and their wide engagement of children and adolescents should lead companies and broadcasters of advertising to be particularly vigilant with regard to minors. Therefore, digital advertising communication, in whatever form, must respect the specific rules that protect children and adolescents.

The visual, sound or written content of the advertisement must not harm the physical or moral integrity of children and teenagers.

Particular attention will be paid to:

- not promoting illicit, aggressive, dangerous or anti-social behaviour;
- not devaluing the authority of parents, teachers and other educators;
- not portraying children or adolescents in a degrading manner;
- not presenting minors with images, and/or indecent and/or violent remarks likely to shock;
- not exploiting the inexperience and credulity of children or adolescents.

With regard to sites, portals or other digital media or services intended primarily for children and adolescents, it is particularly important to ensure that the object of the advertising message and its contents are not detrimental to them. Dangerous contents are messages with pornography, obscenity, drugs, alcohol, hate speech and violence.

The prohibitions in place for the protection of minors are justified by scientifically proven evidence that the exposure of minors to violence produces a series of effects of habituation (desensitisation), of imitation (emulation by assumption of aggressive attitudes), production of anxiety (anxiogenic effect

related to the anxiety of identifying with the passive subject of violence).

Drugs and alcohol are scientifically recognised as dangerous substances for the health and development of minors, as is pornography.

In particular, commercial communications must not present minors as protagonists engaged in dangerous situations (of violence, aggression, self-aggression, etc.); must not represent minors intent on consuming alcohol, tobacco or substances, drugs, nor present abstinence or sobriety from alcohol, tobacco in a negative way, or from drugs or, on the contrary, in a positive way the intake of alcohol or spirits, tobacco or drugs.

Also, commercial communications must not urge minors directly, or through other people, to make purchases by abusing their natural credulity and inexperience. With specific regard to the advertising of toys, commercial messages must not mislead minors about the toy's nature, about its performance or about the size of the toy, the degree of knowledge and skill needed to use it, the description of the accessories included or not included in the package, as well as the price, especially when its operation involves the purchase of complementary products.

After all, there is a prohibition of the transmission of commercial communications directly addressed to minors or who, due to their content, may affect the psychic and moral equilibrium of minors, identified as situations that lead the minor in question to believe that the lack of possession of the advertised product signifies their inferiority or indicate their parents' failure to fulfil their duties. Also against the law are situations that violate accepted social norms of behaviour or that discredit the authority, responsibility and judgments of parents, teachers and other authoritative people, situations that exploit the trust that minors place in parents and teachers, situations of ambiguity between good and evil that disorient minors' points of reference and the models to strive for. In the same way are prohibited communications that portray situations that can create emotional dependence on objects, situations of transgression and situations that promote discrimination by sex and race, etc.

For the protection of minors, in the context of the discipline set against and preventing "gambling addiction", in addition to the ban on advertising relating to gaming with cash prizes, it is specified that commercial communications that present even only one of the following elements are banned:

- incitement to play or exaltation of its practice;
- presence of minors.

When the message is aimed at children and encourages them to spend

money (subscribing to a paid service, promotion of a payment rate telephone number) the call to participate must explicitly involve the parents.

Lastly, the collection of personal data and their use can only be carried out in strict compliance with the law and recommendations provided by sector authorities. In particular it is essential: to encourage, in particular on data entry forms, children to ask permission from parents or their legal guardians before providing personal information and not to collect through a child the personal data of a third party. In order to promote the confidence that the public must be able to have in advertising, it is recommended to use targeting information (use of information such as age or date of birth, etc.) in order to prevent children and adolescents from being exposed to advertising content likely to harm them.

4. Respect for the image and the human person

Digital advertising communication must comply with the requirements of decency and respect for the dignity of the human person. So, it cannot shock or offend the sensitivity of the public through representations or situations, direct or suggested, which could be perceived as degrading, demeaning or humiliating for the human person.

Digital advertising communication cannot devalue or portray as inferior a person because of gender, age, sexual orientation, disability or membership of a social group, in particular through the reduction of their role or responsibilities. The use of stereotypes (sexual, racial, religious, social, etc.) must be approached with the greatest sense of social responsibility, and especially, in the light of these principles, of respect for the dignity of the persons concerned.

Lastly, this kind of communication must not condone or trivialise violence, whether it is moral or physical, direct or suggested.

5. The role of algorithms

In recent times, promotional communication by companies relentlessly makes use of algorithms, that is to say computer programming that carries out operations in an automated way in data structures that allow one to customise, based on the profiling of the network user, the information messages.

The algorithm sifts through endless content and ranks higher what it considers “relevant” or “interesting” for the user, rather than simply displaying all posts in random or reverse chronological order.

By default, algorithms used on social media platforms are built to display content to the user in the way that the algorithm itself calculates is most engaging. Specifically, algorithms memorise all the visits that the user of the network has made to various websites by storing through cookies the paths and the time of visit for each web page, classifying the user’s selected preferences and on the basis of these profile and group users. So, in commercial communications and advertising, the social media algorithm picks and chooses the ads it thinks users will be most responsive to, based on ad quality, the way the ad has been set up by its advertiser (such as which demographics it should target), the users’ previous interactions with a similar type of ad and the profile built through cookie navigation tracing.

Algorithms used on social media platforms can see what Facebook or Twitter think the user is interested in at any time he is logged in. Algorithms inform and process what ads users see, as well as other personalised factors like their demographics, career and location and also can process why they are seeing a certain ad, and if they hide the ad or hide all ads generated from an advertiser.

Thus, the choice of which commercial communication to assign to the user is the result of an automated decision of the computer system, which is governed by algorithms, of which only programmers know the underlying logic.

Of course, the presence and role of algorithms is not limited to promotional communication, but now extends to almost every decision-making field, even those of the courtrooms as some projects carried out by judicial offices and universities attest. This shows how the collective’s choices are largely dependent on algorithms. And this strong dependence is the result of a very specific choice: it was decided to rely on machines to increase safety, comfort, well-being and more generally ease of life. However, in doing so, humanity has relied not only on technology itself but above all on those who work behind this technology: those who develop it, sell it and select it for us. These are subjects that pursue their own purpose: government, control and often, when it comes to private companies, simply making or maximising profits.

6. Internet presence: Domain names

Any subject who intends to be part of this new and complex digital context and, all the more so, the economic operator, will have to organise their own visibility on the network and a suitable communication system. Therefore, he must have an address, to be understood as a real domicile, located within this “information aggregation” that is uniquely and certainly referable to him.

By adopting an address as an exclusive point of reference, the economic entity supports the need for its availability and the exclusive traceability of the information content entered in the new digital context.

The name or company name of a legal entity that is carrying out an economic activity is identified with what is called the domain name, that is, the telematic address freely chosen by the Internet user for their availability, traceability and identification on the network.

Through the domain name, it will be possible to establish a communicative contact with anyone who faces the telematic network and interacts with the subject to whom the address refers. These are, basically, given the immaterial nature of the Internet environment, the traditional distinctive signs of companies that aim to make the public aware of them. These disseminate to the place where the subject’s activity is carried out or is located or, more generally, establish among the public, a link between the product and the subject itself. In this new digital context generated by telematic networks, the functions of distinctive marks merge into different expressive forms, also immaterial, which represents them and encloses them all within it. This new expressive form, due to the technical characteristic in which it is made, manages to add up and carry within itself all the functions performed by the traditional distinctive signs.

Thus, the domain name, providing information about the origin of the products or services offered online and not only in the digital environment, represents the virtual place of contact between the entrepreneur and his potential customer, to be understood as the suitable tool to establish a direct link between the two indicated parties.

Naturally, given that the domain name is represented by a denomination, there may be cases of interference or confusion between it and the other denominations recognised and governed by the law. The lawyer’s task will then consist in examining and regulating the hypotheses of overlap between the name and domain and the typical protected names. Therefore, as for any other denomination, anyone wishing to use it as a domain

name must ensure that they do not damage the property or exclusive rights of others.

The entire system of visibility of presences on the Internet is based on what is defined as the Domain Name System. It is the hierarchical and decentralised naming system used to identify computers, services, and other resources reachable through the Internet or other Internet Protocol (IP) networks. The resource records contained in the DNS associate domain names with other forms of information. These are most commonly used to map human-friendly domain names to the numerical IP addresses computers need to locate services and devices using the underlying network protocols, but have been extended over time to perform many other functions as well. The Domain Name System has been an essential component of the functionality of the Internet since 1985.

Technically, the domain name system makes it possible to browse the Internet by linking domain names with numbers which identify computers connected to the Internet. The management of the technical aspects of this service is coordinated by a nonprofit organisation governed by the law of California (United States of America), known as the *Internet Corporation for Assigned Names and Numbers* (ICANN). This organisation is also responsible for managing the root server system and the top-level domains system. The top-level domain (the “TLD”) brings together a group of computers connected to the internet. It appears on the right of any domain name and comprises a full stop and a special code, a full stop and a generic code, for example ‘.com’, ‘.net’ or ‘.org’, or a full stop and a geographical code such as ‘.it’ or ‘.uk’.

On 21 March 2005, the Board of ICANN authorised its president and general meeting to conclude an agreement delegating the management of the ‘.eu’ TLD to the *European Registry for Internet Domains* (‘EURid’), a non-profit organisation governed by Belgian law, designated by the Commission of the European Communities (see Commission Decision 2003/375/EC of 21 May 2003 on the designation of the .eu Top Level Domain Registry).

The Domain Name System reflects the structure of administrative responsibility on the Internet.

Each subdomain is a zone of administrative autonomy delegated to a subject manager. For zones operated by a Registry, administrative information is often complemented by the registry’s *Registration Data Access Protocol* (RDAP) and WHOIS services. The Registration Data Access Protocol (RDAP) is a computer network communications pro-

protocol standardised by a working group at the Internet Engineering Task Force in 2015, after experimental developments and thorough discussions. It is a successor to the WHOIS protocol, used to look up relevant registration data from such Internet resources as domain names, IP addresses, and autonomous system numbers. That data can be used to gain insight on, and track responsibility for, a given host on the Internet.

As mentioned, the hierarchy of domains descends from the right to the left label in the name; each label to the left specifies a subdivision, or subdomain of the domain to the right. For example: the label «digital» specifies a node digital.com as a subdomain of the .com domain, and www is a label to create www.digital.com, a subdomain of digital.com. Each label may contain from 1 to 63 octets. The empty label is reserved for the root node and when fully qualified is expressed as the empty label terminated by a dot. The full domain name may not exceed a total length of 253 ASCII characters in its textual representation. Thus, when using a single character per label, the limit is 127 levels: 127 characters plus 126 dots have a total length of 253.

So, companies can choose from a variety of alphanumeric combinations for their online presence from which to disseminate information.

Because of the value it represents, the European Court of Human Rights has ruled that the exclusive right to a domain name is protected as property under article 1 of Protocol 1 to the European Convention on Human Rights (ECHR 18 September 2007, no. 25379/04, 21688/05, 21722/05, 21770/05, *Paeffgen v. Germany*).

Moreover, in the United States, the “Truth in Domain Names Act” of 2003, in combination with the PROTECT Act of 2003, forbids the use of a misleading domain name with the intention of attracting Internet users into visiting Internet pornography sites.

Domain name disputes are frequent and generally consist in a legal complaint made on the grounds that a domain name (a proprietary string of language that is registered and recognised by the Domain Name System) has been inappropriately and illegitimately used or assigned. Domain names are typically legitimised by jurisprudence of the courts on the basis of trademark law, which frames the manner in which domain name disputes are generally validated and resolved. The principles or criteria to be followed to resolve disputes are:

- (i) the domain name must be identical or confusingly similar to a trademark owned by the litigant;
- (ii) the assignee of the domain name has no rights or le-

- gitimate interests in respect of the domain name in question;
- (iii) the domain name has been registered and is being used in bad faith.

There is no special legislation to deal with domain name policing and legal grounds for filing complaints (or activate legal actions): these depend on trade mark registrations and trade mark laws in the specific countries, but it is significant or essential to ensure that the distinctive part of the domain name is registered as a trademark.

Moreover, to facilitate operators and try to give a regulation based on uniform principles, ICANN has issued a series of principles to guide the interpreter in the resolution of conflicts concerning domain names. See the Uniform Domain Name Dispute Resolution Policy (<https://www.icann.org/resources/pages/help/dndr/udrp-en>).

There is also a different kind of domain dispute called cybersquatting which is widespread. It is a process whereby individuals register domain names displaying the name of an existing company or a famous trademark among other elements, with the singular intention of selling these back to that company when said company sets up its own website. There are different kinds of cybersquatting. The most usual is “typosquatting” where a digital vagrant registers domain names containing a small orthographic variation of mainstream trademarks.

7. On-line databases

In the meaning of European Union Directive 96/9/EC on the legal protection of databases, the term database refers to a collection of independent works, data or other materials, which have been arranged in a systematic or methodical way and have been made individually accessible by electronic or other means. So, databases are both electronic and non-electronic (paper), as well as both static and dynamic databases.

In the meaning of the Directive the data or materials:

- must not be linked, or must be capable of separation without losing their informative content;
- must be organised according to specific criteria, which means that only planned collections are covered;
- must be individually accessible – mere storage of data is not covered by the term database.

In other words, a database is a collection of data which is arranged in systematic order. The items in a database must be independent elements, that means it has to be possible to retrieve each item of information (the data) independently from other items of data, without the significance of the item being affected. A database therefore needs to be searchable using one or more tools, such as an index or an electronic search function.

A database can be protected by copyright as a literary work, or by a *sui generis* database right; copyright protection applies to databases that are creative and original in the selection and or arrangement of the contents and constitute their authors' own intellectual creation. In this regard there are also the rules of international law – the Berne Convention, the WTO/TRIPs Agreement and the WIPO Copyright Treaty (WCT), original and creative databases enjoy copyright protection as literary works.

But with Directive 96/9/EC on the legal protection of databases the European legislature created a specific property right for databases, that is unrelated to other forms of protection such as copyright. This new form of *sui generis* protection applies to those databases, which are not original in the sense of an author's own intellectual creation (non-original or non-creative databases), but which involved a substantial investment in their making.

Both rights only apply to the arrangement of data – neither database copyright nor the *sui generis* right creates an additional protection for the individual elements of the database.

The *sui generis* protection of databases applies if a substantial investment was made in obtaining, verifying and presenting its contents. A substantial investment is to be understood as a financial or professional investment, which may consist in the deployment of financial resources and the expending of time, effort and energy made in obtaining and collecting the contents.

The collection of data should be contained in a fixed base, which includes technical means – electronic, electromagnetic or electro-optical processes or other means – index, table of contents, plan or method of classification, to allow the retrieval of any independent material contained therein.

The term of protection of the *sui generis* right is 15 years following the database's completion. However, if the database is published during this time, the 15-year term will start running from the publication date.

The *sui generis* right grants its holder two categories of rights:

1. the right to prevent the extraction of either all or a substantial part of the database. The term extraction refers to the permanent or temporary transfer of the whole or a substantial part of the contents of the database to another medium, by any electronic means or

- in any form. It implies that some degree of choice or individual appreciation of the content to be extracted is made;
2. the right to prevent the re-utilisation of all or a substantial part of the database. The term re-utilisation refers to any form of making available to the public the whole or a substantial part of the contents of the database by distributing or renting copies, through on-line or other forms of transmission.

The expression substantial part of the contents refers to a part that could be substantial in quantitative or qualitative terms – therefore a part may be considered substantial even if it is quantitatively small.

The *sui generis* right protects, as an intangible asset, the results of the financial and professional investment carried out towards the methodical and systematic classification of independent data. This right is not a right over the information stored in the database and does not constitute an extension of the copyright protection which may apply to the contents of the database.

In this respect, it is apparent, particularly from recitals 40 and 41 of Directive 96/9, that the purpose of the *sui generis* right is to ensure the protection of a substantial investment in the obtaining, verification or presentation of the contents of a database for the limited duration of the right by granting the maker of a database the possibility of preventing the unauthorised extraction and/or re-utilisation of the whole or a substantial part of the contents of the database.

The EU Court of Justice has stated that the purpose of the right provided for in Article 7 of Directive 96/9 is to ensure that the person who has taken the initiative and assumed the risk of making a substantial investment in terms of human, technical and/or financial resources in the setting up and operation of a database receive a return on his or her investment by protecting him or her against the unauthorised appropriation of the results of that investment (judgment of 19 December 2013, *Innoweb*, C202/12, paragraph 36 and the case-law cited).

The concept of an investment in the verification of the contents of a database must be understood to refer to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation (judgment of 9 November 2004, *The British Horseracing Board and Others*, C203/02, EU:C:2004:695, paragraph 34). Lastly, investment in the presentation of the contents of the database includes the means of giving that database its function of

processing information, that is to say those used for the systematic or methodical arrangement of the materials contained in that database and the organisation of their individual accessibility (judgments of 9 November 2004, *Fixtures Marketing*, C338/02).

It is of interest to note that in recitals 39, 42 and 48 of Directive 96/9, the objective pursued by the EU legislature through the introduction of a *sui generis* right is therefore to stimulate the establishment of data storage and processing systems which contribute to the development of an information market against a background of exponential growth in the amount of information generated and processed annually in all sectors of activity (judgment of 19 December 2013, *Innoweb*, C202/12, paragraph 35 and the case-law cited).

Regarding the on-line databases available to the public, its contents can be automatically extracted and re-used by a specific search engine that operates for a third party. So, the content of a web page may be parsed, searched, reformatted, its data copied and loaded into a different database owned by a third party. This technique is named web scraping, or the process of automatically mining data or collecting information or data from the web to make use of this information or data for another purpose somewhere else.

It is of interest to verify the compatibility of this operation with the provisions protecting the *sui generis* right set out in Article 7 of Directive 96/9, whether Article 7 (1) or (2). This must be interpreted as meaning that an Internet search engine specialising in searching the contents of databases, which copies and indexes the whole or a substantial part of a database freely accessible on the Internet and then allows its users to search that database on its own website according to criteria relevant to its content, is 'extracting' and 're-utilising' the content of that database within the meaning of that provision, and that the maker of such a database is entitled to prohibit such extraction or re-utilisation of that same database.

The EU Court of Justice ruled (judgement of 3 June, 2021, C-762/19, *CV-Online Latvia SIA v. Melons*) on the legal protection of databases in a case in which an Internet search engine specialising in searching the contents of databases that copied and indexed the whole or a substantial part of a database freely accessible on the Internet. This technical mode allows the users to search that database on its own website according to criteria relevant to its content. And according to the EU Court extracting and re-utilising that content may be prohibited by the maker of such a database where those acts adversely affect its investment in the obtaining,

verification or presentation of that content, namely that this conduct constitutes a risk to the possibility of redeeming that investment through the normal operation of the database in question, which it is for the referring court to verify.

8. Social Media Platforms

The Internet offers anyone the opportunity to participate in the creation and sharing of digital content. Each subject is at the same time user and producer of information content, thus adding dissimilar characteristics to himself. And precisely this inequality of functions with coincidence of roles in a single subject produces the transformation of the Internet and its exponential success. In this structural metamorphosis, it can be said that users do not just want to use the web, but make it; we are no longer satisfied with reading web pages, now users want to write them.

The users, however, carry out this construction within perimeters already defined in advance by the major Internet operators, who make available their platforms capable of hosting and containing the heterogeneous information messages entered by the users themselves. Within these boundaries, the Internet continuously thickens with information content due to the active presence of users, who, by adhering to the terms of service prepared by the major players on the network, can perform the desired activities. Ultimately, in order to operate within these social platforms or to be able to participate in the entry (or use) of audiovisual content, or to use the heterogeneous services made available to them substantially free of charge, they must comply with the terms and the pre-established procedures that regulate these activities.

It can therefore be said that the Internet grows and transforms itself under the aegis and formal control of the its big operators, who are able to direct and supervise the heterogeneous flow of information through the preparation of rules and terms of use of the services offered. Hence the enormous relevance of these agreements to which each Internet user, who makes use of the most popular information services, must comply.

9. The terms of use of platform services

The large network operators adopt models of terms of use for the services

offered which contain general clauses that are substantially similar to each other and which differ only in the nature of the service used. First of all, as a general condition for everyone, the user, in order to use the services offered, must accept the terms of use and that this acceptance is offered simply by using the service in question, without the need for further obligations.

We proceeded to examine the terms of use of the three most used services on the Internet, namely: the search engine, the social network site and video platforms.

a) Terms of use of search engines

With regard to the first model of terms of use, the largest search engine includes in the notion of service not only what pertains to searching for information content on the net, but also all other ancillary services, such as, for example, the ability to archive and retrieve documents, photos, instant translators, e-mails, road maps and news.

The search engine grants the user a non-exclusive license, without territorial restrictions and with access to the use of software products free of charge and included with the services provided.

From the user's perspective, the search engine operator grants a free, without expiration, irrevocable, territorially unlimited and non-exclusive license to reproduce, adapt, modify, publish, perform in public, display in public and distribute any information content transmitted, sent or viewed by the user through the services offered. This license granted by the user also includes the right for the search engine operator to assign, transfer to third parties or modify the information content.

It is also indicated that no guarantee is provided by the service provider in favour of the user. The services, as regards the profile of responsibility, are provided "as is", that is, in the state of fact and law in which they are found at the time of their use with express warning that the use of the services may not meet the needs of the user, that the same services may suffer interruptions and that it is not certain that they are free from errors or that they are safe, nor that the information acquired through the use of the services is correct or reliable.

There are express limitations of liability for any loss of profit the user may suffer by relying on the completeness, accuracy of the service, its continuity or the outcome of a contract between the user and an advertiser; in the same way, the loss of data or the deletion of the user's information content does not lead to hypotheses of liability for the service manager. Jurisdiction and applicable law are of the user's residence - if he is a European citizen or resides there - he can file legal disputes before local courts.

b) Terms of use of social network services

In the terms of use of the major social network platforms it is stated that the user, as regards the information content protected by copyright, grants the platform's owner a non-exclusive, transferable, free of charge, unlimited use license, without territorial boundaries. We read that this license may terminate when the user deletes the protected information content from the social network, unless such content has been shared with third parties and always on the assumption that they have in turn deleted them. However, it is noted that it is possible that the removed contents will be kept by the platform owner as backup copies.

There are a number of activity restrictions for the user, who, for example, cannot take actions contrary to the law, multilevel marketing initiatives, inoculate viruses, denigrate, intimidate or harass other users, publish pornographic, hateful or overly violent content or sensitive financial information.

To protect the rights of third parties, the platform manager has the right to remove all content posted on the social network site, in the event that the user is deemed to have violated one of the rules of conduct imposed on him, as they can in case of violation of intellectual property rights that may also lead to disabling access.

Also, for this service, the user agrees to use it "as is", without any express or implied guarantee, not even on safety; the platform owner, as stated, cannot be held responsible in any way for the actions, content, information or data of third parties. The jurisdiction and applicable law are of the user's residence - if he is a European citizen or there resides - he can file legal disputes before local courts.

c) Terms of use for audiovisual social media

Under the terms of use of video platforms examined, the user has various limitations hereinafter indicated. Users may not:

- access, reproduce, download, distribute, transmit, broadcast, display, sell, license, alter, modify or otherwise use any part of the service or any content except: (a) as specifically permitted by the platform owner; (b) with prior written permission from the platform owner and, if applicable, the respective rights holders; or (c) as permitted by applicable law;
- circumvent, disable, fraudulently engage, or otherwise interfere with the service (or attempt to do any of these things), including security-related features or features that: (a) prevent or restrict the

- copying or other use of content; or (b) limit the use of the service or content;
- access the service using any automated means (such as robots, botnets or scrapers) except as permitted by applicable law;
 - collect or use any information that might identify a person (for example, harvesting usernames or faces), unless permitted by that person;
 - use the service to distribute unsolicited promotional or commercial content or other unwanted or mass solicitations (spam);
 - cause or encourage any inaccurate measurements of genuine user engagement with the service, including by paying people or providing them with incentives to increase a video's views, likes, or dislikes, or to increase a channel's subscribers or otherwise manipulate metrics;
 - misuse any reporting, flagging, complaint, dispute or appeals process, including by making groundless, vexatious or frivolous submissions;
 - run contests on or through the service that do not comply with the platform's owner contest policies and guidelines;
 - use the service to view or listen to content other than for personal, non-commercial use (for example, you may not publicly screen videos or stream music from the service); or use the service to: (a) sell any advertising, sponsorships, or promotions placed on, around, or within the service or content, other than those allowed in the policies on advertising (such as compliant product placements); or (b) sell advertising, sponsorships, or promotions on any page of any website or application that only contains content from the service or where content from the service is the primary basis for such sales.

The terms of use establish that the user is responsible for any violation of the aforementioned rules of conduct. The video contributions that come from the user are licensed in favour of the platform owner and all other users.

Furthermore, except for specific authorisation, the user is prohibited from uploading or publishing information contributions subject to the property rights of third parties or harmful to the privacy of others.

With reference to liability, the user is the only person responsible for the video contributions entered, as well as for the consequences deriving from their publication, the platform owner being excluded from any

prejudicial consequence. The latter reserves the right to assess whether the information content published by users complies with the directives of the terms of use and, in case of violation of the same, can remove such content or disable access to the user.

The services are provided “as is”, without any guarantee or obligation on the part of the supplier. There is a clarification that the service may not meet or satisfy the user’s needs, and may not be continuous, safe, reliable and free from errors or malfunctions.

The platform owner, according to the terms of use, cannot be held responsible towards the user for any economic loss, also deriving from presumptions of reliability and completeness of the service, from interruptions of the same, from cancellation or failure to memorise any information content of the user. Finally, it is stated that the limitations of liability borne by the platform owner also operate in the event that the user has been advised of the possible economic loss.

Furthermore, by publishing the information content, the user agrees to be exposed to inaccurate, offensive or indecent comments but, at the same time, renounces to assert their rights against the service provider.

Also, for this service, the user grants the platform owner and any other user of the service a worldwide, non-exclusive, free, transferable license to use, reproduce, display, distribute the information content entered and to create derivative works. This license ends when the user decides to remove or delete the published video, while the license that the user grants to the platform owner for comments on the published video, we read, is eternal and irrevocable, unless such comments are harmful to the rights of the user.

The relationship with the platform owner is governed by the laws of the user’s country of residence, and legal proceedings may be filed before those local courts.

10. Legal qualification of user licenses

The phenomenon of typical web 2.0 services highlights how the traditional contractual categories elaborated and constructed with meticulous spirit of classification by the continental civil law doctrine throughout the last two centuries proved to be inadequate. But these models of user licenses reflect further ideas that transcend the still important theory of the contract and direct the analysis from the micro-economic to the macro-economic level where the innovative market structures affect exactly the relationship between rule of law (the law) and contract law (the contract).

The conceptual category of the license to use an intangible asset, although very widespread in commercial practice, is still the subject of conflicting opinions regarding its juridical qualification and its relative systematic collocation, and it struggles to find a peaceful hermeneutic reconstruction, also due to the multiplicity of forms with which it occurs in economic and social practice.

The evolution of the heterogeneous forms and models adopted by the practice seems to no longer allow doubts in considering these licenses as atypical contracts, not corresponding to any figure within the legal system that can assign a specific discipline. From this perspective, the use license would be placed in the magmatic and extensive area of unnamed contracts, the result of the contractual autonomy of the parties.

The absence for the user of an explicit fee for the fruition of services means that no synallagm characterised by the *do ut des* scheme is recognisable under civil law and neither is a set of promises that underpins the contract in common law. With regard to this aspect, one wonders whether the negotiation model that grants the user the provision of heterogeneous services still qualifies as a license whose causal scheme seems to necessarily provide counter-performances between the parties. In other words, the central point is to ascertain how to legally define this negotiating figure.

Simply speaking, beyond many dogmatic theses, we are faced with an atypically gratuitous contract, as it brings a mere advantage or interest to one of the parties and there is no impoverishment of the subject who disposes of the right as happens instead for example in the case of donations. The parties can, within their contractual autonomy, enter into atypical contracts free of charge, always maintaining the principle according to which the legal system must afford protection to the interests that are compatible with the law.

Having ascertained that we are in the presence of an objective impossibility to subsume this license into any typical free of charge contract regulated by the law, for this atypical contract, the investigation must then necessarily move within the category of free atypical conventions.

In this conception, in atypical free-of-charge contracts, interests are to be considered worthy of protection when they are of a patrimonial nature: in other words, the contractual transaction put in place in the absence of consideration must always have an internal patrimonial interest referred to the settlor who bears the sacrifice; and the interest established in the negotiating regulation connotes the consideration and finally characterises the title with which the transfer is carried out. Therefore, it is necessary that

the sacrifice act carried out by the settlor must find its causal justification on the level of its patrimonial interest, that is, in other words, that this operation will bring him an advantage, appreciable in economic terms.

In the absence of the decisive and effective patrimonial interest of the settlor, the simple and unilateral attribution of patrimonial rights in favour of a third party cannot in any case arise as a legal consideration of the agreement, as it does not allow to identify its purpose and establish, consequently, its socio-economic relevance and, ultimately, lawfulness. So, a contract by which a good or a service is transferred to others, without specifying or justifying the title of such transfer, cannot therefore be assumed to be an atypical contract and therefore remains a void act for lack of consideration.

This is because even atypical free of charge contracts cannot be without consideration, that is, of their own acclaimed economic-social function and the stipulation of the contract by which someone transfers a good to others or provides a service must also offer in the negotiating context a reference to the patrimonial interest pursued. Moreover, the legal and economic conception of market rejects acts of donation, or more generally, any free of charge acts intended to procure an advantage without counter-performance.

So, even in atypical free of charge contracts there is an economic interest on the basis of which the settlor performs the service; this interest is represented by a sort of patrimonial advantage that derives from the contract not as a possible or accidental factor, but which must be present as a constant element, to which the structure of the relationship is functionalised. The advantage, however, reflects the existence of a balance of interests implemented through the particular economic operation carried out and denotes the presence of a suitable cause in the negotiating scheme.

It is not difficult to identify the financial interest or economic advantage that the service provider achieves in releasing to third parties, in the absence of a fee or visible payment, the large faculties of use. The circumstances in which these subjects offer these particular services to the public have allowed their growth into global giants with enormous patrimonial capacities, making it unnecessary to dwell on this aspect.

11. Does consumer law apply?

The task is to ascertain whether the relationship between the on-line service provider and the user can be qualified as between a professional and a consumer. Can anyone who stably prepares and distributes a service without asking any payment be qualified professional? As the service is

provided without any fee one could conclude that consumer law does not apply because the professional is not in a position of supremacy? Assuming consumer law tends to fill the gap that characterises the contractual relationships between professionals and consumers within a constant mechanism of correspondence among the services and payments (that also justifies the particular protection for the consumer), the lack of a *do ut des* scheme, makes it difficult to motivate such protection.

However, the product definition contained in the European legislation about consumer law protection includes any product intended for the consumer, even in the context of a provision of services supplied or made available for payment or free of charge in the context of a commercial activity.

What is decisive, therefore, for the law is not the element of the payment or price, but the context in which the good or service is provided to the consumer and, if this area is of a commercial nature, i.e. aimed at achieving an economic result, even if mediated or achieved indirectly, this characterises the entire relationship and qualifies it as a professional-consumer relationship. So, if the clauses contained in the terms of use of this kind of license are unbalanced to the detriment of the consumer, they are void, as they are not subject to an individual negotiation through which the latter has approved or accepted the content. Therefore, specifically, the clauses that exclude or limit the liability of the professional in the event of damage to the user resulting from a fact or omission of the professional are void; in the same way clauses that exclude the user's actions against the professional in the event of total or partial non-fulfilment or incorrect fulfilment by the professional in providing the service; also, the clauses that impose the legislation and jurisdiction of a non-EU country that have the effect of depriving the user of consumer regulatory protection are to be understood as vexatious.

In the event that the user of these services makes use of these services for purposes related to his economic activity, the consumer law can no longer be applied.

12. The internet service providers' contractual liability

Since we face a negotiation scheme which does not imply any economic burden on the user, can the contractual liability of the licensor for the events related to the use of the services be considered weakened and, therefore, be assessed with less rigor?

Let's imagine that the service provided causes a malfunction of the

user's computer system, or a loss of data, or contains a virus capable of altering the regular functionality of the entire computer system or causing damages to third parties.

Overcoming the clauses of exemption from liability ("as is" clauses), the damages suffered by the user must still be compensated but the liability deriving from services performed without payment of a fee is assessed with less rigor.

In fact, the user who bears the payment of a fee to obtain a service, has a well-founded and legitimate expectation that this service has all the claimed characteristics and, therefore, any deviation from its regular efficiency would not be considered tolerable.

Today, with these new licensing models, precisely as a result of the absence of a direct economic contribution of the user to obtain services, such a case would result in a mitigation of the forms of contractual liability as conceived in the usual licenses with payment. In fact, considering the two different hypotheses described, the same economic conditions that characterise the two negotiating structures would not exist in order to request the same standard of diligence (or duty of care) from the grantor.

Therefore, there is a justified probability not only that the service does not have all the functional characteristics, but also, in theory, that such discrepancies may also cause damages.

So, the user should raise his level of attention in the use of these services and, at the same time, to lower his claims with regard to their exact functionality. This is because the user does not seem to have a right to obtain a perfect and complete functionality of the service.

However, this does not mean that, in these cases, the grantor cannot incur any form of responsibility towards the user. The user, in fact, will always place reasonable reliance on the actual capabilities of the service and any defect of the latter causing damage should go beyond the forecasts made; and the damage, which affects a legal patrimonial situation, should be compensated. Excluded are hypotheses in which the provider granting the service did not act in good faith and has deliberately produced the harmful result with wilful intent.

13. The internet service providers' extra-contractual liability

The E-Commerce Directive (2000/31/EC) introduced rules on the liability of information society service providers. Articles 12, 13 and 14 E-Commerce Directive distinguish three types of intermediary activities:

- mere conduit: transmission over a communication network of information provided by the recipient of the service, or access to a communication network (Article 12);
- caching: automatic, intermediate and temporary storage of information transmitted via the communication network, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request (Article 13);
- hosting: storage of information provided by a recipient of the service (Article 14).
- Information society service providers carrying out one of these activities are exempted from liability under a number of conditions:
- providers of mere conduit services (Article 12): do not initiate the transmission; do not select the receiver of it; do not select or modify its content;
- providers of caching services (Article 13): do not modify the information; comply with conditions on the access to the information; do not interfere with the lawful use of the technology; expeditiously remove or disable the access to the stored information upon obtaining actual knowledge that the information at the initial source has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement;
- providers of hosting services (Article 14): do not have actual knowledge of illegal activity or information; upon obtaining such knowledge, act expeditiously to remove or to disable the access to the information (also, recital 46 E-Commerce Directive).

Recital 42 E-Commerce Directive states that the exemptions only cover cases in which the intermediaries carry out activities that are passive in nature. Furthermore, those activities are limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient.

The fact that intermediaries can be exempted from liability does not affect the possibility of injunctions of different kinds (recital 45 E-Commerce Directive).

Finally, Article 15 E-Commerce Directive expressly forbids member states from imposing on the providers of such services a general obligation to monitor the information transmitted, or a general obligation to actively

seek facts or circumstances indicating illegal activity. As specified in recital 47 E-Commerce Directive, this prohibition does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

In particular, according to recital 48 E-Commerce Directive, it will not affect either the possibility for member states to apply duties of care that can be reasonably expected from service providers in order to detect and prevent certain types of illegal activities.

Article 8 (3) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (also called the “Information Society Directive”) provides that rights holders should have the possibility of applying for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

In the same sense, Article 11 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (also called the “Enforcement Directive”) provides that, without prejudice to Article 8 Information Society Directive, rights holders are in a position to apply for injunctions against intermediaries whose services are used to infringe intellectual property rights.

In addition to these rules, we have to consider also the newly adopted Directive (EU) 2019/790 on Copyright in the Digital Single Market. According to its Article 17, online content sharing service providers can be considered as performing an act of communication to the public or an act of making information available. They should therefore obtain authorisation from rights holders for giving the public access to copyright protected works or other protected subject matter uploaded by their users. The liability exemption of Article 14 E-Commerce Directive will not apply to online content sharing service providers.

14. European case-law

There are numerous jurisprudential rulings in the European context regarding cases of assessment of the provider’s liability for unlawful acts committed by users. The cases concern offenses for the violation of intellectual property rights, violation of privacy and the protection of personal data, defamation, fraud and child pornography.

Member State courts have referred to the provisions of different EU instruments and to national law to determine the scope of the obligations

and liability of intermediaries. Through a brief case-law collection, it is possible to offer an overview of the different criteria and the legal reasoning applied by courts in the European Union, and of the main conclusions or outcomes of selected cases.

The European Court of Justice has given guidance on the criteria for liability in cases of intellectual property rights online infringements, as well as trademark rights. The European Court of Justice also shed light on the notion of the intermediary. It clarified the conditions for exemptions from liability and the scope of the obligations of different types of intermediaries for third-party infringements under the Electronic Commerce Directive (Directive EC 2000/31), the Enforcement Directive (Directive EC 2004/48) and the Information Society Directive (Directive EC 2001/29). In addition, the European Court of Justice has clarified if and under what circumstances different types of intermediaries, and other parties, can be considered to have made a communication to the public in the sense of Article 3 of the Information Society Directive.

The most relevant decisions discuss whether, and under what conditions, the operators of a platform or other service providers, could be considered as infringing third party rights, or be otherwise liable and whether a platform has an active role in the intellectual property rights infringement.

Below are some significant rulings of the EU Court of Justice divided by topics:

a) Trade mark infringements committed by users

In the eBay case (*L'Oréal and Others v. eBay*, C-324/09, 12 July 2011), the EU Court provided clarification on the liability of companies operating internet marketplaces for trademark infringements committed by users.

eBay operates a global electronic marketplace on the Internet, where individuals and businesses can buy and sell a broad variety of goods and services. L'Oréal is the owner of a wide range of well-known trademarks. Its products (especially cosmetics and perfumes) are distributed through a closed distribution network, in which authorised distributors are restrained from supplying products to other distributors. L'Oréal complained that eBay was involved in trademark infringements committed by users of its website. Moreover, it claims that, by purchasing from paid internet referencing services (such as Google's AdWords) keywords corresponding to L'Oréal trademarks, eBay directed its users towards goods that infringe trademark law, which were offered for sale on its website.

The EU Court held that the operator of an internet marketplace does not itself 'use' trademarks within the meaning of the EU legislation if it

provides a service consisting merely in enabling its customers to display on its website, in the course of their commercial activities, signs corresponding to trademarks.

The Court also specifically mentioned certain matters concerning the liability of the operator of an online marketplace. Whilst making clear that it is for the national courts to carry out the assessment concerned, the Court considered that the operator plays an active role of such a kind as to give it knowledge of, or control over, the data relating to the offers for sale, when it provides assistance which entails, in particular, optimising the presentation of the online offers for sale or promoting those offers.

When the operator has played an ‘active role’ of that kind, it cannot rely on the exemption from liability which EU law confers, under certain conditions, on online service providers such as operators of internet marketplaces.

Moreover, even in cases in which the operator has not played an active role of that kind, it cannot rely on that exemption from liability if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the online offers for sale were unlawful and, in the event of it being so aware, failed to act promptly to remove the data concerned from its website or to disable access to them.

The Court held that EU law requires Member States to ensure that the national courts with jurisdiction in relation to the protection of intellectual property rights are able to order the operator to take measures which contribute, not only to bringing to an end any infringement of those rights by the users, but also to preventing further infringements of that kind. Those injunctions must be effective, proportionate and dissuasive and must not create barriers to legitimate trade.

b) The use, in an internet referencing service, of keywords corresponding to other persons’ trademarks

Google operates an internet search engine. When an internet user performs a search on the basis of one or more key words, the search engine will display the sites which appear best to correspond to those key words, in decreasing order of relevance. These are referred to as the ‘natural’ results of the search. In addition, Google offers a paid referencing service called “AdWords”. That service enables any economic operator, by means of the reservation of one or more keywords, to obtain the placing – in the event of a correspondence between one or more of those words and that/those entered as a request in the search engine by an internet user – of an advertising link to its site, accompanied by a commercial message. That advertising link appears under the heading ‘sponsored links’, which

is displayed either on the right-hand side of the screen, to the right of the natural results, or on the upper part of the screen, above those results.

Vuitton, which is the proprietor of the Community trade mark 'Vuitton' and of the French national trademarks "Louis Vuitton" and "LV", Viaticum, which is the proprietor of the French trademarks "Bourse des Vols", "Bourse des Voyages" and "BDV", and Mr Thonet, the proprietor of the French trade mark "Eurochallenges", became aware that the entry, by internet users, of terms constituting those trademarks into Google's search engine triggered the display, under the heading "sponsored links", of links to sites offering imitation versions of Vuitton's products and to sites of competitors of Viaticum and of the Centre national de recherche en relations humaines respectively.

They therefore brought separate sets of proceedings against Google for declarations that it had infringed their trademarks. The *Cour de Cassation* (French Court of Cassation), ruling as a court of final instance in the set of proceedings which the trademark proprietors brought against Google, referred questions to the Court of Justice on whether it is lawful to use, as keywords in the context of an internet referencing service, signs which correspond to trademarks, where consent has not been given by the proprietors of those trademarks.

With regard to the question of whether an internet referencing service, such as "AdWords", is an information society service consisting in the storage of information supplied by advertisers and whether, on those grounds, the liability of the referencing service provider may be limited, the EU Court ruled that it is for the referring court to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge of, or control over, the data which it stores. If it proves to be the case that it has not played an active role, that service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned.

c) On the service provider's duty to install a filtering system with a view to preventing the illegal downloading of files.

Scarlet (an Internet service provider) appealed to the Cour d'appel de Bruxelles (Brussels Court of Appeal), claiming that the injunction failed to comply with EU law because it imposed on Scarlet, *de facto*, a general obligation to monitor communications on its network, something which

was incompatible with the Directive on electronic commerce and with fundamental rights. In that context, the *Cour d'appel* asked the EU Court of Justice whether EU law permits member states to authorise a national court to order an internet service provider to install, on a general basis, as a preventive measure, exclusively at its expense and for an unlimited period, a system for filtering all electronic communications in order to identify illegal file downloads.

In its judgment [case C-70/10 issued 24 November 2011, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*], Court noted that the injunction requiring the installation of a filtering system involves monitoring, in the interests of copyright holders, all electronic communications made through the network of the internet service provider concerned. That monitoring, moreover, is not limited in time. Such an injunction would thus result in a serious infringement of Scarlet's freedom to conduct its business as it would require Scarlet to install a complicated, costly, permanent computer system at its own expense. What is more, the effects of the injunction would not be limited to Scarlet, as the filtering system would also be liable to infringe the fundamental rights of its customers, namely their right to protection of their personal data and their right to receive or impart information, which are rights safeguarded by the Charter of Fundamental Rights of the EU.

It is common ground, first, that the injunction would involve a systematic analysis of all content and the collection and identification of users' IP addresses from which unlawful content on the network is sent. Those addresses are protected personal data. Secondly, the injunction could potentially undermine freedom of information since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications.

Consequently, the EU Court found that, in adopting the injunction requiring Scarlet to install such a filtering system, the national court would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the right to receive or impart information on the other.

Accordingly, the EU Court's reply is that EU law precludes an injunction made against an internet service provider requiring it to install a system for filtering all electronic communications passing via its services which applies indiscriminately to all its customers, as a preventive measure, exclusively at its expense, and for an unlimited period.

The same conclusion was come to in the case C-360/10 (*Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM) v. Netlog NV*), 16 February 2012. Here the EU Court established that the owner of an online social network cannot be obliged to install a general filtering system, covering all its users, in order to prevent the unlawful use of musical and audio-visual work. The EU ruling says that in adopting an injunction requiring the hosting service provider to install such a filtering system, the national court would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.

This is because the injunction would involve the identification, systematic analysis and processing of information connected with the profiles created on the social network, with that information being protected personal data because, in principle, it allows those users to be identified. Second, that injunction could potentially undermine freedom of information, since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications.

More precisely, with regard, to the Internet service provider's freedom to conduct a business, the EU Court (*case C-314/12, 27 March 2014, UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*) considers that that injunction does not seem to infringe the very substance of that right, given that, first, it leaves its addressee to determine the specific measures to be taken in order to achieve the result sought, with the outcome that he can choose to put in place measures which are best adapted to the resources and abilities available to him and which are compatible with the other obligations and challenges which he will encounter in the exercise of his activity, and that, secondly, it allows him to avoid liability by proving that he has taken all reasonable measures.

The EU Court therefore holds that the fundamental rights concerned do not preclude such an injunction, on two conditions: (i) that the measures taken by the Internet Service Provider do not unnecessarily deprive users of the possibility of lawfully accessing the information available and (ii) that those measures have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging users from accessing the subject-matter that has been made available to them in breach of the intellectual property right.

The EU Court states that internet users and also, indeed, the Internet provider must be able to assert their rights before the court. It is a matter for the national authorities and courts to check whether those conditions are satisfied.

d) Offering free wi-fi to the public and liability for copyright infringements

The owner of a commercial activity offers access to the public to his Wi-Fi network free of charge and without a password or any kind of protection to his clients. In this context, a musical work was unlawfully offered for download via that Internet connection. The German court before which the proceedings between the owner of copyright rights and the owner of a commercial activity were brought, takes the view that the latter was not the actual party who infringed the copyright, but is minded to reach a finding of indirect liability on the grounds that his Wi-Fi network had not been made secure.

The EU Court held (*C-484/14, Mc Fadden v. Sony Music Entertainment Germany GmbH*, 15 September 2016) that making a Wi-Fi network available to the general public free of charge in order to draw the attention of potential customers to the goods and services of a shop constitutes an information society service under the Directive 31/2000/CE. The Directive exempts intermediate providers of mere conduit services from liability for unlawful acts committed by a third party with respect to the information transmitted. That exemption of liability takes effect provided that three cumulative conditions are satisfied: (i) the provider of the mere conduit service must not have initiated the transmission; (ii) it must not have selected the recipient of the transmission; and (iii) it must neither have selected nor modified the information contained in the transmission.

The EU Court confirmed that, where the above three conditions are satisfied, a service provider such as the owner of the commercial activity, who provides access to a communication network, may not be held liable. Consequently, the copyright holder is not entitled to claim compensation on the grounds that the network was used by third parties to infringe its rights. Since such a claim cannot be successful, the copyright holder is also precluded from claiming the reimbursement of the costs of giving formal notice or court costs incurred in relation to that claim. However, the directive does not preclude the copyright holder from seeking before a national authority or court to have such a service provider ordered to end or prevent any infringement of copyright committed by its customers.

Lastly, the EU Court held that an injunction ordering the internet

connection to be secured by means of a password is capable of ensuring a balance between, on the one hand, the intellectual property rights of rightsholders and, on the other hand, the freedom to conduct a business of access providers and the freedom of information of the network users. The EU Court also notes, in particular, that such a measure is capable of deterring network users from infringing intellectual property rights.

e) Downloading and reposting a photograph taken from someone else's website

The practice of using a photograph downloaded from a web site owned by third parties infringes copyright rights; in this case (*C-161/17 — Land Nordrhein-Westfalen v. Dirk Renckhoff*, 8 august 2018), a photographer authorised the operators of an online travel portal to publish one of his photographs on their website showing some scenery of a Spanish city. A German student downloaded that photograph, which was freely accessible on said website, and used it in a school presentation. This presentation was later available on the website of his school and the photographer claimed that he only gave a right of use to the operators of the travel website, and that the posting of the photograph infringed his copyright rights.

The EU Court specified that the concept of communication to the public includes two cumulative criteria, namely an act of communication of a work and the communication to the public. The posting on one website of a photograph previously posted on another website, after it has been previously copied onto a private server, must be considered as making available and therefore as an act of communication. The posting of a work protected by copyright on a website other than that on which it was initially communicated with the consent of the rights holder must be regarded as making it available to a new public. A rights holder who authorises the upload to the original website only has in mind the internet users visiting that website. The fact that the rights holder did not restrict access to the work is irrelevant since the enjoyment and exercise of the right is not subject to any formality.

The EU Court clearly distinguishes re-posting from the use of hyperlinks (see judgement C-466/12, 13 February 2014, *Svensson and Others*). Hyperlinks contribute to the smooth functioning of the Internet. The re-posting of a work without the authorisation of the rights holder does not contribute, to the same extent, to that objective. The work may remain available on the second website, irrespective of the removal of the work on the initial website.

f) Posting a hyperlink on a website to works protected by copyright without the author's consent

In 2011, GS Media published an article and a hyperlink directing viewers to an Australian website where photos of Ms Dekker were made available. Those photos were published on the Australian website without the consent of Sanoma, the editor of the monthly magazine Playboy, which holds the copyright to the photos at issue. Despite Sanoma's demands, GS Media refused to remove the hyperlink at issue. When the Australian website removed the photos at Sanoma's request, GeenStijl published a new article that also contained a hyperlink to another website on which the photos in question could be seen. That site complied too with Sanoma's request that it remove the photos. Internet users visiting the GeenStijl forum then posted new links to other websites where the photos could be viewed.

The EU Court declared (*Case C-160/15, GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker*, 8 September 2016) that, in accordance with the EU Directive (2001/29/EC of 22 May 2001) concerned that establishes every act of communication of a work to the public has to be authorised by the copyright holder, member states provide authors with the exclusive right to authorise or prohibit any communication to the public of their works.

At the same time, that Directive seeks to maintain a fair balance between, on the one hand, the interests of copyright holders and related rights and, on the other, the protection of the interests and fundamental rights of users of protected objects, in particular their freedom of expression and of information, as well as the general interest.

The EU Court emphasised, however, that the Internet is of particular importance to freedom of expression and of information and that hyperlinks contribute to its sound operation and to the exchange of opinions and information as well. In addition, it accepts that it may prove difficult, in particular for individuals who wish to post such links, to ascertain whether the works involved are protected and, if necessary, whether the copyright holders of those works have consented to their publication on the Internet.

Having regard to those circumstances, the EU Court held that, for the purposes of the individualised assessment of the existence of a communication to the public, it is necessary, when the posting of a hyperlink to a work freely available on another website is carried out by a person who, in so doing, does not pursue a profit, to take account of the fact that that person does not know and cannot reasonably know that that work had been published on the Internet without the consent of

the copyright holder. Indeed, such a person, does not, as a general rule, intervene in full knowledge of the consequences of his conduct in order to give customers access to a work illegally posted on the Internet.

Furthermore, when hyperlinks are posted for profit, it may be expected that the person who posted such a link should carry out the checks necessary to ensure that the work concerned is not illegally published. Therefore, it must be presumed that that posting has been done with the full knowledge of the protected nature of the work and of the possible lack of the copyright holder's consent to publication on the Internet. In such circumstances, and in so far as that presumption is not rebutted, the act of posting a clickable link to a work illegally published on the Internet constitutes a communication to the public not allowed without the consent of the right's owner.

In the same case ([C-160/15, *GS Media BV v Sanoma Media Netherlands BV*](#), 8 September 2016), the EU Court found that posting of a hyperlink on a website to works protected by copyright and published without the author's consent on another website does not constitute a communication to the public when the person who posts that link does not seek financial gain and acts without knowledge that those works had been published illegally.

The EU Court recalled its earlier case-law in accordance with which the concept of communication to the public requires an individual assessment, which must take account of several complementary criteria. Those criteria include, first, the deliberate nature of the intervention. Thus, a website owner makes an act of communication when it intervenes, in full knowledge of the consequences of its action, in order to give access to a protected work to its customers. Secondly, the concept of the public covers an indeterminate number of potential viewers and implies a fairly large number of people. Thirdly, the profit-making nature of a communication to the public is relevant.

g) Managing an online platform for sharing copyright-protected works (peer-to-peer file-sharing)

Ziggo and XS4ALL are Internet access providers. A significant number of their subscribers use the online sharing platform called "The Pirate Bay". This platform allows users to share and upload, in segments ("torrents"), works present on their computers. The files in question are, for the most part, copyright-protected works in respect of which the rightsholders have not given the operators or users of that platform consent to share.

The EU Court holds that the making available and management of an online sharing platform must be considered to be an act of communication

for the purposes of the EU Directive 2001/29/EC of 22 May 2001 and also highlights the fact that the operators of the platform play an essential role in making those works available. In that context, the EU Court notes that the operators of the platform index the torrent files so that the works to which those files refer can be easily located and downloaded by users. “The Pirate Bay” platform also offers — in addition to a search engine — categories based on the type of the works, their genre or their popularity. Furthermore, the operators delete obsolete or faulty torrent files and actively filter some content.

On the illegality of such conduct, the operators of “The Pirate Bay” have been informed that their platform provides access to copyright-protected works published without the authorisation of the rightsholders. In addition, the same operators expressly display, on blogs and forums accessible on that platform, their intention of making protected works available to users, and encourage the latter to make copies of those works. It is clear that the operators of “The Pirate Bay” cannot be unaware that this platform provides access to works published without the consent of the rightsholders. Lastly, the making available and management of an online sharing platform, such as “The Pirate Bay”, is carried out with the purpose of obtaining a profit, it being clear from the observations submitted to the EU Court that that platform generates considerable advertising revenues. For these reasons, this practice must be considered against the copyright law.

h) Copying of television programmes saved in the cloud

VCAST is a company incorporated under UK law which makes available to its customers via the Internet a remote video recording system for terrestrial programmes of Italian television organisations, among which are those of RTI (Reti Televisive Italiane S.p.A.). The customer selects a programme and a time slot. The system operated by VCAST then picks up the television signal using its own antennas and records the time slot for the selected programme in the cloud data storage space indicated by the user, thereby making the copy of the programmes broadcast available to the customer via the Internet.

VCAST has sought a declaration from the Italian Courts of the lawfulness of its activities. To that end, it invokes the private copying exception, according to which the authorisation of the copyright owner or holder of related rights is not necessary in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the

rightsholders receive fair compensation.

The EU Court found that the service provided by VCAST had a dual functionality, consisting in ensuring both the reproduction and the making available of protected works (*C-265/16, VCAST Limited v. RTI SpA*, 29 November 2017).

The EU Court held that, according to the EU Directive 2001/29, any communication to the public, including the making available of a protected work or subject-matter, requires the rightsholder's consent, given that the right of communication of works to the public should be understood, in a broad sense, as covering any transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.

The EU Court concluded that the (re)transmission made by VCAST constitutes a communication to a different public from that of the original transmission and must therefore receive the consent of the copyright owner or holder of related rights. Accordingly, such a remote recording service cannot fall within the private copying exception.

15. More on the platform's liability and future developments

Even if all the terms of use of platforms establish exemptions from liability for the intermediary, transferring it only to the user, there are several doubts about the robustness of these clauses.

As we know, this self-exemption from liability is based on a contractual self-attribution by the provider of the role of pure host, i.e. neutral with respect to the information content hosted and transmitted and therefore, based on the provisions of 31/2000/CE directive, this regulation does not oblige verification of lawfulness of such content.

However, by analysing more precisely the terms of use of the licenses with the users, the presumed extraneousness of the service provider is not so solid. This is for various reasons:

- (i) the provider has the right to interrupt or disable the service for the user;
- (ii) there is a copyright policy (in particular for the uploading and use of audiovisual content) aimed at protecting copyright holders to eliminate harmful contents, including through automatic software for verifying the contents stored;
- (iii) the provider has the right to decide whether the information contributions posted by users comply with the terms of use;

for example, contents with pedo-pornography information or incitement to racial hatred which, if posted, are removed after a very short time by the provider;

- (iv) in some circumstances, the provider catalogues or indexes the hosted content, demonstrating that it is not extraneous to them.

These circumstances lead us to believe that there is a presumption of effective knowledge that makes it difficult to consider the extraneousness of the service provider, both from a technical and contractual point of view, with respect to the information managed.

And for these profiles case-law is orienting itself toward finding the provider's liability (especially in the case of dissemination of content protected by copyright) on the assumption of their role as active hosts. So, host providers are defined as those who do not carry out a mere intermediary activity on the Internet which is concretely made available to users of a communication protocol or a space where data, content and information can be uploaded, but something more is needed: for example, they may provide additional storage and dissemination services and, above all, indexing, presentation, supervision and management of the same, also for the purpose of data, content and information commercial exploitation. And precisely this *quid pluris* of activity would exclude exemption from non-contractual liability for the provider.

In July 2020, the European Commission launched two public consultations about digital services and the role of platforms as gatekeepers (the so-called "Digital Services Act Package"). It is the aim to reflect on the EU's efforts and to discuss the potential impact of stronger platform regulation for the online economy (<https://ec.europa.eu/digital-single-market/en/news/consultation-digital-services-act-package>).

In Autumn 2022, the EU Regulation 2022/2065 of 19 October 2022, called the Digital Service Act, has been published and will enter into force in all member states on 17 February 2024.

The intention is to provide a common set of rules on the obligations and liability of intermediaries across the single market to open up new opportunities to provide digital services across borders, while ensuring a high level of protection for all users, regardless from where they live in the EU.

Although the intention is to tackle illegal content online and the obligation for platforms to react quickly, enhancing traceability and controls on users who operate online, the principles of liability for intermediary service providers have remained the same.

As regards the framework of the liability exemptions of intermediary

providers, the EU Regulation 2022/2065 deletes articles 12 to 15 of the e-commerce Directive 2000/31/EC and reproduces them in the regulation, maintaining the liability exemptions for these providers, according to the interpretation of the Court of Justice of European Union. The EU Regulation, in fact, maintains the rules relating to the liability of intermediary service providers established by the aforementioned directive on electronic commerce, which now represent a cornerstone of the digital economy and are essential for the protection of fundamental rights online. Indeed, no general obligation to monitor the information which providers of intermediary services transmit or store, nor actively to seek facts or circumstances indicating illegal activity shall be imposed on those providers.

As we know, the current liability framework for online intermediaries is regulated by the e-commerce directive, which dates back to the year 2000. In this legal framework, Internet service providers and intermediaries are not liable for illegal or harmful content, goods, or services which may be distributed via their channels *if* they fulfil certain conditions: intermediaries are not liable if they remove illegal content or disable access to it as fast as possible once they are aware of its illegal nature or if they play a neutral, merely technical and passive role towards the hosted content.

This model has without doubt contributed to the enormous growth and success of the internet in the past 20 years. For example, social media platforms focusing on video could offer freely available content, i.e. content they did not have to create themselves, without spending resources on checking each video. Instead, the platform providers would focus on tailoring the content to their users' preferences by analysing clicks and views and thus strengthening the algorithms that would lead to the promotion of certain content. In social media and messaging platforms, the principle is similar. Individuals would share their personal photographs, thoughts, and opinions on topics ranging from personal exchanges to political views while the platform would not monitor for illegal content and only intervene according to certain community standards which may have banned certain types of content (e.g. sexual imagery). Thus, social media platforms are not liable for the content provided but simply act as hosts.

At the same time, the internet ecosystem as we know it relies to a great extent on advertisement revenues. These ad-reliant business models only work if the companies collect personal data of their users and understand their preferences, behaviour and choices (in order to tailor advertisement). This is why social media platforms play a crucial role in this digital system: people share personal experiences and traits and reveal private information

about themselves which can be used to understand their preferences better and tailor marketing to them. However, in order to obtain this personal data from users and sell advertisement space, the platforms need to make sure that users see the advertisement and reveal personal information, i.e. spend time on their platforms (or other websites which can be tracked by particular software called cookies). This, in turn, only works if users see content that is interesting to them and others. Users need to be attracted to what they see, and they need to be engaged to share content themselves with their friends or in specific groups.

The discussion on the reform on e-commerce directive which led to the issue of EU Regulation 2022/2065 focused on the safety of users online, ranging from illegal goods (e.g. dangerous products), content (e.g. violence, hate speech) and services or practices infringing consumer law. The gatekeeper power of digital platforms; other emerging issues and opportunities, including online advertising and smart or algorithm contracts.

Sometimes, furthermore, these rules can be set unfairly, leading to privacy/data protection concerns in the terms of use — which users need to accept anyway as the platforms offer them unique access to a network — or unfair terms and conditions for business users. But we have to consider governance of the internet and regulating platforms is complex due to the intersection of different social activities (economic activities, private exchanges and conversations, media & news consumption) and formerly separated areas of regulation. How the distribution of media content needs to be governed in order to make sure violent content is limited (e.g. not accessible to children) while ensuring freedom of expression and speech has rather been the role of media regulation (i.e. national rules, but also at European level via the Audiovisual Media Services Directive), while the question of concentration and dominance are areas of competition (i.e. economics and competition law).

CHAPTER IV

PERSONAL DATA AND PRIVACY PROTECTION

SUMMARY: 1. Preliminary considerations – 2. Personal data and freedom of expression in the European Charters – 3. Personal data protection in the GDPR: General principles – 4. Personal data protection and media law in the GDPR: Specific rules – 5. The “right to be forgotten”: From the CJEU decisions to Article 17 GDPR – 6. Social media and official information outlets – 7. EU institutions for the governance of data protection – 8. The relationship between data protection and right to private and family life – 9. Protection of personal data on electronic communications networks – 10. Data protection and digital consumers.

1. Preliminary considerations

Protection of personal data today represents one of the most important personal rights in the digital era. This observation is not obvious, rather it is the result of a long journey starting about 30 years ago. In fact, already in the 1970's European legislatures started to consider the problem of protecting individuals' privacy from violations by states controlling personal information. In 1970 the German Hesse region introduced a law, which later, in 1977, was followed by federal legislation. We find similar provisions enacted in Sweden (1973) and in France (1978).

This was only the beginning: the first official pan-European act is the Council of Europe Convention n. 108/1981 for the “Protection of individuals with regard to automatic processing of personal data” (later updated in 2018). The problem, in fact, was at that time limited by the scarcity of computers, and the fact that they were not connected to and by a network. In a few years, however, this rapidly changed, and the problem of protecting personal data became urgent. The outcome of this evolution was the issuing of a Directive by the European Union in 1995.

Since the enactment of Directive 95/46/EC, a great deal of effort has been devoted to defining the content of the right to personal data, establishing exactly its limits and defining the permissible uses of data.

Over the last 25 years many things have further changed. Thanks to the evolution of technology, and the widespread dissemination of personal computers and smartphones, people are now able to connect, to talk to

each other at any moment by mobile phone, to use multiple platforms to watch television and other audio-visual programs, find news on the internet, access information about people or geo-localise the whereabouts of businesses.

Processing and use of data are now vital for people and companies. The former needs them for both private and professional life. The latter use them as part of their business, often extracting considerable value from them.

Together with the many useful aspects for users, processing personal data presents significant risks of violation of personal privacy.

Some technologies have existed for many years and are still considerably used; other technologies have been only recently developed and allow a high level of control of people's life and activity in every moment. Therefore, European legislation needed to be updated.

One of the main fields has been the expansion of data protection to the context of electronic communications with Directive 2002/58/EC on the "processing of personal data and the protection of privacy in the electronic communications sector" (subsequently amended in 2009), which for the first time introduced a specific regulation of cookies, spamming and electronic marketing.

After a while, further evolution of the communications systems required a new intervention by the European Union.

The result is the General Data Protection Regulation, (2016/679/UE GDPR) effective since May 2018, that has introduced new rules on data protection and privacy protection. It was necessary, taking into account the global use of social networks, the widespread much broader use of geo-localisation systems, as well as that of facial recognition, but especially it was important to affirm the key principles of data processing to provide the definitions of personal data rights and duties and put the focus on the duties of data controllers to protect, in a wider and more efficient way, personal data. Other crucial themes such as consent to data treatment, special rules for sensitive data, limitations to collect data and data treatment hypotheses are also regulated.

From this perspective, it is important to explore the right to a correct personal data treatment in the European legal system, not only in the GDPR context, but first of all in a larger legislative panorama within the frame of the most important European declarations on fundamental rights. We shall then examine the limits that personal data protection finds in the, often very stormy, relationship with communication law.

2. Personal data and freedom of expression in the European charters

Post-World War II charters of fundamental rights contain provisions which are aimed at protecting both the freedom of expression and that of private life. The most important of these charters, the 1948 Universal Declaration of Human Rights, which is the basis of the United Nations Organisations, states in Article 12 that “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence”, and in Article 19 that “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

At the regional level, the 1950 European Convention of Human Rights (ECHR) states at Article 8 that “Everyone has the right to respect for his private and family life, his home and his correspondence”; and at Article 10 that “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”.

These last two provisions have been, over the last 60 years, the object of extensive interpretation by the European Court of Human Rights (sitting in Strasbourg) which on innumerable occasions has been asked to express itself on the alleged violation of Article 8 or of Article 10 ECHR. It is important to point out that the Strasbourg court is a court of last instance to which one can apply only when all internal judicial remedies have been exhausted. Therefore, the cases in front of it are brought by individual who allege non-compliance of a country which is a signatory of the ECHR.

The decisions on Articles 8 and 10 are interwoven, in the sense that very often when the claim is that there has been a violation of Article 8, one of the main defences is that this was done in the exercise of the freedom of expression. And vice versa when the claim is that there has been a violation of Article 10, the limitation of the freedom was applied in order to protect the private life of a third party.

The right to freedom of expression, protected in Article 10 of the European Convention, is not an absolute right. The basic approach taken in Article 10 is to define freedom of expression very broadly, so as to include almost every form of expressive activity, and also to define very broadly what constitutes an interference with the enjoyment of this right, thus casting an extremely wide *prima facie* net of protection. Certain interferences with this right are justifiable under Article 10, so that States may legitimately

impose restrictions on the right, for example to protect other rights (such as privacy) or overriding interests, such as national security.

One must also point out that until the 1980s the focus of Article 8 ECHR was on “private and family life” in the sense of protection of “privacy”. It was only after the incredible development of digital technologies (both hardware and software) and of telecommunication networks that its scope was extended to the protection of personal data collected and processed through information and communication technologies.

This shift is clearly recorded in the 2000 Nice Charter of Fundamental Rights (which is subsequently transposed in the Charter of Fundamental Rights of the European Union). Together with the traditional principles of protection of privacy (“Everyone has the right to respect for his or her private and family life, home and communications” – Article 7) and of freedom of expression (“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers” – Article 11), Article 8 states that “Everyone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified”.

One must therefore register a constant tension between different, and opposing, fundamental rights. The thrust is towards an ever more open society in which the free flow of information and of communications is essential; and the need to protect individuals from pervasive and invasive technologies which are able not only to control all their activities but also to steer their future choices.

3. Personal data protection in the GDPR: General rules

The growing influence of new technologies and Internet activity on personal data has determined many changes on personal data legislation, first of all through the General Protection Data Regulation (GDPR). It is important to highlight the nature of the act chosen by the European Union. In fact, the form of a Regulation instead of that of a Directive (95/46/CE) as opted for previously, is clear evidence of the legislature’s intention to produce profound and uniform effects:

1. The choice of a Regulation – instead of a Directive – brings with it the principle of self-enforcement, with no possibility for the Member states to change, adapt or dilute its text. This implies uniformity throughout the EU.
2. Regulations – and the GDPR is not an exception – establish a common date in which they come into force, with the consequence that in May 2018 the legal systems of all the member States were modified through an Act with a very precise hierarchical position in EU (and in internal) law.
3. The result is unification – rather than harmonisation – of the law in the field of data protection.

The Regulation prevails over Member States' internal legislation in regulating personal data treatment and extension and the limits of personal data rights, except for the issues regulated by Directive 2002/58/EC in case of electronic treatment of personal information in communications services or public networks.

Although the GDPR prevails over the existing internal legislation of the member States which might not be in line with the new provisions, it maintains in force the provisions contained in Directive 2002/58/EC which still govern the collection and processing of personal data collected through public telecommunications networks. This is extremely important because, as we shall see, it impacts on the possible conflict between privacy and communications activity.

The aim of the GDPR – stated in its Article 1 – is the protection of fundamental rights and freedoms of natural persons with regard to the processing of personal data.

The Regulation follows two paths: on one side the data subject is endowed with many important rights; on the other side, many duties and liabilities are imposed upon the controller.

Among the latter, one of the most important is that data controllers and processors are liable for the processing of personal data in violation of the GDPR and for the ensuing damages. Therefore, the controller must implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with the Regulation. In determining those measures, the controller should take into account the nature, scope, context and purposes of processing, the risks of varying likelihood and severity for the rights and freedoms of natural persons, reviewing and updating them if and where necessary (Article 24).

In the *Weltimmo* and *Lindquist* cases (C-230/14, *Weltimmo S.R.O. v. Nemzeti Adatvédelmi és Információs Zsugabadasag Hatosag* (Hungarian Data Protection Authority), 1.10.2015, and C-101/01, *Criminal Proceedings v. Lindquist*, 6.11.2003), the CJEU made it clear that “The operation of loading personal data on an internet page constitutes processing” (§37). For other important specifications about definitions see CJEU, case T-259/03, *Nikolaou v. Commission*, 12.9.2007.

The controller is also responsible for any damage caused by lack of security in data processing. They should, both at the time of the determination of the means for processing and at the time of the processing itself, implement appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data-protection principles, such as data minimisation, and to integrate the necessary safeguards into the processing in order to meet the requirements of the Regulation and protect the rights of data subjects. Moreover, the controller must implement appropriate technical and organisational measures in order to ensure that, by default, only personal data which are necessary for each specific purpose are processed, and only at the appropriate time. The Regulation specifies also that such measures shall ensure that, by default, personal data are not made accessible to an indefinite number of natural persons (Article 25, GDPR).

Another relevant guarantee for the data subjects is that of impact assessment (Article 35, GDPR) in order to verify *ex ante* if there may be critical aspects in the processing of data.

The controller and the processor, in all their activities must comply with Article 5 of the Regulation which imposes that processing shall be done lawfully, fairly and in a transparent manner, and respecting purpose limitation. Therefore, the data must be collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes.

Moreover, personal data treatment shall be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed, in accordance with the data minimisation principle, treating data with accuracy and, where necessary, kept up to date.

Moreover, data controllers must keep data in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical

research purposes or statistical purposes, in accordance with Article 89, in such a way that safeguards the rights and freedoms of the data subject, respecting the storage limitation principle.

Finally, personal data have to be processed in a manner that ensures their appropriate security, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures, granting their integrity and confidentiality.

These should apply also to the processing of data in information and communication activities, but, as we shall see, there are significant exceptions which limit the rights of the data subject.

It is therefore important to examine the latter starting from the initial moment in which the data are collected, until they are deleted.

The foremost requirement is that of the consent of the data subject, as the condition for lawful processing. Although, in theory, these rules should apply also in the case of informational activity we shall see that in most cases the media can publish news (i.e. process personal data) without an express or an implicit consent, provided it complies with some very generic rules.

The GDPR - following the previous Directive – distinguishes between “ordinary” personal data and “special” personal data, the latter being data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership; genetic and biometric data for the purpose of uniquely identifying a natural person; data concerning health or data concerning a person’s sex life or sexual orientation. Processing of such data is generally prohibited but can be allowed if processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

The fundamental requirement for a valid consent is that the personal data subject is informed about data treatment at the moment of data collection. For that, Articles 12, 13 and 14 state that information and communication relating to the personal data subject should be concise, transparent, intelligible and provided in an easy and accessible form, using clear and plain language. Information can be given orally, in writing or by electronic device and may differ according to the means through which the data have been collected, directly from the data subject or indirectly.

The aim of the Regulation is that information is provided in an intelligible form so as to ensure a free and informed consent by the data subject.

Among the various rights of the data subject, one must mention the right of access, i.e. the right to obtain from the controller confirmation as to whether or not personal data concerning himself or herself are being processed, and, in the affirmative, the right to receive all the information concerning the data treatment.

Among the latter, in accordance with Article 15, GDPR, the data subject must have the right to be informed about the purposes of processing; the categories of personal data concerned; the recipients or categories of recipient to whom the personal data have been or will be disclosed, in particular recipients in third countries or international organisations; where possible, the envisaged period for which the personal data will be stored, or, if not possible, the criteria used to determine that period; the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data concerning the data subject or to object to such processing; the right to lodge a complaint with a supervisory authority; where the personal data are not collected from the data subject, any available information as to their source; the existence of automated decision-making, including profiling, ex art. 22 and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

If the personal data are transferred to a third country or to an international organisation, the data subject shall have the right to be informed of the appropriate safeguards pursuant to Article 46 relating to the transfer.

During the period in which the data are held the data subject shall have the right to ask to modify and update them; in particular the data subject has the right to ask the controller and the processor to rectify, without an unjustified delay, any inaccurate and incomplete data.

Finally, the data subject has the right to object to his or her personal data being treated or processed, especially to some specific types of processing such as marketing or profiling purposes, processing in the public interest, or for research or statistical purposes.

In the case of direct marketing the right to object is absolute and must be put into practice in a direct way. Therefore, the controller must adopt a simple way for the data subject to request the removal of his or her held data. In the other cases, instead, the data subject must have a legitimate interest to ask for the removal or there must be a superior public interest.

4. Personal data protection and media law in the GDPR: Special rules

The GDPR contains special provisions for when personal data is processed for journalistic purposes and for the purposes of academic, artistic or literary expression.

A similar provision was already present in Directive 95/46 which at its Article 9 stated that “Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.”

The interpretation of the term “solely” has given rise to a certain number of disputes. In the *Satamedia* case (C-73/07) the ECJ was confronted with these facts: Satamedia, a publishing company, collected public personal data (the name of persons whose income exceeded a threshold, the amount of earned and unearned income, and the wealth tax levied) from Finnish tax authorities and published extracts in a regional newspaper each year. Satamedia also transferred the data on CD ROM to a subsidiary company which disseminated them through a text messaging system. The question, raised by the Finnish data protection ombudsman was if these activities were covered by the “journalistic purpose” exception. The ECJ answered in a rather ambiguous form: it was up to the national court to establish “if the sole object of those activities is the disclosure to the public of information, opinions or ideas” and therefore if the exemption applied.

Probably in order to avoid such uncertainties, Article 85 of the GDPR has eliminated the adverb “solely”, asking Member States to “reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.” To interpret the provision one can therefore look at the case-law and at the guidelines issued under Directive 95/46, keeping however in mind that Article 85 has a broader scope.

What are “journalistic purposes”? Do they include only activities carried out by a professional “journalist”, or do they extend to all kinds of informational activities addressed to the public at large, including social media (see further on at para. 4.7)? Recital 153 of the GDPR supports a broad interpretation in line with the fundamental freedom of expression and information enshrined in Article 11 of the ECFR.

Therefore, Member States should expressly introduce exemptions and derogations concerning the rights of the data subject, the role the controller and of the processor, the transfer of personal data to third countries or international organisations, the independent supervisory authorities, cooperation and consistency of policies throughout the EU, and specific data-processing situations.

The Regulation further establishes that if there are differences in the national legislation, the law of the Member State to which the controller is subject should apply.

5. Right to be forgotten: From the EUCJ decisions to Article 17 GDPR

The relationship between information and communication activities by every kind of media and the processing of personal data can be inferred also from several decisions of the Court of Justice of the European Union, which through their interpretation of Directive 95/46 has often anticipated the specific provisions of the GDPR.

The most relevant example is the May 13th 2014 decision in Case C 131-12 (*Google Spain SL and Google Inc v. Agencia española de Protección de Datos (AEPD) and Mario Costeja González*) which opened the way to the “right to be forgotten” now enshrined in Article 17 of the GDPR.

In the preliminary ruling by the Audiencia Nacional (Spain), Mr. Gonzales, a Spanish national resident in Spain, sued Google Spain, Google Inc. and “La Vanguardia” newspaper, alleging that when an internet user entered his name in the Google search engine, he would obtain links to two pages of “La Vanguardia” newspaper on which an announcement with his name appeared for a real estate auction connected with attachment proceedings for the recovery of social security debts. So, he requested *inter alia* that Google Spain or Google Inc. be required to remove or conceal the personal data relating to him so they ceased to be included in the search results and no longer appeared in the links to “La Vanguardia”.

The Court pointed out that the interests of search engines are economic interests, which cannot justify the potential seriousness of the interference with the data subject’s rights. Nor can these be set aside in order to satisfy the interest of the public at large to find certain information. On the contrary, “The data subject’s rights generally override those of internet users, but the balance may depend on the nature of the information in question and its sensitivity for the data subject’s private life and on the

interest of the public in having that information, which may vary by the role played by the data subject in public life. The interference may be justified by the preponderant interests of the general public in having access to the information” (*Google Spain* judgement, § 81).

Before the *Google Spain* decision, most Courts had held that search engines were not responsible for the results of their search and were not under a positive obligation (in accordance with Article 15 of the e-commerce Directive (2000/31/EC)) to monitor the Internet and “actively seek facts or circumstances indicating illegal activity”.

In the *Google Spain* decision, contrary to the Advocate General’s opinion and previous case-law, with a ground-breaking judgement, the CJEU stated some fundamental principles:

- First of all, the Court found that search engines were data controllers in respect of their search results. The Court expressly said that “The search engine operator determines the purposes and means of that activity and thus of the processing of personal data that it itself carries out within the framework of the activity and is thus a controller. It would be contrary not only to the clear wording of Article 2(d) and to its objective, which is to ensure through a broad definition of the concept of controller, effective and complete protection of data subjects, to exclude the operator of a search engine on the grounds that it does not exercise control over the personal data published on the web pages of third parties. Moreover, the activity of search engines plays a decisive role in the overall dissemination of the personal data in that it renders the latter accessible to any internet user making a search on the basis of the data subject’s name, including to internet users who otherwise would not have found the web page on which those data are published. The search results also provide a structured overview of the information relating to that individual that can be found on the internet, enabling them to establish a detailed profile of the data subject. The fact that publishers of websites have the option of indicating to operators by means of exclusion protocols that they wish some information published on their site to be excluded from the search engines’ automatic indexing does not mean that if publishers do not so indicate, the operator of the search engine is released from responsibility for its processing of personal data. (§§ 33-41)”;
- Secondly, that European data protection law applies to search engines’ processing of the data of European Union citizens, even

where the relevant data was processed outside the EU territory, and “the activities of the search engine and those of its establishment in the Member State are inextricably linked since the activities relating to the advertising space constitute the means of rendering the search engine economically profitable and that engine is the means enabling those activities to be performed. (§§ 52-56, 60)”;

- Moreover, that a ‘right to be forgotten’ online applied to outdated and irrelevant data in search results if that information appears, having regard to all circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine. Here, having regard to the sensitivity of data subjects’ private life and information contained in announcements and the fact that the initial publication occurred 16 years earlier, the data subject had a right to have the links removed (§ 98).

The “right to be forgotten” is now expressly disciplined by article 17 of the GDPR according to which data subjects have the right to obtain erasure of their personal data without undue delay, from the relevant data controller who has an obligation to erase the personal data where:

- The data is no longer necessary for the purpose(s) for which it was collected or processed;
- The data subject withdraws consent on which the processing is based and there are no other legal grounds for the processing;
- The data subject objects to the processing under Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects under Article 21(2) (direct marketing);
- The personal data has been unlawfully processed;
- The personal data has to be erased for compliance with a legal obligation under EU or Member State law to which the controller is subject;
- The personal data has been collected in relation to the offer of information society services from a child who is below the digital age of consent (which varies across Member States from 13-16).
- Where the controller has made data which is the subject of a successful erasure request public, it must take reasonable steps (taking into account available technology and cost) to inform controllers processing the personal data that the data subject has requested erasure of any links to or copy or replication of the data.

However, Article 17, para. 3, sets out a series of exceptions, the first and most important being that processing is necessary to exercise the right of freedom of expression and information. This does not mean that the data subject is without any remedy, as seen in the Google Spain case where at the origin there was a story published by a newspaper and the data subject could ask that search engines de-index the information, making it unavailable on the basis of a web search.

One should also keep in mind that the same para. 3 sets out further exceptions that may be relevant in a communication context, such as:

- Compliance with a legal obligation which requires processing to which the controller is subject, or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller
- For reasons of public interest in the area of public health with regards to certain sensitive data;
- For archiving purposes in the public interest, scientific or historical research or statistical purposes where erasure would seriously impair the objectives of such processing;
- For the establishment, exercise or defence of legal claims.

6. Social media and official information outlets

So-called social media are increasingly used for information and communications purposes both by individuals and by legal entities (public and private) and the question of whether data protection rules apply when common platforms are used repeatedly arises.

According to the GDPR (recital n. 18) “This Regulation does not apply to the processing of personal data by a natural person in the course of a purely personal or household activity and thus with no connection to a professional or commercial activity. Personal or household activities could include correspondence and the holding of addresses, or social networking and online activity undertaken within the context of such activities.”

The same Recital clarifies, however, that the Regulation “applies to controllers or processors which provide the means for processing personal data for such personal or household activities”.

Some guidance may come from the CJEU decision in the *Buivids* decision (case C-345/17). Mr Buivids, made a video recording in a station of the Latvian national police while he was making a statement in the

context of administrative proceedings which had been brought against him. He then published the recorded video, which showed police officers going about their duties in the police station, on YouTube. The Latvian data protection agency sanctioned Mr. Buivids ordering him to remove the video. The legal question was: Were Mr. Buivids' actions covered by the journalistic purpose exemption? The Court excluded that the recording (and therefore the processing) had been done for a purely personal purpose and stated that the publication of a recorded video on a video website, on which users can send, watch and share videos, may constitute a processing of personal data solely for journalistic purposes, in so far as it is apparent from that video that the sole object of that recording and publication thereof is the disclosure of information, opinions or ideas to the public. A determination which the court left to the national judges.

As one can easily see from daily experience, not only media companies or private individuals use the internet as a means of communication. In the *Breyer* decision (C-582/14) Mr. Breyer had accessed several websites operated by German Federal institutions which provided topical information. After those sites have been accessed the logfiles retained certain data such as the name of the web page or file to which access was sought, the terms entered in the search fields, the time of access, the quantity of data transferred, an indication of whether access was successful, and the IP address of the computer from which access was sought. Mr. Breyer brought an action claiming that the German institutions' online media services could not retain his IP address inasmuch this allowed his identification. The German government claimed that this was possible only if the internet service provider matched the IP address with the user's identity. The CJEU followed this interpretation stating that a dynamic IP address registered by an online media services provider constitutes personal data, in relation to that provider, where the latter has the legal means which enable it to identify the data subject with additional data which the internet service provider has about that person.

7. EU institutions for the governance of data protection

The growing importance of data protection has brought about the progressive creation of institutions with the specific purpose of ensuring compliance with the increasing complexity of the corresponding legislation. Already in its first Directive (1995/46), the EU expressly prescribed that

the establishment in each member state of supervisory authorities, exercising their functions with complete independence, is an essential component of the protection of individuals with regard to the processing of personal data. These supervisory authorities were endowed (Article 28) with investigative powers, such as powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties; effective powers of intervention, including ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing, of warning or admonishing the controller, or that of referring the matter to national parliaments or other political institutions; the power to hear claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data; the power to engage in legal proceedings where data protection provisions have been violated or to bring these violations to the attention of the judicial authorities.

In the same Directive (Article 29) a “Working Party on the Protection of Individuals with regard to the Processing of Personal Data” was created in order to contribute to the uniform application of the national rules adopted pursuant to the Directive and to enable the different national authorities to assist each other. Article 29, through its opinions, played an important role in paving the road for the GDPR.

The next step was the provision in Article 8 of the Charter of Fundamental Rights of the EU of para. 3 according to which “Compliance with these [data protection] rules shall be subject to control by an independent authority”. Therefore, Data protection authorities received an explicit and constitutional role.

Subsequently, in 2004, the European Data Protection Supervisor (EDPS) was created with the aim not only of ensuring protection of personal data in the EU institutions, but also of advising the Commission and Parliament on all matters relating to the processing of personal data, especially on proposals for legislation, international agreements, as well as implementing and delegating acts with impact on data protection and privacy; monitoring new technology that may affect the protection of personal information; cooperating with national supervisory authorities and other supervisory bodies to improve consistency in protecting personal information.

The final step, with the GDPR, has been the creation of the European Data Protection Board (EDPB) (Articles 63 ff.) in which all the national data protection authorities are represented together with the EDPS, with the

specific purpose of ensuring cooperation and consistency in and of decisions.

Owing to the growing interaction between data protection and information and communication technologies it is clear that the EDPS and the EDPB have become the EU institutions in charge of regulating many aspects of media and communications law with a direct impact both on individuals and on entities engaged in communications activities. For example, it has set guidelines on the criteria of the “Right to be forgotten” in search engine cases; on the collection of data through social media; the use of personal data during elections. This is extremely relevant because no other EU institution has similarly sweeping and effective powers in the field of collection and dissemination of information.

8. The relationship between data protection and right to private and family life

Although often the two terms are used as synonyms, there are significant differences between the protection of personal data and the right to privacy. The latter protects individual from unsolicited intrusions in their family and personal life; therefore, what is communicated to the public must be, to a smaller or larger extent, “private”. In data protection, instead, the data which are processed do not necessarily have to be related to aspects that an individual wishes not to be publicised (typically: data concerning his/her whereabouts, his/her consumption preferences, political or religious beliefs) and in most cases are not brought to the attention of the public but are processed for business (and internal) purposes by the processor. Therefore, while violations of private life generally are also processing of personal data not compliant with the GDPR, not every – and in fact only a very small amount – of unlawful processing are also violations of private and family life of the data subject.

Also, from a strictly normative perspective, the legislative references are different: data protection falls under Article 8 of the CFREU and under the GDPR, privacy under Article 7 of the CFREU and Article 8 of the ECHR. In the EU – which covers 27 member states – the main reference for data protection is the GDPR. In the Council of Europe – which counts 47 members (including countries geographically very distant such as Turkey, Armenia, Georgia and Azerbaijan) the reference is still the 1981 Convention “for the *protection* of individuals with regard to automatic processing of personal *data*”, one of the first legal instruments in this field.

Also, the jurisdictions somewhat differ in that while the EU Court of Justice has delivered dozens of decisions in the field of data protection, the Strasbourg Court – the European Court of Human Rights – has a long string of decisions grounded on Article 8 ECHR and, most importantly, generally balanced with Article 10 which protects freedom of expression.

The Court has defined the scope of Article 8 (“private and family life”) broadly, even when a specific right is not set out in the Article. The concept of private life extends to aspects relating to personal identity, such as a person’s name, photo, or physical and moral integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is thus a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life (*Von Hannover v. Germany* (no. 2) [GC]). Furthermore, the concept of “private life” is a broad term not susceptible to exhaustive definition, which covers the physical and psychological integrity of a person and can therefore embrace multiple aspects of a person’s identity, such as gender identification and sexual orientation, name or elements relating to a person’s right to their image. It covers personal information which individuals can legitimately expect should not be published without their consent (*Axel Springer AG v. Germany* [GC]).

However, the scope of the provision is not limitless. The applicability of Article 8 has been determined, in some contexts, by a severity test: see the relevant case-law on environmental issues, the attack on a person’s reputation in *Denisov v. Ukraine* [GC]; and acts or measures of a private individual which adversely affect the physical and psychological integrity of another in *Nicolae Virgiliu Tănase v. Romania* [GC].

In the case of access to a private beach by a person with disabilities, the Court held that the right asserted concerned interpersonal relations of such broad and indeterminate scope that there could be no conceivable direct link between the measures the State was being urged to take in order to make good the omissions of the private bathing establishments and the applicant’s private life. Accordingly, Article 8 was not applicable (*Botta v. Italy*).

Additionally, the Court found that Article 8 was not engaged in a case regarding a conviction for professional misconduct because the offence in question had no obvious bearing on the right to respect for “private life”. On the contrary it concerned professional acts and omissions by public officials in the exercise of their duties. Neither had the applicant pointed to any concrete repercussions on his private life which had been directly

and causally linked to his conviction for that specific offence (*Gillberg v. Sweden* [GC]; see also *Denisov v. Ukraine* [GC]). However, in the case of a police investigator who had been found guilty of a serious breach of his professional duties for having solicited and accepted bribes in return for discontinuing criminal proceedings and who had wished to practise as a trainee lawyer after serving his sentence, the Court found that restrictions on registration as a member of certain professions which could to a certain degree affect that person's ability to develop relationships with the outside world fell within the sphere of his or her private life (*Jankauskas v. Lithuania* (no. 2)).

In *Nicolae Virgiliu Tănase v. Romania* [GC], the applicant was seriously injured as a result of a traffic accident. However, the Grand Chamber found that such personal injury did not raise an issue relating to his private life within the meaning of Article 8 since his injuries resulted from his having voluntarily engaged in an activity that took place in public, and the risk of serious harm was minimised by traffic regulations aimed at ensuring road safety for all road users. Furthermore, the accident did not occur as the result of an act of violence intended to cause harm to the applicant's physical and psychological integrity, nor could it be assimilated to any of the other type of situation where the Court has previously found the State's positive obligation to protect physical and psychological integrity engaged.

The Court has additionally clarified that member States also have positive obligations to ensure that Article 8 rights are respected even as between private parties (*Bărbulescu v. Romania* [GC] as to the actions of a private employer). In particular, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life (*Lozovyye v. Russia*). These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, for example, *Evans v. the United Kingdom* [GC]). In the case of a positive obligation, the Court considers whether the importance of the interest at stake requires the imposition of the positive obligation sought by the applicant. Certain factors have been considered relevant for the assessment of the content of positive obligations on States. Some of them relate to the applicant. They concern the importance of the interests at stake and whether "fundamental values" or "essential aspects" of private life are in issue or the impact on an applicant of a discordance between the social reality and the law, the coherence of the administration and legal practices within the domestic

system being regarded as an important factor in the assessment carried out under Article 8.

In cases which require the right to respect for private life to be balanced against the right to freedom of expression, the Court considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the news report, or under Article 10 by the publisher. Indeed, as a matter of principle these rights merit equal respect (*Couderc and Hachette Filipacchi Associés v. France* [GC]; *Satamedia v. Finland* [GC]; *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC]). Accordingly, the margin of appreciation should in theory be the same in both cases. The relevant criteria defined by the case-law are as follows: contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication, and, where appropriate, the circumstances in which the photographs were taken.

In this paragraph we shall summarise the main decisions by the ECtHR in which there is an overlap between Article 8 of the ECHR and data protection.

The leading cases that set the limits to the publication of images (which is a form of data processing) in exercise of media activities are those which involve, as claimant, Princess Caroline von Hannover (formerly, Caroline of Monaco) for the publication by gossip magazines of her photos, by herself and with her children, in different moments of their private life, without her consent. Since the early 1990s the Princess attempted – often through the courts – to prevent the publication of photos about her private life in the press.

In the first case (*Von Hannover v. Germany no. 1 of 2004*) the Court held that the German court's decisions had infringed the Princess's right to respect for her private life, a right guaranteed by Article 8 of the Convention. In a complete reasoning about the concept of private life, the Court reiterated that its protection extends to aspects relating to personal identity, such as a person's name, photo or physical and moral integrity. The guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. Evidencing that there is thus a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life, the Court reiterated that the publication of a photo may intrude upon a person's

private life even where that person is a public figure (in this sense: *Schüssel v. Austria* – 2002; *Sciacca v. Italy* – 2005; *Petrina v. Romania* - 2008).

In particular, regarding photos, the Court has stated that a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. Consequently, in *Reklos and Davourlis v. Greece* (2009) the Court affirmed that the right to the protection of one's image is one of the essential components of personal development. It therefore implies the individual's right to control the use of that image, including the right to refuse its publication.

The Court has also stated that, in certain circumstances, even where a person is known to the general public, he or she may rely on a "legitimate expectation" of protection of and respect for his or her private life (e.g. *Leempoel & S.A. ED. Ciné Revue v. Belgium* - 2006; *Standard Verlags GmbH v. Austria (no. 2)* - 2009; *Hachette Filipacchi Associés (ICI PARIS) v. France* - 2009).

Referring to the boundary between the State's positive and negative obligations, the Court has explained that under Article 8 the applicable principles are similar. In both contexts, in fact, the result must be the fair balance between the relevant competing interests: The State not only should abstain from interfering with private and family life but there may be positive obligations inherent in effective respect of such rights.

These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *X and Y v. the Netherlands* - 1985; and *Armonienė v. Lithuania* - 2009). That also applies to the protection of a person's picture against abuse by others.

According to the court the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. In this case it was clear that they made no such contribution, since the applicant exercised no official function and the photos and articles related exclusively to details of her private life. Furthermore, the Court added, the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public. And even if such a public interest were to exist, as does a commercial interest of the magazines in publishing these photos and these articles, that interest must, in the specific case, yield to the applicant's right to the effective protection of her private life.

If in the first *Carolina von Hannover* case the Court recognised a violation of principles affirmed in Article 8, in the *Von Hannover v. Germany no.2* judgement the Court gave an opposite decision.

The photographs, published by some German magazines, showed Caroline and her husband out for a walk during their skiing holiday in St Moritz, or during other moments of their skiing holidays, accompanied with a photo of Prince Ranieri with his daughter Princess Stéphanie and a photo of Prince Albert of Monaco taken during the Olympic Games in Salt Lake City to evidence the relationship between them.

Deciding on an infringement of the Princess's privacy, the German courts refused to grant an injunction against any further publication of photos of them affirming that there was a general interest well balanced with the family's private rights. The applicants alleged that this refusal infringed their right to respect for their private life guaranteed by Article 8.

The Strasbourg court rejected the claim stating that, subject the exceptions set out in para. 2 of Article 10, freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". The role played by the press in a democratic society is essential. Its duty is to impart – in a manner consistent with total respect of its obligations and responsibilities – information and ideas on all matters of public interest. Still, there is an active and a passive right of information, for which the press does not only have the task of imparting such information and ideas, but the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (*Bladet Tromsø and Stensaas v. Norway* [GC]-1999; and *Pedersen and Baadsgaard v. Denmark* [GC] - 2004).

Another eminent case of conflict between individual privacy (protected by Article 8) and right to publish is the *Plon v. France* (2004) decision. A publishing house had published, ten days after the death of the French President, François Mitterrand, a book containing the report by the President's former private physician of the cancer that he had suffered. The President's widow and children applied to the French courts and obtained an interim injunction prohibiting the distribution of the book. The decision was upheld in the various judicial instances and the publisher and the physician were ordered to pay damages. The ECtHR, in an articulated decision, stated that the interim injunction had been reasonably foreseeable and had pursued legitimate aims, namely "to prevent the disclosure of in-

formation received in confidence” and to protect “the rights of others”. In fact, the damage done by the book to the President’s reputation was serious and its distribution so close to the time of his death was deemed to deepen the suffering of his family, who had appealed to the urgent applications judge in a context of grief. However, the ECtHR went on by stating that the maintenance of the ban many months after the death of the President was no longer justified as the public interest in discussion of the history of the President’s two terms of office took precedence over the requirement to protect the President’s right to medical confidentiality. It therefore concluded that there had been a violation of Article 10.

Of course, the press should play that role of public watchdog while not overstepping certain limits concerning the reputation and the rights of others. Reputation is protected by Article 8 of the Convention as part of the right to respect for private life (*Axel Springer AG v. Germany* [GC]; *Chauvy and Others v. France*; *Pfeifer v. Austria*; *Petrina v. Romania*; *Polanco Torres and Movilla Polanco v. Spain*).

In order for Article 8 to come into play, an attack on a person’s reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life (*Axel Springer AG v. Germany* [GC]; *Bédat v. Switzerland* [GC]; *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC]; *Denisov v. Ukraine* [GC]). This requirement pertains to both social and professional reputation (*idem*). There must also be a sufficient link between the applicant and the alleged attack on his reputation (*Putistin v. Ukraine*). In cases that concerned allegations of criminal conduct, the Court also took into account the fact that under Article 6 § 2 of the Convention, individuals have a right to be presumed innocent of any criminal offence until proven guilty (*Jishkariani v. Georgia*).

The Court did not find a violation of Article 8 in a case concerning an audio-visual recording which was partly broadcast without the applicant’s consent, because among other things, it criticised the commercial practices in a certain industry, rather than the applicant himself (*Haldimann and Others v. Switzerland*). On the other hand, a television report that described the applicant as a “foreign peddler of religion” constituted a violation of Article 8 (*Bremner v. Turkey*).

The Court has also taken into account how well-known an applicant was at the time of the alleged defamatory statements, the extent of acceptable criticism in respect of a public figure being wider than in respect of ordinary citizens, as too the subject-matter of the statements (*Jishkariani v. Georgia*). University professors specialising in human rights appointed

as experts by the public authorities, in a public body responsible for advising the Government on human rights issues, could not be compared to politicians, who had to display a greater degree of tolerance (*Kaboğlu and Oran v. Turkey*).

Freedom of expression, whatever the media used, includes undoubtedly the publication of photos but it is vital to put in evidence that this is nonetheless an area in which the protection of the rights and reputation of others takes on particular importance, as the photos may contain very personal or even intimate information about an individual or his family.

Moreover, photos appearing in the “sensationalist” press or in “romance” magazines, which generally aim to satisfy the public’s curiosity regarding the details of a person’s strictly private life (such as in *Société Prisma Presse v. France* - 2003; and *Hachette Filipacchi Associés (ICI PARIS)* - 2009), are often taken in a climate of continual harassment which may induce in the person concerned a very strong sense of intrusion into their private life or even of persecution.

In cases such as the *von Hannover* ones, which require the right to respect for private life to be balanced against the right to freedom of expression, the Court listed the criteria:

- a) An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest.
- b) The definition of what constitutes a subject of general interest will depend on the circumstances of the case. In particular such an interest exists not only where the publication concerns political issues or crimes, but also where it concerns sporting issues or performing artists (see *Nikowitz and Verlagsgruppe News GmbH v. Austria* - 2007; *Colaço Mestre and SIC- Sociedade Independente de Comunicação, S.A. v. Portugal* - 2007; and *Sapan v. Turkey*, - 2010).
- c) However, the rumoured marital difficulties of the President of a country or the financial difficulties of a famous singer were not deemed to be matters of general interest (see *Standard Verlags GmbH v. Austria (no. 2)* – 2009; and *Hachette Filipacchi Associés (ICI PARIS)* - 2009). In particular, an event in somebody’s private life that doesn’t influence the individual’s public role, should not be disclosed, because it is devoid of general or public interest.
- d) The role or function of the person concerned and the nature of the activities that are the subject of the report and/or photo constitute another important criterion, related to the preceding one. In that connection a distinction has to be made between private indi-

- viduals and persons acting in a public context, as political figures or public figures.
- e) Although in certain special circumstances the public's right to be informed can even extend to aspects of the private life of public figures, particularly where politicians are concerned, this will not be the case – despite the person concerned being well known to the public – where the published photos and accompanying commentaries relate exclusively to details of the person's private life and have the sole aim of satisfying public curiosity in that respect.
 - f) Concerning the content, form and consequences of the publication, it is important to take into consideration the way in which the photo or report are published and the manner in which the person concerned is represented in the photo or report may also be a factor to be considered (see *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. v. Austria (no. 3)* -2005; *Reklos and Davourlis v. Greece* – 2009; and *Jokitaipale and Others v. Finland* - 2010).
 - g) The extent to which the report and photo have been disseminated may also be an important factor, depending on whether the newspaper is a national or local one, and has a large or a limited circulation (see *Karhuvaara and Iltalehti v. Finland* – 2010; and *Gurgenidze v. Georgia* – 2006). This element has a particular importance with regards to publication on the Internet, on websites or social networks.
 - h) Lastly, the circumstances in which the photos are taken – with or without consent, with subterfuge, in a private or public site, are relevant, as well as the nature or seriousness of the intrusion and the consequences of publication of the photo for the person concerned. In *Ismayilova v. Azerbaijan* the Court found that an intrusion into the applicant's home in the form of unauthorised entry into her flat and installation of wires and hidden video cameras inside the flat; a serious, flagrant and extraordinarily intense invasion of her private life in the form of unauthorised filming of the most intimate aspects of her private life, which had taken place in the sanctity of her home, and subsequent public dissemination of those video images were a grave affront to human dignity.

As for more recent cases, in *Egill Einarsson v. Iceland no. 1* (2018), for example, a well-known figure in Iceland had been the subject of an offensive comment on Instagram in which he had been called a “rapist” alongside a photograph. The ECtHR held that a comment of this kind was capable of constituting interference with the applicant's private life in

so far as it had attained a certain level of seriousness. It pointed out that Article 8 was to be interpreted to mean that even if they had prompted heated debate on account of their behaviour and public comments, public figures should not be publicly accused of violent criminal acts without such statements being supported by facts.

The right to respect for private life is safeguarded by Article 8 in relation to the freedom of expression secured by Article 10 to information society service providers such as Google Inc. in *Tamiz v. UK* (2017) and to Internet archives managed by media in *M.L. and W.W. v. Germany*.

In *Tamiz* the Court pointed out that, after all, millions of Internet users post comments online every day and many of these users express themselves in ways that might be regarded as offensive or even defamatory. However, the majority of comments are likely to be too trivial in character, and/or the extent of their publication is likely to be too limited, for them to cause any significant damage to another person's reputation. In this particular case, the applicant complained that his reputation had been damaged as a result of comments on a blog. In deciding whether that threshold had been met, the Court was inclined to agree with the national courts that while the majority of comments about which the applicant complained were undoubtedly offensive, in large part they were little more than "vulgar abuse" of a kind – albeit belonging to a low register of style – which was common in communication on many Internet portals. Furthermore, many of the comments complained of, which made more specific – and potentially injurious – allegations, would, in the context in which they were written, likely be understood by readers as conjectures which should not be taken seriously.

In the same decision the Strasbourg court examined the role of information society service providers such as Google Inc., emphasising the important role that such service providers perform on the Internet in facilitating access to information and debate on a wide range of political, social and cultural topics. As regards third-party comments on a blog, the Court has emphasised that Article 8 encompasses a positive obligation on the Contracting States to ensure the effective protection of the right to respect for reputation to those within their jurisdiction.

In *Egill Einarsson v. Iceland no. 2* - 2018), the domestic courts declared defamatory statements on Facebook against the law, but, having regard to the circumstances of the case, declined to award the applicant damages or costs. For the Court, the decision not to grant compensation did not in itself amount to a violation of Article 8. Among other factors, the fact that

the statements were published as a comment on a Facebook page amongst hundreds or thousands of other comments, and the fact that they had been removed by their author as soon as the applicant had so requested, were taken into account to examine the sufficiency of protection of the applicant's right to reputation.

As regards other online activities, information associated with specific dynamic IP addresses facilitating the identification of the author of such activities, constitutes, in principle, personal data which are not accessible to the public. The use of such data may therefore fall within the scope of Article 8 (*Benedik v. Slovenia*). In that regard, the fact that the applicant had not concealed his dynamic IP address was not a decisive factor for assessing whether his expectation of privacy had been reasonable. Conversely, the anonymity linked to online activities is an important factor which must be taken into account.

9. Protection of personal data on electronic communications networks

As pointed out in the previous paragraphs, the GDPR does not cover all forms of data processing. In particular one of the most pervasive forms, which takes place through electronic communications networks, is still regulated by a rather old (considering the evolution of technology) Directive 2002/58 ("concerning the processing of personal data and the protection of privacy in the electronic communications sector") which was slightly updated in 2009 by Directive 136. According to Recital 173 of the GDPR, Directive 2002/58 should have been revised within two years in order to ensure consistency with the Regulation. Although the European Commission presented a proposal in 2017, its approval appears to still be remote. The result is a considerable judicial activism by the CJEU which has been adapting the rules to the new technological, social and economic environment broadly interpreting the principles stated in Article 8 of the CFREU and in the GDPR.

According to article 2(1), the GDPR 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." Under Article 5, any processing of personal data must be lawful and fair; Article 6 describes the circumstances under which processing of personal data is considered lawful, the most important being the consent of the data subject, and

Article 7 specifies the conditions for valid consent within the meaning of the GDPR. All these dispositions are valid also in the case of processing through electronic communications networks, and therefore in the areas regulated by Directive 2002/58/EC.

Article 95 of the GDPR, expressly entitled ‘Relationship with Directive 2002/58/EC’, states that “This Regulation shall not impose additional obligations on natural or legal persons in relation to processing in connection with the provision of publicly available electronic communications services in public communication networks in the Union in relation to matters for which they are subject to specific obligations with the same objective set out in Directive 2002/58/EC”.

The 2002/58 Directive provides for protection of the legitimate interests of subscribers who are not only natural persons, but also legal persons. The Directive applies when each of the following conditions are met:

- there is an electronic communications service (ECS);
- the service is offered over an electronic communication network;
- the service and network are publicly available;
- the service and network are offered in the EU.

The Directive applies to providers of electronic communication services as well as website operators or other businesses. The main areas of intervention are traffic data (especially through cookies), direct marketing and localisation and tracing of users. The inter-relation between the 2002 Directive and the Regulation with regards to traffic data is clearly set out in Recital 30 of the GDPR which provides a definition of “online identifiers”: “Natural persons may be associated with online identifiers provided by their devices, applications, tools and protocols, such as internet protocol addresses, cookie identifiers or other identifiers such as radio frequency identification tags. This may leave traces which, in particular when combined with unique identifiers and other information received by the servers, may be used to create profiles of the natural persons and identify them”.

What are the implications for information and communication activities? Once more one has to look at the case-law of the CJEU, taking into account the fact that most of the service providers that are present on the Internet disseminate in the public a certain amount of information and fall within four cumulative conditions set above. Therefore, when they collect and process the data of their users, they are subject to the same obligations as any other processor. In the *Fashion ID* case (C-40/17) a German online clothing retailer embedded on its website the Facebook ‘Like’ but-

ton. The consequence of embedding that button appears to be that when a visitor consulted the website of Fashion ID, that visitor's personal data were transmitted to Facebook Ireland. The Court stated that users needed to be properly informed of this use of their data and had to give their consent to such a practice. In the *Planet 49* case (C-673/17) a German website offered promotional online games without clarifying that participation implied acceptance of cookies. The Court stated that the consent which a website user must give to the storage of and access to cookies on his equipment is not validly constituted by way of a pre-checked checkbox. Consent must be specific and therefore the fact that a user selects the button to participate in a promotional lottery does not imply that the user validly gave his or her consent to the storage of cookies.

The relevance of these decisions is obvious when one considers that traditional media companies when they go online adopt the same techniques of other data companies, providing services (in this case information services) in exchange for personal data, collecting as much information as they can on their users and allowing, for a remuneration, third parties (through cookies or a direct link, as in in the *Fashion ID* case) to access such data.

10. Data protection and digital consumers

The European Union (at those times still the European Economic Community) adopted its first special programme for consumer protection and information policy in 1975, where it defined five fundamental consumer rights: the right to protection of health and safety, the right to protection of economic interests, the right to claim for damages, the right to an education and the right to legal representation (or the right otherwise to be heard). This programme (together with its successors) has served as the basis for an ever-growing corpus of directives and regulations in the area of consumer protection.

Since the first consumer Directive was enacted (Directive 85/374 on liability for defective products), nearly ninety Directives, Regulations and other legal instruments have been issued covering the most diverse aspects of relation between traders and consumers.

The main areas covered concern product safety, food safety and labelling, energy, financial services, travel, leisure and transport, telecommunications. However, the most important Directives concern, in general, contractual relations between consumers and traders establishing uniform rules on

the conclusion of contracts, especially through electronic means, and strictly regulating unfair terms in consumer contracts. Further, the EU has regulated commercial communication, aggressive and unfair practices and remedies available to consumers. All this with the aim of rebalancing the economic and informational disequilibrium between the parties and protect the economic interests of the weaker party.

The central legal text is Directive 2011/83 on consumer rights which consolidates previous texts and is a so-called “maximum harmonisation”, which means that member States have very little leeway to adapt its provisions, which therefore are substantially the same throughout the whole EU (“Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection”). The Directive covers the pre-contractual information which must be provided to consumers; ensures that consumers have a right to withdraw from a contract although it has been already concluded; prohibit traders from charging consumers with extra fees for the use of means of payment.

In this context it was inevitable that the intersection between new digital technologies, consumer protection and processing of personal data should become a new field of pan-European regulation.

The last two decisions of the CJEU (*Planet 49* and *Fashion-ID*) cited in the previous paragraph are evidence of the loosening of barriers between companies, institutions and individuals that disseminate information and services on the Internet. Traditional media companies offer their core business in exchange for personal data; data companies seek to attract users by offering information services. Information is a commodity and personal data are the consideration that is paid to “buy” it. The result is that the distinction between “data subject” and “consumer” is blurred.

The EU has become aware of this economic and social reality and has issued two Directives. No. 2019/770/EU “on certain aspects concerning contracts for the supply of digital content and digital services”; and No. 2019/2161/EU on the “better enforcement and modernisation of Union consumer protection rules”.

According to Directive 2019/770 ‘digital content’ means data which are produced and supplied in digital form, while “digital service” is a service that allows the consumer to create, process, store or access data in digital form, or a service that allows the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other

users of that service. Clearly, all information is “digital content”, and all communication services (typically through social media”) can be qualified as “digital services”. The Directive indicates an extremely wide scope, including computer programmes, applications, video files, audio files, music files, digital games, e-books or other e-publications, and also digital services which allow the creation of, processing of, accessing or storage of data in digital form, including software-as-a-service, such as video and audio sharing and other file hosting, word processing or games offered in the cloud computing environment and social media (Recital no. 19). The Directive extends considerably its ambit when natural persons act outside their trade, or when businesses and professionals receive digital content or services and are qualified as consumers and therefore entitled to consumer protection.

Directive 2019/770 points out that digital content or digital services are often supplied also where the consumer does not pay a price but provides personal data to the trader and that such business models are used in a considerable part of the market. How does this square with data protection law? The Directive recognises that the protection of personal data is a fundamental right and that therefore personal data cannot be considered a commodity; however digital consumers, when they “pay” with personal data, should be entitled (also) to contractual remedies (Recital no. 24).

This paves the way to a modern notion of contract for the provision of information. Traditionally, media were substantially exonerated from contractual liability towards the information recipients, either because it was extremely difficult to establish a causal link between the news received and the damage allegedly suffered; or, as in the case of public broadcasting, there was no private law contract between the provider and the user. But now, when individuals are constantly using information providers to direct their choices (e.g. a traffic navigation service; a booking platform; a weather forecast service), if one applies the main consumer protection principles one can see that terms and conditions which are aimed at exonerating the providers from liability, or that make it extremely difficult to bring a claim against them, are invalid. There is therefore an obligation of conformity for the information provided (it must be “fit for any particular purpose for which the consumer requires it and which the consumer made known to the trader at the latest at the time of the conclusion of the contract, and in respect of which the trader has given acceptance” (Article 7).)

Directive 2019/2161 has an even broader scope because it extends to all online transactions – whether a price is paid, or consideration consists

in personal data provided to the trader – the general protection afforded to consumers by the “full harmonisation” Directive 2011/83.

A typical example of this expansion is online advertisement on a media website which now falls under the responsibility also of the media company, especially when it is extremely difficult for the user to understand when he or she is reading an unbiased piece of information or, instead, some form of indirect advertisement.

One of the most important, and most relevant from a practical point of view, innovations brought by Directive 2019/2161 is that which concerns ranking: Traders should be prohibited from providing information to a consumer in the form of search results in response to the consumer’s online search query without clearly disclosing any paid advertising or payment made specifically to achieve a higher ranking within the search results. This provision is particularly important when the information searched for concerns goods and services, such as travel, accommodation and leisure activities, offered by different traders and they are presented according to a certain ranking.

CHAPTER V

COMMON LIMITATIONS TO SPEECH AND COMMUNICATION

SUMMARY: 1. Copyright protection – 2. Women’s dignity – 3. Hate speech – 4. “Fake News”.

1. Copyright protection

Traditionally media, in whatever form (print, electronic, digital), disseminate content which benefits or seeks to benefit from legal protection.

Media enterprises produce their own content (news, entertainment shows) or are licensees of content produced by third parties (films, music or sports events).

This protection is provided through copyright law, one of the areas of major and continuous intervention by EU institutions and courts.

From a strictly economic point of view the strength of a media and communications enterprise is largely dependent on the intellectual property (IP) rights – original or derivative – it holds.

Whether it sells its “products” to the final user (examples might include newspaper copy or pay-per-view films), or collects subscriptions, or offers advertising space for messages addressed to its readers/listeners/viewers, a media enterprise is economically successful if it holds rights over content that attracts the public’s attention.

From this point of view there is substantially little difference between the media industry and other entertainment industries (film, music, sports), to which media is strongly connected and with which it is commonly integrated through the same company group.

The role of copyright law has been further enhanced by the dominant digital technologies of production, storage, transmission and by the possibility open to practically anybody – i.e. not only businesses from the audio-visual industry – to self-produce and disseminate content.

“Copyright” has become a substantial legal umbrella under which works which are quite different from products of artistic creativity, such as computer software, databases and semiconductors, can find shelter.

The EU texts that have a significant influence on media and communications law are

The 2001/29 Directive on the harmonisation of copyright and related rights in the information society

The 2004/48 Directive on the enforcement at IP rights.

The 2019/790 Directive on copyright in the “Digital Single Market”.

The 2019/789 Directive on online transmission and retransmission via satellite and cable.

The 2017/1128 Regulation on cross-border portability of online content services.

To all these normative texts one must add dozens of decisions by the CJEU which are aimed at clarifying the scope of copyright legislation, especially in its intersection with other pieces of EU law.

Before examining the various texts in detail, an important caveat must be made.

Although the above directives insist on their role of protecting “authors”, this claim is purely rhetorical. With very few exceptions (painters, sculptors) the author, in order to exploit his or her work of art must transfer – generally for decades – the rights to an entertainment enterprise (publisher, TV, film or music producer). Therefore, the effective actors of copyright law which together constitute a powerful pressure group on the EU institutions – are not a crowd of unnamed artists, but the media, publishing and entertainment industry, which is the effective holder of copyright and constantly pushes towards its expansion.

With this economic reality in the background, the direction of EU copyright law becomes clearer.

Directive 29/2001 acknowledges the technological revolution brought by digital technologies in the production, the reproduction and the distribution of protected works.

The dramatic change brought about is manifest. While with a printed copy, or a recording on a physical medium (magnetic tape, film, vinyl) the reproduction process was costly and imperfect, there being a natural difference in quality between the original and its copy, in the digital environment there is no difference between the two, and the duplication process is practically costless and can therefore be unlimited.

The Directive therefore aims at clarifying the essential notions of “reproduction” and “communication” in the digital environment granting the copyright holder full control over these aspects and declaring unlawful any system aimed at circumventing technological measures of protection from unauthorised reproduction of copyrighted works (typically: encryption).

The Directive also enumerates the cases of so-called “fair use” of copy-

righted work by third parties, which do not require the authorisation of the copyright holder.

The most significant of these cases, which are the object of an endless tug-of-war between industry and other stakeholders are:

- a) For teaching and research purposes
- b) For limited informational purpose
- c) For criticism or review
- d) For caricature, parody or pastiche.

Article 5 of the Directive has however a final provision: the various exceptions must not “conflict with a normal exploitation of the work” nor “unreasonably prejudice the legitimate interest of the rightsholder”.

The aims pursued through Directive 2001/29 have been powerfully enhanced through the subsequent and connected Directive 2004/48 on the enforcement of IP rights.

The most important part of Directive 2004/48 (Article 9) is devoted to provisional and precautionary measures. It is easily comprehensible that in a digital environment the availability of immediate remedies is essential. Considering the ease and speed at which a copyrighted work can be disseminated, downloaded and further disseminated, any delay renders legal protections ineffective.

Therefore, the Directive allows urgent injunctions to prevent any imminent infringement or continuation of the infringement. The measure may be coupled with a pecuniary penalty related to non-compliance with the injunction and the feared economic damage.

Even more importantly – in the context of widespread access to the internet – the injunction may be also issued against intermediaries whose services are used in the infringement.

Considering the difficulties that may be encountered in serving judicial notice of the proceedings (the alleged infringer may be found in a remote jurisdiction) the injunctions may be issued *inaudita altera parte* with an adversarial hearing only being possible at a later date.

Furthermore, the Directive provides criteria for the liquidation of damages, including loss of profits by the copyright holder, disgorgement of profits made by the infringing party, or equivalent cost of license to use the works, if it had been previously requested.

There is one aspect that needs to be pointed out: Article 13 of the Directive states that damages can be imposed on the “infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity”.

In most cases the infringement is brought through an intermediary (an Internet provider, a platform, a social medium) which is not aware of the infringement and is not in a position to conduct prior verifications on the content hosted or disseminated.

A bona fide intermediary, as we have seen, may be the addressee of a preliminary injunction but generally will not be liable for damage (for a typical situation analysed in depth by the CJEU see the decision in the *You Tube* and *Cyando* cases C-682 and C-683/2018). The result is that most member States have enacted so-called “notice-and-take-down” procedures through which copyright holders can signal to bona fide intermediaries the existence of an infringement. Some public authority is entrusted with the management of the procedure, which satisfies the legitimate concerns of the intermediaries that copyright might be used to stifle freedom of expression.

The pace of development of new digital technologies and the growing capacity of telecommunication networks and their ubiquity have prompted a further Directive, 2019/790, on the protection of copyright in the so-called Digital Single Market. The premise is that as digital services (and therefore the accessibility of copyrighted works) are available at least at a European level and industries are and must be free to establish themselves in any of the member states, a common legal framework is necessary.

Directive 2019/790 is an eminent example of how EU copyright law is mostly the result of an open conflict between industries that hold IP rights and industries that operate on platforms.

The main provision is, however, that of granting press publications an exclusive right to allow the reproduction online of news and information content. Also important is the regulation of content-sharing platforms (the best example is YouTube), making the platform liable for the negligent dissemination of copyrighted works notwithstanding a “substantiated notice from the rightsholders”.

In such a way the “notice-and-take-down” procedure has become a feature of EU law.

Directive 2019/789 regulates the very common case of a broadcasting enterprise which renders available on its website services ancillary to its ordinary broadcasts or that retransmits its broadcasts online. The implications are clear: while the holder of a broadcasting license has a geographically limited area (national or regional) in which it can operate (and therefore only those who are in that area can receive the broadcast), if the content is put on a website, it can be accessible to anybody, from anywhere. The rule is that such trans-border availability must be authorised

by the copyright holder (e.g., a film in German on the website of a German broadcasting company might be seen also by viewers in Austria and the Italian South-Tirol).

2. Women's dignity

Within the notion of “human dignity”, enshrined in article 2 of the Lisbon Treaty and in article 1 of the CFREU, gradually the principle of “women's dignity” has emerged as instrumental to ensure the effectiveness of equal rights between men and women.

The most obvious applications of the principle are in the fields of family, social and employment relationships and in the role of women in institutions.

However, increasingly, the principle of “women's dignity” is invoked and applied in the field of communications under several aspects.

- a) In the regulation of advertising in order to prevent the portrayal of women in a degrading and insulting way or as less capable, intelligent or inferior.
- b) To prevent cyberviolence and cyberbullying which very often expresses itself through sexist language and online sexual harassment against women.
- c) In gradually eliminating gender stereotypes in the media and in the adoption of a gender-neutral language.
- d) In creating a direct link between sexist and misogynist speech and a series of serious crimes against women, first of all domestic violence and physical violence in public spaces.

While in the first three aspects the EU intervention is generally in the form of soft law, in this last one the move is towards considering offensive language against women and sexist imagery as a form of hate speech (on which see the following paragraph) which requires contrast through criminal law and preventive measures. The argument is that sexist hate speech is one of the causes of violence against women and discrimination against them; it also may escalate to or incite overtly offensive and threatening acts, including sexual abuse or violence and potentially lethal action.

Since the Fourth World Conference on Women, in 1995, improving the role of women in media and communications has been identified as one of the goals of action for equality, development and peace (Beijing Platform

for Action, J). The empowerment of women and gender mainstreaming are integral parts of this process. The Act, recognising that “Everywhere the potential exists for the media to make a far greater contribution to the advancement of women” (§ 234), notes that “Print and electronic media in most countries do not provide a balanced picture of women’s diverse lives and contributions to society in a changing world”, and that “In addition, violent and degrading or pornographic media products are also negatively affecting women and their participation in society” (236). Such is argued to be reinforcing women’s traditional roles and creating a climate in which advertisements and commercial messages often portray women primarily as consumers while targeting girls and women of all ages inappropriately.

To realise gender equality goals and eliminate gender-biased programs, self-regulatory mechanisms for the media need to be created and strengthened, especially in developing countries, where most women are not able to effectively access the expanding electronic information highways and therefore cannot establish networks that will provide them with alternative sources of information. Therefore, women need to be involved in decision-making regarding the development of new technologies in order to participate fully in their growth and impact (238). In addressing the issue of the mobilisation of the media, Governments and other actors should promote an active and visible policy of mainstreaming gender perspectives in policies and programmes.

The same objectives are those of the Council of Europe Convention on preventing and combating violence against women and domestic violence, known as the Istanbul Convention, adopted in 2011 with the purpose of preventing, prosecuting and eliminating violence against women and domestic violence. In designing a comprehensive framework, the Istanbul Convention also accounted for the role that media and communications can play in either promoting equality or misogyny. Article 17 disposes that “Parties shall encourage the private sector, the information and communication technology sector and the media, with due respect for freedom of expression and their independence, to participate in the elaboration and implementation of policies and to set guidelines and self-regulatory standards to prevent violence against women and to enhance respect for their dignity”. Moreover, it says that “Parties shall develop and promote, in co-operation with private sector actors, skills among children, parents and educators on how to deal with the information and communications environment that provides access to degrading content of a sexual or violent nature which might be harmful”.

In spite of these determinations, in the last few years the European

Parliament has intervened many times on the same subject in recognition of the persistence of gender stereotypes, sexism, sexual harassment and abuse throughout Europe and the world, and that this phenomenon involves victims and perpetrators of all ages, educational backgrounds, incomes and social positions, with physical, sexual, emotional and psychological consequences for the victim. The unequal distribution of power between men and women is evident and apparent given the endurance of gender stereotypes and sexism, including sexist hate speech, offline and online, and that causes all forms of violence against women while promoting men's domination over women and discrimination against them. In the European Parliament resolution of 26 October 2017 on combating sexual harassment and abuse in the EU, the EU Parliament affirmed that sexual harassment or sexist behaviour is not harmless, whereas trivialising sexual harassment or sexual violence by using understated language reflects sexist attitudes towards women and communicates messages of control and power in the relationship between men and women, impacting on women's dignity, autonomy and freedom.

In the same period, with the European Parliament resolution of 11 September 2018 on measures to prevent and combat mobbing and sexual harassment at the workplace, in public spaces, and political life in the EU, the Parliament condemned all forms of harassment against female politicians on social media in the form of 'trolling', involving the posting of sexist and abusive messages, including death and rape threats. In particular, the Resolution evidenced that this phenomenon has physical, sexual, emotional and psychological consequences for the victim and prevents women's empowerment, and so the resolution calls on the Commission and Member States to carry out further research into the causes and consequences of sexual harassment in public spaces, including the impact that sexist and stereotyped advertisements may have on the incidence of violence and harassment.

Subsequently, with the European Parliament resolution of 17 April 2018 on gender equality in the media sector in the EU, the Parliament highlighted that in modern-day societies the advertising industry plays a major role within the media landscape, as it communicates by using images and ideas that appeal to our emotions and can hence shape our values, attitudes, and perceptions of the world. By conveying a distorted gender image, advertising may resort to sexism and replicate discriminatory practices, when a gender is portrayed in a degrading and insulting way or as less capable, intelligent or as inferior.

It stresses that violent and sexist media content is negatively affecting

women and their participation in society and expresses concern about certain commercial audio-visual communications that cause psychological or physical damage to children and young people, especially advertising that indirectly encourages eating disorders such as anorexia, and to take other steps to protect particularly vulnerable persons, including girls and young women, against such content.

Therefore, the EU Parliament recommended that soft measures such as gender equality plans or guidelines should be given even more prominence in media organisations and advises that these protocols set the standards for the positive portrayal of women in advertising, news, reporting, production or broadcasting and cover all sensitive content areas such as the depiction of power and authority, expertise, decision-making, sexuality, violence, diversity of roles and the use of non-sexist language; encourages, furthermore, public and private media to mainstream gender equality in all their content and to adopt equality plans in order to reflect social diversity. It stressed that special attention needs to be paid to training on how the media report on cases of gender-based violence, including violence against LGBTIQ people.

More recently, the European Parliament adopted the resolution of 14 December 2021 with recommendations to the Commission on combating gender-based cyberviolence, which is a continuation of offline gender-based violence and that no policy alternative will be effective unless it takes that reality into consideration, stressing that existing Union legal acts do not provide the mechanisms needed to address gender-based cyberviolence adequately. So, it asked the Member States and the Commission to formulate and implement legislative and non-legislative measures to combat this widespread problem, especially to eradicate gender stereotypes, sexist attitudes and discrimination against women, as well as sexist advertising and media content, such as sexist imagery and language, sexist practices and gender stereotypes.

Following the same politics, the European Parliament resolution of 21 January 2021 on the EU Strategy for Gender Equality and the European Parliament resolution of 16 September 2021 with recommendations to the Commission on identifying gender-based violence as a new area of crime listed in Article 83(1) TFEU, show how communication is important to make a meaningful positive impact. These acts insist that cyberviolence, including online sexual and psychological harassment, cyber-bullying, cyberstalking, non-consensual disclosure of sexual images, sexist hate speech online and new forms of online harassment such as zoom bombing or threats online, constitutes a form of gender-based violence and disproportionately affects women and girls.

Unfortunately, in spite of all of those interventions, gender-based violence and harassment continue at alarming levels. Too many people still violate the principle of gender equality through sexist hate speech and by blocking actions against gender-based violence and gender stereotypes, especially using media (including social media), advertising, marketing strategies and public speeches.

The recent EU Parliament and Council Regulation (EU) 2021/692 of 28 April 2021, establishing the Citizens, Equality, Rights and Values Programme, continue the actions and the methods of the Daphne programme, which has funded projects to raise awareness, to provide support services to victims and to support the activities of civil society organisations working on the ground. It has addressed all forms of violence, including domestic violence, sexual violence, trafficking in human beings, stalking, and harmful traditional practices, such as female genital mutilation, as well as newly emerging forms of violence, such as cyber-bullying and online harassment.

In spite of the increasing number of interventions to protect women's dignity, still too many violations remain.

3. Hate speech

In Europe, there is a tendency that opinions which openly incite violence and discrimination on racial, ethnic, sexual or religious grounds should not have the protection reserved for freedom of expression, whereas in other countries, such as in the United States, freedom of expression, even when it comes with content inciting hatred and intolerance towards certain categories of subjects, seems to assume a preponderant value.

These are two solid yet opposed principles: on the one hand, freedom of expression and its free marketplace of ideas that sees in the plurality of conflicting voices the growth of the democratic system. On the other hand, the need to protect the position of some subjects from threatening or denigrating expressions, incitement to hatred or in any case intolerance that calls for intervention through repressive acts.

In Europe and in most countries of the world, the circulation of information messages which openly insult people or promote or incite hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, is a criminal offence sanctioned

by law.

This sanction finds its reason because such information provokes public alarm and there is a need to defend a condition of peace, of tranquillity and of collective security proper to public order, which maintains the stable and proper development of the relationships of the social life of a community.

This kind of information can take on the most varied appearance: publications in the press, public meetings and events, radio and television interviews, musical works, cartoons, video games, movies and messages posted on the Internet.

On the regulatory side, there are references dictated by the Council of Europe through Recommendation No. R (97) 20 adopted on 30 October 1997, according to which hate speech includes any form of expression that promotes, incites or justifies racial hatred, xenophobia, anti-Semitism and any other form of hatred based on intolerance.

According to this reference, hate speech shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerant expression of aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.

Directive 2000/43/EEC of 29 June 2000, which implements the principle of equal treatment between persons, regardless of race or ethnic origin, also represents a step forward in the regulation: art. 2, paragraph 3, prohibits “unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”.

In the EU legal context, the most relevant provisions regarding hate speech are the ones embedded in the Council Framework Decision 2008/913/JHA of 28 November 2008 on combatting certain forms and expressions of racism and xenophobia by means of criminal law. This source states clearly that racism and xenophobia constitute a threat to the groups of persons targeted by that conduct and constitute a violation of the principles of freedom, of democracy and respect for fundamental freedoms. All these forms of expression are qualified as hate speech.

Art. 1 (1) provides that:

Offences concerning racism and xenophobia

1. Each member state shall take the measures necessary to ensure that the following intentional conduct is punishable:

(a) public incitement to violence or hatred directed against a group of

- persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;
- (b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;
 - (c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;
 - (d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

But legal definitions of hate speech vary from country to country.

Apart from the statements of principle contained in EU sources, terms such as contempt, hatred and intolerance evoke concepts of difficult determination that can easily lend themselves to different interpretations, related also to the heterogeneous experiences and subjective convictions of the interpreter.

a) European legislation and case-law

In many European countries the contrast of expressive forms of racial hatred and negationism is very clear.

In Belgium, the law of 30 July 1981 (known as “loi Moureaux”) punishes acts of racism and xenophobia.

Within the German Penal Code (Strafgesetzbuch), Section 130, there is a specific offence punishing incitement to hatred against parts of the population (volksverhetzung) and those directed at calling for arbitrary or violent measures against groups of people, or to insult or defame their human dignity. This offence is punishable in Germany even if committed by German citizens abroad or by foreign subjects within German territory. Moreover, it should be noted that even in the law on public and private broadcasting, there is a legislative provision that prohibits discriminatory

expressions that are likely to harm human dignity.

The Danish Penal Code (“Straffeloven”), in its section 266 B, sanctions hate speech, including it in public statements containing threats, insults or denigrations due to race, ethnic origin, faith and sexual orientation. Similarly, the Swedish Penal Code has codified as a crime against public order (Penal Code, Chapter 16, Section 8) the activity of those who communicate threats or contempt to groups of people for their racial, ethnic and religious origins or their sexual orientation.

Finland, too, has provided within the penal code, section 11, a penalty for “vihapuhe”, that is, hate speech, sanctioning it in the most serious cases with up to two years of imprisonment.

Iceland has a similar regulation (Art. 233 of the Penal Code). Norway, in section 135a of the Penal Code (“Straffeloven”), punishes not only discriminatory expressions of a violent character, but also those that ridicule groups of people because of their physical, ethnic or religious beliefs.

Sweden has essentially defined hate speech within its penal code (“Brottsbalken”), as the “offence of agitation against a national or ethnic group” (chapter 16, section 8) to which sexual orientation has also been added.

Equivalent content is the legislation in the Netherlands, whose penal code, art. 137 letters c) and d) punishes those who pronounce in any form (oral, written or graphic) derogatory expressions against a group of people by reason of their race, religion, philosophy, sexual orientation or physical or mental disability.

In Poland, conduct that offends religious feelings or that disturbs religious services is also sanctioned.

In the UK, there are several regulatory sources aimed at countering violent and disparaging expressions, but these tend to admit satirical expressions based on popular and religious beliefs.

The Italian legal system to counteract hate speech is represented by Law 25 June 1993 n. 205, condemning forms of expression such as gestures, actions and slogans linked to the Nazi-Fascist ideology and aimed at inciting violence and discrimination on racial, ethnic, religious or national grounds.

France has probably the most detailed and precise regulation that includes the different cases within the notion of hate speech. The 2005 amendment to the French Penal Code prohibits any form of incitement to discrimination, hatred, violence against persons or groups of persons on account of their ethnicity, nation, race, religion, gender, or their sexual orientation or disability. The French jurisprudence, called to interpret the

legitimacy of many cases of discriminatory forms of communication, has shown itself to be traditionally liberal, not sanctioning conduct that was placed in that labile and mobile partition between hate speech, satire and freedom of expression.

The legal action aimed at blocking and punishing the satirical cartoons published in the French magazine *Charlie Hebdo* was rejected for failing to comply with the procedural requirements established by the law of 29 July 1881 on the freedom of the press (Tribunal de Grande Instance (TGI), Paris, judgment of 22 March 2007, confirmed by the Court of Appeal in its judgment of 12 March 2008).

The Tribunal de Grande Instance (TGI) of Paris, in its judgment of 22 October 2002, considered that the phrase “the stupidest religion is precisely that of Islam” contained in an interview with a French intellectual published in a weekly magazine was not disparaging or counted as hate speech.

Another interview in which it was stated that “Jews are a sect, a fraud” was held by the Court of Cassation, *Assemblée plénière*, of 16 February 2007 n. 06-81785, a derogatory and insulting expression against a group of people because of its ethnic origins and therefore necessarily to be limited.

The poster of the film “The people vs. Larry Flint” by Milos Forman (1996) that depicted the protagonist superimposed on the groin of a bikini-clad woman and himself covered only by a stars-and-stripes loin cloth, his arms outstretched in the position of a crucifix, was held by the Court of Paris with the judgment of 20 February 1997 to be of bad taste, intentionally provocative, but not representing an attack on religion or its adherents.

A cartoon that appeared in the newspaper “*Libération*” on 25 April 2005, depicting a naked Christ wearing a condom was held by the Cour de Cassation, criminal chamber, judgment of 2 May 2007, to not exceed the limit of freedom of expression and also intended to raise public awareness in order to protect against the HIV virus. Similar reasons were given in the case of the *nuit de la sainte-capote*, an event to promote the use of condoms for the prevention of sexually transmitted diseases, whose poster showed a young, apparently religious, woman conspicuously made up, with only her head covered and wearing a cross between her breasts (Cour de Cassation, criminal section, judgment of 14 February 2006).

The poster of a well-known fashion house that replicated the protagonists of the fresco of the Last Supper by Leonardo da Vinci, though wearing clothes promoted by the campaign, was instead considered offensive and blasphemous by the Tribunal de Grande Instance (TGI) of Paris with the precautionary measure of 10 March 2005 on the assumption that such representation

did not pursue an artistic aim, but a commercial propaganda exposed to the public (decision confirmed by the Cour d'appel de Paris of 8 April 2005, but then annulled by the Cour de Cassation on 14 November 2006).

Otherwise, in the United States, freedom of expression is a sacred principle, guaranteed by the First Amendment of the Constitution, whose pervasive force can be affected only in extremely limited cases. According to American jurisprudence, obscene, threatening or inciting expressions and those charged with hatred (the so-called "fighting words") are excluded from constitutional coverage, even if, in interpretive practice, it is very difficult to completely untie them from the path of legitimate freedom of expression.

The first case brought to the attention of the US Supreme Court was *Beauharnais v. Illinois*, 343 U.S. 250 (1952) concerning the distribution of a leaflet accusing black people of committing crimes against property and committing violence.

However, the first leading case is *New York Times v. Sullivan*, 376 U.S. 254 (1964), in which defamatory speech is valued as the exercise of the right to criticism guaranteed by the First Amendment. The case of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), established the criterion of "clear and present danger" that means a real imminent danger as necessary to restrict freedom of expression and declare the anti-juridical nature of the conduct. See also *R.A.V. v. St Paul*, 505 U.S. 377 (1992) and *Virginia v. Black*, 538 U.S. 343 (2003) on cross burning practices considered lawful.

The constant conflict and the difficulty for the interpreter to have a precise and static line of demarcation between the two opposing instances and between what is allowed and what is not allowed is also testified by the jurisprudence of the Supreme Court of Canada, in which the denigration of the semitic race, albeit implemented with different executive modalities, had two conflicting interpretative solutions (see the judgements *R. v. Keegstra*, (1990) 3 S.C.R. 697, and *R. v. Zundel*, (1992) 2 S.C.R. 731).

b) On-line hate speech

The massive diffusion of the Internet and social media allows anyone to express their opinion in the digital context and to widely disseminate it. And it is precisely within electronic communications that most of the messages containing hate content nestle. For these reasons, the Council of Europe, after having produced a Convention on Cybercrime on 23 November 2001, issued an Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (January 28, 2003).

Under this Additional Protocol, each country shall adopt legislative

and other measures as may be necessary to establish as criminal offence under its domestic law, when committed intentionally and without right, the following conduct: threatening and/or insulting publicly, through a computer system, (i) persons for the reason that they belong to a group, distinguished by race, colour, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors, or (ii) a group of persons which is distinguished by any of these characteristics.

But beyond the regulatory provisions in the member states, a significant contribution towards the fight against hate crimes comes from the large telecommunications operators, which have adopted internal policies to control and remove information contents that contain these offenses.

The major worldwide IT companies (owners of platforms, OTT) share, together with other platforms and social media companies, a collective responsibility and a role in promoting and facilitating freedom of expression throughout the online world.

As is known, through the Internet and mainly social media, hate messages are spread and this phenomenon has registered a significant growth among users. For these reasons, on 31 May 2016, Facebook, Google, Microsoft, Twitter and other OTT companies jointly agreed to a European Union code of conduct obligating them to review the majority of valid notifications for removal of illegal hate speech posted on their services within 24 hours.

It is written in this code of conduct that the IT companies support the European Commission and EU member states in the effort to respond to the challenge of ensuring that online platforms do not offer opportunities for illegal online hate speech to spread virally. The spread of illegal hate speech online not only negatively affects the groups or individuals that it targets, it also negatively impacts those who speak out for freedom, tolerance and non-discrimination in our open societies and has a chilling effect on the democratic discourse on online platforms. And in order to prevent the spread of illegal hate speech, it is essential to ensure that relevant national laws transposing the Council Framework Decision 2008/913/JHA are fully enforced by member states in the online as well as the in the offline environment.

While the effective application of provisions criminalising hate speech is dependent on a robust system of enforcement of criminal law sanctions against the individual perpetrators of hate speech, this code of conduct must be complemented with actions geared at ensuring that illegal hate speech online is expeditiously acted upon by online intermediaries and social media platforms, upon receipt of a valid notification, in an appropriate timeframe. To be considered valid in this respect, a notification should not

be insufficiently precise or inadequately substantiated.

The IT companies, responding to the spread of illegal hate speech online, have agreed with the European Commission on a code of conduct setting the following public commitments:

- IT Companies are to be obliged to put in place clear and effective processes to review notifications regarding illegal hate speech on their services so they can remove or disable access to such content and set rules or Community Guidelines clarifying that they prohibit the promotion of incitement to violence and hateful conduct.
- Upon receipt of a valid removal notification, IT Companies must review such requests against their rules and community guidelines and where necessary national laws transposing the Framework Decision 2008/913/JHA.
- IT Companies to must review the majority of valid notifications for removal of illegal hate speech in less than 24 hours and remove or disable access to such content, if necessary.
- In addition to the above, IT Companies must educate and raise awareness with their users about the types of content not permitted under their rules and community guidelines. The use of the notification system could be used as a tool to do this.
- IT companies must provide information on the procedures for submitting notices, with a view to improving the speed and effectiveness of communication between the Member State authorities and the IT Companies, in particular on notifications and on disabling access to or removal of illegal hate speech online. The information is to be channelled through the national contact points designated by the IT companies and the Member States respectively. This would also enable Member States, and in particular their law enforcement agencies, to further familiarise themselves with the methods to recognise and notify the companies of illegal hate speech online.
- IT Companies must encourage the provision of notices and flagging of content that promotes incitement to violence and hateful conduct at scale by experts, particularly via partnerships with Civil Society Organizations, by providing clear information on individual company Rules and Community Guidelines and rules on the reporting and notification processes. IT Companies should endeavour to strengthen partnerships with CSOs by widening the

geographical spread of such partnerships and, where appropriate, to provide support and training to enable CSO partners to fulfil the role of a “trusted reporter” or equivalent, with due respect to the need of maintaining their independence and credibility.

- IT Companies rely on support from Member States and the European Commission to ensure access to a representative network of CSO partners and “trusted reporters” in all Member States helping to help provide high quality notices. IT Companies to make information about “trusted reporters” available on their websites.
- IT Companies must provide regular training to their staff on current societal developments and to exchange views on the potential for further improvement.
- IT Companies should intensify cooperation between themselves and other platforms and social media companies to enhance best practice sharing.
- IT Companies and the European Commission, recognising the value of independent counter speech against hateful rhetoric and prejudice, aim to continue their work in identifying and promoting independent counter-narratives, new ideas and initiatives and supporting educational programs that encourage critical thinking.
- The IT Companies should intensify their work with CSOs to deliver best practice training on countering hateful rhetoric and prejudice and increase the scale of their proactive outreach to CSOs to help them deliver effective counter speech campaigns. The European Commission, in cooperation with Member States, to contribute to this endeavour by taking steps to map CSOs’ specific needs and demands in this respect.
- The European Commission in coordination with Member States to promote the adherence to the commitments set out in this code of conduct also to other relevant platforms and social media companies.

c) **Negationism**

The negation of a tragic historical event such as genocide or ethnic cleansing or a mass crime or against humanity – incontrovertibly ascertained – is a conduct that can take different forms of expression that denies, against all evidence, the existence of the historical fact itself or minimises it.

Negationism can be implemented through a variety of techniques:

through the use of untrue or falsified evidence or documents that are presented to the public as authentic documents, unknown to the public purportedly because of their subversive content, through altered or incomplete statistical data, by means of false evidence and also by means of deliberately incorrect or partial translations inserted in a well-established historical context which is deliberately intended to distort. There are, moreover, other techniques which take into account true documents, that are interpreted differently, through particular arguments devoid of logic that are not combined with the other reliable sources.

The result sought is to rewrite history according to a partial and untruthful perspective, instrumental to the circulation of political theses already disowned by historical events. There are many historical facts that are the subject of denial: examples include the holocaust of the Second World War, the genocides in the former Yugoslavia, the ethnic wars in the African continent, the massacres in Tibet, the Armenian genocide in Turkey and the Foibe massacres in Italy.

The theme of negationism directly involves freedom of expression: to what extent is it permissible, in the name of freedom of expression of thought, to circulate theses, ideas, doctrines that deny historical facts? In the conflict between the fundamental right to freedom of expression and the safeguarding of historical truth and the dignity of persons and their descendants who are victims of the wounds of history, the right is called to take a direction, affirming that freedom of expression cannot also contemplate facts that deny a truth known and proven by history. In other words, the freedom of speech that is the fruit of an incorrect or false inner conviction of the subject that utters it is not protected because it does not correspond, that is, it is not adherent, to an objective truth accredited and already consolidated in the community.

Furthermore, precisely because it involves dramatic events that have affected a multitude of people, the denier opinion, if freely circulated, would undermine the human dignity of said multitude. In the case of racial persecutions such as the Holocaust, moreover, in the publication of denial theses there is also a feeling of a racist nature that undermines one of the cardinal principles of contemporary legal systems, represented by the equality and equal dignity of all individuals.

In Europe, state members have introduced strict legislative measures to prevent and combat negationism; in Austria, the 1992 constitutional law introduced the crime of negationism, that is, the minimisation or justification of the Nazi genocide accomplished through any expressive

means, including the press, radio, cinema and modern communication technologies, as long as it is suitable for being perceived by a multitude of people, which, moreover, provides, in the most serious cases, up to 20 years of imprisonment.

In Belgium, the Law of 23 March 1995 sanctions negationism by punishing those who minimise, justify or approve the genocide committed during the second world war by the Nazi regime.

In France, Law No. 90-615 of 13 July 1990, known as “Loi Gayssot”, in punishing all forms of discrimination based on belonging or not belonging to an ethnic group, nation, race or religion, specifically sanctions the challenge of the existence of crimes against humanity as defined by the statute of the International Military Tribunal of Nuremberg.

In 1984 Germany amended its penal code by introducing paragraph 130, which prohibits the denial or minimisation of genocide committed during the second world war, the sanction of which, in the event of non-compliance, provides for up to five years in prison. In particular, the crime consists in the denial, trivialisation or public justification of the crimes committed by the Nazi regime. This criminal figure is distinguished from the pre-existing ones, relating to the incitement to hatred against parts of the population, by its character of abstract or presumed danger: as has been pointed out, the legislator has omitted any reference both to the objectively agitative conduct and to the subjective identification of the author with the Nazi ideology, so that the legal good protected coincides only with the protection of public order.

The Spanish legislation on denial is very strict: art. 607 of the penal code sanctions any form of expression aimed at denying, minimising or justifying any type of genocide and rehabilitating the regimes that have committed them.

These laws are present mostly in European states, while in the other continents they are almost absent, or in any case they do not possess the same specificity and descriptive precision. This is due to the fact that Europe itself was the scene of the greatest genocide during the second world war, the memory of which is still very clear in the countries that have experienced it.

d) The most relevant case-law on hate speech and negationism of the ECtHR

The European Court of Human Rights (ECHR) has been asked several times to judge on the compatibility of the limits contained in the laws of states that restrict and sanction the circulation of ideas and expressions with

the principle enshrined in art. 10 of the European Convention on Human Rights. Freedom of expression is in fact subject to certain restrictions justified on grounds of public or general interest provided for by law. The aforementioned article establishes the exercise of freedom of expression, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

This means, in other words, that member states may impose regulatory restrictions on the exercise of those fundamental rights and freedoms, provided that such limits do indeed meet objectives of general interest and do not constitute, with regard to the objective pursued by the rule, a disproportionate and unacceptable action likely to affect the very substance of the rights protected.

In such cases, therefore, it is necessary to balance the opposing interests and to ascertain, with reference to all the factual circumstances of each case, whether or not a fair balance between those interests has been observed. And to achieve this, inevitably, the individual competent authorities are given wide discretion in the verification of the proportionality between the regulatory restrictions imposed for the achievement of the objective pursued and the assurance of fundamental rights.

This is a principle first established by the jurisprudence of the ECHR on the interpretation of Article 10, n. 2, (later taken from the jurisprudence of the Court of Justice of the EU) that the national authorities enjoy a margin of discretion in assessing the existence of an overriding social need which may justify a restriction of freedom of expression.

From the above emerges a form of freedom of expression (and the manifestation of thought in general), as effectively indicated in the second paragraph of Article 10 of the ECHR, that can never be expressed in an absolute way. Indeed, its claim as a non-compressible right of the individual, seems a formulation that is closer to myth than reality.

Freedom of expression, in whatever form it takes, must adapt to the context in which it is manifested, under the limits and constraints laid down for that specific social and economic environment.

The expression of thought, even in its most articulated forms, is therefore a primary guarantee that cannot be considered detached from other subjective

situations and must continually confront them, prevailing, in some cases and, succumbing, in others. It is not possible, therefore, to operate a hierarchy within the fundamental freedoms because the context in which they are placed and expressed is complex and changeable and the interpreter will only be able to make a concrete assessment of conflicting interests, encouraging the criteria that best ensure collective protection, namely the public interest, or that maintain public order or protect the interests of specific categories of persons such as consumers in general, or loyalty in business relations.

As is well known, the ECHR is called upon to assess whether a restriction on the freedom of expression imposed by a state is compatible with the fundamental right protected by art. 10 of the Convention; within its power of review, the Court does not have the task of taking the place of the domestic courts, but merely of verifying whether or not the judgments delivered by the national courts are in conformity with the provisions of the Convention. In this context, therefore, the Court confines itself to ascertaining whether the member state has used this option in good faith, scrupulously and reasonably. In order to arrive at such an assessment, the Court must assess the interference of the Member State, taking into account the specific case in its entirety, in order to ascertain whether the reasons invoked by the national authorities justifying such a limitation, are adequate and sufficient and whether the interference was proportionate to the legitimate purpose pursued.

In this way, the EU Court assesses whether the national authorities have applied the rules in accordance with art. 10 of the Convention or not, taking as a reference, of course, the relevant factual circumstances. In the case of infringements of freedom of expression, the Court generally pays particular attention to the content of the applicants' statements and to the context in which the statements were made, also taking into account the seriousness and proportionality of the sanction or penalty imposed.

The Court, ultimately, with the power to review the case before it, represents an additional degree of jurisdiction and is given the task of assessing whether the adoption of "necessary measures" by the state is compatible with freedom of expression, without the possibility of new factual investigations being allowed.

In the case-law of the Court, the restriction of freedom of expression, as well as the restriction of the right of the public to receive information, have been endorsed in order to promote the protection of the vital interests of the state, such as the defence of public order or the prevention of crime, generally all reasons related to security or national integrity.

So among the cases dealt with by the Court that were not deemed violations of art. 10 of the Convention are the condemnation (by the national judicial authorities) of journalists and publishers for the publication by the press of bellicose statements of terrorists (*Falakaoglu, Saygili v. Turkey*, 23 January 2007), diplomatic documents classified as confidential (*Stoll v. Switzerland*, 10 December 2007), the seizure of material inciting ethnic hatred (*Balsyte, Lideikiene v. Lithuania*, 4 November 2008) or documents relating to a parliamentary inquiry (*Leempoel & S.A. Ed. Cinerevue v. Belgium*, 9 November 2006) or the printing of cartoons denigrating the Muslim religion (*I.A. v. Turkey*, 13 September 2005).

Another relevant case (*Féret v. Belgium*, 16 July 2009) concerns a Belgian member of Parliament and chairman of the Front National political party, who during an election campaign distributed leaflets that, according to the Belgian courts, could amount to incitement to racial discrimination. The ECHR did not find any violation of art. 10 of the Convention as the limitation imposed by Belgian law was justified by the interest of preventing disorder, given that the resonance of political slogans in an electoral context is higher.

Of interest for our analysis is the case of denial of a genocide: in 2005 the Chairman of the Turkish Workers' Party, made public statements in Switzerland on the Armenian genocide: "the allegations of the Armenian genocide are an international lie. The lie of the Armenian genocide was first invented in 1915 by the imperialists of England, France and Tsarist Russia, who wanted to divide the Ottoman Empire during the first world war". In balancing the right to freedom of expression under Article 10 and the right to private life under Article 8 of the Convention, the EU Court analysed a number of relevant factors, such as the nature of the statements, the place and time when they were expressed, the extent to which the rights of Armenians were consequently affected, and the severity of the conviction imposed. After taking into account all these relevant factors, the Court held that the Swiss government's interference with the politician's right to freedom of expression was not necessary in a democratic society, condemning the Swiss government for violation of Article 10 of the Convention.

The Court's reasoning in this case was widely criticised for creating a double standard between the Holocaust and other genocides, along with failure to acknowledge anti-Armenian feeling as a motivation for genocide denial.

The condemnation of anti-Semitic sentences can happen even if they were pronounced during a public entertainment show. Such a case concerns the conviction of French comedian Mr. M'Bala for his show in Paris containing public insults directed to a person or group of persons on account of their

origin or for belonging to a given ethnic community, nation, race or religion, specifically, in this case, people of Jewish origin or faith and for Holocaust denial (*M'Bala v. France*, 20 October 2015). The EU Court considered the applicant had sought to deflect Article 10 from its real purpose by using his right to freedom of expression for ends which were incompatible with the letter and spirit of the Convention.

About sexual orientation, an Icelandic person left comments below an online article describing homosexuality as “disgusting”, using expletives and employing derogatory language to imply a link between homosexuality, sexual deviancy and animals mating. After being punished in his own country, he went before the European Court, which was tasked with determining whether this was a violation prescribed by law, and if the determination of the violation was proportionate to the legitimate aim pursued and necessary in a democratic society in order to achieve those aims. There is vast precedent establishing the importance of freedom of expression to democratic society and to individual self-fulfilment, even in cases where information, comments or ideas are considered offensive, shocking or disturbing, owing to demands of pluralism and tolerance (*Von Hannover v Germany*, 7 February 2012; *Bédat v Switzerland*, 29 March 2016). Thus, the Court warned that any exceptions to freedom of expression must be construed strictly and solidly established. In order to establish whether an interference with the applicant’s right is “necessary in a democratic society”, the Court must examine any such encroachment within the whole context of the case and determine whether “it was proportionate to the legitimate aim pursued”, with reference to the “relevant and sufficient” justifications of the national authorities. It must also consider the interference against the nature and severity of any penalty imposed.

The Court then examined whether the applicant’s conviction under Icelandic law fulfilled the three requirements of lawful restriction on freedom of expression, as imposed by Article 10 (2) of the Convention: first, whether it was prescribed by law, second, whether the interference was in pursuance of a legitimate aim and third, whether it was necessary in a democratic society. At the end of this process, the EU Court considered the necessity of the interference with the applicant’s rights to freedom of expression in a democratic society, declared the applicant’s complaint under Article 10 to be “manifestly ill-founded” and found no violation of his rights under Article 10 of the Convention.

The jurisprudence of the Court has more frequently ascertained the violations of art. 10 by the decisions of the national courts restricting or prohibiting the disclosure of statements which are particularly critical or

harsh in relation to the work of someone, or of messages of a political nature, or of books on the activities of the secret services (*Sunday Times v. The United Kingdom*, 26 November 1991), or not scientifically proven research (*Hertel v. Switzerland*, 25 August 1998), or in the revelation of news relating to the intimate life or the private sphere of individuals, providing the interpreter with useful elements for the reconstruction of the principles that govern his pronouncements.

Another case concerned the conviction of the leader and spokesperson of the organisation “Sharia4Belgium”, which was dissolved in 2012, for incitement to discrimination, hatred and violence on account of remarks he made in YouTube videos concerning non-Muslim groups and Sharia (*Belkacem v. Belgium*, 20 July 2017). The EU Court noted that in his phrases he had called on viewers to overpower non-Muslims, teach them a lesson and fight them. The Court considered that the comments in question had a markedly hateful content and the leader of said organisation, through his recordings, had sought to stir up hatred, discrimination and violence towards all non-Muslims.

The same cannot be said about negationism, where the Court, on many occasions when it was called upon to assess whether the resolutions and measures adopted by the member states aimed at repressing such forms of expression were compatible and therefore not in conflict with the provision contained in art. 10 of the Convention, has considered that measures restricting freedom of expression were necessary in a democratic society for the protection of its essential and basic principles, such as human dignity, non-discrimination and the principle of equality. It is, in other words, legitimate and necessary interference in a democratic society, as indicated by the second paragraph of art. 10 of the Convention.

Through these jurisprudential rulings it is not possible to reconstruct general principles to be followed that are suitable for each case because each one has its own particularities.

According to the Rabat Plan of Action, a practical tool to combat incitement to hatred, as well as the empowerment of minorities and vulnerable groups, organised and elaborated by United Nation, a six-part threshold test can be suggested, taking into account the following items:

- (a) the social and political context;
- (b) the status of the speaker;
- (c) any intent to incite the audience against a target group;
- (d) the content and form of the speech;
- (e) the extent of its dissemination;

(f) the likelihood of harm, including imminence.

Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated.

The speaker's position or status in society should be considered, specifically the individual's or organisation's standing in the context of the audience to whom the speech is directed.

Intent means that negligence and recklessness are not sufficient for an act to be qualified as a crime because it involves an incitement rather than the mere circulation of information. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.

Content and form: the content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed.

Extent of the speech act: Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public.

Likelihood, including imminence: Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. This means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognising that such causation should be rather direct.

These elements, combined together, are helpful for the courts to gain a better understanding of legislative patterns, judicial practices and policies regarding the concept of incitement to national, racial, or religious hatred, while ensuring full respect for freedom of expression.

4. "Fake news"

In the pre-digital era control over media content was seen as a form of censorship, prohibited by international charters and national constitutions.

There were two noticeable exceptions:

- a) A general prohibition of pornography which was originally applied to printed matter and to films. Especially for the latter, in most European countries, a prior administrative authorisation was required in order to be viewed in movie theatres.
- b) Broadcasting – as we have seen – was and still is under stringent regulatory measures concerning what and when content can be broadcast with the aim, inter alia, of protecting minors, ensuring informational pluralism during elections, guaranteeing quotas of European audio-visual products, etc.

The scenario has radically changed in the digital era and the pervasiveness of communication networks. As was pointed out in Ch. 1, in the digital environment everything becomes "information", and anybody – not only traditional media outlets – can produce and disseminate it.

The turning point, in Europe, came about from the side-effects of the US presidential elections of 2016. In that event there were widespread accusations against online media and social media for having manipulated information in order to favour the election of Donald Trump.

This prompted the EU institutions – heavily struck also by the British Brexit referendum of 2016 in which the EU was portrayed as a foreign and enemy institution – to gradually set out a series of legal instruments in order to counter political disinformation. The expression which has become common in ordinary language is "fake news".

In 2017 the EU established a "High Level Expert Group" which in 2018 issued a "EU Code of Practice on Disinformation", a soft-law instrument to which some – but not all – social media platforms adhered. The Code was updated in 2022.

Then, in 2019, the European Parliament issued a report titled "Automated tackling of disinformation" which has paved the way – as we shall see – to the algorithmic control of "harmful" informational content disseminated over the Internet.

Still in 2019, the EU issued a Regulation [2019/43] on a "Verification procedure related to infringements of rules on the protection of personal data in the context of elections to the European Parliament". The antecedent of this provision is the so-called Cambridge Analytica scandal. This UK

based company had obtained – thanks to the very open Facebook marketing policies – huge amounts of personal data which had allowed the company to profile millions of US and UK users and to target them with “fake news” aimed at steering their vote.

From the political arena the contrast to “fake news” has rapidly moved to other areas of speech. During the Covid-19 pandemic many European countries have – through specific legislation or decisions by the courts – regulated information concerning health issues, and in particular the remedies to Covid-19 and the effectiveness of vaccines.

This growing attention towards informational content is evident in the draft “Digital Services Act” presented by the EU Commission in 2020 and now under scrutiny by the European Parliament, which expressly entrusts upon “very large online platforms” the supervision over “manipulative techniques with a real and foreseeable negative impact on public health, public security, civil discourse, political participation and equality”. Clearly this supervision can be done only through algorithmic selection of certain keywords, which subsequently raises alarm concerning which blocking procedures may follow. This technique which is already widely applied by Facebook raises considerable concerns for the obtuseness of the algorithm (a typical and illustrative example includes the removal of Renaissance paintings of breast-feeding Madonnas because of rules against nudity). But the major concern, which is widely debated in Europe and the US is the conferral upon private actors – such as the “very large online platforms” – the power to police the Internet and restrict constitutional rights, foremost that of freedom of expression.

Furthermore, one should note that normative interventions aimed at contrasting “disinformation” have become quite common after the Russian invasion of Ukraine. Regulation 2022/350 has suspended broadcasting activities of Russian television channels such as Russia Today and Sputnik in the EU, as these channels’ activity is qualified as “propaganda actions against the Union and its Member States”. The EU Court of First Instance has upheld such decisions.

MATERIALS

1.

EUROPEAN COURT OF HUMANS RIGHTS 29 June 2001.

Thoma v. Luxembourg.

Procedure

1. The case originated in an application (no. 38432/97) against the Grand Duchy of Luxembourg lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Luxembourg national, Mr Marc Thoma (“the applicant”), on 9 September 1997.

[...]

3. The applicant alleged, in particular, a breach of his freedom of expression, as guaranteed by Article 10 of the Convention.

The facts

I. The circumstances of the case

9. On 6 November 1991 *Tageblatt*, a Luxembourg daily newspaper published in German, printed an article by journalist Josy Braun on various reforestation techniques that had been used after the storms in early 1990 that devastated part of the Luxembourg woodlands. The article appeared under the title “*Wiederaufforstung ... das ganze noch einmal*” (“Reforestation ... all over again”) [...].

10. The applicant was at the time a journalist on a national radio station, RTL 92.5, for whom he presented a weekly programme in Letzeburgesch entitled “Oekomagazin” dealing with nature and the environment. He had raised the subject of the problems connected with reforestation after the 1990 storms on a number of occasions on the programme and had alluded, along with other Luxembourg publications, to a breakdown in the system.

11. The applicant had chosen reforestation as the subject matter for his “Oekomagazin” programme of 6 November 1991. He began the programme with an introduction in which he reminded listeners that he had spoken the previous week about “the temptation for Forestry Commission people to take advantage when an opportunity present[ed] itself” and had referred to “a series of telephone calls from people all over the country who [had] interesting tales to tell”. He went on to say “in any event, one thing is clear: the woodland management chapter is much thornier than people might think”. He also reported, indicating that he was giving an example, that a person who had had work done in woodland he owned by a private contractor “no longer knew which way to turn” after receiving a bill for the work from the Forestry Commission responsible for the sector rather than the private contractor [...].

12. The applicant explained that with that “strongly worded” article, Josy Braun had implicitly referred to the provision in the Criminal Code relating to intermeddling, which prohibits civil servants working for the State or the municipalities to use their official status to derive personal gain. He added that people working for the Water and Forestry Commission “have a reasonable salary and can under no circumstances claim a hand-out and get rich at the expense of public-owned woodlands or of private owners, buyers of wood or tree nurseries”.

[...]

17. Between November 1991 and February 1992 fifty-four forest wardens and nine forestry engineers brought civil actions in damages against the applicant alleging that he had damaged their reputation. They each claimed 1,000,000 Luxembourg francs (LUF) in compensation complaining that he had quoted accusations from the article published in the 6 November 1991 edition of *Tageblatt* without in any way toning them down, correcting them or commenting on them “the slightest bit critically”, and that he had passed them off as his own. He had thus suggested publicly that all forestry wardens in Luxembourg (of whom there were eighty at the time) and all Luxembourg forestry engineers were, with only one exception, corruptible and corrupt. In their writs, they quoted from a Luxembourg judgment of 1989, in which it was held as follows:

“By establishing freedom of the press, the Constitution does not impose any restriction on the fundamental principle contained in Articles 1382 and 1383 of the Civil Code. Freedom of the press is not unlimited and ends where it infringes the legitimate rights and interests of others. Journalists do not enjoy any immunity exempting them from their obligation to exercise care towards all individuals and even the State and its institutions, and any breach, albeit slight, of that obligation is unlawful under the aforementioned Articles of the Civil Code which oblige anyone who, through his wrongdoing, or negligent act or omission causes damage to another, to make reparation. Journalists may be held severally liable for any breach of their obligation to be truthful and objective”.

[...]

19. The applicant requested that the various actions against him be joined and declared inadmissible on the ground that he had merely quoted statements made by a clearly identified person. He offered to adduce witness evidence to show that his investigations revealed numerous offences in the sphere concerned. He also lodged a counterclaim against each of the claimants for payment of LUF 25,000 as an allowance for preparing the case for trial and LUF 100,000 for abuse of process and vexatious proceedings; he also claimed costs and expenses.

20. The Luxembourg District Court examined the sixty-three cases at a single hearing and handed down sixty-three almost identical judgments on 14 July 1993. It awarded each of the claimants one franc in nominal damages, dismissed the counterclaims and ordered the applicant to pay the costs and expenses.

21. After examining the text of the aforementioned passage from the *Tageblatt* article and the aforementioned quotations from the transcript of the applicant’s radio programme, the District Court held, *inter alia*:

“The journalist, Thoma, seized upon the article by Josy Braun and, in particular, the impugned passage, to persuade the public that the legislation in force was not being complied with and to adopt Josy Braun’s ‘*fazit*’ conclusion [...].

In view of his position (as a Forestry Commission employee), the claimant has sufficiently established in law that Thoma’s remarks were directed against him.

This Court must analyse whether by so acting the defendant has committed an act that falls to be dealt with under the provisions of Articles 1382 and 1383 of the Civil Code. It is true that the press has the right, and even the duty, to criticise abuses that come to light in public life (*CSJ* 23 March 1912 P.8, p. 346).

It is incumbent on professional journalists to publish breaking news, news items and,

generally, anything which seems to them to present an interest as soon as they can (Luxembourg District Court, 14 February 1990, no. 100/90). The press must preserve its right to criticise the social activity of individuals, that is to say all those whose dealings directly concern the community. The press is entitled to say what it thinks about their activities, provided that it does not attack their reputation and provided that it acts in good faith [...].

Marc Thoma was, accordingly, perfectly entitled to investigate the problems posed by the reforestation of our woodlands after the storms and to denounce and to criticise practices which he considered to be inconsistent with the laws and regulations.

Indeed, through a series of articles in the press, the Luxembourg journalists have not missed the opportunity of drawing the attention of the public and the public authorities to matters which they believe it was their duty to criticise.

While it is true that absolute objectivity cannot be required of journalists, in view of their relatively unreliable means of investigation, they nonetheless have an obligation to act on information that has been verified to the extent the means available to them reasonably permit. The law requires journalists to act in good faith and does not seek to give immunity to persons who through spite, malice or foolishness seek by publication to discredit others. A *mala fide* intention may appear when a journalist had reasons to doubt the truth of the facts or his ability to produce evidence establishing them (Civ. Bruxelles, 29 June 1987 J.T. 1987).

In the instant case, it was for Thoma to prove that he had obtained sufficient evidence to enable him to adopt Braun's allegations and to assert that the claimant had been guilty of corruption in connection with the reforestation of the woodlands."

22. After rejecting an offer by the applicant to adduce evidence as being too vague, the District Court concluded:

"Marc Thoma has, accordingly, not established that he has sufficient evidence to show that the claimant was guilty of corruption in connection with the reforestation of the woodlands [...].

By giving the impression without evidence and without qualification that all the Water and Forestry Commission officials concerned by the reforestation work were, with but one exception, corruptible, Thoma has overstepped the boundaries of his right to impart bona fide information and has, accordingly, committed a tort."

23. The applicant appealed against all sixty-three judgments. In his appeal submissions, he requested the joinder of the fifty-four cases brought by the forestry wardens and the nine actions brought by the forestry engineers. His opponents contested that request. The applicant did not renew the offer to adduce evidence which he had made at first instance.

[...]

25. The applicant appealed to the Court of Cassation, which dismissed his appeals in two judgments of 20 March 1997. The Court of Cassation said, *inter alia*, that Articles 1382 and 1383 of the Civil Code established a system of reparation and that, subject to the last sentence of Article 24 of the Constitution and of section 16(2) of the Law of 20 July 1869 on the Press, the scope of those Articles in press cases was unlimited since, as in every other sphere, the courts would take account of the special nature of the activity of journalists in deciding whether a tort had been committed. It added that the courts

below had justified their decision in law for finding a tort.

The law

I. Alleged violation of article 10 of the convention

32. The applicant considered that the judgment against him constituted an unjustified interference with his right to freedom of expression in breach of Article 10 of the Convention, [...].

[...]

B. The Court's assessment

[...]

64. The Court considers that those cannot, in the circumstances of the instant case, be regarded as “particularly cogent reasons” capable of justifying the imposition of a penalty on the journalist. A general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press’s role of providing information on current events, opinions and ideas. In the instant case, the résumé of the programme shows that in any event the applicant consistently took the precaution of mentioning that he was beginning a quotation and of citing the author, and that, in addition, he described the entire article by his fellow journalist as “strongly worded” when commenting on it. He had also asked a third party, a woodlands owner, whether he thought that what Josy Braun had written in his article was true.
65. In the light of the foregoing, the grounds given for holding the applicant liable are not sufficient to satisfy the Court that the interference in the exercise of the applicant’s right to freedom of expression was “necessary in a democratic society”. In particular, the means employed were disproportionate to the aim pursued, namely “the protection of the reputation or rights of others”.
66. Consequently, the judgment against the applicant infringed Article 10 of the Convention.

For these reasons, the Court

1. *Holds* unanimously that there has been a violation of Article 10 of the Convention;
2. *Holds* by six votes to one that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
3. *Holds* unanimously
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
 - (i) LUF 741,440 (seven hundred and forty-one thousand four hundred and forty Luxembourg francs) for pecuniary damage;
 - (ii) LUF 600,000 (six hundred thousand Luxembourg francs) in respect of costs and expenses;
 - (b) that simple interest at an annual rate of 5.75% shall be payable from the expiry of the above-mentioned three months until settlement;
4. *Dismisses* unanimously the remainder of the applicant’s claim for just satisfaction.

2.

EUROPEAN COURT OF HUMAN RIGHTS 24 June 2004.**Von Hannover v. Germany.****Procedure**

1. The case originated in an application (no. 59320/00) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a national of Monaco, Caroline von Hannover (“the applicant”), on 6 June 2000.
2. The applicant alleged that the German court decisions in her case had infringed her right to respect for her private and family life as guaranteed by Article 8 of the Convention.

[...]

The facts**I. The circumstances of the case**

8. The applicant, who is the eldest daughter of Prince Rainier III of Monaco, was born in 1957. Her official residence is in Monaco but she lives in the Paris area most of the time.

As a member of Prince Rainier’s family, the applicant is the president of certain humanitarian or cultural foundations, such as the Princess Grace Foundation or the Prince Pierre of Monaco Foundation, and also represents the ruling family at events such as the Red Cross Ball or the opening of the International Circus Festival. She does not, however, perform any function within or on behalf of the State of Monaco or any of its institutions.

A. Background to the case

9. Since the early 1990s the applicant has been trying – often through the courts – in a number of European countries to prevent the publication of photos about her private life in the tabloid press.
10. The photos that were the subject of the proceedings described below were published by the Burda publishing company in the German magazines *Bunte* and *Freizeit Revue*, and by the Heinrich Bauer publishing company in the German magazine *Neue Post*.

1. *The first series of photos*

[...]

- (a) **The five photos of the applicant published in *Freizeit Revue* magazine (issue no. 30 of 22 July 1993) [...].**
- (b) **The two photos of the applicant published in *Bunte* magazine (issue no. 32 of 5 August 1993) [...].**
- (c) **The seven photos of the applicant published in *Bunte* magazine (issue no. 34 of 19 August 1993) [...].**

2. *The second series of photos*

[...]

- (a) **The ten photos of the applicant published in *Bunte* magazine (issue no. 10 of 27 February 1997) [...].**
- (b) **The eleven photos of the applicant published in *Bunte* magazine (issue no. 12 of 13 March 1997) [...].**
- (c) **The seven photos of the applicant published in *Bunte* magazine (issue no. 16 of 10 April 1997) von Hannover and on the inside pages of the magazine playing tennis with him or both putting [...].**

[...]

The law

I. Alleged violation of article 8 of the convention

43. The applicant submitted that the German court decisions had infringed her right to respect for her private and family life, guaranteed by Article 8 of the Convention, [...].

[...]

B. The Court's assessment

1. As regards the subject of the application

48. The Court notes at the outset that the photos of the applicant with her children are no longer the subject of this application, as it stated in its admissibility decision of 8 July 2003.

The same applies to the photos published in *Freizeit Revue* magazine (issue no. 30 of 22 July 1993) showing the applicant with Vincent Lindon at the far end of a restaurant courtyard in Saint-Rémy-de-Provence. In its judgment of 19 December 1995, the Federal Court of Justice prohibited any further publication of the photos on the ground that they infringed the applicant's right to respect for her private life.

[...]

2. Applicability of Article 8

50. The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name or a person's picture.

Furthermore, private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life".

3. Compliance with Article 8

[...]

(c) Application of these general principles by the Court

[...]

75. In the Court's view, the criterion of spatial isolation, although apposite in theory, is in reality too vague and difficult for the person concerned to determine in advance. In the present case, merely classifying the applicant as a figure of contemporary society "*par excellence*" does not suffice to justify such an intrusion into her private life.

(d) Conclusion

76. As the Court has stated above, it considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in

the instant case that they made no such contribution, since the applicant exercises no official function and the photos and articles related exclusively to details of her private life.

77. Furthermore, the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.

Even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles, in the instant case those interests must, in the Court's view, yield to the applicant's right to the effective protection of her private life.

78. Lastly, in the Court's opinion the criteria established by the domestic courts were not sufficient to ensure the effective protection of the applicant's private life and she should, in the circumstances of the case, have had a "legitimate expectation" of protection of her private life.

79. Having regard to all the foregoing factors, and despite the margin of appreciation afforded to the State in this area, the Court considers that the German courts did not strike a fair balance between the competing interests.

80. There has therefore been a breach of Article 8 of the Convention.

81. Having regard to that finding, the Court does not consider it necessary to rule on the applicant's complaint relating to her right to respect for her family life.

II. Application of article 41 of the convention

82. Article 41 of the Convention [...]

For these reasons, the Court unanimously

1. *Holds* that there has been a violation of Article 8 of the Convention;
2. *Holds* that the question of the application of Article 41 is not ready for decision; and accordingly,
 - (a) *reserves* the said question in whole;
 - (b) *invites* the Government and the applicant to submit, within six months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
 - (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

3.

EUROPEAN COURT OF HUMAN RIGHTS 14 September 2010.

Sanoma Uitgevers B.V. v. The Netherlands.

Procedure

1. The case originated in an application (no. 38224/03) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) incorporated under

Netherlands law, Sanoma Uitgevers B.V. (“the applicant company”), on 1 December 2003.

[...]

3. The applicant company alleged, in particular, that their rights under Article 10 of the Convention had been violated as a result of their having been compelled to give up information that would allow sources of journalistic information to be identified.

[...]

The facts

I. the circumstances of the case

A. Factual background

1. The applicant company

9. The applicant company is based in Hoofddorp. Its business is publishing and marketing magazines, including the weekly *Autoweek*, which caters for readers who are interested in motoring.

2. The street race

10. On 12 January 2002, an illegal street race was held in an industrial area on the outskirts of the town of Hoorn. Journalists of *Autoweek* attended this race at the invitation of its organisers.
11. The applicant company state that the journalists were given the opportunity to take photographs of the street race and of the participating cars and persons on condition that they guarantee that the identities of all participants would remain undisclosed. The Government, for their part, dispute the existence of any agreement involving more than a small number of organisers or participants at most.
12. The street race was ended by the police, who were present and eventually intervened. No arrests were made.
13. The applicant company intended to publish an article about illegal car races in *Autoweek* no. 7/2002 of 6 February 2002. This article would be accompanied by photographs of the street race held on 12 January 2002. These photographs would be edited in such a manner that the participating cars and persons were unidentifiable, thus guaranteeing the anonymity of the participants in the race. The original photographs were stored by the applicant company on a CD-ROM, which was kept in the editorial office of a different magazine published by the applicant company (not *Autoweek*).
14. The police and prosecuting authorities were afterwards led to suspect that one of the vehicles participating in the street race had been used as a getaway car following a ram raid on 1 February 2001.

[...]

The law

[...]

II. Alleged violation of article 10 of the convention

49. The applicant company complained that they had been compelled to disclose information to the police that would have enabled their journalists’ sources to have been revealed in violation of their right to receive and impart information, as guaranteed by Article 10 of the Convention. [...]

The Government denied that there had been any such violation.

[...]

B. Whether there has been an “interference” with a right guaranteed by Article 10

1. The Chamber’s judgment

52. The Chamber accepted that at the time when the CD-ROM was handed over the information stored on it had only been known to the applicant company and not yet to the public prosecutor and the police. It followed, in the Chamber’s assessment, that the applicant company’s rights under Article 10 as a purveyor of information had been made subject to an interference in the form of a “restriction” and that Article 10 was applicable [...].

[...]

66. The Court further notes that in the present case the order concerned was not intended to identify the sources themselves in connection with their participation in the illegal street race and that indeed, no prosecution had been brought in relation to this race or even against A. and M., who were suspected of having committed grave crimes. The Court, however, does not consider this distinction to be crucial.

[...]

68. As previously observed, in the case of *Financial Times Ltd and Others v. the United Kingdom*, cited above, § 56, the fact that the disclosure order had not actually been enforced against the applicant company did not prevent the Court from finding that there had been an interference.

69. The Court observes, as the Chamber did, that unlike in other comparable cases – *Ernst and Others v. Belgium*, cited above; *Roemen and Schmit v. Luxembourg*, cited above; *Tillack v. Belgium*, cited above – there was no search of the applicant company’s premises. However the public prosecutor and the police investigators clearly indicated their intention to carry out such a search unless the editors of *Autoweek* bowed to their will.

70. This threat – accompanied as it was by the arrest, for a brief period, of a journalist – was plainly a credible one; the Court must take it as seriously as it would have taken the authorities’ actions had the threat been carried out. Not only the offices of *Autoweek* magazine’s editors but those of other magazines published by the applicant company would have been exposed to a search which would have caused their offices to be closed down for a significant time; this might well have resulted in the magazines concerned being published correspondingly late, by which time news of current events would have been stale. News is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest [...].

71. While it is true that no search or seizure took place in the present case, the Court emphasises that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources [...].

72. In sum, the Court considers that the present case concerns an order for the compulsory surrender of journalistic material which contained information capable of identifying journalistic sources. This suffices for the Court to find that this order constitutes, in itself, an interference with the applicant company’s freedom to receive and impart information under Article 10 § 1.

C. Whether the interference was “prescribed by law”

1. The Chamber’s judgment

73. The Chamber was satisfied that a statutory basis for the interference complained of existed, namely Article 96a of the Code of Criminal Procedure. While recognising that

that provision did not set out a requirement of prior judicial control, the Chamber gave decisive weight to the involvement of the investigating judge in the process. Although the Chamber found it unsatisfactory that prior judicial control by the investigating judge was no longer a statutory requirement, as it had been until Article 96a entered into force, it saw no need to examine the matter further.

[...]

3. *The Court's assessment*

[...]

96. The Court, however, is not satisfied that the involvement of the investigating judge in this case could be considered to provide an adequate safeguard. It notes, firstly, the lack of any legal basis for the involvement of the investigating judge. Being nowhere required by law, it occurred at the sufferance of the public prosecutor.
97. Secondly, the investigating judge was called in what can only be described as an advisory role. Although there is no suggestion that the public prosecutor would have compelled the surrender of the CD-ROM in the face of an opinion to the contrary from the investigating judge, the fact remains that the investigating judge had no legal authority in this matter - as he himself admitted. Thus it was not open to him to issue, reject or allow a request for an order, or to qualify or limit such an order as appropriate.
98. Such a situation is scarcely compatible with the rule of law. The Court would add that it would have reached this conclusion on each of the two grounds mentioned, taken separately.
99. These failings were not cured by the review *post factum* offered by the Regional Court, which was likewise powerless to prevent the public prosecutor and the police from examining the photographs stored on the CD-ROM the moment it was in their possession.
100. In conclusion, the quality of the law was deficient in that there was no procedure attended by adequate legal safeguards for the applicant company in order to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources. There has accordingly been a violation of Article 10 of the Convention in that the interference complained of was not "prescribed by law".

D. Compliance with the other requirements of Article 10 § 2

101. Having reached the conclusion that, given the absence of the requisite procedural safeguards, the compulsion by the authorities to disclose information in the present case was not "prescribed by law" as required by this provision, the Court need not ascertain whether the other requirements of the second paragraph of Article 10 of the Convention were complied with in the instant case – namely, whether the interference pursued one of the legitimate aims stated in that paragraph and whether it was necessary in a democratic society in pursuance of such aim.

III. Application of article 41 of the convention

102. Article 41 of the Convention [...]

For these reasons, the Court unanimously

1. *Holds* that there has been a violation of Article 10 of the Convention;
2. *Holds*
 - (a) that the respondent State is to pay the applicant company, within three months, EUR

- 35,000 (thirty-five thousand euros), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
3. *Dismisses* the remainder of the applicant company's claim for just satisfaction

4.

EUROPEAN COURT OF HUMAN RIGHTS 27 March 1996.
Goodwin v. The United Kingdom.

Procedure

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 20 May 1994, within the three-month period laid down by Article 32 para. 1 (art. 32-1) and Article 47 (art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in application (no. 17488/90) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by Mr. William Goodwin, a British citizen, on 27 September 1990. The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) of the Convention.
- [...]

As to the facts

I. Particular circumstances of the case

10. Mr. William Goodwin, a British national, is a journalist and lives in London.
11. On 3 August 1989 the applicant joined the staff of *The Engineer*, published by Morgan-Grampian (Publishers) Ltd ("the publishers"), as a trainee journalist. He was employed by Morgan Grampian PLC ("the employer"). On 2 November 1989 the applicant was telephoned by a person who, according to the applicant, had previously supplied him with information on the activities of various companies. The source gave him information about Tetra Ltd ("Tetra"), to the effect that the company was in the process of raising a £5 million loan and had financial problems as a result of an expected loss of £2.1 million for 1989 on a turnover of £20.3 million. The information was unsolicited and was not given in exchange for any payment. It was provided on an unattributable basis. The applicant maintained that he had no reason to believe that the information derived from a stolen or confidential document. On 6 and 7 November 1989, intending to write an article about Tetra, he telephoned the company to check the facts and seek its comments on the information. The information derived from a draft of Tetra's confidential corporate plan. On 1 November 1989 there had been eight numbered copies of the most recent draft. Five had been in the possession of senior employees of Tetra, one with its accountants, one

with a bank and one with an outside consultant. Each had been in a ring binder and was marked "Strictly Confidential". The accountants' file had last been seen at about 3 p.m. on 1 November in a room they had been using at Tetra's premises. The room had been left unattended between 3 p.m. and 4 p.m. and during that period the file had disappeared.

[...]

As to the law

I. Alleged violation of article 10 (art. 10) of the convention

27. The applicant alleged that the disclosure order requiring him to reveal the identity of his source and the fine imposed upon him for having refused to do so constituted a violation of Article 10 (art. 10) of the Convention, [...].

A. Was the interference "prescribed by law"?

[...]

31. The Court reiterates that, according to its case-law, the relevant national law must be formulated with sufficient precision to enable the persons concerned - if need be with appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. A law that confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference [...].

[...]

B. Did the interference pursue a legitimate aim?

[...]

The applicant and the Commission invoked the fact that Tetra had already obtained an injunction restraining publication, and that no breach of that injunction had occurred. Since the information in question was of a type commonly found in the business press, they did not consider that the risk of damage that further publication could cause was substantiated by Tetra, which had suffered none of the harm adverted to. The applicant added that the information was newsworthy even though it did not reveal matters of vital public interest, such as crime or malfeasance. The information about Tetra's mismanagement, losses and loan-seeking activities was factual, topical and of direct interest to customers and investors in the market for computer software. In any event, the degree of public interest in the information could not be a test of whether there was a pressing social need to order the source's disclosure. A source may provide information of little value one day and of great value the next; what mattered was that the relationship between the journalist and the source was generating the kind of information which had legitimate news potential. This was not to deny Tetra's entitlement to keep its operations secret, if it could, but to contest that there was a pressing social need for punishing the applicant for refusing to disclose the source of the information which Tetra had been unable to keep secret.

[...]

In these circumstances, according to the Government, the order requiring the applicant to divulge his source and the further order fining him for his refusal to do so did not amount to a breach of the applicant's rights under Article 10 (art. 10) of the Convention [...].

39. [...] Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms [...] and Resolution on the Confidentiality of Journalists' Sources by the European Parliament, 18 January 1994, Official Journal of the European Communities No. C 44/34. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. [...] Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest. These considerations are to be taken into account in applying to the facts of the present case the test of necessity in a democratic society under paragraph 2 of Article 10 (art. 10-2).
40. As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established [...]. The Court's task, in exercising its supervisory function, is not to take the place of the national authorities but rather to review under Article 10 (art. 10) the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".
41. In the instant case, as appears from Lord Bridge's speech in the House of Lords, Tetra was granted an order for source disclosure primarily on the grounds of the threat of severe damage to their business, and consequently to the livelihood of their employees, which would arise from disclosure of the information in their corporate plan while their refinancing negotiations were still continuing. This threat, "ticking away beneath them like a time bomb", as Lord Donaldson put it in the Court of Appeal, could only be defused, Lord Bridge considered, if they could identify the source either as himself the thief of the stolen copy of the plan or as a means to lead to identification of the thief and thus put the company in a position to institute proceedings for the recovery of the missing document. The importance of protecting the source, Lord Bridge concluded, was much diminished by the source's complicity, at the very least, in a gross breach of confidentiality which was not counterbalanced by any legitimate interest in publication of the information.
42. In the Court's view, the justifications for the impugned disclosure order in the present case have to be seen in the broader context of the *ex parte* interim injunction which had earlier been granted to the company, restraining not only the applicant himself but also the publishers of *The Engineer* from publishing any information derived from the plan. That injunction had been notified to all the national newspapers and relevant journals.
[...]
46. In sum, there was not, in the Court's view, a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim. The restriction which the disclosure order entailed on the applicant journalist's exercise of his freedom of expression cannot therefore be regarded as having been necessary in a democratic society, within the meaning of para-

graph 2 of Article 10 (art. 10-2), for the protection of Tetra's rights under English law, notwithstanding the margin of appreciation available to the national authorities. Accordingly, the Court concludes that both the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so gave rise to a violation of his right to freedom of expression under Article 10 (art. 10).
[...]

For these reasons, the Court

1. *Holds* by eleven votes to seven that there has been a violation of Article 10 (art. 10) of the Convention
2. *Holds* unanimously that the finding of a violation constitutes adequate just satisfaction for the non-pecuniary damage suffered by the applicant;
3. *Holds* unanimously:
 - (a) that the respondent State is to pay to the applicant, within three months, in respect of costs and expenses £37,595.50 (thirty seven thousand, five hundred and ninety five pounds sterling and fifty pence) less 9,300 (nine thousand, three hundred) French francs to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment;
 - (b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;
4. *Dismisses* unanimously the remainder of the claim for just satisfaction.

5.

EUROPEAN COURT OF HUMAN RIGHTS 25 May 2003.

Roemen and Schmit v. Luxembourg.

Procedure

1. The case originated in an application (no. 51772/99) against the Grand Duchy of Luxembourg lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Luxembourgish nationals, Mr. Robert Roemen ("the first applicant") and Ms. Anne-Marie Schmit ("the second applicant"), on 23 August 1999.

[...]

The facts

1. The circumstances of the case

8. The applicants were born in 1945 in 1963 respectively and live in Luxembourg.
9. On 21 July 1998 the first applicant, acting in his capacity as a journalist, published an article in *Lëtzebuurger Journal*, a daily newspaper, under the headline "Minister W. convicted of tax fraud" (*Minister W. der Steuerhinterziehung überführt*). He alleged in the article that the minister had broken the Seventh, Eighth and Ninth Commandments by committing value-added tax (VAT) frauds. He went on to say that a politician from the right might have been expected to take the rules so carefully drawn up by Moses more seriously. He added that a fiscal fine of 100,000 Luxembourg francs had been imposed on the minister. He said in conclusion that the minister's conduct was par-

- particularly shameful in that it involved a public figure, who should have set an example.
10. The applicants produced documents showing that the fine had been imposed on the minister concerned on 16 July 1998 by the Director of the Registration and State-Property Department (*Administration de l'enregistrement et des domaines*), pursuant to section 77(2) of the VAT Act of 12 February 1979. The decision had been served on the minister on 20 July 1998. It also appears that on 27 July 1998 the minister appealed to the District Court against the fine. In a judgment of 3 March 1999, the District Court ruled that the fine was not justified as the offence under section 77(2) of the VAT Act of 12 February 1979 had not been made out. An appeal was lodged against that judgment to the Supreme Court of Justice. The parties have not furnished any further information regarding developments in those proceedings.
 11. The decision of 16 July 1998 was the subject of comment in other newspapers, such as the daily *Le Républicain Lorrain* and the weekly *d'Letzebuenger Land*. A Liberal member of Parliament also tabled a parliamentary question on the matter.
 12. Two sets of court proceedings were issued following the publication of the first applicant's article.
 13. On 24 July 1998 the minister brought an action in damages in the District Court against the first applicant and *Letzebuenger Journal*, arguing that they had been at fault in publishing the information concerning the fiscal fine and making comments which he said constituted an attack on his honour. In a judgment of 31 March 1999, the District Court dismissed the minister's action on the ground that the article came within the sphere of freedom of the press. In a judgment of 27 February 2002, the Court of Appeal overturned the District Court's judgment.
 14. On 4 August 1998 the minister lodged a criminal complaint.
 15. On 21 August 1998 the public prosecutor requested the investigating judge to open an investigation into a suspected offence by the first applicant of handling information disclosed in breach of professional confidence, and by a person or persons unknown of breach of professional confidence. The public prosecutor stated in his submissions: "The investigation and inquiries should determine which civil servant or civil servants from the Registration and State-Property Department had any involvement in the case and access to the documents." The public prosecutor also requested the investigating judge to carry out or arrange for searches of the first applicant's home and any appurtenances, the offices of *Letzebuenger Journal* and the Registration and State-Property Department offices.

[...]

The law

I. Alleged violation of article 10 of the convention

43. The first applicant argued that his right as a journalist to refuse to reveal his sources had been violated by the various searches. In that connection, he relied on Article 10 of the Convention, [...].

B. The Court's assessment

[...]

2. Application of the above principles

47. In the present case, the Court finds that the searches of the first applicant's home

and workplace indisputably constituted an interference with his rights guaranteed by paragraph 1 of Article 10. The measures were intended to establish the identities of the Registration and State-Property Department officials who had worked on the file concerning the imposition of a fiscal fine on the minister. In that connection, the Court considers that the fact that the searches proved unproductive did not deprive them of their purpose, namely to establish the identity of the person responsible for the breach of professional confidence, in other words, the journalist's source.

48. The question is whether that interference can be justified under paragraph 2 of Article 10. It is therefore necessary to examine whether it was "prescribed by law", pursued a legitimate aim under that paragraph and was "necessary in a democratic society" [...].
 49. The first applicant did not dispute the Government's assertion that the interference was "prescribed by law", in this instance Articles 65 and 66 of the Criminal Investigation Code. The Court accordingly sees no reason to reach a different view.
 50. The Court considers that the interference pursued the "legitimate aim" of the prevention of disorder or crime.
 51. The main issue is whether the impugned interference was "necessary in a democratic society" to achieve that aim. It must therefore be determined whether the interference met a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient.
- [...]
57. In the Court's opinion, there is a fundamental difference between this case and *Goodwin*. In the latter case, an order for discovery was served on the journalist requiring him to reveal the identity of his informant, whereas in the instant case searches were carried out at the first applicant's home and workplace. The Court considers that, even if unproductive, a search conducted with a view to uncover a journalist's source is a more drastic measure than an order to divulge the source's identity. This is because investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist. The Court reiterates that "limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court" [...]. It thus considers that the searches of the first applicant's home and workplace undermined the protection of sources to an even greater extent than the measures in issue in *Goodwin*.
 58. In the light of the foregoing, the Court reaches the conclusion that the Government have not shown that the balance between the competing interests, namely the protection of sources on the one hand and the prevention and punishment of offences on the other, was maintained. In that connection, the Court would reiterate that "the considerations to be taken into account by the Convention institutions for their review under paragraph 2 of Article 10 tip the balance of competing interests in favour of the interest of democratic society in securing a free press [...]."
 59. The Court is thus of the opinion that while the reasons relied on by the domestic authorities may be regarded as "relevant", they were not "sufficient" to justify the searches of the first applicant's home and workplace.
 60. It therefore finds that the impugned measures must be regarded as disproportionate

and that they violated the first applicant's right to freedom of expression, as guaranteed by Article 10 of the Convention.

II. Alleged violation of article 8 of the Convention

61. The second applicant complained that the search carried out at her offices constituted an unjustified interference with her right to respect for her home. She also argued that the seizure of the letter had infringed the right to respect for "correspondence between a lawyer and his or her client". She relied on Article 8 of the Convention, [...].

[...]

B. The Court's assessment

64. The Court reiterates, firstly, that the protection afforded by Article 8 may extend, for instance, to the offices of a member of a profession [...].

65. It accepts the second applicant's submission that the search of her law offices and seizure of a document relating to her client's file constituted an interference with her rights, as guaranteed under paragraph 1 of Article 8 of the Convention.

66. It finds that that interference was "in accordance with the law", since Articles 65 and 66 of the Criminal Investigation Code deal with searches and seizures in general, whereas section 35(3) of the Act of 10 August 1991 lays down the procedure to be followed for searches and seizures at a lawyer's office or home.

67. It also finds that the interference pursued a "legitimate aim", namely the prevention of disorder or crime.

68. As to the "necessity" for the interference, the Court reiterates that "the exceptions provided for in paragraph 2 of Article 8 are to be interpreted narrowly, and [that] the need for them in a given case must be convincingly established" [...].

[...]

71. Above all, the ultimate purpose of the search was to establish the journalist's source through his lawyer. Thus, the search of the second applicant's offices had a bearing on the first applicant's rights under Article 10 of the Convention. Moreover, the search of the second applicant's offices was disproportionate to the intended aim, particularly as it was carried out at such an early stage of the proceedings.

72. In the light of the foregoing and for reasons analogous in part to those set out in Part I of this judgment, the Court holds that there has been a violation of the second applicant's rights under Article 8 of the Convention.

III. Application of article 41 of the Convention

73. Article 41 of the Convention [...]

For these reasons, the Court unanimously

1. *Holds* that there has been a violation of Article 10 of the Convention with respect to the first applicant;

2. *Holds* that there has been a violation of Article 8 of the Convention with respect to the second applicant;

3. *Holds*

(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:

(i) EUR 4,000 (four thousand euros) for non-pecuniary damage;

(ii) EUR 11,629.41 (eleven thousand six hundred and twenty-nine euros forty-one cents)

- for costs and expenses;
- (b) that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 4,000 (four thousand euros) for non-pecuniary damage;
 - (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicants' claims for just satisfaction.

6.

EUROPEAN COURT OF HUMAN RIGHTS 7 June 2012.

Centro Europa 7 S.R.L and Di Stefano v. Italy.

Procedure

1. The case originated in an application (no. 38433/09) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian limited liability company, Centro Europa 7 S.r.l., and an Italian national, Mr. Francescantonio Di Stefano ("the applicants"), on 16 July 2009.
2. The applicants were represented by Mr. A. Pace, Mr. R. Mastroianni, Mr. O. Grandinetti and Mr. F. Ferraro, lawyers practising in Rome. The Italian Government ("the Government") were represented by their Agent, Ms. E. Spatafora.
3. The applicants alleged that the failure to allocate the applicant company the necessary frequencies for television broadcasting had infringed their right to freedom of expression, and especially their freedom to impart information and ideas. They also complained of a violation of Article 14 and Article 6 § 1 of the Convention and of Article 1 of Protocol No. 1.

[...]

The facts

I. The circumstances of the case

8. The first applicant, Centro Europa 7 S.r.l. ("the applicant company"), is a limited liability company operating in the television-broadcasting sector, with its registered office in Rome. The second applicant, Mr. Francescantonio Di Stefano, is an Italian national who was born in 1953 and lives in Rome. He is the statutory representative of the applicant company.
9. By a ministerial decree of 28 July 1999, the appropriate authorities granted Centro Europa 7 S.r.l. a licence for nationwide terrestrial television broadcasting in accordance with Law no. 249/1997, authorising it to install and operate an analogue television network. The licence specified that the applicant company was entitled to three frequencies covering 80% of national territory. As regards the allocation of the frequencies, the licence referred to the national frequency-allocation plan, adopted on 30 October 1998. It indicated that the installations should be brought into line with the requirements of the "assignment plan" (*piano di assegnazione*) within twenty-four months and that the measures taken to that end should conform to the adjustment programme (*programma*

di adeguamento) drawn up by the Communications Regulatory Authority (*Autorità per le garanzie nelle comunicazioni* – AGCOM) in conjunction with the Ministry of Communications (“the Ministry”). It appears from the *Consiglio di Stato’s* judgment no. 2624 of 31 May 2008 that, under the terms of the licence, the allocation of frequencies was deferred until such time as the authorities had adopted the adjustment programme, on the basis of which the applicant company should have upgraded its own installations. The adjustment programme should, in turn, have taken into account the requirements of the national frequency-allocation plan. However, the plan was not implemented. A succession of transitional schemes that benefited existing channels were applied at national level, with the result that, even though it had a licence, the applicant company was unable to broadcast until June 2009 as it had not been allocated any frequencies.

10. The applicant company, through its statutory representative, made a number of applications to the administrative courts.

[...]

The law

[...]

III. Alleged violation of article 10 of the convention

110. The applicant company alleged a violation of its right to freedom of expression, and especially its freedom to impart information and ideas. It complained in particular that for a period of almost ten years the Government had not allocated it any frequencies for analogue terrestrial television broadcasting. It submitted that the failure to apply Law no. 249/1997, the failure to enforce the Constitutional Court’s judgments nos. 420/1994 and 466/2002 and the duopoly existing in the Italian television market were in breach of Article 10 of the Convention, [...].

111. The Government contested that argument.

A. Admissibility

112. The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

[...]

2. The Court’s assessment

[...]

(b) Whether there was interference

136. The Court has held that the refusal to grant a broadcasting licence constitutes interference with the exercise of the rights guaranteed by Article 10 § 1 of the Convention [...]. It is of little consequence whether the licence is refused following an individual application or participation in a call for tenders [...].

[...]

(c) Whether the interference was “prescribed by law”

[...]

(ii) Application of the above principles in the instant case

144. In the instant case, therefore, the Court must determine whether Italian legislation laid down with sufficient precision the conditions and procedure whereby the applicant

company could have been allocated broadcasting frequencies in accordance with the licence it had been granted. This is especially important in a case such as the present one, in which the relevant legislation concerned the conditions of access to the audio-visual market.

[...]

146. However, the frequency-allocation plan was not implemented until December 2008 and the applicant company was allocated a channel to broadcast its programmes with effect from 30 June 2009 only. In the meantime, several channels had continued on a provisional basis to use various frequencies that were supposed to have been allocated under the plan. The *Consiglio di Stato* held that this state of affairs was due to essentially legislative factors. The Court will briefly examine those factors.

147. It notes firstly that section 3(1) of Law no. 249/1997 provided that the over-quota channels could continue to broadcast at both national and local level until new licences were awarded or applications for new licences were rejected but, in any event, not after 30 April 1998. However, section 3(6) of the same Law established a transitional scheme whereby the over-quota channels could continue broadcasting on terrestrial frequencies on a temporary basis after 30 April 1998, provided that they complied with the obligations imposed on channels holding licences and that their programmes were broadcast simultaneously on satellite or cable.

[...]

151. The Court observes that the successive application of these laws had the effect of blocking the frequencies and preventing operators other than the over-quota channels from participating in the early stages of digital television. In particular, the laws in question postponed the expiry of the transitional scheme until the completion of an AGCOM investigation into the development of digital television channels and until the implementation of the national frequency-allocation plan, that is to say, with reference to events occurring on dates which were impossible to foresee [...].

152. The Court therefore considers that the laws in question were couched in vague terms which did not define with sufficient precision and clarity the scope and duration of the transitional scheme.

[...]

154. Having regard to the foregoing, the Court considers that the domestic legislative framework lacked clarity and precision and did not enable the applicant company to foresee, with sufficient certainty, the point at which it might be allocated the frequencies and be able to start performing the activity for which it had been granted a licence, this notwithstanding the successive findings of the Constitutional Court and the ECJ. It follows that the laws in question did not satisfy the foreseeability requirements established by the Court in its case-law.

[...]

(d) Conclusion

156. In conclusion, the Court considers that the legislative framework, as applied to the applicant company, which was unable to operate in the television-broadcasting sector for more than ten years despite having been granted a licence in a public tendering procedure, did not satisfy the foreseeability requirement under the Convention and deprived the company of the measure of protection against arbitrariness required by

the rule of law in a democratic society. This shortcoming resulted, among other things, in reduced competition in the audio-visual sector. It therefore amounted to a failure by the State to comply with its positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective media pluralism.

157. These findings are sufficient to conclude that there has been a violation of Article 10 of the Convention in the instant case.
158. The above conclusion dispenses the Court from examining whether the other requirements of paragraph 2 of Article 10 of the Convention were complied with in the instant case, namely whether the laws prolonging the transitional scheme pursued a legitimate aim and were necessary in a democratic society for achieving that aim.

IV. Alleged violation of article 14 of the convention taken in conjunction with article 10

[...]

162. The Court observes that this complaint is closely linked to the complaint under Article 10 of the Convention and must likewise be declared admissible. Having regard to its conclusions under Article 10, the Court does not consider it necessary to examine separately the complaint under Article 14 of the Convention.

V. Alleged violation of article 1 of protocol no. 1

163. The applicant company complained of an infringement of its right to the peaceful enjoyment of its possessions as enshrined in Article 1 of Protocol No. 1, [...].
164. The applicant company submitted that, for nearly ten years, it had been unable to exercise its rights under the licence it had been granted for nationwide television broadcasting, and that the compensation awarded to it by the domestic courts did not reflect the full value of its “possession”.
165. The Government contested that argument.

A. Admissibility

166. The Court must first determine whether the applicant company had a “possession” within the meaning of Article 1 of Protocol No. 1 and whether that Article is consequently applicable in the instant case.

[...]

2. *The Court’s assessment*

[...]

(b) Application of the above principles in the instant case

174. The Court observes at the outset that from 28 July 1999 the applicant company held a licence for nationwide terrestrial television broadcasting. The licence authorised it to install and operate an analogue television network. The Italian administrative courts found that this did not confer on the applicant company a personal right (*diritto soggettivo*) to be allocated broadcasting frequencies but only a legitimate interest (*interesse legittimo*), that is, an individual position indirectly protected as far as was consistent with the public interest. Accordingly, the applicant company’s sole entitlement was to have its request for frequencies dealt with by the Government in a manner consistent with the criteria laid down by domestic law and the ECJ [...].
175. As the Court has noted in relation to Article 10 of the Convention, in view of the terms of the licence and the legislative framework in place at the time, the applicant company could reasonably have expected the authorities, within the twenty-four months

following 28 July 1999, to take the necessary legal measures to regulate its terrestrial broadcasting activities. Provided that it upgraded its installations as it was required to do, the applicant company should then have been entitled to transmit television programmes. It therefore had a “legitimate expectation” in that regard. It is true that, as the Government noted, the administrative courts refused the applicant company’s requests to be allocated frequencies. However, that decision did not entail a rejection of the applicant company’s request on the merits but resulted from the general rule in Italian law to the effect that the administrative courts cannot take certain measures in place of the administrative authorities.

[...]

Although the licence was not in fact withdrawn in the instant case, the Court considers that, without the allocation of broadcasting frequencies, it was deprived of its substance.

178. The Court thus considers that the interests associated with exploiting the licence constituted property interests attracting the protection of Article 1 of Protocol No. 1 [...].

179. It therefore finds that the applicant company’s legitimate expectation, which was linked to property interests such as the operation of an analogue television network by virtue of the licence, had a sufficient basis to constitute a substantive interest and hence a “possession” within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No. 1, which is therefore applicable in the present case [...].

180. The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

[...]

2. The Court’s assessment

[...]

188. However, the Court has already held under Article 10 of the Convention that the interference with the applicant company’s rights did not have a sufficiently foreseeable legal basis within the meaning of its case-law. It can only reach the same finding in relation to Article 1 of Protocol No. 1, and this is sufficient to conclude that there has been a violation of that Article.

189. The above conclusion dispenses the Court from reviewing whether the other requirements of Article 1 of Protocol No. 1 were satisfied in the present case, in particular whether the control of the use of the applicant company’s “property” was “in accordance with the general interest”.

VI. Alleged violation of article 6 § 1 of the Convention

190. The applicant company alleged a violation of its right to a fair hearing. It relied on Article 6 § 1 of the Convention, [...].

B. The Court’s assessment

196. The Court considers that part of the applicant company’s grievances cover largely the same ground as the complaint under Article 10 of the Convention. It is therefore unnecessary to examine them separately under Article 6.

[...]

197. In particular, the Court cannot itself assess the facts which have led a national court to adopt one decision rather than another; otherwise, it would be acting as a court of

fourth instance and would disregard the limits imposed on its action [...]. The Court's sole task in connection with Article 6 of the Convention is to examine applications alleging that the domestic courts have failed to observe specific procedural safeguards laid down in that Article or that the conduct of the proceedings as a whole did not guarantee the applicant a fair hearing [...].

198. In the instant case, the Court can see no evidence to suggest the proceedings in the *Consiglio di Stato* were not conducted in accordance with the requirements of a fair hearing. It further reiterates that the requirements of independence and impartiality in Article 6 of the Convention concern the court determining the merits of the case and not the parties to the proceedings [...], and that it is for the national courts to assess the relevance of proposed evidence [...].
199. It follows that this complaint must be rejected as manifestly illfounded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

VII. Application of article 41 of the Convention

200. Article 41 of the Convention [...].

B. The Court's assessment

1. Pecuniary and non-pecuniary damage

[...]

215. In the instant case, the Court is unable to establish the precise extent to which the violations it has found affected the applicant company's property rights, having regard, in particular, to the specific features of the Italian audio-visual market and the absence of a comparable commercial situation in the market in question.
- [...]

218. With regard to the losses sustained, the Court notes that the applicant company has not shown that all the investments it made were necessary to operate under the licence it had been granted. As to the alleged loss of earnings, the Court finds that the applicant company did indeed suffer a loss of this nature as a result of its inability to derive any profit whatsoever from the licence over a period of many years. It considers, however, that the circumstances of the case do not lend themselves to a precise assessment of pecuniary damage, since this type of damage involves many uncertain factors, making it impossible to calculate the exact amounts capable of affording fair compensation.
- [...]

220. In those circumstances, the Court considers it appropriate to award a lump sum in compensation for the losses sustained and the loss of earnings resulting from the impossibility of making use of the licence. It must also take into account the fact that the applicant company was awarded compensation at the domestic level in respect of part of the period concerned.

221. In addition, the Court considers that the violations it has found of Article 10 of the Convention and Article 1 of Protocol No. 1 in the instant case must have caused the applicant company prolonged uncertainty in the conduct of its business and feelings of helplessness and frustration [...]. In this connection, it reiterates that it may award pecuniary compensation for non-pecuniary damage to a commercial company. Non-pecuniary damage suffered by such companies may include aspects that are to a greater or lesser extent "objective" or "subjective". Aspects that may be taken into account include the company's reputation, uncertainty in decision-planning, disruption in the

management of the company (for which there is no precise method of calculating the consequences) and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team

[...]

For these reasons, the Court

1. *Upholds* unanimously the Government's preliminary objection that the application is incompatible *ratione personae* with the provisions of the Convention in so far as it was lodged by Mr Di Stefano and accordingly *declares* this part of the application inadmissible;
2. *Dismisses* by a majority the Government's preliminary objection that the application was out of time;
3. *Dismisses* by a majority the Government's other preliminary objections;
4. *Declares* by a majority the application by the applicant company admissible as regards the complaints under Articles 10 and 14 of the Convention;
5. *Declares* by a majority the application by the applicant company admissible as regards the complaint under Article 1 of Protocol No. 1;
6. *Declares* unanimously the remainder of the application by the applicant company inadmissible;
7. *Holds* by sixteen votes to one that there has been a violation of Article 10 of the Convention;
8. *Holds* unanimously that it is not necessary to examine separately the complaint under Article 14 of the Convention taken in conjunction with Article 10;
9. *Holds* by fourteen votes to three that there has been a violation of Article 1 of Protocol No. 1;
10. *Holds* by nine votes to eight that the respondent State is to pay the applicant company, within three months, EUR 10,000,000 (ten million euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage;
11. *Holds* unanimously that the respondent State is to pay the applicant company, within three months, EUR 100,000 (one hundred thousand euros), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses;
12. *Holds* unanimously that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
13. *Dismisses* unanimously the remainder of the applicant company's claim for just satisfaction.

7.

EUROPEAN COURT OF HUMAN RIGHTS 17 September 2009.

Manole and others v. Moldova.

Procedure

1. The case originated in an application (no. 13936/02) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection

of Human Rights and Fundamental Freedoms (“the Convention”) by nine Moldovan nationals, on 19 March 2002.

[...]

The facts

I. The circumstances of the case

A. Teleradio-moldova

7. “Teleradio-Moldova” (TRM) was created by Presidential decree as a State-owned company on 11 March 1994, out of the previously existing State broadcasting body. TRM’s statutes were changed in 1995, 1996 and again in 2002, when it was transformed into a public company and was registered as such on 26 July 2004.
8. In November 2004 a privately-owned Moldovan television station (NIT) began broadcasting nationally. Until that date, in addition to TRM, only one Romanian public channel (Romania 1) and one Russian public channel (ORT) could be viewed throughout Moldova. Romania 1 carried no local news and ORT introduced a daily 10-minute Moldovan news bulletin in 2002. While, in October 2004, 61% of Moldova’s population was rural, cable television was available only in the big cities and the use of satellite television was largely undeveloped. According to the Government, a survey commissioned by the Centre of Independent Journalism in 2004 found that TRM was the most-watched channel in Moldova and that TRM’s evening news bulletin was the favourite television programme of approximately 20% of the population.

[...]

The law

I. Alleged violation of article 10 of the convention

79. The applicants alleged that, while they were working as journalists at TRM, they were subjected to a censorship regime imposed by the State authorities through TRM’s senior management, contrary to Article 10 of the Convention. [...]

A. The temporal scope of the case

80. For the purposes of the present judgment, the Court has considered the period commencing February 2001, when the applicants alleged that the problem of political control over editorial policy at TRM became acute, and ending with the date of the Court’s admissibility decision, 26 September 2006.

[...]

2. The Court’s assessment

83. The Court recalls that the principle that an applicant must first make use of the remedies provided by the national legal system before applying to the international Court is an important aspect of the machinery of protection established by the Convention [...]. The Court is intended to be subsidiary to the national systems safeguarding human rights and it is appropriate that the national courts should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention and that, if an application is nonetheless subsequently brought to Strasbourg, the European Court should have the benefit of the views of the national courts, as being in direct and continuous contact with the forces of their countries [...].
84. Under Article 35 § 1 of the Convention normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only

in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. The burden of proof is on the Government to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. Once this burden of proof is satisfied, it falls to the applicant to show that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement [...].

85. The exhaustion rule is, however, inapplicable where an administrative practice, namely a repetition of acts incompatible with the Convention and official tolerance by the State authorities, has been shown to exist and is of such a nature as to make proceedings futile or ineffective [...].

[...]

C. The merits

[...]

2. The Court's assessment

(a) General principles regarding pluralism in audiovisual media

[...]

100. The Court considers that, in the field of audiovisual broadcasting, the above principles place a duty on the State to ensure, first, that the public has access through television and radio to impartial and accurate information and a range of opinion and comment, reflecting *inter alia* the diversity of political outlook within the country and, secondly, that journalists and other professionals working in the audiovisual media are not prevented from imparting this information and comment. The choice of the means by which to achieve these aims must vary according to local conditions and, therefore, falls within the State's margin of appreciation. Thus, for example, while the Court, and previously the Commission, have recognised that a public service broadcasting system is capable of contributing to the quality and balance of programmes [...], there is no obligation under Article 10 to put in place such a service, provided that some other means are used to the same end.
101. Where a State does decide to create a public broadcasting system, it follows from the principles outlined above that domestic law and practice must guarantee that the system provides a pluralistic service. [...].
102. In this connection, the standards relating to public service broadcasting which have been agreed by the Contracting States through the Committee of Ministers of the Council of Europe provide guidance as to the approach which should be taken to interpreting Article 10 in this field. The Court notes that in "Resolution No. 1 on The Future of Public Service Broadcasting" (1994), the participating States undertook "to guarantee the independence of public service broadcasters against political and economic interference". Furthermore, in the Appendix to Recommendation no. R (96)10 on "The Guarantee of the Independence of Public Service Broadcasting" (1996), the Committee of Ministers adopted a number of detailed guidelines aimed at ensuring the independence of public service broadcasters. These included the recommendation that "the legal framework governing public service broadcasting organisations should clearly

stipulate their editorial independence and institutional autonomy”, with reference in particular to a number of key areas of activity, including the editing and presentation of news and current affairs programmes and the recruitment, employment and management of staff [...].

[...]

(d) Conclusion on compliance with Article 10

111. In summary, therefore, in the light in particular of the virtual monopoly enjoyed by TRM over audiovisual broadcasting in Moldova, the Court finds that the State authorities failed to comply with their positive obligation. The legislative framework throughout the period in question was flawed, in that it did not provide sufficient safeguards against the control of TRM’s senior management, and thus its editorial policy, by the political organ of the Government. These flaws were not remedied when Law No. 1320-XV was adopted and amended.

[...]

(f) Conclusion

114. It follows that the Court rejects the Government’s preliminary objection and finds a violation of Article 10 of the Convention.

III. Application of articles 46 and 41 of the convention

115. Articles 46 and 41 of the Convention provide:

“Article 46

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

“Article 41

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

116. The Court recalls that where it finds a violation, the respondent State has a legal obligation under Article 46 of the Convention not just to pay those concerned any sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment [...].

117. In the present case the Court recalls that it has found a violation of Article 10 arising *inter alia* out of deficiencies in TRM’s legislative framework. It considers that the respondent State is under a legal obligation under Article 46 to take general measures at the earliest opportunity to remedy the situation which gave rise to the violation of Article 10. In the light of the deficiencies found by the Court, these general measures should include legislative reform, to ensure that the legal framework complies with the

requirements of Article 10 and takes into account the Committee of Ministers' Recommendation no. R(96)10 and the recommendations of Mr. Jakubowicz.

118. The Court considers that the question of just satisfaction under Article 41 is not yet ready for decision. It is, accordingly, necessary to reserve it and to fix the further procedure, account being taken of the possibility of an agreement between the parties [...].

For these reasons, the Court unanimously

1. *Dismisses* the Government's preliminary objection;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Holds* that the question of the application of Article 41 is not ready for decision and accordingly,
 - (a) *reserves* the said question in whole;
 - (b) *invites* the Government and the applicants to submit, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
 - (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

8.

EUROPEAN COURT OF HUMAN RIGHTS 24 May 1988.

Müller and Others v. Switzerland.

Procedure

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Swiss Confederation ("the Government") on 12 December 1986 and 25 February 1987 respectively, within the three-month period laid down in Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 10737/84) against Switzerland lodged with the Commission under Article 25 (art. 25) by nine Swiss citizens [...].

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). Both sought a decision from the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings pending before the Court and designated the lawyer who would represent them (Rule 30).

[...]

As to the facts

I. The circumstances of the case

8. The first applicant, Josef Felix Müller, a painter born in 1955, lives in St. Gall. [...]

9. Josef Felix Müller has exhibited on his own and with other artists on many occasions, particularly since 1981, both in private galleries and in museums, in Switzerland and

elsewhere.

With the assistance of the Federal Office of Culture, he took part in the Sydney Biennial in Australia in 1984, as Switzerland's representative. He has been awarded several prizes and has sold works to museums such as the Kunsthalle in Zürich.

10. In 1981, the nine last-mentioned applicants mounted an exhibition of contemporary art in Fribourg at the former Grand Seminary, a building due to be demolished. The exhibition, entitled "Fri-Art 81", was held as part of the celebrations of the 500th anniversary of the Canton of Fribourg's entry into the Swiss Confederation. The organisers invited several artists to take part, each of whom was allowed to invite another artist of his own choosing. The artists were meant to make free use of the space allocated to them. Their works, which they created on the spot from early August 1981 onwards, were to have been removed when the exhibition ended on 18 October 1981.
11. In the space of three nights Josef Felix Müller, who had been invited by one of the other artists, produced three large paintings (measuring 3.11m x 2.24m, 2.97m x 1.98m and 3.74m x 2.20m) entitled "Drei Nächte, drei Bilder" ("Three Nights, Three Pictures"). They were on show when the exhibition began on 21 August 1981. The exhibition had been advertised in the press and on posters and was open to all, without any charge being made for admission. The catalogue, specially printed for the preview, contained a photographic reproduction of the paintings.
12. On 4 September 1981, the day of the official opening, the principal public prosecutor of the Canton of Fribourg reported to the investigating judge that the paintings in question appeared to come within the provisions of Article 204 of the Criminal Code, which prohibited obscene publications and required that they be destroyed. The prosecutor thought that one of the three pictures also infringed freedom of religious belief and worship within the meaning of Article 261 of the Criminal Code.

According to the Government, the prosecutor had acted on an information laid by a man whose daughter, a minor, had reacted violently to the paintings on show; some days earlier another visitor to the exhibition had apparently thrown down one of the paintings, trampled on it and crumpled it.

13. Accompanied by his clerk and some police officers, the investigating judge went to the exhibition on 4 September and had the disputed pictures removed and seized; ten days later, he issued an attachment order. On 30 September 1981, the Indictment Chamber dismissed an appeal against that decision.

After questioning the ten applicants on 10, 15 and 17 September and 6 November 1981, the investigating judge committed them for trial to the Sarine District Criminal Court.

14. [...]

In its judgment, the court pointed out first of all that "the law [did] not define obscenity for the purposes of Article 204 CC [Criminal Code] and the concept [had] to be clarified by means of interpretation, having regard to the intent and purpose of the enactment as well as to its place in the legislation and in the overall legal system". After referring to the Federal Court's case-law on the subject, it said among other things:

"In the instant case, although Mr. Müller's three works are not sexually arousing to a person of ordinary sensitivity, they are undoubtedly repugnant at the very least. The overall impression is of persons giving free rein to licentiousness and even perversion. The subjects - sodomy, fellatio, bestiality, the erect penis - are obviously morally offensive

to the vast majority of the population. Although allowance has to be made for changes in the moral climate, even for the worse, what we have here would revolutionise it. Comment on the confiscated works is superfluous; their vulgarity is plain to see and needs no elaborating upon [...].

Nor can a person of ordinary sensitivity be expected to go behind what is actually depicted and make a second assessment of the picture independently of what he can actually see. To do that he would have to be accompanied to exhibitions by a procession of sexologists, psychologists, art theorists or ethnologists in order to have explained to him that what he saw was in reality what he wrongly thought he saw.

Lastly, the comparisons with the works of Michelangelo and J. Bosch are specious. Apart from the fact that they contain no depictions of the kind in Müller's paintings, no valid comparison can be made with history-of-art or cultural collections in which sexuality has a place ..., but without lapsing into crudity. Even with an artistic aim, crude sexuality is not worthy of protection [...]. Nor are comparisons with civilisations foreign to western civilisation valid”.

On the question whether to order the destruction of the pictures under paragraph 3 of Article 204, the court said:

“Not without misgivings, the court will not order the destruction of the three works.
[...]

The Art and History Museum of the Canton of Fribourg meets the requirements for preventing any further breach of Article 204 of the Criminal Code. The three confiscated paintings will be deposited there”.

15. All the applicants appealed on points of law on 24 February 1982; in particular, they challenged the trial court's interpretation as regards the obscenity of the relevant paintings [...].

16. The Fribourg Cantonal Court, sitting as a court of cassation, dismissed the appeals on 26 April 1982.

Referring to the Federal Court's case-law, it acknowledged that “in the recent past, and still today, the public's general views on morality and social mores, which vary at different times and in different places, have changed in a way which enables things to be seen more objectively and naturally”. The trial court had to take account of this change, but that did not mean that it had to show complete permissiveness, which would leave no scope for the application of Article 204 of the Criminal Code [...].

17. On 18 June 1982, the applicants lodged an application for a declaration of nullity (Nichtigkeitsbeschwerde) with the Federal Court. They sought to have the judgment of 26 April set aside and the case remitted with a view to their acquittal and the return of the confiscated paintings or, in the alternative, merely the return of the paintings.

In their submission, the Fribourg Cantonal Court had wrongly interpreted Article 204 of the Criminal Code; in particular, it had taken no account of the scope of the freedom of artistic expression, guaranteed inter alia in Article 10 (art. 10) of the Convention. [...].

As to the “publication” of obscene items, which was prohibited under Article 204 of the Criminal Code, this was a relative concept. It should be possible to show in an exhibition pictures which, if they were displayed in the market-place, would fall foul of Article 204; people interested in the arts ought to have an opportunity to acquaint themselves with all the trends in contemporary art. Visitors to an exhibition of

contemporary art like “Fri-Art 81” should expect to be faced with modern works that might be incomprehensible. If they did not like the paintings in issue, they were free to look away from them and pass them by; there was no need for the protection of the criminal law. It was not for the court to undertake indirect censorship of the arts. On a strict construction of Article 204 - that is, one which, having regard to the fundamental right to freedom of artistic expression, left it to art-lovers to decide for themselves what they wanted to see -, the applicants should be acquitted.

Confiscation of the disputed paintings, they submitted, could only be ordered if they represented a danger to public order such that returning them could not be justified - and that was a matter the court of cassation had not considered. Since the pictures had been openly on display for ten days without giving rise to any protests, it was difficult to see how such a danger was made out. Josef Felix Müller would certainly not show his paintings in Fribourg in the near future. On the other hand, they could be shown without any difficulty elsewhere, as was proved by his exhibition in Basle in February 1982. It was consequently out of all proportion to deprive him of them.

18. The Criminal Cassation Division of the Federal Court dismissed the appeal on 26 January 1983 for the following reasons:

“The decided cases show that for the purposes of Article 204 of the Criminal Code, any item is obscene which offends, in a manner that is difficult to accept, the sense of sexual propriety; the effect of the obscenity may be to arouse a normal person sexually or to disgust or repel him. ... The test of obscenity to be applied by the court is whether the overall impression of the item or work causes moral offence to a person of ordinary sensitivity [...]

The paintings in issue show an orgy of unnatural sexual practices (sodomy, bestiality, petting), which is crudely depicted in large format; they are liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity. The artistic licence relied on by the appellant cannot in any way alter that conclusion in the instant case.

[...]

Expert opinion as to the artistic merit of the work in issue is therefore irrelevant at this stage, though it might be relevant to the decision as to what action to take in order to prevent fresh offences [...].

The Cantonal Court duly scrutinised the paintings for a predominantly aesthetic element. [...].

The overall impression created by Müller’s paintings is such as to be morally offensive to a person of normal sensitivity. The Cantonal Court’s finding that they were obscene was accordingly not in breach of federal law.

The appellants maintained that the publication element of the offences was lacking. They are wrong.

The obscene paintings were on display in an exhibition open to the public which had been advertised on posters and in the press. There was no condition of admission to ‘Fri-Art 81’, such as an age-limit. The paintings in dispute were thus made accessible to an indeterminate number of people, which is the criterion of publicity for the purposes of Article 204 CC [...].”

Finally, the Criminal Cassation Division of the Federal Court declared the alternative application for return of the paintings to be inadmissible as it had not first been made

before the cantonal courts.

19. On 20 January 1988, the Sarine District Criminal Court granted an application made by Josef Felix Müller on 29 June 1987 and ordered the return of the paintings.

Josef Felix Müller recovered his paintings in March 1988 [...].

As to the law

26. The applicants complained that their conviction and the confiscation of the paintings in issue violated Article 10 (art. 10) of the Convention, [...].

The Government rejected this contention. The Commission too rejected it with regard to the first of the measures complained of but accepted it with regard to the second.

27. The applicants indisputably exercised their right to freedom of expression - the first applicant by painting and then exhibiting the works in question, and the nine others by giving him the opportunity to show them in public at the “Fri-Art 81” exhibition they had mounted.

Admittedly, Article 10 (art. 10) does not specify that freedom of artistic expression, in issue here, comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression. As those appearing before the Court all acknowledged, it includes freedom of artistic expression - notably within freedom to receive and impart information and ideas - which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Confirmation, if any were needed, that this interpretation is correct, is provided by the second sentence of paragraph 1 of Article 10 (art. 10-1), which refers to “broadcasting, television or cinema enterprises”, media whose activities extend to the field of art. Confirmation that the concept of freedom of expression is such as to include artistic expression is also to be found in Article 19 § 2 of the International Covenant on Civil and Political Rights, which specifically includes within the right of freedom of expression information and ideas “in the form of art”.

28. The applicants clearly suffered “interference by public authority” with the exercise of their freedom of expression - firstly, by reason of their conviction by the Sarine District Criminal Court on 24 February 1982, which was confirmed by the Fribourg Cantonal Court on 26 April 1982 and then by the Federal Court on 26 January 1983, and secondly on account of the confiscation of the paintings, which was ordered at the same time but subsequently lifted.

Such measures, which constitute “penalties” or “restrictions”, are not contrary to the Convention solely by virtue of the fact that they interfere with freedom of expression, as the exercise of this right may be curtailed under the conditions provided for in paragraph 2 (art. 10-2). Consequently, the two measures complained of did not infringe Article 10 (art. 10) if they were “prescribed by law”, had one or more of the legitimate aims under paragraph 2 of that Article (art. 10-2) and were “necessary in a democratic society” for achieving the aim or aims concerned.

Like the Commission, the Court will look in turn at the applicants’ conviction and at the confiscation of the pictures from this point of view.

I. The applicants’ conviction

1. “Prescribed by law”

[...]

In the present instance, it is also relevant to note that there were a number of consistent

decisions by the Federal Court on the “publication” of “obscene” items. These decisions, which were accessible because they had been published and which were followed by the lower courts, supplemented the letter of Article 204 § 1 of the Criminal Code. The applicants’ conviction was therefore “prescribed by law” within the meaning of Article 10 § 2 (art. 10-2) of the Convention.

2. *The legitimacy of the aim pursued*

30. The Government contended that the aim of the interference complained of was to protect morals and the rights of others. On the latter point, they relied above all on the reaction of a man and his daughter who visited the “Fri-Art 81” exhibition.

The Court accepts that Article 204 of the Swiss Criminal Code is designed to protect public morals, and there is no reason to suppose that in applying it in the instant case the Swiss courts had any other objectives that would have been incompatible with the Convention. Moreover, as the Commission pointed out, there is a natural link between protection of morals and protection of the rights of others.

The applicants’ conviction consequently had a legitimate aim under Article 10 § 2 (art. 10-2).

3. *“Necessary in a democratic society”*

31. The submissions of those appearing before the Court focused on the question whether the disputed interference was “necessary in a democratic society” for achieving the aforementioned aim.

In the applicants’ view, freedom of artistic expression was of such fundamental importance that banning a work or convicting the artist of an offence struck at the very essence of the right guaranteed in Article 10 (art. 10) and had damaging consequences for a democratic society. No doubt the impugned paintings reflected a conception of sexuality that was at odds with the currently prevailing social morality, but, the applicants argued, their symbolical meaning had to be considered, since these were works of art. Freedom of artistic expression would become devoid of substance if paintings like those of Josef Felix Müller could not be shown to people interested in the arts as part of an exhibition of experimental contemporary art.

In the Government’s submission, on the other hand, the interference was necessary, having regard in particular to the subject-matter of the paintings and to the particular circumstances in which they were exhibited.

For similar reasons and irrespective of any assessment of artistic or symbolical merit, the Commission considered that the Swiss courts could reasonably hold that the paintings were obscene and were entitled to find the applicants guilty of an offence under Article 204 of the Criminal Code.

32. [...] The Court must determine whether the interference at issue was “proportionate to the legitimate aim pursued” and whether the reasons adduced by the Swiss courts to justify it are “relevant and sufficient”.

33. In this connection, the Court must reiterate that freedom of expression, as secured in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society, indeed one of the basic conditions for its progress and for the self-fulfilment of the individual. Subject to paragraph 2 (art. 10-2), it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State

or any section of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society” [...]. Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression.

[...]

36. The Court recognises, as did the Swiss courts, that conceptions of sexual morality have changed in recent years. Nevertheless, having inspected the original paintings, the Court does not find unreasonable the view taken by the Swiss courts that those paintings, with their emphasis on sexuality in some of its crudest forms, were “liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity”. In the circumstances, having regard to the margin of appreciation left to them under Article 10 § 2 (art. 10-2), the Swiss courts were entitled to consider it “necessary” for the protection of morals to impose a fine on the applicants for publishing obscene material.

The applicants claimed that the exhibition of the pictures had not given rise to any public outcry and indeed that the press on the whole was on their side. It may also be true that Josef Felix Müller has been able to exhibit works in a similar vein in other parts of Switzerland and abroad, both before and after the “Fri-Art 81” exhibition. It does not, however, follow that the applicants’ conviction in Fribourg did not, in all the circumstances of the case, respond to a genuine social need, as was affirmed in substance by all three of the Swiss courts which dealt with the case.

37. In conclusion, the disputed measure did not infringe Article 10 (art. 10) of the Convention.

II. The confiscation of the paintings

[...]

2. The legitimacy of the aim pursued

39. The confiscation of the paintings - the persons appearing before the Court were in agreement on this point - was designed to protect public morals by preventing any repetition of the offence with which the applicants were charged. It accordingly had a legitimate aim under Article 10 § 2 (art. 10-2).

3. “Necessary in a democratic society”

[...] The Commission considered the confiscation of the paintings to be disproportionate to the legitimate aim pursued. In its view, the judicial authorities had no power to weigh the conflicting interests involved and order measures less severe than confiscation for an indefinite period.

[...]

43. The applicants’ conviction responded to a genuine social need under Article 10 § 2 (art. 10-2) of the Convention. The same reasons which justified that measure also apply in the view of the Court to the confiscation order made at the same time.

[...]

Admittedly, the first applicant was deprived of his works for nearly eight years, but there was nothing to prevent him from applying earlier to have them returned; the relevant case-law of the Basle Court of Appeal was public and accessible, and, what is more, the Agent of the Government himself drew his attention to it during the Commission’s hearing on 6 December 1985; there is no evidence before the Court to show that such

an application would have failed.

That being so, and having regard to their margin of appreciation, the Swiss courts were entitled to hold that confiscation of the paintings in issue was “necessary” for the protection of morals.

44. In conclusion, the disputed measure did not infringe Article 10 (art. 10) of the Convention.

For these reasons, the Court

1. *Holds* by six votes to one that the applicants’ conviction did not infringe Article 10 (art. 10) of the Convention;
2. *Holds* by five votes to two that the confiscation of the paintings did not infringe Article 10 (art. 10) of the Convention.

9.

EUROPEAN COURT OF HUMAN RIGHTS 29 October 1992.

Open Door and Dublin Well Woman v. Ireland.

Procedure

1. The case was referred to the Court by the European Commission of Human Rights (“the Commission”) on 24 April 1991, and on 3 July 1991 by the Government of Ireland (“the Government”), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”). It originated in two applications against Ireland lodged with the Commission under Article 25 (art. 25) on 10 August and 15 September 1988. The first (no. 14234/88) was brought by Open Door Counselling Ltd, a company incorporated in Ireland; the second (no. 14235/88) by another Irish company, Dublin Well Woman Centre Ltd, and one citizen of the United States of America, Ms. Bonnie Maher, and three Irish citizens, Ms. Ann Downes, Mrs. X and Ms. Maeve Geraghty.

The Commission’s request referred to Articles 44 and 48 (art. 44, art. 48) and the declaration whereby Ireland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46) and the Government’s application referred to Article 48 (art. 48). The object of the request and the application was to obtain a decision as to whether or not the facts of the case disclosed a breach by Ireland of its obligations under Articles 8, 10 and 14 (art. 8, art. 10, art. 14) and also, in the case of the application, to examine these issues in the context of Articles 2, 17 and 60 (art. 2, art. 17, art. 60).

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30). On 23 January 1992 the President granted leave, pursuant to Rule 30 of the Rules of Court, to the first applicant company to be represented at the oral proceedings by a lawyer from the United States of America.

[...]

As to the facts

I. Introduction

A. The applicants

9. The applicants in this case are (a) Open Door Counselling Ltd (hereinafter referred to as Open Door), a company incorporated under Irish law, which was engaged, inter alia, in counselling pregnant women in Dublin and in other parts of Ireland; and (b) Dublin Well Woman Centre Ltd (hereinafter referred to as Dublin Well Woman), a company also incorporated under Irish law which provided similar services at two clinics in Dublin; (c) Bonnie Maher and Ann Downes, who worked as trained counsellors for Dublin Well Woman; (d) Mrs. X, born in 1950 and Ms. Maeve Geraghty, born in 1970, who join in the Dublin Well Woman application as women of child-bearing age. The applicants complained of an injunction imposed by the Irish courts on Open Door and Dublin Well Woman to restrain them from providing certain information to pregnant women concerning abortion facilities outside the jurisdiction of Ireland by way of non-directive counselling.

Open Door and Dublin Well Woman are both non-profit-making organisations. Open Door ceased to operate in 1988. Dublin Well Woman was established in 1977 and provides a broad range of services relating to counselling and marriage, family planning, procreation and health matters. The services offered by Dublin Well Woman relate to every aspect of women's health, ranging from smear tests to breast examinations, infertility, artificial insemination and the counselling of pregnant women.

10. In 1983, at the time of the referendum leading to the Eighth Amendment of the Constitution, Dublin Well Woman issued a pamphlet stating inter alia that legal advice on the implications of the wording of the provision had been obtained and that "with this wording anybody could seek a court injunction to prevent us offering" the non-directive counselling service. The pamphlet also warned that "it would also be possible for an individual to seek a court injunction to prevent a woman travelling abroad if they believe she intends to have an abortion".

[...]

As to the law

[...]

III. Alleged violation of article 10 (art. 10)

53. The applicants alleged that the Supreme Court injunction, restraining them from assisting pregnant women to travel abroad to obtain abortions, infringed the rights of the corporate applicants and the two counsellors to impart information, as well as the rights of Mrs X and Ms Geraghty to receive information. They confined their complaint to that part of the injunction which concerned the provision of information to pregnant women as opposed to the making of travel arrangements or referral to clinics. They invoked Article 10 (art. 10) [...].

54. In their submissions to the Court the Government contested these claims and also contended that Article 10 (art. 10) should be interpreted against the background of Articles 2, 17 and 60 (art. 2, art. 17, art. 60) of the Convention the relevant parts of which state:

Article 2 (art. 2) [...]

Article 17 (art. 17) [...]

A. Was there an interference with the applicants' rights?

55. The Court notes that the Government accepted that the injunction interfered with

the freedom of the corporate applicants to impart information. Having regard to the scope of the injunction which also restrains the “servants or agents” of the corporate applicants from assisting “pregnant women”, there can be no doubt that there was also an interference with the rights of the applicant counsellors to impart information and with the rights of Mrs. X and Ms. Geraghty to receive information in the event of being pregnant.

To determine whether such an interference entails a violation of Article 10 (art. 10), the Court must examine whether or not it was justified under Article 10 para. 2 (art. 10-2) by reason of being a restriction “prescribed by law” which was necessary in a democratic society on one or other of the grounds specified in Article 10 para. 2 (art. 10-2).

B. Was the restriction “prescribed by law”?

1. Arguments presented by those appearing before the Court

56. [...]

In sum, given the uncertain scope of this provision and the considerable doubt as to its meaning and effect, even amongst the most authoritative opinion, the applicants could not have foreseen that such non-directive counselling was unlawful.

58. For the Commission, the Eighth Amendment did not provide a clear basis for the applicants to have foreseen that providing information about lawful services abroad would be unlawful. A law restricting freedom of expression across frontiers in such a vital area required particular precision to enable individuals to regulate their conduct accordingly. Since it was not against the criminal law for women to travel abroad to have an abortion, lawyers could reasonably have concluded that the provision of information did not involve a criminal offence. In addition, the Government had been unable to show, with reference to case-law, that the applicant companies could have foreseen that their counselling service was a constitutional tort. Moreover, the wording of the Amendment suggested that legislation was to have been enacted regulating the protection of the rights of the unborn.

[...]

2. Court’s examination of the issue

[...]

60. Taking into consideration the high threshold of protection of the unborn provided under Irish law generally and the manner in which the courts have interpreted their role as the guarantors of constitutional rights, the possibility that action might be taken against the corporate applicants must have been, with appropriate legal advice, reasonably foreseeable [...]. This conclusion is reinforced by the legal advice that was actually given to Dublin Well Woman that, in the light of Article 40.3.3o, an injunction could be sought against its counselling activities.

The restriction was accordingly “prescribed by law”.

C. Did the restriction have aims that were legitimate under Article 10 para. 2 (art. 10-2)?

[...]

63. The Court cannot accept that the restrictions at issue pursued the aim of the prevention of crime since, as noted above (paragraph 59), neither the provision of the information in question nor the obtaining of an abortion outside the jurisdiction involved any criminal offence. However, it is evident that the protection afforded under Irish law to the

right to life of the unborn is based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion as expressed in the 1983 referendum. The restriction thus pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect. It is not necessary in the light of this conclusion to decide whether the term “others” under Article 10 para. 2 (art. 10-2) extends to the unborn.

D. Was the restriction necessary in a democratic society?

[...]

66. The Court observes at the outset that in the present case it is not called upon to examine whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2 (art. 2). The applicants have not claimed that the Convention contains a right to abortion, as such, their complaint being limited to that part of the injunction which restricts their freedom to impart and receive information concerning abortion abroad.

Thus the only issue to be addressed is whether the restrictions on the freedom to impart and receive information contained in the relevant part of the injunction are necessary in a democratic society for the legitimate aim of the protection of morals as explained above. It follows from this approach that the Government’s argument based on Article 2 (art. 2) of the Convention does not fall to be examined in the present case. On the other hand, the arguments based on Articles 17 and 60 (art. 17, art. 60) fall to be considered below.

2. Proportionality

[...]

68. The Court cannot agree that the State’s discretion in the field of the protection of morals is unfettered and unreviewable [...].

[...]

70. Accordingly, the Court must examine the question of “necessity” in the light of the principles developed in its case-law [...]. It must determine whether there existed a pressing social need for the measures in question and, in particular, whether the restriction complained of was “proportionate to the legitimate aim pursued” (ibid.).

71. In this context, it is appropriate to recall that freedom of expression is also applicable to “information” or “ideas” that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”[...].

72. While the relevant restriction, as observed by the Government, is limited to the provision of information, it is recalled that it is not a criminal offence under Irish law for a pregnant woman to travel abroad in order to have an abortion. Furthermore, the injunction limited the freedom to receive and impart information with respect to services which are lawful in other Convention countries and may be crucial to a woman’s health and well-being. Limitations on information concerning activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society.

[...]

75. In the first place, it is to be noted that the corporate applicants were engaged in the

counselling of pregnant women in the course of which counsellors neither advocated nor encouraged abortion, but confined themselves to an explanation of the available options. The decision as to whether or not to act on the information so provided was that of the woman concerned. There can be little doubt that following such counselling there were women who decided against a termination of pregnancy. Accordingly, the link between the provision of information and the destruction of unborn life is not as definite as contended. Such counselling had in fact been tolerated by the State authorities even after the passing of the Eighth Amendment in 1983 until the Supreme Court's judgment in the present case. Furthermore, the information that was provided by the relevant applicants concerning abortion facilities abroad was not made available to the public at large.

[...]

3. *Articles 17 and 60 (art. 17, art. 60)*

[...]

Accordingly, it is not the interpretation of Article 10 (art. 10) but the position in Ireland as regards the implementation of the law that makes possible the continuance of the current level of abortions obtained by Irish women abroad.

4. *Conclusion*

80. In the light of the above, the Court concludes that the restraint imposed on the applicants from receiving or imparting information was disproportionate to the aims pursued. Accordingly there has been a breach of Article 10 (art. 10).

IV. Alleged violations of articles 8 and 14 (art. 8, art. 14)

81. Open Door also alleged a violation of the right to respect for private life contrary to Article 8 (art. 8) claiming that it should be open to it to complain of an interference with the privacy rights of its clients. Similarly, Mrs X and Ms Geraghty complained under this provision that the denial to them of access to information concerning abortion abroad constituted an unjustifiable interference with their right to respect for private life.

Open Door further claimed discrimination contrary to Article 14 in conjunction with Article 8 (art. 14+8) alleging that the injunction discriminated against women since men were not denied information "critical to their reproductive and health choices". It also invoked Article 14 in conjunction with Article 10 (art. 14+10) claiming discrimination on the grounds of political or other opinion since those who seek to counsel against abortion are permitted to express their views without restriction.

[...]

83. The Court notes that the complaints of discrimination made by the applicants in Dublin Well Woman were made for the first time in the proceedings before the Court and that consequently it may be questioned whether it has jurisdiction to examine them. However, having regard to its finding that there had been a breach of Article 10 (art. 10) the Court considers that it is not necessary to examine either these complaints or those made by Open Door, Mrs X and Ms Geraghty.

V. Application of article 50 (art. 50)

84. Article 50 (art. 50) [...]

For these reasons, the Court

1. *Dismisses* by fifteen votes to eight the Government's plea that Mrs X and Ms Geraghty

- cannot claim to be victims of a violation of the Convention;
2. *Dismisses* unanimously the remainder of the Government's preliminary objections;
 3. *Holds* by fifteen votes to eight that there has been a violation of Article 10 (art. 10);
 4. *Holds* unanimously that it is not necessary to examine the remaining complaints;
 5. *Holds* by seventeen votes to six that Ireland is to pay to Dublin Well Woman, within three months, IR£25,000 (twenty-five thousand Irish pounds) in respect of damages;
 6. *Holds* unanimously that Ireland is to pay to Open Door and Dublin Well Woman, within three months, in respect of costs and expenses, the sums resulting from the calculation to be made in accordance with paragraphs 90, 93 and 94 of the judgment;
 7. *Dismisses* unanimously the remainder of the claims for just satisfaction.

10.

EUROPEAN COURT OF HUMAN RIGHTS 13 July 2012.

Mouvement Raëlien Suisse v. Switzerland.

Procedure

1. The case originated in an application (no. 16354/06) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an association constituted under Swiss law, Mouvement raëlien suisse ("the applicant association"), on 10 April 2006.
 2. The applicant association was represented by Mr E. Elkaim, a lawyer practising in Lausanne (Switzerland). The Swiss Government ("the Government") were represented by their Agent, Mr F. Schürmann, of the Federal Office of Justice.
 3. The applicant association alleged that the banning of its posters by the Swiss authorities had breached its right to freedom of religion and its right to freedom of expression, as guaranteed by Articles 9 and 10 of the Convention respectively.
- [...]
6. On 12 April 2011 the applicant association requested the referral of the case to the Grand Chamber under Article 43 of the Convention and Rule 75. On 20 June 2011 the panel of the Grand Chamber accepted that request.

[...]

I. The circumstances of the case

[...]

21. In a judgment of 20 September 2005, served on the applicant association on 10 October 2005, the Federal Court dismissed the appeal. The relevant passages read as follows:
- [...]
- 5.3 In the present case, the grounds given by the Cantonal Court to confirm the refusal by the City of Neuchâtel relate to respect for morality and the Swiss legal order. The Administrative Court took the view that it was necessary to take into account not only the content of the poster but also the ideas conveyed by the Raelian Movement, together with the works and websites that could be accessed from the movement's website. Three different criticisms are thus directed against the [applicant] association.

Firstly, the [applicant] association's website contains a link to that of Clonaid, via which this company offers specific cloning-related services to the general public and announced, in early 2003, the birth of cloned babies. Cloning is prohibited under Swiss law, pursuant to Art. 119 of the Constitution and to the Medically-Assisted Reproduction Act (RS 814.90). Secondly, the Administrative Court referred to a judgment of the District Court of La Sarine, which mentioned possible sexual abuse of children. Numerous members of the movement had, moreover, been investigated by the police because of their sexual practices.

[...]

5.5 The poster in itself does not contain anything, either in its text or in its illustrations, that was unlawful or likely to offend the general public.

[...]

5.6 Having regard to the foregoing, the refusal issued to the [applicant] appears to be justified by sufficient public-interest grounds, because it is necessary to prevent the commission of acts constituting criminal offences under Swiss law (reproductive cloning and sexual acts with children). Moreover, certain passages in the works available via the [applicant]'s website (in particular about the 'sensual awakening' of children, and 'geniocracy') are likely to be seriously offensive to readers.

5.7 The [applicant] invokes the principle of proportionality. It points out that the poster itself contains nothing that is contrary to public order, and maintains that the measure is not appropriate to the aim pursued.

5.7.1 In accordance with Article 36 § 3 of the Constitution, any restriction on a fundamental right must be proportionate to the aim pursued. It must be appropriate to the fulfilment of that aim and any damage to private interests must be kept to a minimum [...].

5.7.2 In the present case, the public interest does not only consist in limiting the publicity given to the [applicant] association's website, in view of the reservations expressed above about public order and morality; it is even more important to ensure that the State does not provide any support for such publicity by making public space available for it, which might suggest that it endorses or tolerates the opinions or conduct in question. From that perspective, the prohibition of the posters is appropriate to the aim pursued. Furthermore, the measure criticised by the [applicant] is confined to the display of posters in public spaces. The [applicant] association remains free to express its beliefs by many other means of communication at its disposal [...].

[...]

The law

I. Alleged violation of article 10 of the Convention

28. The applicant association claimed that the measures taken by the Swiss authorities to prohibit the display of its posters had breached its right to freedom of expression as guaranteed by Article 10 of the Convention.

[...]

B. Compliance with Article 10 of the Convention

1. The Chamber judgment

33. In its judgment of 13 January 2011 the Chamber first found that the prohibition of the posters in question constituted an interference with the applicant association's freedom of expression. In the Chamber's view, such interference was prescribed by

law and pursued the legitimate aims of prevention of crime, protection of health and morals and protection of the rights of others. Turning then to the necessity of the interference, the Chamber, after noting that it found itself confronted for the first time with the question whether the domestic authorities should allow an association, by making public space available to it, to disseminate its ideas through a poster campaign, emphasised that whilst it was not in dispute that the poster in question contained nothing unlawful or shocking, either in its text or in its illustrations, it had displayed the applicant association's website address. Taking into account the general context of the poster, and in particular the ideas imparted by the website and the links to other sites from that website, the Chamber pointed out that this modern means of conveying information and the fact that it was accessible to everyone, including minors, would have multiplied the impact of the poster campaign. Observing that the Swiss courts had carefully reasoned their decisions, and also taking into account the limited scope of the impugned ban, which did not extend to the association itself or to its website, the Chamber took the view that the competent authorities had not overstepped the wide margin of appreciation afforded to them as regards regulation of the extended use of public space. The Chamber thus held that there had been no violation of Article 10 of the Convention.

[...]

3. *The Court's assessment*

[...]

(b) Application of the above principles to the present case

(i) Whether there has been an interference

[...]

50. The Court would reiterate in this connection that in addition to the primarily negative undertaking by the State to abstain from any interference with the rights guaranteed by the Convention, there "may be positive obligations inherent" in such rights. The boundaries between the State's positive and negative obligations under the Convention do not lend themselves to precise definition; in both situations – whether the obligations are positive or negative – the State enjoys a certain margin of appreciation.

51. In the present case the Court takes the view that it is not necessary to examine further whether Article 10 imposed a positive obligation on the Swiss authorities. As the impugned ban constituted, in any event, an interference, it will not be acceptable unless it fulfils the requirements of paragraph 2 of that Article.

(ii) Justification for the interference

52. Such an interference with the applicant association's right to freedom of expression must be "prescribed by law", have one or more legitimate aims in the light of paragraph 2 of Article 10, and be "necessary in a democratic society".

[...]

56. It follows that the main question to be addressed in the present case is whether the impugned measure was necessary in a democratic society.

57. As the Chamber noted, the present case is singular in the sense that it raises the question whether the national authorities were required to permit the applicant association to disseminate its ideas through a poster campaign by making certain public space available to it for that purpose. In this connection the Court notes that in two Turkish

cases it found a breach in respect of a poster ban imposed on a political party. However the Court's finding in those cases was based on the fact that the regulations permitting such a ban were "not subject to any strict or effective judicial supervision"

[...]

(α) *Margin of appreciation*

[...]

62. In the present case, the Court observes that it can be reasonably argued that the poster campaign in question sought mainly to draw the attention of the public to the ideas and activities of a group with a supposedly religious connotation that was conveying a message claimed to be transmitted by extraterrestrials, referring for this purpose to a website address. The applicant association's website thus refers only incidentally to social or political ideas. The Court takes the view that the type of speech in question is not political because the main aim of the website in question is to draw people to the cause of the applicant association and not to address matters of political debate in Switzerland. Even if the applicant association's speech falls outside the commercial advertising context – there is no inducement to buy a particular product – it is nevertheless closer to commercial speech than to political speech *per se*, as it has a certain proselytising function. The State's margin of appreciation is therefore broader.

[...]

66. Having regard to the foregoing considerations concerning the breadth of the margin of appreciation in the present case, the Court finds that only serious reasons could lead it to substitute its own assessment for that of the national authorities.

(β) *Reasons given by the domestic courts*

[...]

69. The Court reiterates its general principle that the impugned interference has to be examined in the light of the case as a whole in order to determine whether it is "proportionate to the legitimate aim pursued" and whether the reasons given by the national authorities to justify it appear "relevant and sufficient."

[...]

71. In finding the refusal to authorise the campaign in question to be justified, the Federal Court successively examined each of the reasons relied on by the lower courts as justifying such refusal, namely the promotion of human cloning, the advocating of "geniocracy" and the possibility that the Raelian Movement's literature and ideas might lead to sexual abuse of children by some of its members.

72. Even though some of these reasons, taken separately, might not be capable of justifying the impugned refusal, the Court takes the view that the national authorities were reasonably entitled to consider, having regard to all the circumstances of the case, that it was indispensable to ban the campaign in question in order to protect health and morals, protect the rights of others and to prevent crime.

[...]

75. In the Court's view, however, such a contradiction is no more than apparent. Like the Government, it finds that a distinction must be drawn between the aim of the association and the means that it uses to achieve that aim. Accordingly, in the present case it might perhaps have been disproportionate to ban the association itself or its website on the basis of the above-mentioned factors. The Court reiterates in this

connection that the authorities are required, when they decide to restrict fundamental rights, to choose the means that cause the least possible prejudice to the rights in question [...]. In view of the fact that the applicant association is able to continue to disseminate its ideas through its website, and through other means at its disposal such as the distribution of leaflets in the street or in letter-boxes, the impugned measure cannot be said to be disproportionate.

(c) Conclusion

76. The Court concludes that the national authorities did not overstep the broad margin of appreciation afforded to them in the present case, and the reasons given to justify their decisions were “relevant and sufficient” and met a “pressing social need”. The Court does not therefore see any serious reason to substitute its own assessment for that of the Federal Court, which examined the question at issue with care and in line with the principles laid down by the Court’s case-law.

77. Accordingly, there has been no violation of Article 10 of the Convention.

II. Alleged violation of article 9 of the Convention

78. The applicant association further relied on Article 9 of the Convention in support of its allegations, finding that the impugned prohibition had infringed its right to freedom of religion.

79. In its judgment, the Chamber took the view that it was not required to examine separately the complaint under Article 9.

80. The Court is of the view that there is no reason to depart from the Chamber’s approach on this point. Accordingly, it concludes that it is not required to examine whether Article 9 of the Convention applies to the impugned ban and, if so, whether there has been a violation of that provision.

For these reasons, the Court

1. *Dismisses*, unanimously, the Government’s preliminary objection;
2. *Holds*, by nine votes to eight, that there has been no violation of Article 10 of the Convention;
3. *Holds*, unanimously, that it is not required to examine the complaint under Article 9 of the Convention.

11.

EUROPEAN COURT OF HUMAN RIGHTS 17 December 2004.

Cumpănă and Mazăre v. Romania.

Procedure

1. The case originated in an application (no. 33348/96) against Romania lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Romanian nationals, Mr Constantin Cumpănă (“the first applicant”) and Mr Radu Mazăre (“the second applicant”), on 23 August 1996.

[...]

3. The applicants alleged, in particular, that there had been unjustified interference with their right to freedom of expression, as guaranteed by Article 10 of the Convention, on

account of their conviction following the publication on 12 April 1994 of an article in a local newspaper.

[...]

The facts

I. The circumstances of the case

15. The applicants, Mr Cumpănă and Mr Mazăre, were born in 1951 and 1968 respectively and live in Constanța.

A. Background to the case

1. *The city authorities' partnership contract with the Vinalex company*

16. In decision no. 33 of 30 June 1992, Constanța City Council, implementing government decision no. 147 of 26 March 1992, introduced a fine for drivers of illegally parked vehicles and entrusted the task of removing, towing away and impounding such vehicles to S.C.

17. By order no. 163 of 30 June 1992, the mayor of Constanța authorised a private company, Vinalex, to perform the services of removing, towing away and impounding illegally parked vehicles.

[...]

2. *Content of the article in issue*

19. On 12 April 1994 the applicants, who are journalists by profession, published an article in the local newspaper *Telegraf*, of which the second applicant was the editor, with the headline "Former Deputy Mayor [D.M.] and serving judge [R.M.] responsible for series of offences in Vinalex scam". The names of the former deputy mayor and of the city council's former legal expert, Mrs R.M., who had subsequently become a judge, were printed in full in the headline and in the article itself.

[...] The contract with Vinalex was negotiated and signed illegally, as the signatories based it on the decision [of 30 June 1992], which, as has already been shown, referred to a different company without envisaging any other partnership.

[...]

The Constanța Audit Court detected this blatant fraud, which has generated considerable profits for the briber (S.C. Vinalex) ... The offending company [S.C. Vinalex] has never shown that it had adequate means to impound illegally parked vehicles. This explains why large numbers of privately owned vehicles have been damaged and, as a result, thousands of complaints have been made [...].

Furthermore, the alleged partnership contract was valid for one year, until 16 December 1993. From that date [S.C. Vinalex] no longer had any right to interfere with citizens' private property! It has nevertheless continued to tow vehicles away and illegally collect money ... It is incomprehensible how the police could have provided it with assistance for the past four months.

[...]

21. The article was accompanied by a photograph of a police car on the scene as an illegally parked vehicle was being towed away, photocopies of extracts from the partnership contract and from Constanța City Council's decision of 30 June 1992, and certain passages of Law no. 69/1991 concerning the responsibilities and powers of mayors, prefects and city and county councils.

22. The article was also accompanied by a cartoon showing a man and a woman arm in

arm, carrying a bag marked “Vinalex” which was full of banknotes. [...]

[...]

The law

[...]

II. Alleged violation of article 10 of the convention

70. The applicants submitted that their conviction following the publication on 12 April 1994 of an article in a local newspaper amounted to unjustified interference with their right to freedom of expression within the meaning of Article 10 of the Convention, [...].

[...]

B. The Court’s assessment

1. Whether there was interference

84. It was not disputed that the applicants’ conviction by the national courts following their publication of an article in a local newspaper of which the second applicant was the editor amounted to “interference” with their right to freedom of expression.

85. Such interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It should therefore be determined whether it was “prescribed by law”, whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was “necessary in a democratic society” in order to achieve those aims.

2. Whether the interference was justified

86. It appears from the decisions taken by the national courts that the interference was indisputably “prescribed by law”, namely by Articles 205 and 206 of the Criminal Code as worded at the material time, whose accessibility and foreseeability have not been contested, and that it pursued a legitimate aim, “protection of the rights of others”, and more particularly of the reputation of Mrs R.M., who was a city council official at the time of the events described in the article and a judge on the date of its publication.

87. Those appearing before the court differed as to whether the interference in question had been “necessary in a democratic society”. The Court must therefore determine whether this requirement, as set forth in the second paragraph of Article 10, was satisfied in the instant case, after first reiterating the principles established by its relevant case-law.

[...]

(b) Application of the above principles in the instant case

(i) “Pressing social need”

92. In the instant case the national courts found that in the article in issue the applicants had tarnished Mrs R.M.’s honour, dignity and public image by accusing her of having committed specific offences, such as aiding and abetting fraudulent activities on the part of Vinalex, and by portraying her in a cartoon on the arm of a man carrying a bag full of money; in the courts’ view, this was likely to cause her psychological trauma and to lead to misinformation of the public. The Court must determine whether the reasons given by the national authorities to justify the applicants’ conviction were relevant and sufficient.

[...]

98. The Court reiterates that it has consistently held that, in assessing whether there was a “pressing social need” capable of justifying interference with the exercise of freedom of expression, a careful distinction needs to be made between facts and value judgments.

- The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof [...].
99. Admittedly, where allegations are made about the conduct of a third party, it may sometimes be difficult, as in the instant case, to distinguish between assertions of fact and value judgments. Nevertheless, even a value judgment may be excessive if it has no factual basis to support it [...].
 100. In the instant case, the applicants' statements about Mrs R.M. were mainly worded in the form of an alternative ("Either she was ignorant of national legislation ... or she accepted bribes"), which might have suggested that they were value judgments. However, it must be concluded from an examination of the imputations in issue in the light of the article as a whole, including the accompanying cartoon, that they in fact contained allegations of specific conduct on Mrs R.M.'s part, namely that she had been complicit in the signing of illegal contracts and had accepted bribes. The applicants' statements suggested to readers that Mrs R.M. had behaved in a dishonest and self-interested manner, and were likely to lead them to believe that the "fraud" of which she and the former deputy mayor were accused and the bribes they had allegedly accepted were established and uncontroversial facts.
 101. While the role of the press certainly entails a duty to alert the public where it is informed about presumed misappropriation on the part of local elected representatives and public officials, the fact of directly accusing specific individuals by mentioning their names and positions placed the applicants under an obligation to provide a sufficient factual basis for their assertions [...].
 102. This was particularly so because the accusations against Mrs R.M. were so serious as to render her criminally liable, as, indeed, the Supreme Court of Justice noted in its judgment of 9 July 1996 [...].
 103. That was not the case in this instance. After examining all the evidence before them, the national courts found that the applicants' allegations against Mrs R.M. had presented a distorted view of reality and had not been based on actual [...].
 104. Another factor that must carry some weight in the instant case is the applicants' conduct during the criminal proceedings against them. [...] It must be noted that the applicants displayed a clear lack of interest in their trial, not attending the hearings either at first instance or in the County Court, despite having been duly summoned. They did not state any grounds for their and failed to adduce evidence at any stage of the proceedings to substantiate their allegations or provide a sufficient factual basis for them.
- [...]
109. As regards the manner in which the authorities dealt with the present case, the Court notes that the Romanian courts fully recognised that it involved a conflict between the applicants' right, as representatives of the media, to impart information and ideas and Mrs R.M.'s right to protection of her reputation and dignity. On the basis of the evidence before it, the Court considers that the grounds the domestic courts relied on to justify the applicants' conviction were relevant and sufficient.
 110. Having regard to the margin of appreciation left to the Contracting States in such matters, the Court finds in the circumstances of the case that the domestic authorities were entitled to consider it necessary to restrict the exercise of the applicants' right to

freedom of expression and that the applicants' conviction for insult and defamation accordingly met a "pressing social need". What remains to be determined is whether the interference in issue was proportionate to the legitimate aim pursued, in view of the sanctions imposed.

(ii) *Proportionality of the sanction*

[...]

119. The Court considers that by prohibiting the applicants from working as journalists as a preventive measure of general scope, albeit subject to a time-limit, the domestic courts contravened the principle that the press must be able to perform the role of a public watchdog in a democratic society.

(iii) *Conclusion*

[...]

121. The Court concludes that the domestic courts in the instant case went beyond what would have amounted to a "necessary" restriction on the applicants' freedom of expression.

122. There has therefore been a violation of Article 10 of the Convention.

For these reasons, the Court

1. *Holds* unanimously that there has been a violation of Article 10 of the Convention;
2. *Holds* by sixteen votes to one that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;
3. *Dismisses* by sixteen votes to one the remainder of the applicants' claim for just satisfaction.

12.

EUROPEAN COURT OF HUMAN RIGHTS 13 July 1995.

Tolstoy Miloslavsky V. The United Kingdom.

Procedure

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 March 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 18139/91) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by Count Nikolai Tolstoy Miloslavsky, who is a British citizen, on 18 December 1990.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 para. 1 and 10 (art. 6-1, art. 10) of the Convention.

[...]

As to the facts

I. Particular circumstances of the case

7. Count Nikolai Tolstoy Miloslavsky, a British citizen, lives in Southall, Berkshire, in the United Kingdom. He is a historian.

A. The impugned pamphlet

8. In March 1987 a pamphlet written by the applicant and entitled “War Crimes and the Wardenship of Winchester College” was circulated by Mr. Nigel Watts to parents, boys, staff and former members of the school as well as to Members of Parliament, Members of the House of Lords and the press. Mr. Watts bore a grievance against the Warden of Winchester College, Lord Aldington, at the time Chairman of an insurance company, concerning an insurance claim.

[...]

B. Libel proceedings

1. *Proceedings in the High Court*

9. Lord Aldington instituted proceedings against Mr. Watts for libel in the High Court of Justice (Queen’s Bench Division). The applicant was subsequently joined to these proceedings at his own request. The defendants pleaded “justification” and “fair comment”.
10. Lord Aldington asked that the case be heard by a single judge without a jury. However, the applicant exercised his right to trial by jury.

The trial began on 2 October 1989 and lasted until 30 November when the jury of twelve returned its verdict [...].

Accordingly, Mr Justice Davies directed that judgment should be entered against the applicant and Mr Watts for the above-mentioned sum, which was approximately three times the largest amount previously awarded by an English libel jury. In addition he granted an application by Lord Aldington for an injunction (section 37 of the Supreme Court Act 1981) restraining, inter alios, the defendants from publishing or causing or permitting to be published or assisting or participating in or conniving at the publication of the words contained in the impugned pamphlet or “any other words or allegations (however expressed) to the following or any similar effect namely that the Plaintiff [Lord Aldington] in connection with the handover in 1945 to Soviet or Yugoslav forces of military or civilian personnel was guilty of disobedience or deception or criminal or dishonourable or inhumane or other improper or unauthorised conduct or was responsible for the subsequent treatment of any such personnel by the Soviets or the Yugoslavs the said defendants being at liberty to apply to vary or discharge this injunction.”

2. *Proceedings in the Court of Appeal*

The applicant (but not Mr Watts) gave notice of appeal to the Court of Appeal setting out a number of grounds, several of which went to the fairness of the proceedings [...]. The Judge had, he alleged, insulted and disparaged the defence witnesses.

[...]

13. The damages had in any event been unreasonable and excessive.
14. On 9 January 1990 Lord Aldington applied to the Court of Appeal for an order requiring the applicant, under Order 59, Rule 10 (5) of the 1965 Rules of the Supreme Court, to give security in an amount which would cover the costs of his opponent’s representation if the appeal were to be unsuccessful. It was not disputed that the applicant would be unable to pay the relevant costs.
15. In an open letter of 2 February 1990, Lord Aldington offered not to enforce £1,200,000 of the damages awarded. In his reply the applicant confirmed that he was unable to provide any security for Lord Aldington’s costs in the appeal proceedings and, main-

taining that the trial had been a travesty of justice, declined the offer. [...] There was a possibility that if the applicant succeeded in convincing the Court of Appeal that he had not had a fair trial, and his case had not been fairly and clearly put to the jury, the Court of Appeal would conclude that a new trial had to be ordered, notwithstanding the fact that the chances of his succeeding on the new trial were slim.

In view of the above conclusion the Registrar did not find it necessary to deal with an argument made by counsel for Lord Aldington that the appeal on quantum would be academic because of his offer of 2 February 1990.

16. Lord Aldington appealed successfully against the Registrar's decision to the full Court of Appeal, which heard the matter for six days between 9 and 17 July 1990 and gave judgment on 19 July 1990.

[...]

The applicant's submission that Lord Aldington was supported by Sun Alliance Insurance Company was irrelevant.

In the result, on the issue of liability there was no merit in the appeal.

[...]

As to the law

I. Alleged violation of article 10 (art. 10) of the Convention

33. The applicant alleged a violation of Article 10 (art. 10) of the Convention, [...].

[...]

D. Recapitulation

55. In sum, the Court concludes that the award was "prescribed by law" but was not "necessary in a democratic society" as there was not, having regard to its size in conjunction with the state of national law at the relevant time, the assurance of a reasonable relationship of proportionality to the legitimate aim pursued. Accordingly, on the latter point, there has been a violation of Article 10 (art. 10). On the other hand, the injunction, either taken alone or together with the award, did not give rise to any breach of that Article (art. 10).

[...]

II. Alleged violation of article 6 para. 1 (art. 6-1) of the Convention

[...]

B. Compliance with Article 6 para. 1 (art. 6-1)

The Court reiterates that the right of access to the courts secured by Article 6 para. 1 (art. 6-1) may be subject to limitations in the form of regulation by the State. In this respect the State enjoys a certain margin of appreciation. However, the Court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved [...]. The Court's role is to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation.

[...]

67. In the light of the foregoing, the Court does not find that the national authorities overstepped their margin of appreciation in setting the conditions which they did for the applicant to pursue his appeal in the Court of Appeal. It cannot be said that those

conditions impaired the essence of the applicant's right of access to court or were disproportionate for the purposes of Article 6 para. 1 (art. 6-1). Accordingly, there has been no violation of that provision (art. 6-1).

III. Application of article 50 (art. 50) of the Convention

[...]

72. The Court is not empowered under Article 50 (art. 50) of the Convention to make a declaration such as that requested by the applicant [...]. Accordingly, the applicant's request under this head must be rejected.

[...]

For these reasons, the Court

1. *Holds* unanimously that the award was "prescribed by law" within the meaning of Article 10 (art. 10) of the Convention;
2. *Holds* unanimously that the award, having regard to its size taken in conjunction with the state of national law at the relevant time was not "necessary in a democratic society" and thus constituted a violation of the applicant's rights under Article 10 (art. 10);
3. *Holds* unanimously that the injunction, either taken alone or together with the award, did not give rise to a breach of Article 10 (art. 10);
4. *Holds* unanimously that Article 6 para. 1 (art. 6-1) of the Convention was applicable to the proceedings in the Court of Appeal;
5. *Holds* by eight votes to one that there has been no violation of the applicant's right of access to court as guaranteed by Article 6 para. 1 (art. 6-1) on account of the security for costs order by the Court of Appeal;
6. *Holds* unanimously that the United Kingdom is to pay to the applicant, within three months, in compensation for fees and expenses 40,000 (forty thousand) Swiss francs and £70,000 (seventy thousand).

13.

EUROPEAN COURT OF HUMAN RIGHTS 8 July 1986.

Lingens v. Austria.

Procedure

1. The present case was referred to the Court, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), on 13 December 1984 by the European Commission of Human Rights ("the Commission") and, subsequently, on 28 January 1985, by the Federal Government of the Republic of Austria ("the Government"). The case originated in an application (no. 9815/82) against Austria lodged with the Commission on 19 April 1982 under Article 25 (art. 25) by Mr. Peter Michael Lingens, an Austrian national.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Republic of Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46), and the Government's application referred to Article 48 (art. 48). They sought a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10).

2. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, Mr. Lingens stated that he wished to take part in the proceedings pending before the Court and designated the lawyer who would represent him (Rule 30).

[...]

As to the facts

8. Mr. Lingens, an Austrian journalist born in 1931, resides in Vienna and is editor of the magazine *Profil*.

I. The applicant's articles and their background

9. On 9 October 1975, four days after the Austrian general elections, in the course of a television interview, Mr. Simon Wiesenthal, President of the Jewish Documentation Centre, accused Mr. Friedrich Peter, the President of the Austrian Liberal Party (*Freiheitliche Partei Österreichs*) of having served in the first SS infantry brigade during the Second World War. This unit had on several occasions massacred civilians behind the German lines in Russia. Mr. Peter did not deny that he was a member of the unit, but stated that he was never involved in the atrocities it committed. Mr. Wiesenthal then said that he had not alleged anything of the sort [...]. Immediately before the television interview, he had met Mr. Peter at the Federal Chancellery. Their meeting was one of the normal consultations between heads of parties with a view to forming a new government [...].

At the interview, Mr. Kreisky excluded the possibility of such a coalition because his party had won an absolute majority. However, he vigorously supported Mr. Peter and referred to Mr. Wiesenthal's organisation and activities as a "political mafia" and "mafia methods". Similar remarks were reported the next day in a Vienna daily newspaper to which he had given an interview.

[...]

11. At this juncture, the applicant published two articles in the Vienna magazine *Profil*.
12. The first was published on 14 October 1975 under the heading "The Peter Case" ("Der Fall Peter"). It related the above events and in particular the activities of the first SS infantry brigade; it also drew attention to Mr. Peter's role in criminal proceedings instituted in Graz (and later abandoned) against persons who had fought in that brigade. It drew the conclusion that although Mr. Peter was admittedly entitled to the benefit of the presumption of innocence, his past nevertheless rendered him unacceptable as a politician in Austria [...].
13. The second article, published on 21 October 1975, was entitled "Reconciliation with the Nazis, but how?" ("Versöhnung mit den Nazis - aber wie?"). It covered several pages and was divided into an introduction and six sections: "Still' or 'Already", "We are all innocent", "Was it necessary to shoot defenceless people?", "Why is it still a question for discussion?", "Helbich and Peter" and "Politically ignorant".
14. In the introduction Mr. Lingens recalled the facts and stressed the influence of Mr. Kreisky's remarks on public opinion. He criticised him not only for supporting Mr. Peter, but also for his accommodating attitude towards former Nazis who had recently taken part in Austrian politics.
15. Under the heading "Still' or 'Already" the applicant conceded that one could not object to such attitudes on grounds of "Realpolitik". According to him "the time has passed when for electoral reasons one had to take account not only of Nazis but also of their

victims ... the former have outlived the latter ...". Nevertheless Austria, which had produced Hitler and Eichmann and so many other war criminals, had not succeeded in coming to terms with its past; it had simply ignored it. This policy risked delivering the country into the hands of a future fascist movement [...].

What was surprising was not that one "still" spoke about these things thirty years later but, on the contrary, that so many people were "already" able to close their eyes to the existence of this mountain of corpses.

Finally, Mr. Lingens criticised the lack of tact with which Mr. Kreisky treated the victims of the Nazis.

16. The second section commented on the attitude of Austrian society in general with regard to Nazi crimes and former Nazis. In the author's opinion, by sheltering behind the philosophic alternative between collective guilt and collective innocence the Austrians had avoided facing up to a real, discernible and assessable guilt [...].

17. The third and fourth sections (which together amounted to a third of the article) also dealt with the need to overcome the consciousness of collective guilt and envisage the determination of real guilt. Under the title "Was it necessary to shoot defenceless people?", Mr. Lingens drew a distinction between the special units and the regular forces in the armies of the Third Reich; [...]

Finally, he considered the possibility of showing clemency after so many years and concluded: "It belongs to every society to show mercy but not to maintain an unhealthy relationship with the law by acquitting obvious murderers and concealing, dissembling or denying manifest guilt."

[...]

19. The article ended with a section criticising the political parties in general owing to the presence of former Nazis among their leaders. The applicant considered that Mr. Peter ought to resign, not to admit his guilt but to prove that he possessed a quality unknown to Mr. Kreisky, namely tact.

[...]

As to the law

I. Alleged violation of article 10 (art. 10)

34. Under Article 10 (art. 10) of the Convention, [...].

Mr. Lingens claimed that the impugned court decisions infringed his freedom of expression to a degree incompatible with the fundamental principles of a democratic society.

This was also the conclusion reached by the Commission. In the Government's submission, on the other hand, the disputed penalty was necessary in order to protect Mr. Kreisky's reputation.

35. It was not disputed that there was "interference by public authority" with the exercise of the applicant's freedom of expression [...].

Such interference contravenes the Convention if it does not satisfy the requirements of paragraph 2 of Article 10 (art. 10-2). It therefore falls to be determined whether the interference was "prescribed by law", had an aim or aims that is or are legitimate under Article 10 para. 2 (art. 10-2) and was "necessary in a democratic society" for the aforesaid aim or aims [...].

36. As regards the first two points, the Court agrees with the Commission and the Government that the conviction in question was indisputably based on Article 111 of

the Austrian Criminal Code; it was moreover designed to protect “the reputation or rights of others” and there is no reason to suppose that it had any other purpose [...]. The conviction was accordingly “prescribed by law” and had a legitimate aim under Article 10 para. 2 (art. 10-2) of the Convention.

[...]

In this connection, the Court cannot accept the opinion, expressed in the judgment of the Vienna Court of Appeal, to the effect that the task of the press was to impart information, the interpretation of which had to be left primarily to the reader.

[...]

II. The application of article 50 (art. 50)

48. Under Article 50 (art. 50) of the Convention, [...].

50. The applicant claimed firstly repayment of the 15,000 Schillings fine and of the 30,600 Schillings costs awarded against him by the Vienna Court of Appeal. He is indeed entitled to recover these sums by reason of their direct link with the decision the Court has held to be contrary to the freedom of expression [...].

[...]

For these reasons, the Court unanimously:

1. *Holds* that there has been a breach of Article 10 (art. 10) of the Convention;
2. *Holds* that the Republic of Austria is to pay to the applicant 284,538.60 Schillings (two hundred and eighty-four thousand five hundred and thirty-eight Schillings sixty Groschen) as “just satisfaction”.

14.

COURT OF JUSTICE OF THE EUROPEAN UNION 3 February 2021, Case C-555/19. Fussl Modestraße Mayr GmbH v. SevenOne Media GmbH and others

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 56 TFEU, Article 11 of the Charter of Fundamental Rights of the European Union (‘the Charter’), the general principle of equal treatment and Article 4(1) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [...].

2 The request has been made in proceedings between Fussl Modestraße Mayr GmbH, a company incorporated under Austrian law (‘Fussl’), and SevenOne Media GmbH, ProSiebenSat.1 TV Deutschland GmbH and ProSiebenSat.1 Media SE, companies under German law, regarding the refusal of SevenOne Media to perform a contract concluded with Fussl for the broadcasting of television advertising for fashion products sold by Fussl within the territory of Freistaat Bayern (Land of Bavaria, Germany) on the ground that such advertising, if it is intended to be included in television programmes broadcast throughout Germany, is contrary to the applicable national law.

[...]

9 Fussl, which has its registered office in Ort im Innkreis (Austria), operates a network

of fashion shops in Austria and the Land of Bavaria.

10 SevenOne Media, which has its registered office in Unterföhring, (Germany), is the marketing company of the ProSiebenSat.1 Group, a private television broadcaster established in Germany.

11 On 25 May 2018, Fussl concluded a contract with SevenOne Media to broadcast television advertising, solely in the Land of Bavaria, for inclusion in the programmes of the national ProSieben channel using the Bavarian cable networks of Vodafone Kabel Deutschland GmbH.

12 Subsequently, SevenOne Media refused to perform that contract on the ground that it is prohibited by Paragraph 7(11) of the RStV from inserting, in programmes broadcast throughout Germany, television advertising whose transmission is restricted to a regional level.

13 Fussl then referred the matter to the referring court, the Landgericht Stuttgart (Regional Court, Stuttgart, Germany), to order SevenOne Media to comply with its obligations under the contract.

[...]

16 First, it considers that it is not certain that that objective is pursued in a consistent and systematic manner, since the prohibition does not apply to advertising disseminated solely at regional level on internet sites.

17 Secondly, the proportionality of the prohibition provided for in Paragraph 7(11) of the RStV could also be questioned, since regional television broadcasters benefit only to a lesser extent from that prohibition, while economic operators such as Fussl are significantly limited in their possibilities to promote their products.

18 The referring court considers, in the second place, that Paragraph 7(11) of the RStV may constitute an unlawful interference with the freedom to hold opinions and to receive or impart information, as guaranteed by Article 11 of the Charter and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms,

19 In the third place, that court considers that Paragraph 7(11) of the RStV could be contrary to the principle of equal treatment, a general principle of Union law.

[...]

The application for the oral part of the procedure to be reopened

[...]

30 In the present case, it is therefore for the referring court alone to assess the facts relied on by SevenOne Media, ProSiebenSat.1 TV Deutschland and ProSiebenSat.1 Media in support of their application to reopen the oral phase of the proceedings if that court were to find that such an assessment is necessary for the resolution of the dispute in the main proceedings, having regard, in particular, to the interpretation of EU law provided by the Court in the context of its reply to the present reference for a preliminary ruling.

31 Therefore, the Court considers, after hearing the Advocate General, that it is sufficiently informed by the various arguments which have been duly presented before it.

32 In the light of the foregoing, there is no need to order the reopening of the oral part of the procedure.

Consideration of the questions referred

33 By its four questions, which must be examined together, the referring court asks, in

substance, whether Article 4(1) of Directive 2010/13, the principle of equal treatment, Article 56 TFEU and Article 11 of the Charter must be interpreted as precluding national legislation which prohibits television broadcasters from inserting in their programmes broadcast throughout the national territory television advertisements whose transmission is limited to a regional level.

Conformity with Directive 2010/13

[...]

36 The reference in Article 1(1)(e) of Directive 2010/13 to the notion of ‘simultaneous viewing of programmes’ cannot be understood in the sense that it implies an obligation for Member States to ensure that advertisements or other content in a television programme designated or authorised for broadcasting at national level are, in the absence of authorisation, systematically broadcast throughout their territory, as provided for in Paragraph 7(11) of the RStV in the present case.

[...]

40 Next, as regards the possible impact of Article 4(1) of Directive 2010/13 on the answer to be given to the questions referred for a preliminary ruling as reformulated in paragraph 33 of the present judgment, it should be recalled that it follows from that provision, as well as from recitals 41 and 83 of that directive, that, for the purposes of ensuring full and adequate protection of the interests of consumers, who are viewers, Member States have the option, with regard to media service providers under their jurisdiction, of laying down more detailed or stricter rules and, in certain cases, different conditions, in the fields covered by that directive, provided that such rules comply with Union law and, in particular, with its general principles [...].

[...]

42 It follows that the measure established by Paragraph 7(11) of the RStV cannot be qualified as a ‘more detailed’ or ‘stricter’ rule within the meaning of Article 4(1) of Directive 2010/13 and does not fall within the scope of that directive.

Conformity with the freedom to provide services guaranteed by Article 56 TFEU

The existence of a restriction on the freedom to provide services

[...]

49 In the present case, Paragraph 7(11) of the RStV, in so far as it prevents non-resident economic operators, such as Fussl, from benefiting from the provision of television advertising broadcasting services on German.

[...]

51 It is sufficient in that respect to note that it is clear from the reference for a preliminary ruling that that is a mere option which has not yet been used by any *Land*, so that it must be held that, *de lege lata*, the prohibition on television broadcasters, to include in their programmes transmitted throughout the national territory television advertising whose broadcasting is limited to a regional level, as provided for in Paragraph 7(11) of the RStV, and the restriction of the freedom to provide services resulting therefrom is established.

Possible justification for the restriction on the freedom to provide services

[...]

66 It is for the referring court alone to ascertain, on the basis of current, sufficiently detailed and substantiated data, whether there is a real or actually foreseeable risk of a

shift, to the detriment of regional television broadcasters, in the demand for regional advertising services and in the revenue derived therefrom, the importance of which would be such that the funding and, therefore, the sustainability of those broadcasters would be liable to be jeopardised if national television broadcasters were authorised to broadcast regional advertising as part of their programmes broadcast throughout the national territory.

[...]

68 In that context, the referring court will in particular have to ascertain whether German law permits national television broadcasters to broadcast regional advertising as part of their streaming programmes on the internet. If so, it would necessarily have to be concluded that the measure introduced by Paragraph 7(11) of the RStV is inconsistent.

[...]

76 That being the case, it should be noted that Paragraph 7(11) of the RStV itself provides for a so-called ‘opening clause’, enabling the *Länder* to introduce a measure that is less restrictive than the outright prohibition, namely a specific authorisation scheme, provided that the law of the *Land* concerned so provides.

77 Consequently, a less restrictive measure could result from the effective implementation of that authorisation system at the level of the *Länder*, allowing the broadcasting of regional advertising by national television broadcasters within certain limits and under certain conditions to be determined in the light of the specific features of each *Land* in order, in particular, to minimise any financial impact on regional and local television broadcasters and thus to preserve the pluralistic nature of the television offer, particularly at regional and local level.

[...]

79 Moreover, the existence of an a priori less restrictive measure cannot affect the proportionality of Paragraph 7(11) of the RStV unless, which it is for the referring court to verify, it can actually be adopted and implemented in such a way as to ensure that, in practice, the objective of that provision to preserve media pluralism at regional and local level through the protection of the funding and sustainability of regional and local television broadcasters can be achieved.

Conformity with Articles 11 and 20 of the Charter

[...]

85 In that regard, it should be noted, in the present case, first, that the limitation resulting from the prohibition on regional advertising under Paragraph 7(11) of the RStV must be regarded as laid down by law in so far as it is contained in a treaty concluded between all the German *Länder*.

86 Secondly, the essential content of the freedom of expression and information of the operators concerned is not affected, since, on the one hand, as the Advocate General also stated in point 81 of his Opinion, that national legislation restricts only the ability of advertisers to use a particular channel of communication, namely national television channels, while leaving them free to use other promotional channels to reach their regional target, such as advertising on the internet, the effectiveness of which, including at regional level, is not disputed.

[...]

88 Thirdly, the interference referred to in paragraph 85 of the present judgment responds

to an objective of general interest recognised by the Union.

[...]

92 The prohibition of regional advertising under Paragraph 7(11) of the RStV is essentially a balancing act between, on the one hand, the freedom of commercial expression of national television broadcasters and advertisers to broadcast regional television advertising in the context of programmes intended for all national television viewers and, on the other hand, the protection of media pluralism at regional and local level, to which regional and local television broadcasters can contribute only if their funding and hence their sustainability is ensured by reserving sufficient income from regional advertising.

[...]

The principle of equal treatment guaranteed by Article 20 of the Charter

[...]

100 It is therefore for the referring court to ascertain whether the situation of national television broadcasters and that of providers of advertising services, in particular linear advertising services, on the internet, with respect to the provision of regional advertising services, is significantly different as regards the elements characterising their respective situations, namely, in particular, the usual ways in which advertising services are used, the manner in which they are provided or the legal framework within which they are provided.

101 It is also for the referring court to ascertain whether, having regard to the object and purpose of Paragraph 7(11) of the RStV, which is aimed in particular at safeguarding the funding of regional and local television broadcasters, the situation of non-subsidised national television broadcasters providing advertising is comparable to that of providers of advertising services, in particular linear advertising services, on the internet, taking into account the fact that those two categories of operators are equally dependent on that advertising revenue for their funding.

[...]

103 Secondly, if, following those checks, the referring court were to conclude that the situation of national television broadcasters and that of providers of advertising services, in particular linear advertising services, on the internet are comparable having regard to the factors which characterise them, the object and purpose of Paragraph 7(11) of the RStV and the principles and objectives of the area of national law to which that provision belongs, it would still be for that court to ascertain whether the inequality of treatment between those two categories of operator can be objectively justified.

104 In that regard, as is clear from paragraph 95 of the present judgment, a difference of treatment is justified where it is based on an objective and reasonable criterion, that is to say, where it relates to a legally permissible aim pursued by the legislation in question, and where that difference is proportionate to the aim pursued by the treatment concerned.

105 While it is for the referring court alone to determine whether any inequality of treatment resulting from the application of the rule laid down in Paragraph 7(11) of the RStV can be objectively justified in the light of the criteria referred to in the previous paragraph, it should be noted that such an examination corresponds, in substance, to that relating to the justification of the restriction on the freedom to provide services,

carried out in paragraphs 52 to 79 of the present judgment, so that the two examinations must be carried out in the same way.

106 Finally, as regards the question whether the rule laid down in Paragraph 7(11) of the RStV leads to unequal treatment between, on the one hand, advertisers who engage the services of national television broadcasters in order to advertise at the regional level and, on the other hand, advertisers who make use of providers of advertising services, in particular linear advertising services, on the internet at the same level, it is important to note that the examination of that question is closely linked to the examination of the situation of those broadcasters and providers. Therefore, the explanations set out in paragraphs 98 to 105 of the present judgment also apply in relation to such advertisers.

[...]

On those grounds, the Court (Third Chamber) hereby rules:

Article 4(1) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services ('the Audiovisual Media Services Directive') and Article 11 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation which prohibits television broadcasters from inserting in their programmes broadcast throughout the national territory television advertising whose broadcasting is limited to a regional level;

Article 56 TFEU must be interpreted as not precluding such national legislation, provided that it is suitable for securing the attainment of the objective of protecting media pluralism at regional and local level which it pursues and does not go beyond what is necessary to attain that objective, which it is for the referring court to ascertain;

Article 20 of the Charter of Fundamental Rights must be interpreted as not precluding such national legislation, provided that it does not give rise to unequal treatment between national television broadcasters and internet advertising providers as regards the broadcasting of advertising at regional level, which it is for the referring court to ascertain.

15.

COURT OF JUSTICE OF THE EUROPEAN UNION 3 September 2020, Case C-719/18. Vivendi SA v. Autorità per le Garanzie nelle Comunicazioni.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49, 56 and 63 TFEU and Articles 15 and 16 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009, ('the Framework Directive').

[...]

The dispute in the main proceedings and the questions referred for a preliminary rul-

ing

- 14 Vivendi, a company governed by French law and entered in the Paris (France) register of companies, is the parent company of a group that is active in the media sector and in the creation and distribution of audiovisual content.
- 15 Vivendi holds a 23.9% stake in the capital of Telecom Italia SpA, a company which it controls since, in essence, it secured a majority of the voting rights in the general meeting of that company at the vote which took place at the shareholders' meeting on 4 May 2017.
- 16 On 8 April 2016, Vivendi, Mediaset and Reti Televisive Italiane SpA entered into a strategic partnership agreement under which Vivendi acquired 3.5% of Mediaset's share capital and 100% of Mediaset Premium SpA's share capital, in exchange for transferring 3.5% of its own share capital to Mediaset.
- 17 In December 2016, as a result of disagreements relating to that agreement, Vivendi launched a hostile acquisition campaign for shares in Mediaset. By 22 December 2016, Vivendi had thus succeeded in securing 28.8% of Mediaset's share capital and 29.94% of the voting rights at Mediaset's shareholders' meetings. That qualified minority shareholding did not, however, enable it to exercise control over Mediaset, which remained under the control of the Fininvest group.
- 18 Against that background, on 20 December 2016, Mediaset lodged a complaint with AGCOM, alleging that Vivendi had infringed Article 43(11) of TUSMAR ('the provision at issue in the main proceedings'), on the ground that Vivendi's shareholdings in Telecom Italia and in Mediaset meant that Vivendi's revenue in the electronic communications sector, on the one hand, and in the SIC, on the other hand, exceeded, according to Mediaset, the thresholds laid down in that provision, under which undertakings the revenue of which in the electronic communications sector, including that secured through controlled or affiliated undertakings, is greater than 40% of the total revenues generated in that sector, may not earn, within the SIC, revenue exceeding 10% of the total revenues generated in that system.
- 19 By decision of 18 April 2017 ('the decision of AGCOM'), AGCOM held that Vivendi had infringed the provision at issue in the main proceedings. In that regard, AGCOM noted that (i) Vivendi was a company affiliated with Telecom Italia and Mediaset since it held more than one fifth of the voting rights in the shareholders' meetings of each of those companies, (ii) Vivendi had secured 59% of the revenues generated in the electronic communications sector, which consists of fixed network retail services, fixed and mobile network wholesale services and television broadcasting services for the transmission of content to end users, and (iii) Mediaset had received 13.3% of the revenues generated in the SIC. By that decision, AGCOM also ordered Vivendi to terminate its acquisition of shareholdings in Mediaset or in Telecom Italia within 12 months.
- 20 In that decision, AGCOM took the view, inter alia, that only markets which had been regulated in accordance with Articles 15 and 16 of the Framework Directive were relevant for the purposes of applying the provision at issue in the main proceedings. It also stated that that provision was intended to protect media pluralism and that its objective in particular was to avoid, in the light of the growing phenomenon of convergence between telecommunications and the media, distorting effects on media pluralism, which may occur where an undertaking with significant market power in the electronic

- communications sector acquires a ‘significant economic dimension’ in the SIC. In that context, AGCOM added that the limits laid down by the provision at issue in the main proceedings were automatic, since they apply independently of any analysis of those distorting effects and irrespective of any consideration relating to competition law.
- 21 On 6 April 2018, Vivendi complied with the injunction issued to it by AGCOM by transferring to a third company 19.19% of the share capital in Mediaset, representing 19.95% of the voting rights in Mediaset’s shareholders’ meetings. Vivendi thus retained a direct holding in Mediaset’s capital of less than 10% of the voting power in Mediaset’s shareholders’ meetings.
- 22 Vivendi nevertheless brought an action against AGCOM’s decision before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy), the referring court.
- 23 In that action Vivendi claims, in the first place, that AGCOM incorrectly defined the electronic communications sector in so far as, in calculating the total revenues generated in that sector, AGCOM ought to have taken into consideration all of the markets actually comprising the electronic communications sector and not only some of those markets, namely those which have been the subject of a market analysis decision designed to detect the presence of an operator in a dominant position, to the exclusion of significant markets such as the market for mobile telephone retail services.
- 24 In the second place, Vivendi submits that AGCOM incorrectly interpreted the concept of ‘affiliated company’, within the meaning of the third paragraph of Article 2359 of the Civil Code, by taking into account the revenues of the companies belonging to the Mediaset group, whereas these are neither controlled by nor affiliated with Vivendi and Vivendi exercises no ‘significant influence’ over them within the meaning of that provision.
- 25 In the third place, Vivendi alleges infringement of Articles 49, 56 and 63 TFEU, in so far as, in its view, AGCOM’s decision adversely affected the ability of a company registered in France to acquire a minority shareholding in a company registered in Italy.
- 26 In the fourth place, Vivendi alleges that the provision at issue in the main proceedings is discriminatory, given that, for certain other operators in the electronic communications sector, it sets the threshold for revenue obtained in the SIC at 20% instead of 10%.
- 27 AGCOM submits that the legal basis of the prohibition of establishing a ‘significant economic dimension’ in the SIC, laid down by the provision at issue in the main proceedings, is the principle of media pluralism, enshrined in particular in Article 11 of the Charter of Fundamental Rights of the European Union, and in recital 8 of the Audiovisual Media Services Directive. AGCOM also notes that, according to the Court’s case-law, the fundamental freedoms may be restricted in order to ensure media pluralism in the Member States.
- 28 In that context, the referring court observes that it is necessary to assess the appropriateness and proportionality of the restrictions imposed by the provision at issue in the main proceedings not only in relation to the freedom of establishment, the freedom to provide services and the free movement of capital, but also in relation to principles such as the freedom and pluralism of the media.

[...]

Consideration of the questions referred

Substance

[...]

Consideration of the questions referred

- 50 By its three questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 49 TFEU must be interpreted as precluding legislation of a Member State which has the effect of preventing a company registered in another Member State, the revenue of which in the electronic communications sector, as defined for the purposes of that national legislation, including through controlled or affiliated companies, is in excess of 40% of the total revenues in that sector, from earning, within the SIC, revenue exceeding 10% of the total revenues generated in that system.
- 51 In that regard, it must be borne in mind that Article 49 TFEU precludes any national measure which, even if applicable without discrimination on grounds of nationality, is liable to hinder or render less attractive the exercise by EU nationals of the freedom of establishment guaranteed by the FEU Treaty, and that such restrictive effects may arise, inter alia, where, on account of national legislation, a company may be deterred from setting up subsidiary bodies, such as permanent establishments, in [...]
- 53 Thus when Vivendi acquired 28.8% of Mediaset's share capital and 29.94% of the voting rights in Mediaset's shareholders' meetings, AGCOM prohibited Vivendi, on the basis of that provision, from retaining the shareholdings that it had acquired in Mediaset or that it held in Telecom Italia and ordered Vivendi to cease to hold those shares in one or other of those undertakings in so far as they exceeded the thresholds laid down in that provision.

[...]

- 57 The Court has held that the safeguarding of the freedoms protected under Article 11 of the Charter of Fundamental Rights unquestionably constitutes a legitimate aim in the general interest, the importance of which in a democratic and pluralistic society must be stressed in particular, capable of justifying a restriction on freedom of establishment [...].
- 58 Protocol No 29 on the system of public broadcasting in the Member States, annexed to the EU and FEU Treaties, also refers to media pluralism, stating that 'the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism'.
- 59 In the present case, the restriction on freedom of establishment resulting from the provision at issue in the main proceedings could therefore, in principle, be justified by an overriding reason in the public interest, namely the protection of pluralism of information and the media.
- 60 As regards, in the second place, the proportionate nature of that restriction in relation to the objective pursued, it must be observed that Article 43(9) of TUSMAR provides that entities which are required to be entered in the Register of Communications Operators are prohibited from generating more than 20% of the total revenues generated in the SIC, thereby establishing a general rule intended to apply only to entities that are active in the electronic communications sector.

[...]

- 64 In the present case, it should be noted that it is apparent from recital 5 of the Framework Directive that, indeed, there are links between the two sectors referred to in the

provision at issue in the main proceedings, given the convergence of the telecommunications, media and information technology sectors.

- 65 As the Advocate General observed, in essence, in point 74 of his Opinion, given the proximity between the electronic communications services sector and the media sector, it may, in principle, be accepted that certain limits may be imposed on the possibility for undertakings which already occupy a ‘dominant position’ in the first sector to take advantage of that position in order to strengthen their position in the second.

[...]

- 68 In the present case, the provision at issue in the main proceedings does not refer to those links between the production of content and the transmission of content, and it is also not worded in such a way as to apply specifically in relation to those links.

- 69 That provision prohibits, in absolute terms, entities the revenue of which in the electronic communications sector, as defined for the purposes of that provision, is greater than 40% of the total revenues generated in that sector, from earning within the SIC revenue exceeding 10% of the total revenues generated in that system.

- 70 Thus, in order to determine whether a provision such as the provision at issue in the main proceedings is appropriate for attaining that specific objective, which seeks to prevent the negative aspects of convergence between the electronic communications sector and the SIC, it is necessary to assess the link between, on the one hand, the thresholds referred to in that provision and, on the other hand, the risk to media pluralism.

[...]

- 76 Finally, as regards the fact that, for the purpose of identifying the revenue earned by an undertaking in the electronic communications sector or in the SIC, AGCOM takes into consideration not only revenue obtained through ‘controlled’ companies, but also that obtained through ‘affiliated’ companies, over which the undertaking concerned exercises a ‘significant influence’, within the meaning of the third paragraph of Article 2359 of the Civil Code, it must be observed that it is apparent from the request for a preliminary ruling that such a practice is likely to lead to revenue being taken into consideration twice and thus to a distortion of the calculation of revenue generated in the SIC. The same revenue of a company active in the SIC might therefore be taken into account both for the calculation of the income of an undertaking which is its minority shareholder and in calculating the revenue of an undertaking which is its majority shareholder and actually controls it.

[...]

- 78 Thus, in a situation such as that in the main proceedings, treating a ‘controlled company’ in the same way as an ‘affiliated company’ when calculating the revenue of an undertaking in the electronic communications sector or the SIC does not appear reconcilable with the objective pursued by the provision at issue in the main proceedings.

- 79 Consequently, that provision cannot be considered to be appropriate for attaining the objective which it pursues, in so far as it sets thresholds which bear no relation to the risk to media pluralism, since those thresholds do not make it possible to determine whether and to what extent an undertaking is actually in a position to influence the content of the media.

[...]

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 49 TFEU must be interpreted as precluding legislation of a Member State which has the effect of preventing a company registered in another Member State, the revenue of which in the electronic communications sector, as defined for the purposes of that legislation, is in excess of 40% of the total revenues generated in that sector, from earning, within the integrated communications system, revenue which exceeds 10% of the total revenues generated in that system.

16.

COURT OF JUSTICE OF THE EUROPEAN UNION 13 December 2018, Case C- 298/17. France Télévisions SA v. Playmédia and Conseil supérieur de l’audiovisuel (CSA).

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 31(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (‘Universal Service Directive’) (OJ 2002 L 108, p. 51), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 (OJ 2009 L 337, p. 11) (the ‘Universal Service Directive’).

[...]

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 Playmédia offers live streaming of television programmes on its website mainly paid for by the advertisements screened before and during those broadcasts. In its capacity as services distributor within the meaning of Article 2-1 of the Law on Freedom of Communication, Playmédia considers that Article 34-2 of that law confers on it the right to distribute programmes produced by France Télévisions. It follows from the order for reference that France Télévisions also offers live streaming of those programmes on a website available to the general public.

12 By decision of 27 May 2015, the CSA gave France Télévisions formal notice to comply with Article 34-2 of the Law on Freedom of Communication by not opposing the online streaming of its programmes by Playmédia on Playmédia’s website.

13 By a summary application lodged on 6 July 2015 at the secretariat of the judicial section of the Conseil d’État (Council of State, France), France Télévisions requested the annulment of that formal notice, claiming that Playmédia cannot benefit from the obligation provided in Article 34-2 of that law. France Télévisions argued, in that regard, that the conditions provided in Article 31(1) of the Universal Service Directive are not satisfied when, in particular, it is impossible to assert that a significant number of end-users use the network as their principal means to receive television broadcasts.

[...]

Consideration of the questions referred*The first question*

15 By its first question the national court asks, in essence, if Article 31(1) of the Universal Service Directive must be interpreted as meaning that an undertaking which offers the possibility to live stream television programmes online must, based on that fact alone,

be regarded as an undertaking which provides an electronic communications network used for the distribution of radio and television channels to the public.

[...]

22 In those circumstances, the answer to the first question is that Article 31(1) of the Universal Service Directive must be interpreted as meaning that an undertaking which offers the live streaming of television programmes online must not, based on that fact alone, be regarded as an undertaking which provides an electronic communications network used for the distribution of radio or television channels to the public.

The second to fourth questions

23 By the second to fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether the provisions of the Universal Service Directive or other EU law rules must be interpreted as precluding a Member State from imposing, in a situation such as that at issue in the main proceedings, ‘must carry’ obligations on undertakings which, without providing electronic communication networks, offer the live streaming of television programmes online.

[...]

34 In this case, the referring court has not indicated in what way the dispute pending before it, despite its purely domestic character, has a connecting factor with the provisions of EU law on the freedom to provide services that makes the interpretation of Article 56 TFEU necessary for it to give judgment on that dispute.

35 In those circumstances, it must be declared that the second to fourth questions are inadmissible, inasmuch as they concern ‘other rules of EU law’.

36 In those circumstances, the answer to the second to fourth questions is that the provisions of the Universal Service Directive must be interpreted as not precluding a Member State from imposing, in a situation such as that at issue in the main proceedings, a ‘must carry’ obligation on undertakings which, without providing electronic communication networks, offer the live streaming of television programmes online.

The fifth question

37 By its fifth question, the referring court asks, in essence, whether, in a case such as that in the main proceedings, the condition under which a significant number of final users of the networks subject to the ‘must carry’ obligation must use those networks as their principal means to receive television channels, referred to in Article 31(1) of the Universal Service Directive, must be assessed in the light of the users who view television programmes online as a whole, or solely of the users of the website who belong to the undertaking subject to that obligation.

38 In this case, an undertaking such as Playmédia does not come under Article 31(1) of the Universal Service Directive. As regards undertakings which do not come under that article, EU law does not impose compliance with the condition under which a significant number of final users of the networks subject to the ‘must carry’ obligation must use those networks as their principal means to receive television channels.

39 In those circumstances, there is no need to reply to the fifth question.

[...]

On those grounds, the Court (Fourth Chamber) hereby rules:

1. Article 31(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electron-

ic communications networks and services (Universal Service Directive), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009, must be interpreted as meaning that an undertaking which offers the live streaming of television programmes online must not, based on that fact alone, be regarded as an undertaking which provides an electronic communications network used for the distribution of radio or television channels to the public.

2. The provisions of Directive 2002/22, as amended by Directive 2009/136, must be interpreted as not precluding a Member State from imposing, in a situation such as that at issue in the main proceedings, a ‘must carry’ obligation on undertakings which, without providing electronic communication networks, offer the live streaming of television programmes online.

17.

COURT OF JUSTICE OF THE EUROPEAN UNION 22 December 2008, Case C-336/07. Kabel Deutschland Vertrieb und Service GmbH & Co. KG v. Niedersächsische Landesmedienanstalt für privaten Rundfunk.

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 31(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) [...].

[...]

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 12 In the *Land* of Lower Saxony, Kabel Deutschland operates cable networks, which it owns. It has 32 channels permanently usable for analogue broadcasting available on those cable networks.
- 13 The 37 interveners in the dispute in the main proceedings are broadcasters of television programmes or providers of media services (‘telemidia’), some of which provide teleshopping services (together, ‘the broadcasters’). All these broadcasters provide access to their television channels or telemidia services on the cable networks of Kabel Deutschland. Some of those channels and services are also broadcast via the terrestrial network under the Digital Video Broadcasting Terrestrial standard (‘the DVB-T’) in parts of the *Land* of Lower Saxony.
- 14 By decision of 19 September 2005, the NLM, as the competent authority in that *Land*, allocated the 32 television channels available on Kabel Deutschland’s analogue cable network as follows: 18 channels were allocated to broadcasters whose channels were classified as ‘specified channels’ by the NMedienG since they were already being broadcast under the DVBT; another channel was allocated in part to Bürgerfernsehen (Citizens’ television), and also to an organisation broadcasting a programme specified under the provisions of the NMedienG relating to specified territories; as regards the remaining 13 channels, as there were more applicants than available channels, the NLM es-

established an order of priority for the various broadcasters in accordance with Paragraph 37(2) of the NMedienG.

15 The result of that arrangement for cable usage was that the channels available on Kabel Deutschland's analogue cable network were fully utilised.

16 Kabel Deutschland instituted proceedings challenging the decision of 19 September 2005 before the Verwaltungsgericht Hannover (Administrative Court, Hanover), in which it claimed that the provisions of the NMedienG on the use of the analogue cable network are incompatible with Article 31(1) of the Universal Service Directive. According to Kabel Deutschland, the obligation imposed by the NLM to provide access to its analogue cable television network to television channels of certain broadcasters must be regarded as unlawful, since those channels are already being broadcast under the DVBT standard in large areas of the *Land* of Lower Saxony and should therefore be available to the same end-users. Kabel Deutschland also alleged that the requirements that its analogue cable network be fully utilised is unlawful where, as in the present case, there are more applicants than analogue channels available.

17 In addition, on 19 April 2007, the NLM replaced the decision of 19 December 2005 with a similar decision which also resulted in Kabel Deutschland's analogue cable network being fully utilised. Save for changing some of the broadcasters, the content of that decision was the same as the one which it replaced; the decision of 19 April 2007 was also the subject of an action brought by Kabel Deutschland in new proceedings which were suspended at the request of the parties in the main proceedings.

[...]

The questions referred

The first, second and fourth questions

19 By its first, second and fourth questions, which should be examined together, the referring court is essentially asking whether Article 31(1) of the Universal Service Directive is to be interpreted as meaning that it precludes national legislation, such as that at issue in the main proceedings, which, first, requires a cable operator to provide access to its analogue cable network to television channels and services which are already being broadcast terrestrially, thereby resulting in the utilisation of more than half of the channels available on that network, and, secondly, in the event of a shortage of channels, establishes an order of priority of applicants which results in full utilisation of the channels available on that network.

[...]

65 Telemedia services, such as teleshopping, broadcast by the various electronic communications networks, irrespective of the manner in which they are transmitted by those networks, are 'intended for reception by the public'. It follows that those services are 'television broadcasting services' within the meaning of Directive 89/552.

[...]

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 31(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) is to be interpreted as meaning that it does not preclude national legislation, such as that at issue in the main proceedings, which requires a cable operator to provide access**

to its analogue cable network to television channels and services that are already being broadcast terrestrially, thereby resulting in the utilisation of more than half of the channels available on that network, and which provides, in the event of a shortage of available channels, for an order of priority of applicants which results in full utilisation of the channels available on that network, provided that those obligations do not give rise to unreasonable economic consequences, which is a matter for the national court to establish.

2. The concept of 'television services' within the meaning of Article 31(1) of Directive 2002/22 includes services of broadcasters of television programmes or providers of media services, such as teleshopping, provided that the conditions laid down in that provision are met, which is a matter for the national court to establish.

18.

COURT OF JUSTICE OF THE EUROPEAN UNION 4 May 2016, Case C-547/14.

Philip Morris Brands SARL and Others v. Secretary of State for Health.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation and validity of a number of provisions of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC [...].

[...]

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 25 PMI and BAT brought claims before the referring court seeking judicial review of the 'intention and/or obligation' of the United Kingdom Government to implement Directive 2014/40 in national law.
- 26 They argue that the directive is invalid, in whole or in part, on the ground that it infringes Articles 114 TFEU, 290 TFEU and 291 TFEU, the principles of proportionality and subsidiarity and Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter').
- 27 The referring court considers that the arguments advanced by the claimants in the main proceedings are 'reasonably arguable'.

[...]

Consideration of the questions referred

[...]

Question 1

- 54 By Question 1 the referring court asks, in essence, whether Directive 2014/40 is invalid in whole or in part by reason of the fact that Article 114 TFEU does not provide an adequate legal basis. In particular, that court has some doubts about the validity of Articles 7, 18 and 24(2) and (3) of the directive and that of the provisions of Chapter II of Title II thereof.
- 55 The Court notes that, notwithstanding the wording of Question 1, the order for ref-

erence does not give any precise ground of invalidity as regards Directive 2014/40 as a whole. The reasoning in the order for reference relates exclusively to the validity of each of the provisions set out in the previous paragraph of this judgment, taken in isolation.

[...]

65 The question whether the conditions for recourse to Article 114 TFEU as a legal basis for the provisions of Directive 2014/40 covered by Question 1 were met must be determined in the light of those principles.

Question 1(a)

66 By Question 1(a) the referring court asks, in essence, whether Article 24(2) of Directive 2014/40 must be interpreted as permitting Member States to adopt rules in relation to the standardisation of the packaging of tobacco products which are more stringent than those provided for by the directive and whether, in light of that interpretation, Article 24(2) is invalid because Article 114 TFEU does not provide an adequate legal basis for it.

[...]

84 In the light of the foregoing considerations, the answer to Question 1(a) is as follows:

- Article 24(2) of Directive 2014/40 must be interpreted as permitting Member States to maintain or introduce further requirements in relation to aspects of the packaging of tobacco products which are not harmonised by that directive;
- consideration of that question has disclosed no factor of such a kind as to affect the validity of that provision.

Question 1(b)

85 By Question 1(b), the referring court asks whether Article 24(3) of Directive 2014/40 is invalid because Article 114 TFEU does not constitute an adequate legal basis for that provision.

[...]

95 Having regard to the foregoing, consideration of Question 1(b) has disclosed no factor of such a kind as to affect the validity of Article 24(3) of Directive 2014/40.

Question 1(c)

96 By Question 1(c), the referring court asks whether the provisions of Chapter II of Title II of Directive 2014/40, and Articles 7 and 18 thereof, are invalid because Article 114 TFEU does not constitute an adequate legal basis for those provisions.

– *Question 1(c)(i)*

97 The grounds of invalidity raised in the order for reference with regard to the provisions of Chapter II (entitled ‘Labelling and packaging’) of Title II of Directive 2014/40 concern, in the first place, the alleged absence of any actual or likely divergences between national rules concerning the labelling and packaging of tobacco products which are liable to hinder the free movement of those products. Existing differences are said to be driven, not by such divergences in rules, but rather by the manufacturers’ commercial strategy of tailoring the packaging and labelling of their products to consumer preferences, which vary from one Member State to another.

[...]

105 It follows from the foregoing that consideration of Question 1(c)(i) has disclosed no factor of such a kind as to affect the validity of the provisions of Chapter II of Title II of Directive 2014/40.

– *Question 1(c)(ii)*

106 According to the order for reference, the validity of Article 7 of Directive 2014/40, which prohibits the placing on the market of tobacco products with a characterising flavour, is challenged on the ground, first, that there are no actual or likely divergences between Member States' rules as regards, in particular, the use of menthol which are such as to create obstacles to trade.

[...]

126 Having regard to the foregoing, consideration of Question 1(c)(ii) has disclosed no factor of such a kind as to affect the validity of Article 7 of Directive 2014/40.

– *Question 1(c)(iii)*

127 According to the order for reference, the validity of Article 18 of Directive 2014/40 is challenged on the ground that the provision does not contribute to improving the functioning of the internal market but, instead, facilitates the emergence of disparities between national rules, with the result that Article 114 TFEU does not provide an adequate legal basis for Article 18 of the directive.

[...]

136 It follows from the foregoing that consideration of Question 1(c)(iii) has disclosed no factor of such a kind as to affect the validity of Article 18 of Directive 2014/40.

Question 2

137 By Question 2 the referring court asks, in essence, whether Article 13(1) of Directive 2014/40 must be interpreted as prohibiting the display on the labelling of unit packets and on the outside packaging, as well as on the tobacco product itself, of certain information, although that information is factually accurate, and, if that is the case, whether Article 13(1) is invalid because it infringes Article 11 of the Charter and the principle of proportionality.

[...]

163 Having regard to the foregoing, consideration of Question 2 has disclosed no factor of such a kind as to affect the validity of Article 13(1) of Directive 2014/40.

Question 3

164 By Question 3, the referring court asks whether Articles 7(1) and (7), 8(3), 9(3), 10(1)(a), (c) and (g) and 14 of Directive 2014/40 are invalid because they infringe the principle of proportionality.

[...]

167 The question whether the provisions of Directive 2014/40 to which Question 3 refers infringe the principle of proportionality must be determined in the light of those principles.

Question 3(a)

168 Question 3(a) concerns the validity of Article 7(1) and (7) of Directive 2014/40 in the light of the principle of proportionality. Those provisions prohibit the placing on the market of tobacco products with a characterising flavour or containing flavourings in any of their components such as filters, papers, packages, capsules or any technical features allowing modification of the smell or taste of the tobacco products concerned or their smoke intensity.

[...]

191 Having regard to the foregoing, consideration of Question 3(a) has disclosed no factor

of such a kind as to affect the validity of Article 7(1) and (7) of Directive 2014/40.

Question 3(b)

192 The provisions at which Question 3(b) is directed include various rules concerning the labelling and packaging of tobacco products which relate, in essence, to the integrity of health warnings after the packet has been opened (Article 8(3) of Directive 2014/40), to the position and minimum dimensions of the general health warning and the information message (Article 9(3) of the directive), to the minimum dimensions of combined health warnings (Article 10(1)(g) of the directive) and to the shape of unit packets of cigarettes and the minimum number of cigarettes per unit packet (Article 14 of the directive).

[...]

201 Accordingly, the Court finds that consideration of Question 3(b) has disclosed no factor of such a kind as to affect the validity of those provisions.

Question 3(c)

202 Article 10(1)(a) and (c) of Directive 2014/40, with which Question 3(c) is concerned, provides, in substance, that each unit packet and the outside packaging must carry combined health warnings taking the form of one of the messages listed in Annex I to the directive and a corresponding colour photograph as set out in Annex II thereto. The combined health warning must cover 65% of the external front and back surface of each unit packet.

[...]

212 Accordingly, the Court finds that consideration of Question 3(c) has disclosed no factor of such a kind as to affect the validity of Article 10(1)(a) and (c) of Directive 2014/40.

Question 7

213 In view of the finding made in paragraph 52 of this judgment, Question 7 should be addressed only in so far as it concerns the validity of Article 7 of Directive 2014/40 in the light of the principle of subsidiarity.

[...]

228 Having regard to the foregoing, consideration of Question 7 has disclosed no factor of such a kind as to affect the validity of Article 7 of Directive 2014/40.

[...]

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 24(2) of Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC must be interpreted as permitting Member States to maintain or introduce further requirements in relation to aspects of the packaging of tobacco products which are not harmonised by that directive.**
2. **Article 13(1) of Directive 2014/40 must be interpreted as prohibiting the display, on the labelling of unit packets and on the outside packaging, as well as on the tobacco product itself, of any information covered by that provision, even if the information concerned is factually accurate.**
3. **Consideration of the questions referred for a preliminary ruling by the High**

Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) has disclosed no factor of such a kind as to affect the validity of Articles 7, 18 and 24(2) and (3) of Directive 2014/40 or that of the provisions of Chapter II of Title II of that directive.

19.

COURT OF JUSTICE OF THE EUROPEAN UNION 13 December 2018, Case C-492/17. *Südwestrundfunk v Tilo Rittinger and Others.*

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49, 107 and 108 TFEU, Article 11 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the ECHR'), and of the principles of equal treatment and non-discrimination.

[...]

The disputes in the main proceedings and the questions referred for a preliminary ruling

13 The applicants in the main proceedings are persons owing the broadcasting contribution (*Rundfunkbeitrag*) who did not pay it or did not pay it in full.

14 In 2015 and 2016 SWR, the competent *Land* broadcasting institution, sent the contribution debtors enforcement instruments for the purpose of recovering the unpaid amounts for the period from January 2013 to the end of 2016.

15 When the contribution debtors still did not pay the contribution, SWR sought to enforce its claims on the basis of those instruments.

16 According to the order for reference, the debtors brought proceedings before the courts with territorial jurisdiction over them, namely the Amtsgericht Reutlingen (Local Court, Reutlingen, Germany), the Amtsgericht Tübingen (Local Court, Tübingen, Germany) and the Amtsgericht Calw (Local Court, Calw, Germany), against the enforcement procedures concerning them.

17 The Amtsgericht Tübingen (Local Court, Tübingen) allowed the three applications brought before it by the debtors concerned. The actions brought before the Amtsgericht Reutlingen (Local Court, Reutlingen) and the Amtsgericht Calw (Local Court, Calw) were dismissed.

18 According to the documents before the Court, the parties whose claims were dismissed all appealed to the referring court against the judgments dismissing their claims.

19 The referring court, which has joined the cases, states that the disputes in the main proceedings essentially concern questions regarding the law on the enforcement of unpaid debts, but those questions are closely connected with the applicable provisions of substantive law.

20 The referring court takes the view that the provisions of the legislation in question are contrary to EU law.

21 First, the court observes that German public broadcasting is partly financed by the broadcasting contribution. The contribution must in principle be paid, on pain of a

fine, by all adults living in Germany, and in the *Land* of Baden-Württemberg is paid in particular to the public broadcasters SWR and ZDF. The contribution constitutes State aid within the meaning of Article 107(1) TFEU in favour of those broadcasters which should have been notified to the Commission pursuant to Article 108(3) TFEU.

[...]

23 Second, the broadcasting contribution is contrary to EU law, in so far as the revenue from that contribution is used to finance the establishment of a new terrestrial digital broadcasting system, DVB-T2, the use of which by foreign broadcasters is not provided for. In the referring court's view, the situation is similar to that of the case in which judgment was given on 15 September 2011, *Germany v Commission* [...], concerning the transition from analogue to digital transmission technology.

24 The referring court considers that the contribution at issue in the main proceedings should in fact be equated to a special purpose tax (*Zwecksteuer*). The replacement of the broadcasting fee previously levied by a person-based broadcasting contribution was an essential change to the public broadcasting financing system [...]. The present system of contributions thus constitutes unlawful aid for the introduction of the DVB-T2 system, financed by taxation.

25 Third, as a result of the legislation at issue, public broadcasters enjoy a number of advantages not available to private broadcasters, which constitute an economic advantage and, in view of the general nature of the obligation to pay the broadcasting contribution, State aid. Those advantages consist in particular in the exceptions to the ordinary law which allow public broadcasters themselves to issue the enforcement instruments for the enforcement of those debts. That method of issuing enforcement instruments is quicker, simpler and cheaper than having recourse to judicial proceedings for the recovery of debts. Moreover, it is disadvantageous for users, in that their opportunity to bring proceedings and have a court review the case before the enforcement instrument is issued and enforced is excluded or made extremely difficult.

26 Fourth, the Law on the broadcasting contribution, in particular Paragraphs 2 and 3, infringes the freedom of information mentioned in Article 11 of the Charter and Article 10 of the ECHR. The broadcasting contribution is deliberately structured as an obstacle to access to all kinds of information transmitted by satellite, cable or mobile telephone network. The broadcasting contribution is payable by an individual regardless of whether he actually makes use of the public broadcasters' programmes.

27 Fifth, according to the referring court, the broadcasting contribution is contrary to freedom of establishment. It also infringes the principle of equal treatment and produces discrimination against women. On that last point, the referring court observes that the contribution is payable per dwelling regardless of the number of persons living there, so that the amount of the contribution to be paid by an adult varies considerably according to the number of persons in the household. Single parents, a majority of whom are women, are disadvantaged compared to adults living together.

[...]

Admissibility of the request for a preliminary ruling

[...]

33 SWR's argument based on an alleged failure to comply with the national rules on the organisation of the courts is not therefore capable of preventing the referring court

from requesting the Court for a preliminary ruling under Article 267 TFEU.

34 The request for a preliminary ruling is therefore admissible.

Consideration of the questions referred

Admissibility

[...]

40 In the present case, first, by Questions 1 to 3 the referring court essentially questions the Court on the interpretation of Articles 107 and 108 TFEU, in order to determine whether the Commission should have been notified, pursuant to Article 108(3) TFEU, of the alteration to the German broadcasting finance system made by the Law on the broadcasting contribution, and whether Articles 107 and 108 TFEU preclude such a system.

41 Contrary to the submissions of SWR and the German Government, the fact that the disputes in the main proceedings concern the recovery of the broadcasting contribution does not rule out the possibility of the referring court having to interpret and apply the concept of aid in Article 107(1) TFEU, in particular to determine whether or not the broadcasting contribution should have been subjected to the advance review procedure under Article 108(3) TFEU and, if necessary, to ascertain whether the Member State concerned complied with that obligation.

[...]

44 Consequently, with respect to the purpose of the disputes in the main proceedings, Questions 1 to 3 do not appear manifestly irrelevant, in that they concern the interpretation of Articles 107 and 108 TFEU.

45 Next, it must be stated that by the first part of Question 2 the referring court raises more specifically the question whether the broadcasting contribution at issue is compatible with Articles 107 and 108 TFEU, in so far as that contribution might involve State aid for the introduction of a transmission system using the DVB-T2 standard whose use by broadcasters established in other EU Member States is not provided for.

46 However, the order for reference does not contain the factual or legal material to enable the Court to give a useful answer to the referring court's questions in this respect [...]. 47 Consequently, the first part of Question 2 is inadmissible. Questions 1 to 3 are otherwise admissible.

[...]

50 According to settled case-law of the Court, the justification for making a request for a preliminary ruling is not that it enables advisory opinions to be delivered on general or hypothetical questions, but rather that it is necessary for the effective resolution of a dispute concerning EU law [...].

51 Questions 4 to 7 are therefore inadmissible.

52 In the light of all the above factors, only Question 1, the second part of Question 2, and Question 3 are admissible.

Substance

Question 1

[...]

66 In those circumstances, in the light of the documentation available to the Court, it has not been shown that the Law on the broadcasting contribution entailed a substantial alteration to the system of financing public broadcasting in Germany which required

the Commission to be notified of its adoption, pursuant to Article 108(3) TFEU.

- 67 In the light of the above, the answer to Question 1 is that Article 1(c) of Regulation No 659/1999 must be interpreted as meaning that an alteration to the system of financing the public broadcasting of a Member State which, like that at issue in the main proceedings, consists in replacing a broadcasting fee payable on the basis of possession of a receiving device by a broadcasting contribution payable in particular on the basis of occupation of a dwelling or business premises does not constitute an alteration to existing aid within the meaning of that provision which should be notified to the Commission under Article 108(3) TFEU.

Second part of Question 2 and Question 3

- 68 By the second part of Question 2 and Question 3, which should be considered together, the referring court essentially asks whether Articles 107 and 108 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which confers on public broadcasters powers, as exceptions to the general law, allowing those broadcasters themselves to enforce claims in respect of unpaid broadcasting contributions.

[...]

- 71 In those circumstances, it must be found that the Law on the broadcasting contribution is not liable to affect the assessment made by the Commission in connection with the decision of 24 April 2007 as regards those rights.

[...]

- 73 Consequently, the answer to the second part of Question 2 and to Question 3 is that Articles 107 and 108 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which confers on public broadcasters powers, as exceptions to the general law, allowing those broadcasters themselves to enforce claims in respect of unpaid broadcasting contributions.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 1(c) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] must be interpreted as meaning that an alteration to the system of financing the public broadcasting of a Member State which, like that at issue in the main proceedings, consists in replacing a broadcasting fee payable on the basis of possession of a receiving device by a broadcasting contribution payable in particular on the basis of occupation of a dwelling or business premises does not constitute an alteration to existing aid within the meaning of that provision which should be notified to the Commission under Article 108(3) TFEU.**
2. **Articles 107 and 108 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which confers on public broadcasters powers, as exceptions to the general law, allowing those broadcasters themselves to enforce claims in respect of unpaid broadcasting contributions.**

**COURT OF JUSTICE OF THE EUROPEAN UNION 11 December 2019, Case C-87/19.
TV Play Baltic AS v. Lietuvos radijo ir televizijos komisija.****Judgment**

- 1 This request for a preliminary ruling primarily concerns the interpretation of Article 2(m) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ('the Framework Directive') and of Article 31(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), as amended by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws ('the Universal Service Directive').
- 2 The request has been made in proceedings between TV Play Baltic AS (formerly Viasat AS) and the Lietuvos radijo ir televizijos komisija (Radio and Television Commission of jania) ('the LRTK') concerning the rejection, by the latter, of Viasat's application to be exempted from the obligation to rebroadcast the television channel LRT Kultūra.

[...]

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 7 TV Play Baltic is a company established in Estonia, which broadcasts packages of pay television channels in Lithuania by means of a satellite network owned by a third party for which it pays it remuneration.
- 8 Since the amendment, in 2015, of the Law on information, the activities of the applicant in the main proceedings have been regarded as the retransmission of television programmes and, in accordance with Article 33(5) of that law, it is subject to the obligation to rebroadcast the channels of Lietuvos nacionalinis radijas ir televizija VšĮ ('LRT'), which include the channel LRT Kultūra.
- 9 The applicant in the main proceedings submitted to the LRTK an application to be exempted from the obligation to rebroadcast that channel.
- 10 Since that application for exemption was refused, the applicant in the main proceedings brought an action for the annulment of the decision rejecting its application before the Vilniaus apygardos administracinis teismas (Regional Administrative Court, Vilnius, Lithuania).
- 11 By decision of 4 January 2017, that court, in particular, confirmed the obligation imposed on the applicant in the main proceedings to rebroadcast that channel.
- 12 Ruling on appeal, the Lietuvos vyriausiasis administracinis teismas (Supreme Administrative Court of Lithuania) has doubts as to the interpretation of EU law, in particular of Article 56 TFEU, the Framework Directive and the Universal Service Directive.

- 13 At the outset, the referring court points out that the obligation to rebroadcast, provided for in Article 33(5) of the Law on information, as amended by Law No XII-1731 of 21 May 2015, is not subject to any conditions and that that provision constitutes the transposition, into Lithuanian law, of Article 31 of the Universal Service Directive.
- 14 In the first place, that court questions whether the activities of the applicant in the main proceedings must be regarded as the ‘provision of an electronic communications network’, for the purposes of Article 2(m) of the Framework Directive and Article 31 of the Universal Service Directive. It concludes, in that regard, that that applicant rebroadcasts television channels by using, in exchange for payment, a communication infrastructure belonging to other economic operators.
- 15 That court notes, nevertheless, that certain facilities of that infrastructure are thus used exclusively for the transmission of signals by the applicant in the main proceedings and that the latter could be regarded as a network operator, for the purposes of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009.
- 16 In the second place, the referring court considers that, if the activities of the applicant in the main proceedings are not covered by the concept of provision of an electronic communications network, it is necessary to determine whether a Member State may impose ‘must carry’ obligations on economic operators other than those referred to in Article 31 of the Universal Service Directive. It is of the opinion that the activities of the applicant in the main proceedings can be regarded as electronic communications services within the scopes of application of the Framework Directive and the Universal Service Directive. However, it does not exclude that those activities could be regarded as a service for the supply of content, to which the universal service obligations provided for by the latter directive do not apply.
- 17 In the third place, the referring court questions the interpretation to be given to the requirement in Article 31(1) of the Universal Service Directive, according to which a ‘must carry’ obligation may be imposed only where a significant number of end users of such networks use them as their principal means to receive radio and television channels. It notes that, although that requirement does not apply to undertakings not covered by the scope of application of that provision, the Lithuanian legislature ensures uniform treatment of all re-transmitters with respect to that obligation.
- 18 In the fourth place, the referring court considers that the ‘must carry’ obligation restricts the freedom to provide services, referred to in Article 56 TFEU. It considers that, although such a restriction may be justified for overriding reasons in the public interest relating to cultural policy, that obligation must be proportionate and necessary for the achievement of the objectives pursued. It questions whether the possibility, for LRT, to itself broadcast LRT Kultūra on the same satellite network as that used by the customers of the applicant in the main proceedings is relevant in that regard, since LRT broadcasts another free channel on the same satellite as that used by the applicant. It likewise has doubts relating to the fact that that channel is broadcast via the terrestrial broadcasting network and that part of its content is freely available online.

[...]

Consideration of the questions referred

[...]

The first question

21 It should be noted that the Court has held that an undertaking which limits itself to offering live streaming of television programmes online does not provide an electronic communications network, but offers, in contrast, access to the contents of audiovisual services provided on the electronic communication networks [...].

[...]

23 Although the referring court has doubts, nevertheless, concerning the possibility of regarding the activities at issue in the main proceedings as consisting in the provision of electronic communications networks, on the ground that certain facilities of satellite infrastructure are used exclusively for the transmission of signals by the applicant in the main proceedings, it is not disputed that the latter does not perform any of the tasks undertaken by the provider of an electronic communications network, for the purposes of Article 2(m) of the Framework Directive, namely responsibility for the establishment, operation, control or making available of such a network.

[...]

The second question

26 It should be noted that the Court has held that the directives which form part of the common regulatory framework, including the Framework Directive and the Universal Service Directive, are without prejudice to measures taken at national level, in compliance with EU law, to pursue general interest objectives, in particular relating to content regulation and audiovisual policy, since that common framework does not apply to the content of services delivered over electronic communications networks [...].

27 As a result, the Court has held that the Universal Service Directive leaves the Member States free to impose ‘must carry’ obligations, outside of those covered by Article 31(1) of that directive, in particular on undertakings which, without providing electronic communication networks, offer the live streaming of television programmes online [...].

[...]

30 Consequently, the answer to the second question is that Article 31(1) of the Universal Service Directive must be interpreted as not precluding Member States from imposing a ‘must carry’ obligation to broadcast a television programme on undertakings which rebroadcast, by means of satellite networks owned by third parties, television channels protected by a conditional access system and offer their customers television programme packages.

The third and fourth questions

31 In view of the answer given to the first and second questions, there is no need to answer the third and fourth questions.

The fifth and sixth questions

[...]

35 As regards the question whether national legislation, such as that at issue in the main proceedings, gives rise to a restriction which is prohibited by Article 56 TFEU, it should be noted that, according to the case-law, the freedom to provide services requires not only the elimination of all discrimination on grounds of nationality against

providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where it lawfully provides similar services [...].

36 It must be noted that, by imposing a ‘must carry’ obligation to broadcast certain television programmes of LRT on undertakings which, whatever their place of establishment, rebroadcast television programmes via satellite, aimed at Lithuanian television viewers, the national legislation at issue in the main proceedings creates a restriction on the freedom to provide services, for the purposes of Article 56 TFEU.

[...]

38 In that regard, it should be noted that, according to the Court’s settled case-law, a cultural policy may constitute an overriding requirement relating to the general interest which justifies a restriction of the freedom to provide services. The maintenance of the pluralism which that policy seeks to safeguard is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, which freedom is one of the fundamental rights guaranteed by the EU legal order and, in particular, by Article 11 of the Charter of Fundamental Rights of the European Union [...].

39 In the present case, the Lithuanian Government noted that the ‘must carry’ obligation to broadcast the television channel LRT Kultūra, imposed on undertakings such as the applicant in the main proceedings, pursues an aim in the public interest connected with cultural policy, in the light of the significant social and cultural value of that channel for Lithuanian television viewers.

40 Such a cultural policy objective may be capable of justifying the existence of a restriction of the freedom to provide services.

41 However, the national legislation which establishes such a restriction must be suitable for ensuring the achievement of the objective pursued. On that point, subject to verifications to be carried out by the referring court, the ‘must carry’ obligation to broadcast certain television programmes may allow the cultural policy objective it pursues to be achieved, in so far as it is apt to ensure that Lithuanian television viewers, who do not have access to television via satellite, have the possibility to watch programmes of the LRT Kultūra channel, to which they would not otherwise have access.

[...]

43 Therefore, it is necessary, as the European Commission pointed out in its observations, that the referring court take account of the number or percentage of end users who actually make use of the means of broadcasting television channels, in order to assess the proportionality of the ‘must carry’ obligation at issue in the main proceedings.

44 Moreover, in order to assess whether the ‘must carry’ obligation at issue in the main proceedings is proportionate, the referring court should also take into consideration, after having verified them, elements such as the geographical distribution of the end users of the services supplied by the applicant in the main proceedings, the fact that the latter rebroadcasts the LRT Kultūrachannel unencrypted and the fact that that channel, or a large number of its programmes, is freely available online and via the terrestrial broadcasting network.

[...]

On those grounds, the Court (Ninth Chamber) hereby rules:

1. **Article 2(m) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) must be interpreted as meaning that activities of television rebroadcasting over satellite networks owned by third parties are not covered by the concept of ‘provision of an electronic communications network’, for the purposes of that provision.**
2. **Article 31(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) must be interpreted as not precluding Member States from imposing a ‘must carry’ obligation to broadcast a television programme on undertakings which rebroadcast, by means of satellite networks owned by third parties, television channels protected by a conditional access system and offer their customers television programme packages.**
3. **Article 56 TFEU must be interpreted as not precluding the Member States from imposing a ‘must carry’ obligation to broadcast a television channel free of charge on undertakings which rebroadcast, by means of satellite networks owned by third parties, television programmes protected by a conditional access system and offer their customers television programme packages, provided, first, that that obligation to broadcast allows a significant number or percentage of end users of all of the means of broadcasting television programmes to access the channel benefiting from that obligation and, secondly, that account is taken of the geographical distribution of the end users of the services supplied by the operator on whom that ‘must carry’ obligation is imposed, of the fact that the latter rebroadcasts that channel unencrypted and of the fact that that channel is freely available online and via the terrestrial broadcasting network, which it is for the referring court to verify.**

21.

COURT OF JUSTICE OF THE EUROPEAN UNION 3 March 2011, Case C-134/10. European Commission v. Kingdom of Belgium.

Judgment

- 1 By its application, the European Commission seeks a declaration from the Court that, by failing to transpose correctly Article 31 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (‘Universal Service Directive’), the Kingdom of Belgium has failed to fulfil its obligations under that directive and Article 56 TFEU.

[...]

The pre-litigation procedure

- 5 On 28 April 2006, the Commission sent a letter of formal notice to the Kingdom of Belgium expressing its doubts concerning the compatibility of Article 13 of the Law

- of 30 March 1995, in its original version, with Article 31(1) of the Universal Service Directive as well as with Article 49 EC.
- 6 By letter dated 5 October 2006, after contesting the complaints raised by the Commission, the Kingdom of Belgium informed the Commission that a review of the system for awarding ‘must-carry’ status in the Brussels-Capital region was required in the near future.
- 7 Following the notification by the Belgian authorities of amendments to Article 13 of the Law of 30 March 1995 introduced by the Law of 16 March 2007, the Commission by supplementary letter of formal notice of 27 June 2007 reiterated its doubts as regards the compatibility of those new provisions with Article 31(1) of the Universal Service Directive and with Article 49 EC. The Commission invited the Kingdom of Belgium to submit its observations within two months of receipt of that letter.
- 8 By letter of 1 August 2007, the Kingdom of Belgium requested an extension of the period prescribed for its reply in stating its intention to take the necessary action in response to the letter of formal notice, if need be by adapting the legislation. However, it pointed out its internal problems of an institutional nature to the Commission. The Commission granted an extension of the period for replying until 29 October 2007. A new request for an extension of that period that was sent to the Commission on 26 October 2007, relying on the same grounds, was rejected by the Commission.
- 9 By letter of 8 May 2008, the Commission issued a reasoned opinion to the Kingdom of Belgium inviting it to take the necessary measures to comply with that opinion within a period of two months from the date of its receipt.
- [...]
- 12 By letter dated 16 January 2009, the Kingdom of Belgium responded to the supplementary reasoned opinion by claiming that, following annulment by the Council of State (Conseil d’Etat) (Belgium) of the Ministerial Order on the designation of television stations covered by ‘must-carry’ status, no private broadcaster possessed that ‘must-carry’ status and that, therefore, the Kingdom of Belgium has complied with Article 31(1) of the Universal Service Directive.
- 13 As it was not satisfied with the Kingdom of Belgium’s reply, the Commission brought the present action.

[...]

Substance

Arguments of the parties

- 27 The Commission raises three complaints in support of its action.
- 28 The first complaint relates to the lack of general interest objectives clearly defined in the national legislation at issue. The Commission takes the view that that legislation refers to those general-interest objectives in very vague and general terms and that the specific criteria used by the national authorities to select the television broadcast channels to enjoy ‘must-carry’ status are not specified in that legislation itself or in the preparatory documents to that legislation.
- [...]
- 30 By its second complaint, the Commission alleges that the procedure for granting ‘must-carry’ status under the second indent of the first paragraph of Article 13 of the Law of 30 March 1995 does not observe the principle of transparency.

[...]

54 Clearly, the mere statement of a general policy objective, which is not accompanied by any additional factor capable of enabling operators to determine in advance the nature and effect of the precise conditions and obligations to be fulfilled if they apply for the award of 'must-carry' status, does not permit these requirements to be met.

[...]

56 The first complaint raised by the Commission in support of its action is therefore well founded.

57 By its second complaint, the Commission alleges that the Kingdom of Belgium in its procedure for awarding 'must-carry' status under the second indent of the first paragraph of Article 13 of the Law of 30 March 1995 has not observed the principle of transparency under Article 31(1) of the Universal Service Directive, having regard to the lack of criteria relied on for awarding 'must-carry' status, the failure to specify which television broadcasters benefit from that status and the ambiguity as to the requirement to be established on Belgian territory.

[...]

68 In any event, that requirement is not sufficient to satisfy the condition of transparency under Article 31(1) of the Universal Service Directive. It is not clear from the second indent of the first paragraph of Article 13 of the Law of 30 March 1995 what the effect of the requirement is that non-public broadcasters must fall under the powers of the Belgian Community in order to benefit from 'must-carry' status.

[...]

70 It follows that the second complaint advanced by the Commission in support of its action is also well founded.

71 The Commission's third complaint relates to disregard of the scope of Article 31 of the Universal Service Directive on the ground that Article 13 of the Law of 30 March 1995 did not confine the 'must-carry' obligation to operators of electronic communications networks which have a significant number of end-user subscribers.

[...]

75 Accordingly, as the 'must-carry' obligations under Article 31 of the Universal Service Directive can refer only to network operators that have a sufficient number of end users who use that network as their principal one, it follows that subparagraph (b) of the fourth paragraph of Article 13 of the Law of 30 March 1995 does not correctly transpose Article 31(1) of the Universal Service Directive.

76 In those circumstances, it must, therefore, be held that the third complaint raised by the Commission in support of its action is well founded.

[...]

On those grounds, the Court (Third Chamber) hereby

1. **Declares that, by failing correctly to transpose Article 31 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services ('Universal Service Directive'), the Kingdom of Belgium has failed to fulfil its obligations under the provisions of that Directive and Article 56 TFEU.**
2. **Orders the Kingdom of Belgium to pay the costs.**

22.

**COURT OF JUSTICE OF THE EUROPEAN UNION 21 February 2018, Case C-132/17.
Peugeot Deutschland GmbH v. Deutsche Umwelthilfe e V.****Judgment**

1 The present request for a preliminary ruling concerns the interpretation of Article 1(1)(a) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

2 The request has been made in proceedings between Peugeot Deutschland GmbH and Deutsche Umwelthilfe eV concerning the publication by Peugeot Deutschland GmbH, on the video channel which it runs on the YouTube internet service, of a short video concerning a new passenger car model without providing information in that video on the official fuel consumption and official CO² emissions of that model.

[...]

The dispute in the main proceedings and the question referred for a preliminary ruling

11 Peugeot Deutschland markets vehicles in Germany under the Peugeot brand. It runs a video channel on the YouTube internet service on which, on 17 February 2014, it posted a video of approximately 15 seconds in length with the title ‘Peugeot RCZ R Experience: Boxer’.

12 Deutsche Umwelthilfe brought an action against Peugeot Deutschland before the Landgericht Köln (Regional Court, Cologne, Germany), claiming that the failure to provide, in that video, information on the official fuel consumption and official specific CO² emissions of the new vehicle model being advertised infringed Paragraph 5(1) of the Pkw-ENVKV.

13 That court upheld the action brought by Deutsche Umwelthilfe and the Oberlandesgericht Köln (Higher Regional Court, Cologne, Germany) dismissed Peugeot Deutschland’s appeal against that ruling.

14 Seised of an appeal on a point of law (*Revision*) against that judgment, the referring court observes that the outcome of the dispute in the main proceedings depends on whether the provision of a promotional video channel for new passenger car models on YouTube constitutes an ‘audiovisual media service’ within the meaning of Article 1(1)(a) of Directive 2010/13. If that were the case, Peugeot Deutschland would be exempt from the obligation imposed by Paragraph 5(1) of the Pkw-ENVKV to provide information in those videos on the official fuel consumption and official specific CO² emissions of the models concerned, by reason of the second half of the first sentence of Paragraph 5(2). That exemption would be based on the Commission Recommendation of 26 March 2003 on the application to other media of the provisions of Directive 1999/94/EC concerning promotional literature, that recommendation being itself based on point (c) of the first subparagraph of Article 9(2) of that directive.

15 The referring court takes the view that the video and the YouTube channel at issue in the main proceedings do not constitute an ‘audiovisual media service’ within the meaning of Article 1(1)(a)(i) of Directive 2010/13. Even if that video were to be regarded as a ‘programme’ within the meaning of Article 1(1)(b), the principal purpose of that

channel is, however, not the provision of programmes in order to inform, entertain or educate the general public, as required under Article 1(1)(a)(i).

16 With regard to the question of whether that video and that channel come under Article 1(1)(a)(ii) of Directive 2010/13, the referring court is uncertain as to whether, given the definition of ‘audiovisual commercial communication’ provided in Article 1(1)(h), the video at issue in the main proceedings is part of a ‘programme’, within the meaning of Article 1(1)(b), comparable to television broadcasts.

17 In those circumstances, the Bundesgerichtshof (Federal Court of Justice, Germany) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does a person who runs a video channel on the YouTube internet service on which internet users can view short advertising videos for new passenger car models operate an audiovisual media service within the meaning of Article 1(1)(a) of Directive 2010/13?’

Consideration of the question referred

[...]

21 However, a promotional video channel on the YouTube internet service, such as that at issue in the main proceedings, cannot be regarded as having as its principal purpose the provision of programmes in order to inform, entertain or educate the general public.

[...]

23 In that regard, to the extent that a promotional video can inform, entertain or educate viewers, as Peugeot Deutschland claims, it does so with the sole aim of, and as a means of, achieving the promotional purpose of the video in question.

24 Therefore, even in the event that a promotional video channel on YouTube were to satisfy the other criteria and display the features of an audiovisual media service referred to in Article 1(1)(a)(i) of Directive 2010/13, its promotional purpose suffices to exclude it from the scope of that provision.

25 That finding is not called into question by Peugeot Deutschland’s assertion that such an exclusion amounts to a difference in treatment of its promotional videos as against programmes which do not have any advertising purpose, which, it submits, is contrary to Article 11 of the Charter of Fundamental Rights of the European Union enshrining the freedom of expression and information.

26 In that regard, it suffices to note that the argument that the principle of equal treatment requires the inclusion of a promotional video channel, such as that at issue in the main proceedings, within the scope of Article 1(1)(a)(i) of Directive 2010/13 is based on the false premiss that those videos are, in the light of the objective which they pursue, in a comparable situation to that of non-promotional programmes.

27 In the second place, the audiovisual media service referred to in Article 1(1)(a)(ii) of Directive 2010/13 consists of ‘audiovisual commercial communication’. ‘Audiovisual commercial communication’ is defined, in turn, in paragraph 1(h) of that article as ‘images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, inter alia, television advertising, sponsorship, teleshop-

ping and product placement’.

- 28 However, a video such as that at issue in the main proceedings cannot be regarded as accompanying or being included in a programme in return for payment or for similar consideration or for self-promotional purposes. Inasmuch as a video channel, such as that run by Peugeot Deutschland, contains solely videos, such as the video at issue in the main proceedings, which are individual elements independent of one another, it cannot reasonably be argued that that video accompanies or is included in a ‘programme’, within the meaning of Article 1(1)(h) of Directive 2010/13.
- 29 Furthermore, Peugeot Deutschland’s argument that the images pursuing advertising purposes are situated at the beginning and at the end of the video at issue in the main proceedings and, therefore, accompany or are included in that video, which itself constitutes a programme, cannot be accepted.
- 30 The view cannot be taken that the EU legislature, in using the words ‘accompany’ and ‘be included’, regard being had to their ordinary meaning, was referring to individual images that are part of or even central to a programme. A video such as that in the present case is promotional in its entirety and it would be artificial to assert that only the images at the beginning and the end of that video pursue advertising purposes.
- 31 It follows that, by virtue of the information that an audiovisual commercial communication, as defined in Article 1(1)(h) of Directive 2010/13, consists of images accompanying or included in a programme, a promotional video, such as that at issue in the main proceedings, is excluded from the scope of Article 1(1)(a)(ii) of that directive.

[...]

On those grounds, the Court (Ninth Chamber) hereby rules:

Article 1(1)(a) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (the Audiovisual Media Services Directive) must be interpreted as meaning that the definition of ‘audiovisual media service’ covers neither a video channel, such as that at issue in the main proceedings, on which internet users can view short promotional videos for new passenger car models, nor a single video of that kind considered in isolation.

23.

EUROPEAN COURT OF HUMAN RIGHTS 18 September 2007.

Paeffgen GmbH v. Germany.

The facts

The applicant, Paeffgen GmbH, is a limited liability company possessing legal personality under German law. It was represented before the Court by Mr B. Hoeller and colleagues, lawyers practising in Bonn.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Background to the case

The applicant company sells construction materials, but is also engaged in e-commerce. It

held several thousand internet domain names which had been registered by the competent registration authority (DENIC e.G.) after payment of the respective fees [...]. In particular, in 1997 and 1998 the applicant successfully applied for the registration of the domains “freundin-online.de”, “ad-acta.de”, “Eltern-online.de” and “duck.de”.

The domain contracts concluded with DENIC e.G. granted the applicant the exclusive right to use or dispose of the domains registered. According to terms of the contract, DENIC e.G. did not examine whether the registration and use of the domain infringed the rights of others, which was a matter for the domain holder to verify. The contracts were open-ended and could be terminated by the domain holder without notice and by DENIC e.G. for good cause [...].

Subsequently, several sets of proceedings were brought against the applicant by other companies and private individuals claiming that the registration and use by the applicant of certain domains breached their trademark rights and / or their rights to a (business) name.

[...]

5. The court proceedings underlying application no. 21770/05

In 2001 Mr Peter Duck, an architect who had been working under the business name “Architekturbüro Duck” (“architecture office Duck”) since 2000, brought an action in the Munich Regional Court for a court order prohibiting the applicant to use or dispose of the domain name “duck.de” and obliging the applicant to apply with the registration authority for the cancellation of that domain. He argued that the applicant breached his right to a name and his trademark rights.

On 26 April 2001 the Munich I Regional Court allowed the plaintiff’s action.

On 10 January 2002 the Munich Court of Appeal dismissed the applicant’s appeal. The domain name contained the plaintiff’s family name and the applicant had failed to give sound reasons outweighing the plaintiff’s interests why it made use of the name [...]. As the applicant had spent less than 3,000 marks in domain fees and had not posted any contents on the internet under the domain name in question, its possession did not warrant protection.

The Federal Court of Justice subsequently refused to grant the applicant leave to appeal on points of law.

On 20 September 2002 the applicant lodged a complaint with the Federal Constitutional Court. It argued, in particular, that its property rights had been breached by the decisions of the civil courts and that the civil courts had failed to consider its arguments concerning the violation of these rights.

On 24 November 2004 the Federal Constitutional Court, without giving reasons, declined to consider the applicant’s constitutional complaint [...].

The law

1. The applicant company complained that the prohibition on using or disposing of the internet domains in question and the duty to apply to the registration authority for cancellation of these domains had violated its property rights. It relied on Article 1 of Protocol No. 1 to the Convention, [...].

[...] In the instant case, the contracts with the registration authority gave the applicant company, in exchange for paying the domain fees, an open-ended right to use or transfer the domains registered in its name. As a consequence, the applicant could offer to all internet users entering the domain name in question, for example, adver-

tisements, information or services, possibly in exchange for money, or could sell the right to use the domain to a third party. The exclusive right to use the domains in question thus had an economic value. Having regard to the above criteria, this right therefore constituted a “possession”, which the court decisions prohibiting the use of the domains interfered with.

[...]

Having regard to all the circumstances of the case and the State’s wide margin of appreciation in this field [...], the Court therefore finds that the court orders struck a fair balance between the protection of the applicant’s possessions and the requirements of the general interest and that the applicant thus did not have to bear an individual and excessive burden.

It follows that this part of the application must be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

2. The applicant company further argued that the proceedings before the German courts had been unfair following the courts’ breach of procedural law and due to the manner in which its appeal and complaints were dismissed without giving reasons or without duly taking into consideration its legal arguments.

It relied on Article 6 which, in so far as relevant, reads:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal...”

The Court has examined the applicant’s complaints under Article 6 as submitted by it. However, having regard to all material in its possession, the Court finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

It follows that the remainder of the application must likewise be rejected as manifestly ill-founded, pursuant to Article 35 Convention.

For these reasons, the Court unanimously

1. Decides to join the applications;

2. Declares the applications inadmissible.

24.

COURT OF JUSTICE OF THE EUROPEAN UNION 19 December 2013, Case C-202/12. Innoweb BV v. Wegener ICT Media BV, Wegener Mediaventions BV.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 7 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20).

2 The request has been made in proceedings between, on the one hand, Innoweb BV and, on the other, Wegener ICT Media BV and Wegener Mediaventions BV (collectively, ‘Wegener’) concerning Innoweb’s operation, through its website, of a ‘dedicated meta search engine’ that enables searches to be carried out on third party websites and, in particular, on Wegener’s website, where a collection of car sales advertisements (‘car ads’) is displayed.

[...]

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 Through its website www.autotrack.nl ('the AutoTrack website'), Wegener provides access to an online collection of car ads, together with a list, updated daily, of 190 000 to 200 000 second-hand cars [...]. With the help of the AutoTrack website search engine, the user can carry out a targeted search for a vehicle on the basis of various criteria.

9 Via its website, www.gaspedaal.nl, Innoweb provides a meta search engine dedicated to car sales ('GasPedaal'). A 'meta search engine' uses search engines from other websites, transferring queries from its users to those other search engines – a feature which differentiates meta search engines from general search engines such as Google [...]. GasPedaal is such a dedicated meta search engine, designed to search for car ads: through a single query on GasPedaal, the user can simultaneously carry out searches of several collections of car ads listed on third party sites, including the AutoTrack website.

[...]

11 The results thrown up by the AutoTrack website [...] are merged into one item with links to all the sources where that car was found. A webpage is then created with the list of the results thus obtained and merged, which shows essential information relating to each car, including the year of manufacture, the price, the mileage and a thumbnail picture. That webpage is stored on the GasPedaal server for approximately 30 minutes and sent to the user or shown to him on the GasPedaal website, using the format of that site.

[...]

14 On the view that Innoweb compromises its *sui generis* right in relation to its database, Wegener brought an action claiming that Innoweb should be ordered to desist from infringing Wegener's database rights and, at first instance, succeeded in all essential respects.

15 Innoweb brought an appeal against that decision before the *Gerechtshof te 's-Gravenhage* (Regional Court of Appeal, The Hague; or 'the referring court').

16 The order for reference is predicated on the assumption that Wegener's collection of advertisements constitutes a database which meets the necessary conditions for protection under Article 7 of Directive 96/9.

17 According to the referring court, moreover, the case before it does not concern a situation in which the whole or a substantial part of Wegener's database is extracted. Nor does the repeated extraction of insubstantial parts of the contents of that database have a cumulative effect; and, accordingly, it does not constitute an infringement of Article 7(5) of Directive 96/9.

[...]

Consideration of the questions referred

19 In the first place, it should be noted that the questions are essentially intended to ascertain whether the operator of a dedicated meta search engine such as that at issue in the main proceedings engages in an activity covered by Article 7(1) or Article 7(5) of Directive 96/9, with the consequence that the maker of a database which meets the criteria laid down in Article 7(1) may prevent that database from being included, for no consideration, in the service of the dedicated meta search engine.

[...]

Questions 1, 2 and 3

23 By Questions 1, 2 and 3, which it is appropriate to examine together, the referring court asks, in essence, whether Article 7(1) of Directive 96/9 must be interpreted as meaning that the operator of a dedicated meta search engine such as that at issue in the main proceedings re-utilises the whole or a substantial part of the contents of a database covered by its service.

[...]

37 In the light of that purpose, the concept of ‘re-utilisation’ as used in Article 7 of Directive 96/9 must be construed as referring to any act of making available to the public, without the consent of the database maker, the results of his investment, thus depriving him of revenue which should have enabled him to redeem the cost of the investment.

[...]

52 Consequently, the operator of a dedicated meta search engine such as that at issue in the main proceedings re-utilises part of the contents of a database for the purposes of Article 7(2)(b) of Directive 96/9.

53 [...] As the European Commission observed, the fact that, on the basis of the search criteria specified by the end user, only part of the database is actually consulted and displayed in no way detracts from the fact that the entire database is made available to that end user, as was pointed out in paragraphs 39 and 40 above.

[...]

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 7(1) of Directive 96/9/EC of the European Parliament and of the Council of 11

March 1996 on the legal protection of databases must be interpreted as meaning that an operator who makes available on the Internet a dedicated meta search engine such as that at issue in the main proceedings re-utilises the whole or a substantial part of the contents of a database protected under Article 7, where that dedicated meta engine:

- provides the end user with a search form which essentially offers the same range of functionality as the search form on the database site;
- ‘translates’ queries from end users into the search engine for the database site ‘in real time’, so that all the information on that database is searched through; and
- presents the results to the end user using the format of its website, grouping duplications together into a single block item but in an order that reflects criteria comparable to those used by the search engine of the database site concerned for presenting results.

25.

COURT OF JUSTICE OF THE EUROPEAN UNION 9 November 2002, Case C-203/02. The British Horseracing Board Ltd and Others v. William Hill Organization Ltd.

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Article 7 and Article 10(3) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

2. The reference was made in the course of proceedings brought by The British Horseracing Board Ltd, the Jockey Club and Weatherbys Group Ltd ('the BHB and Others') against William Hill Organization Ltd ('William Hill'). The litigation arose over the use by William Hill, for the purpose of organising betting on horse racing, of information taken from the BHB database.

[...]

The main proceedings and the questions referred for a preliminary ruling

10. The BHB and Others manage the horse racing industry in the United Kingdom and in various capacities compile and maintain the BHB database which contains a large amount of information supplied by horse owners, trainers, horse race organisers and others involved in the racing industry. The database contains information on inter alia the pedigrees of some one million horses, and 'prerace information' on races to be held in the United Kingdom. That information includes the name, place and date of the race concerned, the distance over which the race is to be run, the criteria for eligibility to enter the race, the date by which entries must be received, the entry fee payable and the amount of money the racecourse is to contribute to the prize money for the race.
11. Weatherbys Group Ltd, the company which compiles and maintains the BHB database, performs three principal functions, which lead up to the issue of pre-race information.

[...]

15. The BHB database contains essential information not only for those directly involved in horse racing but also for radio and television broadcasters and for bookmakers and their clients. The cost of running the BHB database is approximately £4 million per annum. The fees charged to third parties for the use of the information in the database cover about a quarter of that amount.
16. The database is accessible on the internet site operated jointly by BHB and Weatherbys Group Ltd. Some of its contents are also published each week in the BHB's official journal. The contents of the database, or of certain parts of it, are also made available to Racing Pages Ltd, a company jointly controlled by Weatherbys Group Ltd and the Press Association, which then forwards data to its various subscribers, including some bookmakers, in the form of a 'Declarations Feed', the day before a race. Satellite Information Services Limited ('SIS') is authorised by Racing Pages to transmit data to its own subscribers in the form of a 'raw data feed' ('RDF'). The RDF includes a large amount of information, in particular, the names of the horses running in the races, the names of the jockeys, the saddle cloth numbers and the weight for each horse. Through the newspapers and the Ceefax and Teletext services, the names of the runners in a particular race are made available to the public during the course of the afternoon before the race.
17. William Hill, which is a subscriber to both the Declarations Feed and the RDF, is one of the leading providers of offcourse bookmaking services in the United Kingdom, to both UK and international customers. It launched an on-line betting service on two internet sites. Those interested can use these sites to find out what horses are running in which races at which racecourses and what odds are offered by William Hill.
18. The information displayed on William Hill's internet sites is obtained, first, from newspapers published the day before the race and, second, from the RDF supplied by SIS

on the morning of the race.

19. According to the order for reference, the information displayed on William Hill's internet sites represents a very small proportion of the total amount of data on the BHB database, given that it concerns only the following matters: the names of all the horses in the race, the date, time and/or name of the race and the name of the racecourse where the race will be held. Also according to the order for reference, the horse races and the lists of runners are not arranged on William Hill's internet sites in the same way as in the BHB database.
20. In March 2000 the BHB and Others brought proceedings against William Hill in the High Court of Justice of England and Wales, Chancery Division, alleging infringement of their *sui generis* right. They contend, first, that each day's use by William Hill of racing data taken from the newspapers or the RDF is an extraction or re-utilisation of a substantial part of the contents of the BHB database, contrary to Article 7(1) of the directive. Secondly, they say that even if the individual extracts made by William Hill are not substantial they should be prohibited under Article 7(5) of the directive.
21. The High Court of Justice ruled in a judgment of 9 February 2001 that the action of BHB and Others was well founded. William Hill appealed to the referring court.

[...]

27. *The second and third questions, concerning the concept of investment in the obtaining or verification of the contents of a database within the meaning of Article 7(1) of the directive*

[...]

42. In the light of the foregoing, the second and third questions referred should be answered as follows:

- The expression 'investment in ... the obtaining ... of the contents' of a database in Article 7(1) of the directive must be understood to refer to the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database.
- The expression 'investment in ... the ... verification ... of the contents' of a database in Article 7(1) of the directive must be understood to refer to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation. The resources used for verification during the stage of creation of materials which are subsequently collected in a database do not fall within that definition.
- The resources used to draw up a list of horses in a race and to carry out checks in that connection do not constitute investment in the obtaining and verification of the contents of the database in which that list appears.

The seventh, eighth and ninth questions, on the terms 'extraction' and 're-utilisation' in Article 7 of the directive.

[...]

67. In the light of the foregoing, the seventh, eighth and ninth questions should be answered as follows:

- The terms 'extraction' and 're-utilisation' in Article 7 of the directive must be interpreted as referring to any unauthorised act of appropriation and distribution to the public of the whole or a part of the contents of a database. Those terms do not imply direct access to the database concerned.

- The fact that the contents of a database were made accessible to the public by its maker or with his consent does not affect the right of the maker to prevent acts of extraction and/or re-utilisation of the whole or a substantial part of the contents of a database.

The first, fourth, fifth and sixth questions, concerning the terms ‘substantial part’ and ‘insubstantial part’ of the contents of a database in Article 7 of the directive.

[...]

82. In the light of the foregoing, the fourth, fifth and sixth questions referred should be answered as follows:

- The expression ‘substantial part, evaluated ... quantitatively, of the contents of [a] database’ in Article 7 of the directive refers to the volume of data extracted from the database and/or re-utilised and must be assessed in relation to the total volume of the contents of the database.
- The expression ‘substantial part, evaluated qualitatively ... of the contents of [a] database’ refers to the scale of the investment in the obtaining, verification or presentation of the contents of the subject of the act of extraction and/or re-utilisation, regardless of whether that subject represents a quantitatively substantial part of the general contents of the protected database.
- Any part which does not fulfil the definition of a substantial part, evaluated both quantitatively and qualitatively, falls within the definition of an insubstantial part of the contents of a database.

The 10th question, concerning the scope of the prohibition laid down by Article 7(5) of the directive

[...]

88. Similarly, Article 7(5) of the directive prohibits third parties from circumventing the prohibition on re-utilisation laid down by Article 7(1) of the directive by making insubstantial parts of the contents of the database available to the public in a systematic and repeated manner.

90. In the case in the main proceedings, it is clear, in the light of the information given in the order for reference, that the acts of extraction and re-utilisation carried out by William Hill concern insubstantial parts of the BHB database, as stated in paragraphs 74 to 80 of this judgment. According to the order for reference, they are carried out on the occasion of each race held. They are thus of a repeated and systematic nature.

91. However, such acts are not intended to circumvent the prohibition laid down in Article 7(1) of the directive. There is no possibility that, through the cumulative effect of its acts, William Hill might reconstitute and make available to the public the whole or a substantial part of the contents of the BHB database and thereby seriously prejudice the investment made by BHB in the creation of that database.

92. It must be pointed out in that connection that, according to the order for reference, the materials derived from the BHB database which are published daily on William Hill’s internet sites concern only the races for that day and are limited to the information mentioned in paragraph 19 of this judgment.

[...]

On those grounds, the Court (Grand Chamber) rules as follows:

1. The expression ‘investment in ... the obtaining ... of the contents’ of a database in Article 7(1) of Directive 96/9/EC of the European Parliament and of the Council

of 11 March 1996 on the legal protection of databases must be understood to refer to the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database.

The expression 'investment in ... the ... verification ... of the contents' of a database in Article 7(1) of Directive 96/9 must be understood to refer to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation. The resources used for verification during the stage of creation of materials which are subsequently collected in a database do not fall within that definition.

The resources used to draw up a list of horses in a race and to carry out checks in that connection do not constitute investment in the obtaining and verification of the contents of the database in which that list appears.

2. The terms 'extraction' and 're-utilisation' as defined in Article 7 of Directive 96/9 must be interpreted as referring to any unauthorised act of appropriation and distribution to the public of the whole or a part of the contents of a database. Those terms do not imply direct access to the database concerned.

The fact that the contents of a database were made accessible to the public by its maker or with his consent does not affect the right of the maker to prevent acts of extraction and/or re-utilisation of the whole or a substantial part of the contents of a database.

3. The expression 'substantial part, evaluated ... quantitatively, of the contents of [a] database' in Article 7 of Directive 96/9 refers to the volume of data extracted from the database and/or re-utilised and must be assessed in relation to the total volume of the contents of the database.

The expression 'substantial part, evaluated qualitatively ... of the contents of [a] database' refers to the scale of the investment in the obtaining, verification or presentation of the contents of the subject of the act of extraction and/or re-utilisation, regardless of whether that subject represents a quantitatively substantial part of the general contents of the protected database.

Any part which does not fulfil the definition of a substantial part, evaluated both quantitatively and qualitatively, falls within the definition of an insubstantial part of the contents of a database.

4. The prohibition laid down by Article 7(5) of Directive 96/9 refers to unauthorised acts of extraction or re-utilisation the cumulative effect of which is to reconstitute and/or make available to the public, without the authorisation of the maker of the database, the whole or a substantial part of the contents of that database and thereby seriously prejudice the investment by the maker.

**COURT OF JUSTICE OF THE EUROPEAN UNION 9 November 2004, Case C-338/02.
Fixtures Marketing Ltd v. Svenska Spel AB.**

Judgment

1. This reference for a preliminary ruling concerns the interpretation of the provisions of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
2. The reference was made in the course of proceedings brought by Fixtures Marketing Limited ('Fixtures') against Svenska Spel AB ('Svenska Spel'). The litigation arose over the use by Svenska Spel, for the purpose of organising betting games, of information taken from the fixture lists for the English and Scottish football leagues.

[...]

The main proceedings and the questions referred for a preliminary ruling

9. In England professional football is organised by the Football Association Premier League Ltd and the Football League Ltd and in Scotland by the Scottish Football League. Fixture lists have to be drawn up for the matches to be played in the various divisions during the season, that is to say, about 2 000 matches per season in England and 700 matches per season in Scotland. The data are stored electronically and published inter alia in printed booklets, both chronologically and by reference to each team participating.
[...]
11. The organisers of English and Scottish football retained Football Fixtures Limited to handle the exploitation of the fixture lists through licensing. F.Fixtures was assigned the right to represent the holders of the intellectual property rights in those fixture lists.
12. In Sweden Svenska Spel operates pools games in which bets can be placed on the results of football matches in inter alia the English and Scottish football leagues. For the purposes of those games it reproduces data concerning those matches on pools coupons.
13. In February 1999 Fixtures, having first unsuccessfully offered Svenska Spel a licence to use the data in return for payment of a fee, brought an action against Svenska Spel before Gotlands tingsrätt (District Court, Gotland, Sweden), claiming reasonable compensation for the use of data from the fixture lists for the English and Scottish football leagues during the period from 1 January 1998 to 16 May 1999. In support of its action, Fixtures submitted that the databases containing data concerning the fixture lists were protected under Paragraph 49 of the 1960 law and that the use by Svenska Spel of data from those fixture lists constituted a breach of the intellectual property rights of the football leagues.
14. By its judgment of 11 April 2000 the Tingsrätt dismissed Fixture's case, ruling that although the fixture lists were covered by catalogue protection since they constituted the result of a substantial investment, Svenska Spel's use of the data from the fixture lists did not entail any infringement of the rights of Fixtures.
15. On appeal, the Svea hovrätt (Svea Court of Appeal, Sweden), by judgment of 3 May 2001, upheld the judgment at first instance. The Hovrätt did not expressly rule on the question whether fixture lists are protected under Paragraph 49 of the 1960 law, but held that it was not proven that the data on Svenska Spel's pools coupons had been

- extracted from the databases of the football leagues.
16. Fixtures appealed before the Högsta domstolen, seeking to have the judgment on appeal set aside.
 17. Pointing out that Paragraph 49 of the 1960 law, as amended by the 1997 law, must, as an implementing measure, be interpreted in the light of the directive, the Högsta domstolen observes that the directive does not make clear whether, and if so, to what extent, the purpose of the database should be ascribed importance in determining whether it is protected under a *sui generis* right. It also raises the question of what sort of human or financial investment can be taken into account in assessing whether investment is substantial. In addition, it raises the question of the interpretation of the expressions 'extraction and/or re-utilisation of the whole or a substantial part' of the database and 'normal exploitation' and 'unreasonable prejudice' in the case of extraction and/or re-utilisation of insubstantial parts of the database.

[...]

The questions referred

18. As a preliminary point, it must be borne in mind that the protection provided for by Paragraph 49 (of the 1960 law, as amended by the 1997 law, requires the existence of a catalogue, a table or similar work 'in which a large quantity of data has been collected or which is the result of substantial investment'.

[...]

28. In that light, the fact that the creation of a database is linked to the exercise of a principal activity in which the person creating the database is also the creator of the materials contained in the database does not, as such, preclude that person from claiming the protection of the *sui generis* right, provided that he establishes that the obtaining of those materials, their verification or their presentation, in the sense described in paragraphs 24 to 27 of this judgment, required substantial investment in quantitative or qualitative terms, which was independent of the resources used to create those materials.
29. In those circumstances, although the search for data and the verification of their accuracy at the time a database is created do not require the maker of that database to use particular resources because the data are those he created and are available to him, the fact remains that the collection of those data, their systematic or methodical arrangement in the database, the organisation of their individual accessibility and the verification of their accuracy throughout the operation of the database may require substantial investment in quantitative and/or qualitative terms within the meaning of Article 7(1) of the directive.
30. In the case in the main proceedings, the resources deployed for the purpose of determining, in the course of arranging the football league fixtures, the dates and times of and home and away teams playing in the various matches represent, as Svenska Spel and the Belgian, German and Portuguese Governments submit, an investment in the creation of the fixture list. Such an investment, which relates to the organisation as such of the leagues is linked to the creation of the data contained in the database at issue, in other words those relating to each match in the various leagues. It cannot, therefore, be taken into account under Article 7(1) of the directive.

[...]

33. The professional football leagues do not need to put any particular effort into mon-

itoring the accuracy of the data on league matches when the list is made up because those leagues are directly involved in the creation of those data. The verification of the accuracy of the contents of fixture lists during the season simply involves, according to the observations made by Fixtures, adapting certain data in those lists to take account of any postponement of a match or fixture date decided on by or in collaboration with the leagues. Such verification cannot, therefore, be regarded as requiring substantial investment.

34. The presentation of a football fixture list, too, is closely linked to the creation as such of the data which make up the list, as is confirmed by the absence of any mention in the order for reference of work or resources specifically invested in such presentation. It cannot therefore be considered to require investment independent of the investment in the creation of its constituent data.
35. It follows that neither the obtaining, nor the verification nor yet the presentation of the contents of a football fixture list attests to substantial investment which could justify protection by the *sui generis* right provided for by Article 7 of the directive.

[...]

On those grounds, the Court (Grand Chamber) rules as follows:

The expression ‘investment in ... the obtaining ... of the contents’ of a database in Article 7(1) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases must be understood to refer to the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database. In the context of drawing up a fixture list for the purpose of organising football league fixtures, therefore, it does not cover the resources used to establish the dates, times and the team pairings for the various matches in the league.

27.

COURT OF JUSTICE OF THE EUROPEAN UNION 3 June 2021, Case C-762/19.

CV-Online Latvia SIA v. Melons SIA.

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Article 7(2) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

2 The request has been made in proceedings between ‘CV-Online Latvia’ SIA (‘CV-Online’) and ‘Melons’ SIA concerning the display by the latter, in the list of results generated by its search engine, of a hyperlink to CV-Online’s website and the meta tags inserted by CV-Online in the programming of that site.

[...]

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 CV-Online, a company incorporated under Latvian law, operates the website www.cv.lv. That website includes a database, developed and regularly updated by CV-Online,

- containing job advertisements published by employers.
- 10 The website www.cv.lv is also equipped with meta tags of the 'microdata' type. Those tags, which are not visible when the CV-Online web page is opened, allow Internet search engines to better identify the content of each page in order to index it correctly. In the case of CV-Online's website, those meta tags contain, for each job advertisement in the database, the following key words: 'job title', 'name of the undertaking', 'place of employment' and 'date of publication of the notice'.
- 11 Melons, also a company incorporated under Latvian law, operates the website www.kurdarbs.lv, which is a search engine specialising in job advertisements. That search engine makes it possible to carry out a search on several websites containing job advertisements, according to various criteria, including the type of job and the place of employment. By means of hyperlinks, the website www.kurdarbs.lv refers users to the websites on which the information sought was initially published, including CV-Online's website. By clicking on such a link, the user can, inter alia, access the website www.cv.lv, in order to become acquainted with that site and the entirety of its contents. The information contained in the meta tags inserted by CV-Online in the programming of its website is also displayed in the list of results obtained when using the specialised search engine of Melons.
- 12 Taking the view that there is a breach of its *sui generis* right under Article 7 of Directive 96/9, CV-Online brought an action against Melons. It maintains that Melons 'extracts' and 're-utilises' a substantial part of the contents of the database on the website www.cv.lv.
- 13 The court of first instance found that there had been a breach of that right, on the ground that there was a 're-utilisation' of the database.
- 14 Melons brought an appeal against the judgment at first instance before the Rīgas apgabaltiesas Civillietu tiesas kolēģija (Regional Court, Riga (Civil Law Division), Latvia). It maintains that its website does not provide online transmission, namely, that it does not operate 'in real time'. Melons also claims that a distinction must be drawn between the website www.cv.lv and the database which it contains. It submits, in that regard, that it is the meta tags used by CV-Online that cause the information relating to the job advertisements to appear in the results obtained by means of the www.kurdarbs.lv search engine and that those meta tags are not part of the database. Melons claims that it was precisely because CV-Online wanted the search engines to show that information that CV-Online inserted those meta tags in the programming of its site.

[...]

Consideration of the questions referred

- 16 It should be noted as a preliminary point that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court may have to reformulate the questions referred to it [...].
- 17 In the present case, it is apparent from the information in the documents before the Court that the issue raised in the main proceedings concerns the compatibility of the operation of a specialised search engine with the *sui generis* right set out in Article 7 of Directive 96/9 [...].

[...]

26 Next, the concept of an investment in the verification of the contents of a database must be understood to refer to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation [...].

27 Lastly, investment in the presentation of the contents of the database includes the means of giving that database its function of processing information, that is to say those used for the systematic or methodical arrangement of the materials contained in that database and the organisation of their individual accessibility [...].

[...]

33 In the present case, it is apparent from the order for reference and the observations of the parties to the main proceedings, and from information obtained at the hearing, [...] that a specialised search engine such as that at issue in the main proceedings does not utilise the search forms of the websites on which it enables searches to be carried out, and does not translate in real time the queries of its users into the criteria used by those forms. However, it regularly indexes those sites and keeps a copy on its own servers. Next, by using its own search form, it enables its users to carry out searches according to the criteria which it offers, such searches being carried out among the data that have been indexed.

[...]

On those grounds, the Court (Third Chamber) hereby rules:

Article 4(1) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (‘the Audiovisual Media Services Directive’) and Article 11 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation which prohibits television broadcasters from inserting in their programmes broadcast throughout the national territory television advertising whose broadcasting is limited to a regional level;

Article 56 TFEU must be interpreted as not precluding such national legislation, provided that it is suitable for securing the attainment of the objective of protecting media pluralism at regional and local level which it pursues and does not go beyond what is necessary to attain that objective, which it is for the referring court to ascertain;

Article 20 of the Charter of Fundamental Rights must be interpreted as not precluding such national legislation, provided that it does not give rise to unequal treatment between national television broadcasters and internet advertising providers as regards the broadcasting of advertising at regional level, which it is for the referring court to ascertain.

28.

**COURT OF JUSTICE OF THE EUROPEAN UNION 12 July 2011, Case C-324/09.
L'Oréal SA and Others v. eBay.**

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 5 and 7 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, as amended by the Agreement on the European Economic Area of 2 May 1992 ('Directive 89/104'), Articles 9 and 13 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, Article 14 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') and Article 11 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

[...]

II – The dispute in the main proceedings and the questions referred for a preliminary ruling

26 L'Oréal is a manufacturer and supplier of perfumes, cosmetics and hair-care products. In the United Kingdom it is the proprietor of a number of national trade marks. It is also the proprietor of Community trade marks.

[...]

28 eBay operates an electronic marketplace on which are displayed listings of goods offered for sale by persons who have registered for that purpose with eBay and have created a seller's account with it. eBay charges a percentage fee on completed transactions.

29 eBay enables prospective buyers to bid for items offered by sellers. It also allows items to be sold without an auction, and thus for a fixed price, by means of a system known as 'Buy It Now'. Sellers can also set up online shops on eBay sites. An online shop lists all the items offered for sale by one seller at a given time.

30 Sellers and buyers must accept eBay's online-market user agreement. One of the terms of that agreement is a prohibition on selling counterfeit items and on infringing trade marks.

[...]

32 On 22 May 2007, L'Oréal sent eBay a letter expressing its concerns about the widespread incidence of transactions infringing its intellectual property rights on eBay's European websites.

33 L'Oréal was not satisfied with the response it received and brought actions against eBay in various Member States, including an action before the High Court of Justice (England & Wales), Chancery Division.

34 L'Oréal's action before the High Court of Justice sought a ruling, first, that eBay and the individual defendants are liable for sales of 17 items made by those individuals through the website www.ebay.co.uk, L'Oréal claiming that those sales infringed the rights conferred on it by, inter alia, the figurative Community trade mark including the words 'Amor Amor' and the national word mark 'Lancôme'.

35 It is common ground between L'Oréal and eBay that two of those 17 items are coun-

terfeits of goods bearing L'Oréal trade marks.

- 36 Although L'Oréal does not claim that the other 15 items are counterfeits, it none the less considers that the sale of the items infringed its trade mark rights, since those items were either goods that were not intended for sale (such as tester or dramming products) or goods bearing L'Oréal trade marks intended for sale in North America and not in the European Economic Area ('EEA'). Furthermore, some of the items were sold without packaging.
- 37 Whilst refraining from ruling at this stage on the question as to the extent to which L'Oréal's trade mark rights have been infringed, the High Court of Justice has confirmed that the individual defendants made the sales described by L'Oréal on the website www.ebay.co.uk.
- 38 Second, L'Oréal submits that eBay is liable for the use of L'Oréal trade marks where those marks are displayed on eBay's website and where sponsored links triggered by the use of keywords corresponding to the trade marks are displayed on the websites of search engine operators, such as Google.
- 39 Concerning the last point, it is not disputed that eBay, by choosing keywords corresponding to L'Oréal trade marks in Google's 'Ad Words' referencing service, caused to be displayed, each time that there was a match between a keyword and the word entered in Google's search engine by an internet user, a sponsored link to the site www.ebay.co.uk. That link would appear in the 'sponsored links' section displayed on either the right-hand side, or on the upper part, of the screen displayed by Google.
- 40 Thus, on 27 March 2007, when an internet user entered the words 'shu uemura' – which in essence coincide with L'Oréal's national word mark 'Shu Uemura' – as a search string in the Google search engine, the following eBay advertisement was displayed in the 'sponsored links' section:
- 'Shu Uemura
Great deals on Shu uemura
Shop on eBay and Save!
www.ebay.co.uk'
- 41 Clicking on that sponsored link led to a page on the www.ebay.co.uk website which showed '96 items found for shu uemura'. Most of those items were expressly stated to be from Hong Kong.
- [...]
- 43 Third, L'Oréal has claimed that, even if eBay was not liable for the infringements of its trade mark rights, it should be granted an injunction against eBay by virtue of Article 11 of Directive 2004/48.
- 44 L'Oréal reached a settlement with some of the individual defendants. Subsequently, in March 2009, a hearing dealing with the action against eBay was held before the High Court of Justice.
- 45 By judgment of 22 May 2009, the High Court of Justice made a number of findings of fact and concluded that the state of the proceedings did not permit final judgment in the case, as a number of questions of law first required an interpretation from the Court of Justice of the European Union.
- 46 In its judgment, the High Court of Justice notes that eBay has installed filters in order to detect listings which might contravene the conditions of use of the site. That court

also notes that eBay has developed, using a programme called ‘VeRO’ (*Verified Rights Owner*), a notice and take-down system that is intended to provide intellectual property owners with assistance in removing infringing listings from the marketplace. L’Oréal has declined to participate in the VeRO programme, contending that the programme is unsatisfactory.

47 The High Court of Justice has also stated that eBay applies sanctions, such as the temporary – or even permanent – suspension of sellers who have contravened the conditions of use of the online marketplace.

48 Despite the findings set out above, the High Court of Justice took the view that eBay could do more to reduce the number of sales on its online marketplace which infringe intellectual property rights. According to that court, eBay could use additional filters. It could also include in its rules a prohibition on selling, without the consent of the trade mark proprietors, trade-marked goods originating from outside the EEA. It could also impose additional restrictions on the volumes of products that can be listed at any one time and apply sanctions more rigorously.

49 The High Court of Justice states, however, that the fact that it would be possible for eBay to do more does not necessarily mean that it is legally obliged to do so.

[...]

III – Consideration of the questions referred

A – *The first to fourth questions, and the seventh question, concerning the sale of trade-marked goods on an online marketplace*

1. Preliminary considerations

[...]

60 In the situation under consideration in the context of this question, in which the goods have at no time been put on the market within the EEA by the trade mark proprietor or with his consent, the exception set out in Article 7 of Directive 89/104 and Article 13 of Regulation No 40/94 cannot apply. In that regard, the Court has repeatedly held that it is essential that the proprietor of a trade mark registered in a Member State can control the first placing of goods bearing that trade mark on the market in the EEA [...].

61 Whilst recognising those principles, eBay submits that the proprietor of a trade mark registered in a Member State or of a Community trade mark cannot properly rely on the exclusive right conferred by that trade mark as long as the goods bearing it and offered for sale on an online marketplace are located in a third State and will not necessarily be forwarded to the territory covered by the trade mark in question. L’Oréal, the United Kingdom Government, the Italian, Polish and Portuguese Governments, and the European Commission contend, however, that the rules of Directive 89/104 and Regulation No 40/94 apply as soon as it is clear that the offer for sale of a trade-marked product located in a third State is targeted at consumers in the territory covered by the trade mark.

62 The latter contention must be accepted. [...]

63 It is sufficient to state in that regard that, under Article 5(3)(b) and (d) of Directive 89/104 and Article 9(2)(b) and (d) of Regulation No 40/94, the use by third parties of signs identical with or similar to trade marks which proprietors of those marks may prevent includes the use of such signs in offers for sale and advertising [...].

[...]

67 Accordingly, the answer to the seventh question referred is that where goods located in a third State, which bear a trade mark registered in a Member State of the EU or a Community trade mark and have not previously been put on the market in the EEA or, in the case of a Community trade mark, in the EU, (i) are sold by an economic operator through an online marketplace without the consent of the trade mark proprietor to a consumer located in the territory covered by the trade mark or (ii) are offered for sale or advertised on such a marketplace targeted at consumers located in that territory, the trade mark proprietor may prevent that sale, offer for sale or advertising by virtue of the rules set out in Article 5 of Directive 89/104 or in Article 9 of Regulation No 40/94. It is the task of the national courts to assess on a case-by-case basis whether relevant factors exist, on the basis of which it may be concluded that an offer for sale or an advertisement displayed on an online marketplace accessible from the territory covered by the trade mark is targeted at consumers in that territory.

3. *The offer for sale of testers and dramming products*

[...]

72 The Court has also stated that when a trade mark proprietor marks items such as perfume testers with the words 'demonstration' or 'not for sale', that precludes, in the absence of any evidence to the contrary, a finding that that proprietor impliedly consented to those items being put on the market [...].

73 Accordingly, the answer to the first question is that where the proprietor of a trade mark supplies to its authorised distributors items bearing that mark, intended for demonstration to consumers in authorised retail outlets, and bottles bearing the mark from which small quantities can be taken for supply to consumers as free samples, those goods, in the absence of any evidence to the contrary, are not put on the market within the meaning of Directive 89/104 and Regulation No 40/94.

4. *The marketing of unboxed goods*

[...]

76 In view of the fact that the unboxed goods at issue in the main proceedings are, for the most part, cosmetics, the referring court requests that these questions be answered in the light of Article 6(1) of Directive 76/768, under which cosmetic products may be marketed only if the container and packaging mention, inter alia, the identity of the manufacturer or the person responsible for marketing the product, the composition of the product (content and list of ingredients), the use of the product (function and particular precautions to be observed in use) and preservation of the product (date of minimum durability). In that regard, it seeks, in essence, to ascertain whether the proprietor of a trade mark may, by virtue of its exclusive right under Directive 89/104 or, in the case of a Community trade mark, under Regulation No 40/94, oppose the resale of products bearing that mark when those sales take place without the requirements of Article 6(1) of Directive 76/768 being met.

[...]

83 In view of the foregoing, the answer to the second to fourth questions is that Article 5 of Directive 89/104 and Article 9 of Regulation No 40/94 must be interpreted as meaning that the proprietor of a trade mark may, by virtue of the exclusive right conferred by the mark, oppose the resale of goods such as those at issue in the main

proceedings, on the ground that the person reselling the goods has removed their packaging, where the consequence of that removal is that essential information, such as information relating to the identity of the manufacturer or the person responsible for marketing the cosmetic product, is missing. Where the removal of the packaging has not resulted in the absence of that information, the trade mark proprietor may nevertheless oppose the resale of an unboxed perfume or cosmetic product bearing his trade mark, if he establishes that the removal of the packaging has damaged the image of the product and, hence, the reputation of the trade mark.

B – The fifth and sixth questions concerning the advertisement by the operator of an online marketplace of its website and the goods offered on it

[...]

87 With regard to internet advertising on the basis of keywords corresponding to trade marks, the Court has already held that a keyword is the means used by an advertiser to trigger the display of his advertisement and is therefore use ‘in the course of trade’ within the meaning of Article 5(1) of Directive 89/104 and Article 9 of Regulation No 40/94 [...].

[...]

97 In view of the foregoing, the answer to the fifth and sixth questions is that, on a proper construction of Article 5(1)(a) of Directive 89/104 and Article 9(1)(a) of Regulation No 40/94, the proprietor of a trade mark is entitled to prevent an online marketplace operator from advertising – on the basis of a keyword which is identical to his trade mark and which has been selected in an internet referencing service by that operator – goods bearing that trade mark which are offered for sale on the marketplace, where that advertising does not enable reasonably well-informed and reasonably observant internet users, or enables them only with difficulty, to ascertain whether the goods concerned originate from the proprietor of the trade mark or from an undertaking economically linked to that proprietor or, on the contrary, originate from a third party.

C – The eighth question concerning the use of signs corresponding to trade marks in offers for sale displayed on the website of an operator of an online marketplace

[...]

99 In that regard, it is first necessary to point out that, where sales are made through online marketplaces, the service provided by the operator of the marketplace includes the display, for its customer-sellers, of offers for sale originating from the latter.

[...]

105 In view of the foregoing, the answer to the eighth question is that the operator of an online marketplace does not ‘use’ – for the purposes of Article 5 of Directive 89/104 or Article 9 of Regulation No 40/94 – signs identical with or similar to trade marks which appear in offers for sale displayed on its site.

D – The ninth question concerning the liability of the operator of an online marketplace

106 By its ninth question, the referring court asks, in essence,

- whether the service provided by the operator of an online marketplace is covered by Article 14(1) of Directive 2000/31 (hosting), and, if so,
- in what circumstances it may be concluded that the operator of an online marketplace has ‘awareness’ within the meaning of Article 14(1) of Directive 2000/31.

1. Hosting, by the operator of an online marketplace, of information provided by the sellers

that are its customers

[...]

117 It is for the referring court to examine whether eBay played a role such as that described in the preceding paragraph in relation to the offers for sale at issue in the case before it.

2. *The possession, by the operator of the online marketplace, of 'awareness'*

118 Should the referring court conclude that eBay has not acted in the way described in paragraph 116 of this judgment, it will be for it to ascertain whether, in the circumstances of the case before it, eBay has met the conditions to which entitlement to the exemption from liability is subject under points (a) and (b) of Article 14(1) of Directive 2000/31.

[...]

123 In view of the foregoing, the answer to the ninth question is that Article 14(1) of Directive 2000/31 must be interpreted as applying to the operator of an online marketplace where that operator has not played an active role allowing it to have knowledge or control of the data stored. The operator plays such a role when it provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them.

124 Where the operator of the online marketplace has not played an active role within the meaning of the preceding paragraph and the service provided falls, as a consequence, within the scope of Article 14(1) of Directive 2000/31, the operator none the less cannot, in a case which may result in an order to pay damages, rely on the exemption from liability provided for in that provision if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31.

E – The tenth question relating to injunctions against the operator of the online marketplace

125 By its tenth question, the referring court asks, in essence,

- whether Article 11 of Directive 2004/48 requires the Member States to afford proprietors of intellectual property rights the right to obtain against the operator of a website, such as the operator of an online marketplace by means of which their rights have been infringed, injunctions requiring the operator to take measures to prevent future infringements of those rights, and, if so,
- what those measures might be.

[...]

130 For that reason, an 'injunction' as referred to in the third sentence of Article 11 of Directive 2004/48 cannot be equated with an 'injunction aimed at prohibiting the continuation of the infringement' as referred to in the first sentence of Article 11.

131 Next, it must be stated that, in view of the objective pursued by Directive 2004/48, which is that the Member States should ensure, especially in the information society, effective protection of intellectual property [...], the jurisdiction conferred, in accordance with the third sentence of Article 11 of the directive, on national courts must allow them to order an online service provider, such as a provider making an online marketplace available to internet users, to take measures that contribute not only to bringing to an end infringements committed through that marketplace, but also to

preventing further infringements.

[...]

On those grounds, the Court (Grand Chamber) hereby rules:

1. Where goods located in a third State, which bear a trade mark registered in a Member State of the European Union or a Community trade mark and have not previously been put on the market in the European Economic Area or, in the case of a Community trade mark, in the European Union, (i) are sold by an economic operator on an online marketplace without the consent of the trade mark proprietor to a consumer located in the territory covered by the trade mark or (ii) are offered for sale or advertised on such a marketplace targeted at consumers located in that territory, the trade mark proprietor may prevent that sale, offer for sale or advertising by virtue of the rules set out in Article 5 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, as amended by the Agreement on the European Economic Area of 2 May 1992, or in Article 9 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark. It is the task of the national courts to assess on a case-by-case basis whether relevant factors exist, on the basis of which it may be concluded that an offer for sale or an advertisement displayed on an online marketplace accessible from the territory covered by the trade mark is targeted at consumers in that territory.
2. Where the proprietor of a trade mark supplies to its authorised distributors items bearing that mark, intended for demonstration to consumers in authorised retail outlets, and bottles bearing the mark from which small quantities can be taken for supply to consumers as free samples, those goods, in the absence of any evidence to the contrary, are not put on the market within the meaning of Directive 89/104 and Regulation No 40/94.
3. Article 5 of Directive 89/104 and Article 9 of Regulation No 40/94 must be interpreted as meaning that the proprietor of a trade mark may, by virtue of the exclusive right conferred by the mark, oppose the resale of goods such as those at issue in the main proceedings, on the ground that the person reselling the goods has removed their packaging, where the consequence of that removal is that essential information, such as information relating to the identity of the manufacturer or the person responsible for marketing the cosmetic product, is missing. Where the removal of the packaging has not resulted in the absence of that information, the trade mark proprietor may nevertheless oppose the resale of an unboxed perfume or cosmetic product bearing his trade mark, if he establishes that the removal of the packaging has damaged the image of the product and, hence, the reputation of the trade mark.
4. On a proper construction of Article 5(1)(a) of Directive 89/104 and Article 9(1)(a) of Regulation No 40/94, the proprietor of a trade mark is entitled to prevent an online marketplace operator from advertising – on the basis of a keyword which is identical to his trade mark and which has been selected in an internet referencing service by that operator – goods bearing that trade mark which are offered for sale on the marketplace, where the advertising does not enable reasonably well-informed and reasonably observant internet users, or enables them only with diffi-

culty, to ascertain whether the goods concerned originate from the proprietor of the trade mark or from an undertaking economically linked to that proprietor or, on the contrary, originate from a third party.

5. The operator of an online marketplace does not ‘use’ – for the purposes of Article 5 of Directive 89/104 or Article 9 of Regulation No 40/94 – signs identical with or similar to trade marks which appear in offers for sale displayed on its site.
6. Article 14(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) must be interpreted as applying to the operator of an online marketplace where that operator has not played an active role allowing it to have knowledge or control of the data stored.

The operator plays such a role when it provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them.

Where the operator of the online marketplace has not played an active role within the meaning of the preceding paragraph and the service provided falls, as a consequence, within the scope of Article 14(1) of Directive 2000/31, the operator none the less cannot, in a case which may result in an order to pay damages, rely on the exemption from liability provided for in that provision if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31.

7. The third sentence of Article 11 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights must be interpreted as requiring the Member States to ensure that the national courts with jurisdiction in relation to the protection of intellectual property rights are able to order the operator of an online marketplace to take measures which contribute, not only to bringing to an end infringements of those rights by users of that marketplace, but also to preventing further infringements of that kind. Those injunctions must be effective, proportionate, and dissuasive and must not create barriers to legitimate trade.

29.

COURT OF JUSTICE OF THE EUROPEAN UNION 24 November 2011, Case C-70/10. Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM).

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Directives:
 - 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’);
 - 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on

the harmonisation of certain aspects of copyright and related rights in the information society;

- 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights;
 - 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data; and
 - 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).
- 2 The reference has been made in proceedings between Scarlet Extended SA ('Scarlet') and the Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) ('SABAM') concerning Scarlet's refusal to install a system for filtering electronic communications which use file-sharing software ('peer-to-peer'), with a view to preventing file sharing which infringes copyright.

[...]

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 15 SABAM is a management company which represents authors, composers and editors of musical works in authorising the use of their copyright-protected works by third parties.
- 16 Scarlet is an internet service provider ('ISP') which provides its customers with access to the internet without offering other services such as downloading or file sharing.
- 17 In the course of 2004, SABAM concluded that internet users using Scarlet's services were downloading works in SABAM's catalogue from the internet, without authorisation and without paying royalties, by means of peer-to-peer networks, which constitute a transparent method of file sharing which is independent, decentralised and features advanced search and download functions.
- 18 On 24 June 2004, SABAM accordingly brought interlocutory proceedings against Scarlet before the President of the Tribunal de première instance, Brussels, claiming that that company was the best placed, as an ISP, to take measures to bring to an end copyright infringements committed by its customers.
- 19 SABAM sought, first, a declaration that the copyright in musical works contained in its repertoire had been infringed, in particular the right of reproduction and the right of communication to the public, because of the unauthorised sharing of electronic music files by means of peer-to-peer software, those infringements being committed through the use of Scarlet's services.
- 20 SABAM also sought an order requiring Scarlet to bring such infringements to an end by blocking, or making it impossible for its customers to send or receive in any way, files containing a musical work using peer-to-peer software without the permission of the rightholders, on pain of a periodic penalty. Lastly, SABAM requested that Scarlet provide it with details of the measures that it would be applying in order to comply with the judgment to be given, on pain of a periodic penalty.
- 21 By judgment of 26 November 2004, the President of the Tribunal de première instance, Brussels, found that copyright had been infringed, as claimed by SABAM,

but, prior to ruling on the application for cessation, appointed an expert to investigate whether the technical solutions proposed by SABAM were technically feasible, whether they would make it possible to filter out only unlawful file sharing, and whether there were other ways of monitoring the use of peer-to-peer software, and to determine the cost of the measures envisaged.

22 In his report, the appointed expert concluded that, despite numerous technical obstacles, the feasibility of filtering and blocking the unlawful sharing of electronic files could not be entirely ruled out.

23 By judgment of 29 June 2007, the President of the Tribunal de première instance, Brussels, accordingly ordered Scarlet to bring to an end the copyright infringements established in the judgment of 26 November 2004 by making it impossible for its customers to send or receive in any way files containing a musical work in SABAM's repertoire by means of peer-to-peer software, on pain of a periodic penalty.

24 Scarlet appealed against that decision to the referring court, claiming, first, that it was impossible for it to comply with that injunction since the effectiveness and permanence of filtering and blocking systems had not been proved and that the installation of the equipment for so doing was faced with numerous practical obstacles, such as problems with the network capacity and the impact on the network. Moreover, any attempt to block the files concerned was, it argued, doomed to fail in the very short term because there were at that time several peer-to-peer software products which made it impossible for third parties to check their content.

25 Scarlet also claimed that that injunction was contrary to Article 21 of the Law of 11 March 2003 on certain legal aspects of information society services, which transposes Article 15 of Directive 2000/31 into national law, because it would impose on Scarlet, *de facto*, a general obligation to monitor communications on its network, inasmuch as any system for blocking or filtering peer-to-peer traffic would necessarily require general surveillance of all the communications passing through its network.

26 Lastly, Scarlet considered that the installation of a filtering system would be in breach of the provisions of European Union law on the protection of personal data and the secrecy of communications, since such filtering involves the processing of IP addresses, which are personal data.

[...]

Consideration of the questions referred

[...]

36 In that regard, the Court has already ruled that that prohibition applies in particular to national measures which would require an intermediary provider, such as an ISP, to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual-property rights. Furthermore, such a general monitoring obligation would be incompatible with Article 3 of Directive 2004/48, which states that the measures referred to by the directive must be fair and proportionate and must not be excessively costly.

[...]

40 In the light of the foregoing, it must be held that the injunction imposed on the ISP concerned requiring it to install the contested filtering system would oblige it to actively monitor all the data relating to each of its customers in order to prevent any future

infringement of intellectual-property rights. It follows that that injunction would require the ISP to carry out general monitoring, something which is prohibited by Article 15(1) of Directive 2000/31.

[...]

49 In those circumstances, it must be held that the injunction to install the contested filtering system is to be regarded as not respecting the requirement that a fair balance be struck between, on the one hand, the protection of the intellectual-property right enjoyed by copyright holders, and, on the other hand, that of the freedom to conduct business enjoyed by operators such as ISPs.

50 Moreover, the effects of that injunction would not be limited to the ISP concerned, as the contested filtering system may also infringe the fundamental rights of that ISP's customers, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Articles 8 and 11 of the Charter respectively.

51 It is common ground, first, that the injunction requiring installation of the contested filtering system would involve a systematic analysis of all content and the collection and identification of users' IP addresses from which unlawful content on the network is sent. Those addresses are protected personal data because they allow those users to be precisely identified.

52 Secondly, that injunction could potentially undermine freedom of information since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications [...].

[...]

On those grounds, the Court (Third Chamber) hereby rules:

Directives:

- **2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce');**
- **2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society;**
- **2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights ;**
- **95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data; and – 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), read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding an injunction made against an internet service provider which requires it to install a system for filtering**
- **all electronic communications passing via its services, in particular those involving the use of peer-to-peer software;**

- which applies indiscriminately to all its customers;
 - as a preventive measure;
 - exclusively at its expense; and
 - for an unlimited period,
- which is capable of identifying on that provider's network the movement of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold intellectual-property rights, with a view to blocking the transfer of files the sharing of which infringes copyright.

30.

COURT OF JUSTICE OF THE EUROPEAN UNION 16 February 2012, Case C-360/10. Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV.

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of:
- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce);
 - Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society;
 - Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights;
 - Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;
 - 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).
- 2 The reference has been made in proceedings between Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) ('SABAM') and Netlog NV ('Netlog'), the owner of an online social networking platform, concerning Netlog's obligation to introduce a system for filtering information stored on its platform in order to prevent files being made available which infringe copyright.

[...]

The dispute in the main proceedings and the question referred for a preliminary ruling

- 15 SABAM is a management company which represents authors, composers and publishers of musical works. On that basis, it is responsible for, inter alia, authorising the use by third parties of copyright-protected works of those authors, composers and publishers.
- 16 Netlog runs an online social networking platform where every person who registers acquires a personal space known as a 'profile' which the user can complete himself and

which becomes available globally.

- 17 The most important function of that platform, which is used by tens of millions of individuals on a daily basis, is to build virtual communities through which those individuals can communicate with each other and thereby develop friendships. On their profile, users can, inter alia, keep a diary, indicate their hobbies and interests, show who their friends are, display personal photos or publish video clips.
- 18 However, SABAM claimed that Netlog's social network also offers all users the opportunity to make use, by means of their profile, of the musical and audio-visual works in SABAM's repertoire, making those works available to the public in such a way that other users of that network can have access to them without SABAM's consent and without Netlog paying it any fee.
- 19 During February 2009, SABAM approached Netlog with a view to concluding an agreement regarding the payment of a fee by Netlog for the use of the SABAM repertoire.
- 20 By letter of 2 June 2009, SABAM gave notice to Netlog that it should give an undertaking to cease and desist from making available to the public musical and audio-visual works from SABAM's repertoire without the necessary authorisation.
- 21 On 23 June 2009, SABAM had Netlog summoned before the President of the rechtbank van eerste aanleg te Brussel (Court of First Instance, Brussels) in injunction proceedings under Article 87(1) of the Law of 30 June 1994 on copyright and related rights, requesting inter alia that Netlog be ordered immediately to cease unlawfully making available musical or audio-visual works from SABAM's repertoire and to pay a penalty of EUR 1000 for each day of delay in complying with that order.
- [...]
- 23 In addition, Netlog claimed, without being contradicted by SABAM, that the granting of such an injunction could result in the imposition of an order that it introduce, for all its customers, *in abstracto* and as a preventative measure, at its own cost and for an unlimited period, a system for filtering most of the information which is stored on its servers in order to identify on its servers electronic files containing musical, cinematographic or audio-visual work in respect of which SABAM claims to hold rights, and subsequently that it block the exchange of such files.
- 24 It is possible that introducing such a filtering system would mean that personal data would have to be processed which would have to satisfy the provisions of EU law relating to the protection of personal data and the confidentiality of communications.
- 25 In those circumstances, the rechtbank van eerste aanleg te Brussel decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:
- 'Do Directives 2001/29 and 2004/48, in conjunction with Directives 95/46, 2000/31 and 2002/58, construed in particular in the light of Articles 8 and 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms [signed in Rome on 4 November 1950], permit Member States to authorise a national court, before which substantive proceedings have been brought and on the basis merely of a statutory provision stating that "[the national courts] may also issue an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right", to order a hosting service provider to introduce, for all its customers, *in*

abstracto and as a preventive measure, at its own cost and for an unlimited period, a system for filtering most of the information which is stored on its servers in order to identify on its servers electronic files containing musical, cinematographic or audio-visual work in respect of which SABAM claims to hold rights, and subsequently to block the exchange of such files?’

[...]

On those grounds, the Court (Third Chamber) hereby rules:

Directives:

- 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce);
- 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; and
- 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights,

read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding a national court from issuing an injunction against a hosting service provider which requires it to install a system for filtering:

- information which is stored on its servers by its service users;
- which applies indiscriminately to all of those users;
- as a preventative measure;
- exclusively at its expense; and
- for an unlimited period,

which is capable of identifying electronic files containing musical, cinematographic or audio-visual work in respect of which the applicant for the injunction claims to hold intellectual property rights, with a view to preventing those works from being made available to the public in breach of copyright.

31.

COURT OF JUSTICE OF THE EUROPEAN UNION 27 March 2014, Case C-314/12. UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft GmbH.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 5(1) and (2)(b) and Article 8(3) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, and of certain fundamental rights enshrined in EU law.
- 2 The request has been made in proceedings between (i) UPC Telekabel Wien GmbH (‘UPC Telekabel’) and (ii) Constantin Film Verleih GmbH (‘Constantin Film’) and Wega Filmproduktionsgesellschaft mbH (‘Wega’) concerning an application for UPC

Telekabel to be ordered to block the access of its customers to a website making available to the public some of the films of Constantin Film and of Wega without their consent.

[...]

The dispute in the main proceedings and the questions referred for a preliminary ruling

[...]

40 In view of the above, Article 8(3) of Directive 2001/29 must be interpreted as meaning that a person who makes protected subject-matter available to the public on a website without the agreement of the rightholder, for the purpose of Article 3(2) of that directive, is using the services of the internet service provider of the persons accessing that subject-matter, which must be regarded as an intermediary within the meaning of Article 8(3) of Directive 2001/29.

[...]

42 The referring court asks, essentially, whether the fundamental rights recognised by EU law must be interpreted as precluding a court injunction prohibiting an internet service provider from allowing its customers access to a website placing protected subject-matter online without the agreement of the rightholders when that injunction does not specify the measures which that access provider must take and when that access provider can avoid incurring coercive penalties for breach of that injunction by showing that it has taken all reasonable measures.

[...]

47 In the present case, it must be observed that an injunction such as that at issue in the main proceedings, taken on the basis of Article 8(3) of Directive 2001/29, makes it necessary to strike a balance, primarily, between (i) copyrights and related rights, which are intellectual property and are therefore protected under Article 17(2) of the Charter, (ii) the freedom to conduct a business, which economic agents such as internet service providers enjoy under Article 16 of the Charter, and (iii) the freedom of information of internet users, whose protection is ensured by Article 11 of the Charter.

48 As regards the freedom to conduct a business, the adoption of an injunction such as that at issue in the main proceedings restricts that freedom.

[...]

50 An injunction such as that at issue in the main proceedings constrains its addressee in a manner which restricts the free use of the resources at his disposal because it obliges him to take measures which may represent a significant cost for him, have a considerable impact on the organisation of his activities or require difficult and complex technical solutions.

[...]

52 First, an injunction such as that at issue in the main proceedings leaves its addressee to determine the specific measures to be taken in order to achieve the result sought, with the result that he can choose to put in place measures which are best adapted to the resources and abilities available to him and which are compatible with the other obligations and challenges which he will encounter in the exercise of his activity.

53 Secondly, such an injunction allows its addressee to avoid liability by proving that he has taken all reasonable measures. That possibility of exoneration clearly has the effect

that the addressee of the injunction will not be required to make unbearable sacrifices, which seems justified in particular in the light of the fact that he is not the author of the infringement of the fundamental right of intellectual property which has led to the adoption of the injunction.

[...]

55 None the less, when the addressee of an injunction such as that at issue in the main proceedings chooses the measures to be adopted in order to comply with that injunction, he must ensure compliance with the fundamental right of internet users to freedom of information.

56 In this respect, the measures adopted by the internet service provider must be strictly targeted, in the sense that they must serve to bring an end to a third party's infringement of copyright or of a related right but without thereby affecting internet users who are using the provider's services in order to lawfully access information. Failing that, the provider's interference in the freedom of information of those users would be unjustified in the light of the objective pursued.

[...]

58 As regards intellectual property, it should be pointed out at the outset that it is possible that the enforcement of an injunction such as that in the main proceedings will not lead to a complete cessation of the infringements of the intellectual property right of the persons concerned.

[...]

62 None the less, the measures which are taken by the addressee of an injunction, such as that at issue in the main proceedings, when implementing that injunction must be sufficiently effective to ensure genuine protection of the fundamental right at issue, that is to say that they must have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter made available to them in breach of that fundamental right.

[...]

On those grounds, the Court (Fourth Chamber) hereby rules:

- 1. Article 8(3) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that a person who makes protected subject-matter available to the public on a website without the agreement of the rightholder, for the purpose of Article 3(2) of that directive, is using the services of the internet service provider of the persons accessing that subject-matter, which must be regarded as an intermediary within the meaning of Article 8(3) of Directive 2001/29.**
- 2. The fundamental rights recognised by EU law must be interpreted as not precluding a court injunction prohibiting an internet service provider from allowing its customers access to a website placing protected subject-matter online without the agreement of the rightholders when that injunction does not specify the measures which that access provider must take and when that access provider can avoid incurring coercive penalties for breach of that injunction by showing that it has taken all reasonable measures, provided that (i) the measures taken do not unneces-**

sarily deprive internet users of the possibility of lawfully accessing the information available and (ii) that those measures have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right, that being a matter for the national authorities and courts to establish.

32.

COURT OF JUSTICE OF THE EUROPEAN UNION 15 September 2016, Case C-484/14. Tobias Mc Fadden v. Sony Music Entertainment Germany GmbH.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 12(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce').

2 The request has been made in proceedings between Mr. Tobias Mc Fadden and Sony Music Entertainment Germany GmbH ('Sony Music') concerning the potential liability of Mr. Mc Fadden for the use by a third party of the wireless local area network (WLAN) operated by Mr. Mc Fadden in order to make a phonogram produced by Sony Music available to the general public without authorisation.

[...]

Facts of the main proceedings and the questions referred for a preliminary ruling

22 Mr. Mc Fadden runs a business selling and leasing lighting and sound systems.

23 He operates an anonymous access to a wireless local area network free of charge in the vicinity of his business. In order to provide such internet access, Mr. Mc Fadden uses the services of a telecommunications business. Access to that network was intentionally not protected in order to draw the attention of customers of near-by shops, of passers-by and of neighbours to his company.

24 Around 4 September 2010, Mr. Mc Fadden changed the name of his network from 'mcfadden.de' to 'freiheitstattangst.de' in reference to a demonstration in favour of the protection of personal data and against excessive State surveillance.

25 At the same time, by means of the wireless local area network operated by Mr. Mc Fadden, a musical work was made available on the internet free of charge to the general public without the consent of the rightholders. Mr. Mc Fadden asserts that he did not commit the infringement alleged, but does not rule out the possibility that it was committed by one of the users of his network.

26 Sony Music is the producer of the phonogram of that work.

27 By letter of 29 October 2010, Sony Music gave formal notice to Mr. Mc Fadden to respect its rights over the phonogram.

28 Following the giving of formal notice, Mr. Mc Fadden brought an action for a negative declaration ('*negative Feststellungsklage*') before the referring court. In reply, Sony Music made several counterclaims seeking to obtain from Mr. Mc Fadden, first, payment of

- damages on the ground of his direct liability for the infringement of its rights over the phonogram, second, an injunction against the infringement of its rights on pain of a penalty and, third, reimbursement of the costs of giving formal notice and court costs.
- 29 In a judgement of 16 January 2014, entered in default of Mr. Mc Fadden's appearance, the referring court dismissed Mr. Mc Fadden's action and upheld the counter-claims of Sony Music.
- 30 Mr Mc Fadden appealed against that judgment on the ground that he is exempt from liability under the provisions of German law transposing Article 12(1) of Directive 2000/31.
- 31 In the appeal, Sony Music claims that the referring court should uphold the judgment at first instance and, in the alternative, in the event that that court should not hold Mr Mc Fadden directly liable, order Mr Mc Fadden, in accordance with the case-law on the indirect liability (*Störerhaftung*) of wireless local area network operators, to pay damages for not having taken measures to protect his wireless local area network and for having thereby allowed third parties to infringe Sony Music's rights.
- [...]
- 41 Nonetheless, it does not follow that a service of an economic nature performed free of charge may under no circumstances constitute an 'information society service' within the meaning of Article 12(1) of Directive 2000/31 [...].
- 42 That is the case, inter alia, where the performance of a service free of charge is provided by a service provider for the purposes of advertising the goods sold and services provided by that service provider, since the cost of that activity is incorporated into the price of those goods or services [...].
- [...]
- 54 In the light of the foregoing, Article 12(1) of Directive 2000/31 must be interpreted as meaning that, in order for the service referred to in that article, consisting in providing access to a communication network, to be considered to have been provided, that access must not go beyond the boundaries of a technical, automatic and passive process for the transmission of the required information, there being no further conditions to be satisfied.
- 55 [...] The referring court asks, in essence, whether Article 12(1) of Directive 2000/31 must be interpreted as meaning that the condition laid down in Article 14(1)(b) of that directive applies *mutatis mutandis* to Article 12(1) of the directive.
- [...]
- 65 In the light of the foregoing, Article 12(1) of Directive 2000/31 must be interpreted as meaning that the condition laid down in Article 14(1)(b) of that directive does not apply *mutatis mutandis* to Article 12(1).
- 66 [...] The referring court asks, in essence, whether Article 12(1) of Directive 2000/31, read in conjunction with Article 2(b) of that directive, must be interpreted as meaning that there are conditions other than the one mentioned in that provision to which a service provider providing access to a communication network is subject.
- 67 In that regard, Article 12(1) of Directive 2000/31, read in conjunction with Article 2(b) of that directive, expressly provides for only one condition as regards such a service provider, namely that of being a natural or legal person providing an information society service.

[...]

71 In the light of the foregoing, Article 12(1) of Directive 2000/31, read in conjunction with Article 2(b) of that directive, must be interpreted as meaning that there are no conditions, other than the one mentioned in that provision, to which a service provider supplying access to a communication network is subject.

72 [...] The referring court asks, in essence, whether Article 12(1) of Directive 2000/31 must be interpreted as meaning that it does not preclude a person harmed by the infringement of its rights over a work from claiming injunctive relief against the recurrence of that infringement, compensation and the payment of costs of giving formal notice and court costs from a communication network access provider whose services were used in that infringement.

73 In that regard, it should be noted that Article 12(1) of Directive 2000/31 states that the Member States must ensure that service providers supplying access to a communication network are not held liable for information transmitted to them by the recipients of that service on the threefold condition laid down in that provision that such providers do not initiate such a transmission, that they do not select the receiver of that transmission and that they do not select or modify the information contained in the transmission.

[...]

85 In the present case, it appears from the order for reference that the referring court envisages a situation in which there are, in practice, only three measures that the addressee of the injunction may take, namely examining all communications passing through an internet connection, terminating that connection or password-protecting it.

[...]

87 As regards, first, monitoring all of the information transmitted, such a measure must be excluded from the outset as contrary to Article 15(1) of Directive 2000/31, which excludes the imposition of a general obligation on, inter alia, communication network access providers to monitor the information that they transmit.

88 As regards, second, the measure consisting in terminating the internet connection completely, it must be found that so doing would cause a serious infringement of the freedom to conduct a business of a person who pursues an economic activity, albeit of a secondary nature, consisting in providing internet access by categorically preventing that provider from pursuing the activity in practice in order to remedy a limited infringement of copyright without considering the adoption of measures less restrictive of that freedom.

[...]

90 As regards, third, the measure consisting in password-protecting an internet connection, it should be noted that such a measure is capable of restricting both the freedom to conduct a business of the provider supplying the service of access to a communication network and the right to freedom of information of the recipients of that service.

[...]

On those grounds, the Court (Third Chamber) hereby rules:

1. Article 12(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic

commerce'), read in conjunction with Article 2(a) of that directive and with Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, must be interpreted as meaning that a service such as that at issue in the main proceedings, provided by a communication network operator and consisting in making that network available to the general public free of charge constitutes an 'information society service' within the meaning of Article 12(1) of Directive 2000/31 where the activity is performed by the service provider in question for the purposes of advertising the goods sold or services supplied by that service provider.

2. Article 12(1) of Directive 2000/31 must be interpreted as meaning that, in order for the service referred to in that article, consisting in providing access to a communication network, to be considered to have been provided, that access must not go beyond the boundaries of a technical, automatic and passive process for the transmission of the required information, there being no further conditions to be satisfied.
3. Article 12(1) of Directive 2000/31 must be interpreted as meaning that the condition laid down in Article 14(1)(b) of that directive does not apply *mutatis mutandis* to Article 12(1) of Directive 2000/31.
4. Article 12(1) of Directive 2000/31, read in conjunction with Article 2(b) of that directive, must be interpreted as meaning that there are no conditions, other than the one mentioned in that provision, to which a service provider supplying access to a communication network is subject.
5. Article 12(1) of Directive 2000/31 must be interpreted as meaning that a person harmed by the infringement of its rights over a work is precluded from claiming compensation from an access provider on the ground that the connection to that network was used by a third party to infringe its rights and the reimbursement of the costs of giving formal notice or court costs incurred in relation to its claim for compensation. However, that article must be interpreted as meaning that it does not preclude such a person from claiming injunctive relief against the continuation of that infringement and the payment of the costs of giving formal notice and court costs from a communication network access provider whose services were used in that infringement where such claims are made for the purposes of obtaining, or follow the grant of injunctive relief by a national authority or court to prevent that service provider from allowing the infringement to continue.
6. Having regard to the requirements deriving from the protection of fundamental rights and to the rules laid down in Directives 2001/29 and 2004/48, Article 12(1) of Directive 2000/31, read in conjunction with Article 12(3) of that directive, must be interpreted as, in principle, not precluding the grant of an injunction such as that at issue in the main proceedings, which requires, on pain of payment of a fine, a provider of access to a communication network allowing the public to connect to the internet to prevent third parties from making a particular copyright-protected work or parts thereof available to the general public from an online (peer-to-peer)

exchange platform via an internet connection, where that provider may choose which technical measures to take in order to comply with the injunction even if such a choice is limited to a single measure consisting in password-protecting the internet connection, provided that those users are required to reveal their identity in order to obtain the required password and may not therefore act anonymously, a matter which it is for the referring court to ascertain.

33.

**COURT OF JUSTICE OF THE EUROPEAN UNION 7 August 2018, Case C-161/17.
Land Nordrhein-Westfalen v. Dirk Renckhoff.**

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
- 2 The request has been made in proceedings between the Land Nordrhein-Westfalen (Land of North Rhine-Westphalia, Germany) and Mr. Dirk Renckhoff, a photographer, concerning the unauthorised use by a pupil of a school for which that *Land* is responsible of a photograph taken by Mr. Renckhoff, which is freely accessible on one website, to illustrate a school presentation posted by that school on another website.

[...]

The dispute in the main proceedings and the question referred for a preliminary ruling

- 6 Mr. Renckhoff, the applicant who brought the proceedings before the Landgericht Hamburg (Hamburg Regional Court, Germany), is a photographer. Stadt Waltrop (City of Waltrop, Germany) which was originally the defendant at first instance, but which is no longer a party to the dispute in the main proceedings, has responsibility for the Gesamtschule Waltrop (Waltrop secondary school, 'the school'). The Land of North Rhine-Westphalia, also a defendant at first instance, has responsibility for the educational supervision of the school and is the employer of the teaching staff working there.
- 7 From 25 March 2009, it was possible to access on the school website a presentation written by one of the school's pupils as part of a language workshop it organised which included, by way of illustration, a photograph taken by Mr. Renckhoff ('the photographer') that that pupil had downloaded from an online travel portal ('the online travel portal'). The photograph was posted on the online travel portal without any restrictive measures preventing it from being downloaded. Below the photograph the pupil included a reference to that online portal.
- 8 Mr. Renckhoff claims that he gave a right of use exclusively to the operators of the online travel portal and that the posting of the photograph on the school website infringes his copyright. He requested the court with jurisdiction at first instance to prohibit the Land of North Rhine-Westphalia, on pain of a financial penalty, from reproducing/having reproduced and/or making available/having made available to the public the photo and, in the alternative, from allowing school students to reproduce the photo for purposes of posting it on the internet. He also claimed payment of damages from the

Land of North Rhine-Westphalia of EUR 400.

- 9 Since Mr. Renckhoff's action was upheld in part, the Land of North Rhine- Westphalia was ordered to remove the photograph from the school website and to pay EUR 300 plus interest.
- 10 Both parties appealed against that judgment before the Oberlandesgericht Hamburg (Higher Regional Court, Hamburg, Germany), which held, inter alia, that the photograph was protected by copyright and that posting it on the school website was an infringement of the reproduction right and the right to make available to the public held by Mr. Renckhoff. That court found that the fact that the photograph was already accessible to the public without restriction on the internet before the acts at issue was irrelevant, since the reproduction of the photograph on the server and the making available to the public on the school website which followed led to a 'disconnection' with the initial publication on the online travel portal.
- 11 Hearing an appeal on point of law, the referring court considers that the outcome of that appeal depends on the interpretation of Article 3(1) of Directive 2001/29. In particular, that court has doubts as to whether the requirement, laid down in the case-law, according to which the communication to the public concerned must have been made to a 'new' public has been satisfied.

[...]

Consideration of the question referred

[...]

- 21 In the present case, the posting on one website of a photograph previously posted on another website, after it has been previously copied onto a private server, must be treated as 'making available' and therefore, an 'act of communication' within the meaning of Article 3(1) of Directive 2001/29. Such a posting gives visitors to the website on which it is posted the opportunity to access the photograph on that website.

[...]

- 24 However, as is clear from settled case-law, in order to be treated as a 'communication to the public', the protected work must be communicated using specific technical means, different from those previously used or, failing that, to a 'new public', that is to say, to a public that was not already taken into account by the copyright holders when they authorised the initial communication to the public of their work [...].

[...]

- 33 To hold that the posting on one website of a work previously communicated on another website with the consent of the copyright holder does not constitute making available to a new public would amount to applying an exhaustion rule to the right of communication.

- 34 In addition to the fact that it would be contrary to the wording of Article 3(3) of Directive 2001/29, that rule would deprive the copyright holder of the opportunity to claim an appropriate reward for the use of his work, set out in recital 10 of that directive, even though, as the Court stated, the specific purpose of the intellectual property is, in particular, to ensure for the rightholders concerned protection of the right to exploit commercially the marketing or the making available of the protected subject matter, by the grant of licences in return for payment of an appropriate reward for each use of the protected subject matter [...].

[...]

41 Therefore, to allow such a posting without the copyright holder being able to rely on the rights laid down in Article 3(1) of Directive 2001/29 would fail to have regard to the fair balance, referred to in recitals 3 and 31 of that directive, which must be maintained in the digital environment between, on one hand, the interest of the holders of copyright and related rights in the protection of their intellectual property, guaranteed by Article 17(2) of the Charter of Fundamental Rights of the European Union and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter, in particular their freedom of expression and information guaranteed by Article 11 of the Charter of Fundamental Rights, as well as the public interest.

On those grounds, the Court (Second Chamber) hereby rules:

The concept of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that it covers the posting on one website of a photograph previously posted, without any restriction preventing it from being downloaded and with the consent of the copyright holder, on another website.

34.

COURT OF JUSTICE OF THE EUROPEAN UNION 13 February 2014, Case C-466/12. Nils Svensson and Others v. Retriever Sverige AB.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

2 The request has been made in proceedings between Mr Svensson, Mr Sjögren, Ms Sahlman and Ms Gadd, the applicants in the main proceedings, and Retriever Sverige AB (‘Retriever Sverige’) concerning compensation allegedly payable to them for the harm they consider they have suffered as a result of the inclusion on that company’s website of clickable Internet links (hyperlinks) redirecting users to press articles in which the applicants hold the copyright.

[...]

The dispute in the main proceedings and the questions referred for a preliminary ruling

8 The applicants in the main proceedings, all journalists, wrote press articles that were published in the *Göteborgs-Posten* newspaper and on the *Göteborgs-Posten* website. Retriever Sverige operates a website that provides its clients, according to their needs, with lists of clickable Internet links to articles published by other websites. It is common ground between the parties that those articles were freely accessible on the *Göteborgs-Posten* newspaper site. According to the applicants in the main proceedings, if a

client clicks on one of those links, it is not apparent to him that he has been redirected to another site in order to access the work in which he is interested. By contrast, according to Retriever Sverige, it is clear to the client that, when he clicks on one of those links, he is redirected to another site.

9 The applicants in the main proceedings brought an action against Retriever Sverige before the Stockholms tingsrätt (Stockholm District Court) in order to obtain compensation on the ground that that company had made use, without their authorisation, of certain articles by them, by making them available to its clients.

10 By judgment of 11 June 2010, the Stockholms tingsrätt rejected their application. The applicants in the main proceedings then brought an appeal against that judgment before the Svea hovrätt (Svea Court of Appeal).

11 Before that court, the applicants in the main proceedings claimed, inter alia, that Retriever Sverige had infringed their exclusive right to make their respective works available to the public, in that as a result of the services offered on its website, Retriever Sverige's clients had access to the applicants' works.

12 Retriever Sverige contends, in defence, that the provision of lists of Internet links to works communicated to the public on other websites does not constitute an act liable to affect the copyright in those works. Retriever Sverige also contends that it did not carry out any transmission of any protected work; its action is limited to indicating to its clients the websites on which the works that are of interest to them are to be found.

[...]

15 It follows from Article 3(1) of Directive 2001/29 that every act of communication of a work to the public has to be authorised by the copyright holder.

[...]

18 In the circumstances of this case, it must be observed that the provision, on a website, of clickable links to protected works published without any access restrictions on another site, affords users of the first site direct access to those works.

19 As is apparent from Article 3(1) of Directive 2001/29, for there to be an 'act of communication', it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity [...].

20 It follows that, in circumstances such as those in the case in the main proceedings, the provision of clickable links to protected works must be considered to be 'making available' and, therefore, an 'act of communication', within the meaning of that provision.

[...]

22 An act of communication such as that made by the manager of a website by means of clickable links is aimed at all potential users of the site managed by that person, that is to say, an indeterminate and fairly large number of recipients.

23 In those circumstances, it must be held that the manager is making a communication to a public.

[...]

25 In the circumstances of this case, it must be observed that making available the works concerned by means of a clickable link, such as that in the main proceedings, does not lead to the works in question being communicated to a new public.

[...]

27 In those circumstances, it must be held that, where all the users of another site to whom the works at issue have been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site, the users of the site managed by the latter must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication.

28 Therefore, since there is no new public, the authorisation of the copyright holders is not required for a communication to the public such as that in the main proceedings.
[...]

32 In those circumstances, the answer to the first three questions referred is that Article 3(1) of Directive 2001/29 must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an act of communication to the public, as referred to in that provision.
[...]

34 It is apparent, in particular, from recitals 1, 6 and 7 in the preamble to Directive 2001/29 that the objectives of the directive are, inter alia, to remedy the legislative differences and legal uncertainty that exist in relation to copyright protection.
[...]

36 It is true that recital 7 in the preamble to the directive indicates that the directive does not have the objective of removing or preventing differences that do not adversely affect the functioning of the internal market. Nevertheless, it must be observed that, if the Member States were to be afforded the possibility of laying down that the concept of communication to the public includes a wider range of activities than those referred to in Article 3(1) of the directive, the functioning of the internal market would be bound to be adversely affected.

37 It follows that Article 3(1) of Directive 2001/29 cannot be construed as allowing Member States to give wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision.
[...]

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an ‘act of communication to the public’, as referred to in that provision.**
2. **Article 3(1) of Directive 2001/29 must be interpreted as precluding a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision.**

**COURT OF JUSTICE OF THE EUROPEAN UNION 8 September 2016, Case C-160/15.
GS Media BV v. Sanoma Media Netherlands BV, Playboy Enterprises International
Inc. and Britt Geertruida Dekker.**

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

2 The request has been made in proceedings between GS Media BV and Sanoma Media Netherlands BV ('Sanoma'), Playboy Enterprises International Inc. and Ms Britt Geertruida Dekker (together, 'Sanoma and Others'), concerning, inter alia, the posting on the GeenStijl.nl website ('the GeenStijl website'), operated by GS Media, of hyperlinks to other websites enabling photographs of Ms Dekker, taken for Playboy magazine ('the photos at issue'), to be viewed.

[...]

The dispute in the main proceedings and the questions referred for a preliminary ruling

6 At the request of Sanoma, which is the publisher of *Playboy* magazine, on 13 and 14 October 2011 the photographer, Mr C. Hermès, took the photos at issue, which were to be published in the December 2011 edition of that magazine. In that context, Mr Hermès granted Sanoma authorisation, on an exclusive basis, to publish those photos. He also granted Sanoma authorisation to exercise the rights and powers arising from his copyright.

7 GS Media operates the website GeenStijl, which includes, according to information provided by that website, 'news, scandalous revelations and investigative journalism with lighthearted items and wacky nonsense' and which is viewed daily by more than 230 000 visitors, making it one of the 10 most visited websites in the area of news in the Netherlands.

8 On 26 October 2011, the editors of the GeenStijl website received a message from a person using a pseudonym, which included a hyperlink to an electronic file hosted on the website Filefactory.com ('the Filefactory website'), located in Australia and dedicated to data storage. That electronic file contained the photos at issue.

9 On the same day, Sanoma asked GS Media's parent company to prevent the photos at issue being published on the GeenStijl website.

10 On 27 October 2011, an article relating to those photos of Ms Dekker, entitled "...! Nude photos of ... [Ms] Dekker", was published on the GeenStijl website, which included part of one of the photos at issue, and which ended with the following words: "And now the link with the pics you've been waiting for." By clicking on a hyperlink accompanying that text, users were directed to the Filefactory website, on which another hyperlink allowed them to download 11 electronic files each containing one of those photos.

11 On the same day, Sanoma sent GS Media's parent company an email demanding that it confirm that the hyperlink to the photos at issue had been removed from the

- GeenStijl website. GS Media failed to respond to that demand.
- 12 However, at Sanoma's request, the photos at issue appearing on the Filefactory website were removed.
- 13 By letter of 7 November 2011, counsel for Sanoma and Others demanded that GS Media remove from the GeenStijl website the article of 27 October 2011, including the hyperlink, the photographs it contained and the reactions of users published on the same page of that website.
- 14 On the same day, an article about the dispute between GS Media and Sanoma and Others about the photos at issue was published on the GeenStijl website. That article ended with the following sentence: 'Update: Not yet seen the nude pics of [Ms. Dekker]? They are HERE.' That announcement was, once again, accompanied by a hyperlink to access the website Imageshack.us where one or more of the relevant photographs could be viewed. The operator of that website, however, also subsequently complied with Sanoma's request to remove them.
- 15 A third article, entitled 'Bye Bye Wave Wave Playboy', again contained a hyperlink to the photos at issue, appeared on 17 November 2011 on the GeenStijl website. Forum users of that website then posted new links to other websites where the photos at issue could be viewed.
- 16 In December 2011, the photos at issue were published in *Playboy* magazine.
- 17 Sanoma and Others brought an action before the rechtbank Amsterdam (Amsterdam District Court, Netherlands), claiming, in particular, that by posting hyperlinks and a cutout of one of the photos at issue on the GeenStijl website, GS Media had infringed Mr Hermès' copyright and acted unlawfully towards Sanoma and Others. The rechtbank Amsterdam (Amsterdam District Court) largely upheld that action.
- 18 The Gerechtshof Amsterdam (Amsterdam Court of Appeal, the Netherlands) set aside that decision, finding that, by posting the hyperlinks on the GeenStijl website, GS Media had not infringed Mr Hermès' copyright, since the photos at issue had already been made public before they were posted on the Filefactory website. In contrast, it found that, by posting those links, GS Media acted unlawfully toward Sanoma and Others, as visitors to that website accordingly were encouraged to view the photos at issue which were illegally posted on the Filefactory website. Without those hyperlinks, those photos would not have been easy to find. In addition, the Gerechtshof Amsterdam (Amsterdam Court of Appeal) held that, by posting a cutout of one of the photos at issue on the GeenStijl website, GS Media had infringed Mr. Hermès' copyright.
- 19 GS Media brought an appeal against that judgment before the referring court, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands).
- 20 Sanoma and Others brought a cross-appeal, in which they refer in particular to the judgment of 13 February 2014, *Svensson and Others*, (C466/12, EU:C:2014:76), claiming that the fact of making a hyperlink available to internet users to a website on which a work has been posted without the consent of the latter's copyright holder constitutes a communication to the public. Sanoma and Others submit, moreover, that access to the photos at issue on the Filefactory website was protected by restrictions within the meaning of that judgment which internet users could circumvent through the intervention of GS Media and its GeenStijl website, so that those photos have been made available to a wider public than the public which would normally have accessed

those photos on the Filefactory website.

[...]

Consideration of the questions referred

25 [...] The referring court asks, in essence, whether, and in what possible circumstances, the fact of posting, on a website, a hyperlink to protected works, freely available on another website without the consent of the copyright holder, constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29.

[...]

27 It follows from Article 3(1) of Directive 2001/29 that Member States are to provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

[...]

On those grounds, the Court (Second Chamber) hereby rules:

Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that, in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a ‘communication to the public’ within the meaning of that provision, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed.

36.

COURT OF JUSTICE OF THE EUROPEAN UNION 29 November 2017, Case C-265/16. VCAST Limited v. RTI S.p.A.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, in particular of Article 5(2)(b) thereof, of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on rental right and lending right and on certain rights related to copyright in the field of intellectual property and of the FEU Treaty.

2 The request has been made in proceedings between VCAST Limited and RTI SpA concerning the lawfulness of the making available to VCAST’s customers of a cloud video recording system for television programmes broadcast, inter alia, by RTI.

[...]

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 14 VCAST is a company incorporated under UK law which makes available to its customers via the Internet a video recording system, in storage space within the cloud, for terrestrial programmes of Italian television organisations, among which are those of RTI.
- 15 It is apparent from the order for reference that, in practice, the user selects a programme on the VCAST website, which includes all the programming from the television channels covered by the service provided by that company. The user can specify either a certain programme or a time slot. The system operated by VCAST then picks up the television signal using its own antennas and records the time slot for the selected programme in the cloud data storage space indicated by the user. That storage space is purchased by the user from another provider.
- 16 VCAST brought proceedings against RTI before the specialised chamber for company law of the Tribunale di Torino (District Court, Turin, Italy), seeking a declaration of the lawfulness of its activity.
- 17 In the course of proceedings, by an order for reference of 30 October 2015, that court upheld in part the application for interim measures submitted by RTI and prohibited VCAST, in essence, from pursuing its activity.

[...]

Consideration of the questions referred

Preliminary observations

[...]

- 24 In that regard, as the Advocate General observed in point 19 of his Opinion, the provision of Directive 2000/31 which could possibly be applicable in this case is Article 3(2) thereof, which prohibits Member States from restricting the freedom to provide information society services from another Member State. However, according to Article 3(3) of that directive, restrictions stemming from the protection of copyright and neighbouring rights are in particular excluded from the scope of that prohibition.
- 25 It follows that the provisions of Directive 2000/31 are not applicable in a case such as that at issue in the main proceedings, which concerns copyright and its exceptions.

[...]

The Court's reply

- 30 Under Article 5(2)(b) of Directive 2001/29, Member States may provide for exceptions or limitations to the reproduction right in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial.

[...]

- 33 The Court has also held that copying by natural persons acting in a private capacity must be regarded as an act likely to cause harm to the rightholder concerned, where it is done without seeking prior authorisation from that rightholder [...].
- 34 In addition, the Court has held that, while Article 5(2)(b) of Directive 2001/29 must be understood as meaning that the private copying exception prohibits the rightholder from relying on his exclusive right to authorise or prohibit reproductions with regard to persons who make private copies of his works, that provision must not be understood as requiring, beyond that express limitation, the copyright holder to tolerate infringements of his rights which may accompany the making of private copies [...].

[...]

40 It follows from Article 3 of Directive 2001/29 that any communication to the public, including the making available of a protected work or subject matter, requires the right-holder's consent, given that, as is apparent from recital 23 of that directive, the right of communication of works to the public should be understood in a broad sense covering any transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.

[...]

43 Moreover, every transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question [...].

46 In the present case, the service provider at issue in the main proceedings records programmes broadcast and makes them available to its customers via the Internet.

[...]

49 The transmissions referred to thus constitute communications to different publics, and each of them must therefore receive the consent of the rightholders concerned.

[...]

51 It follows that, without the rightholder's consent, the making of copies of works by means of a service such as that at issue in the main proceedings could undermine the rights of that rightholder.

52 Accordingly, such a remote recording service cannot fall within the scope of Article 5(2)(b) of Directive 2001/29.

[...]

On those grounds, the Court (Third Chamber) hereby rules:

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, in particular Article 5(2)(b) thereof, must be interpreted as precluding national legislation which permits a commercial undertaking to provide private individuals with a cloud service for the remote recording of private copies of works protected by copyright, by means of a computer system, by actively involving itself in the recording, without the rightholder's consent.

37.

COURT OF JUSTICE OF THE EUROPEAN UNION 1° October 2015, Case C-230/14. Weltimmo S. R. O. v. Nemzeti Adatvédelmi és Információszabadság Hatóság.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 4(1)(a) and 28(1), (3) and (6) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

2 The request has been made in proceedings between Weltimmo s. r. o. ('Weltimmo'), a company which has its registered office in Slovakia, and the Nemzeti Adatvédelmi és Információszabadság Hatóság (the national authority for data protection and freedom

of information; ‘the Hungarian data protection authority’) concerning a fine imposed by the latter for infringement of Law CXII of 2011 on the right to self-determination as regards information and freedom of information [...], which transposed Directive 95/46 into Hungarian law.

[...]

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 Weltimmo, a company registered in Slovakia, runs a property dealing website concerning Hungarian properties. For that purpose, it processes the personal data of the advertisers. The advertisements are free of charge for one month but thereafter a fee is payable. Many advertisers sent a request by e-mail for the deletion of both their advertisements and their personal data as from that period. However, Weltimmo did not delete those data and charged the interested parties for the price of its services. As the amounts charged were not paid, Weltimmo forwarded the personal data of the advertisers concerned to debt collection agencies.

10 Those advertisers lodged complaints with the Hungarian data protection authority. That authority declared that it was competent under Paragraph 2(1) of the Law on information, taking the view that the collection of the data concerned constituted processing of data or a technical operation for the processing of data concerning natural persons. Considering that Weltimmo had infringed the Law on information, that data protection authority imposed on that company a fine of HUF 10 million (approximately EUR 32 000).

11 Weltimmo then brought an action before the Budapest administrative and labour court (Fővárosi Közigazgatási és Munkaügyi Bíróság), which held that the fact that that company did not have a registered office or branch in Hungary was not a valid argument in defence because the processing of data and the supply of data services relating to the Hungarian property concerned had taken place in Hungary. However, that court set aside the decision of the Hungarian data protection authority on other grounds, connected with the lack of clarity over some of the facts.

12 Weltimmo appealed on a point of law to the referring court, claiming that there was no need for further clarification of the facts, since, pursuant to Article 4(1)(a) of Directive 95/46, the Hungarian data protection authority in this case was not competent and could not apply Hungarian law in respect of a supplier of services established in another Member State. Weltimmo maintained that, under Article 28(6) of Directive 95/46, that authority should have asked the Slovak data protection authority to act in its place.

13 The Hungarian data protection authority submitted that Weltimmo had a Hungarian representative in Hungary, namely one of the owners of that company, who represented it in the administrative and judicial proceedings that took place in that Member State. That authority added that Weltimmo’s Internet servers were probably installed in Germany or in Austria, but that the owners of that company lived in Hungary. Lastly, according to that authority, it follows from Article 28(6) of Directive 95/46 that it was in any event competent to act, regardless of the applicable law.

[...]

Consideration of the questions referred

[...]

16 It is apparent from that information, first, that that authority informally learned from its Slovak counterpart that Weltimmo did not carry out any activity at the place where it has its registered office, in Slovakia. Moreover, on several occasions, Weltimmo moved that registered office from one State to another. Secondly, Weltimmo developed two property dealing websites, written exclusively in Hungarian. It opened a bank account in Hungary, which was intended for the recovery of its debts, and had a letter box in that Member State for its everyday business affairs. The post was regularly picked up and sent to Weltimmo by electronic means. Thirdly, the advertisers themselves not only had to enter the data relating to their properties on Weltimmo's website, but also had to delete those data from that website if they did not want those data to continue to appear on the website after the end of the one-month period mentioned above. Weltimmo raised a computer management issue in order to explain why it had not been possible to carry out that erasure. Fourthly, Weltimmo is a company made up of only one or two persons. Its representative in Hungary tried to negotiate the settlement of the unpaid debts with the advertisers.

[...]

32 In the present case, the activity exercised by Weltimmo consists, at the very least, of the running of one or several property dealing websites concerning properties situated in Hungary, which are written in Hungarian and whose advertisements are subject to a fee after a period of one month. It must therefore be held that that company pursues a real and effective activity in Hungary.

[...]

40 By contrast, the fact that the owners of the properties forming the subject-matter of the advertisements have Hungarian nationality is of no relevance whatsoever for the purposes of determining the national law applicable to the processing of the data at issue in the main proceedings.

[...]

42 The seventh question is asked only in the event that the Hungarian data protection authority should consider that Weltimmo has, not in Hungary but in another Member State, an establishment, within the meaning of Article 4(1)(a) of Directive 95/46, performing activities in the context of which the processing of the personal data concerned is carried out.

[...]

44 With regard, in the first place, to the competence of a supervisory authority to act in such a case, it must be observed that, under Article 28(4) of Directive 95/46, each supervisory authority is to hear claims lodged by any person concerning the protection of his rights and freedoms in regard to the processing of personal data.

45 Consequently, in a situation such as that at issue in the main proceedings, the Hungarian data protection authority may hear claims lodged by persons, such as the advertisers of properties at issue in the main proceedings, who consider themselves victims of unlawful processing of their personal data in the Member State in which they hold those properties.

[...]

52 [...] Article 28(6) of the directive also states that each authority may be requested to exercise its powers by an authority of another Member State and that the supervisory

authorities are to cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information.

53 [...] In the absence of that provision, where the controller of personal data is subject to the law of a Member State, but infringes the right to the protection of the privacy of natural persons in another Member State, in particular by directing his activity at that other Member State without, however, being established there within the meaning of that directive, it would be difficult, or even impossible, for those persons to enforce their right to that protection.

54 It thus follows from Article 28(6) of Directive 95/46 that the supervisory authority of a Member State, to which a complaint has been submitted, on the basis of Article 28(4) of that directive, by natural persons in relation to the processing of their personal data, may examine that complaint irrespective of the applicable law, and, consequently, even if the law applicable to the processing of the data concerned is that of another Member State.

[...]

57 Thus, when a supervisory authority receives a complaint, in accordance with Article 28(4) of Directive 95/46, that authority may exercise its investigative powers irrespective of the applicable law and before even knowing which national law is applicable to the processing in question. However, if it reaches the conclusion that the law of another Member State is applicable, it cannot impose penalties outside the territory of its own Member State [...].

[...]

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 4(1)(a) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data must be interpreted as permitting the application of the law on the protection of personal data of a Member State other than the Member State in which the controller with respect to the processing of those data is registered, in so far as that controller exercises, through stable arrangements in the territory of that Member State, a real and effective activity — even a minimal one — in the context of which that processing is carried out.**

In order to ascertain, in circumstances such as those at issue in the main proceedings, whether that is the case, the referring court may, in particular, take account of the fact (i) that the activity of the controller in respect of that processing, in the context of which that processing takes place, consists of the running of property dealing websites concerning properties situated in the territory of that Member State and written in that Member State's language and that it is, as a consequence, mainly or entirely directed at that Member State, and (ii) that that controller has a representative in that Member State, who is responsible for recovering the debts resulting from that activity and for representing the controller in the administrative and judicial proceedings relating to the processing of the data concerned.

By contrast, the issue of the nationality of the persons concerned by such data processing is irrelevant.

2. **Where the supervisory authority of a Member State, to which complaints have**

been submitted in accordance with Article 28(4) of Directive 95/46, reaches the conclusion that the law applicable to the processing of the personal data concerned is not the law of that Member State, but the law of another Member State, Article 28(1), (3) and (6) of that directive must be interpreted as meaning that that supervisory authority will be able to exercise the effective powers of intervention conferred on it in accordance with Article 28(3) of that directive only within the territory of its own Member State. Accordingly, it cannot impose penalties on the basis of the law of that Member State on the controller with respect to the processing of those data who is not established in that territory, but should, in accordance with Article 28(6) of that directive, request the supervisory authority within the Member State whose law is applicable to act.

3. Directive 95/46 must be interpreted as meaning that the term ‘adatfeldolgozás’ (technical manipulation of data), used in the Hungarian version of that directive, in particular in Articles 4(1)(a) and 28(6) thereof, must be understood as having the same meaning as that of the term ‘adatkezelés’ (data processing).

38.

**COURT OF JUSTICE OF THE EUROPEAN UNION 13 May 2014, Case C-131/12.
Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD)
and Mario Costeja González.**

Judgment

1. This request for a preliminary ruling concerns the interpretation of Article 2(b) and (d), Article 4(1)(a) and (c), Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and of Article 8 of the Charter of Fundamental Rights of the European Union (‘the Charter’).
2. This request for a preliminary ruling concerns the interpretation of Article 2(b) and (d), Article 4(1)(a) and (c), Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and of Article 8 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

[...]

The dispute in the main proceedings and the questions referred for a preliminary ruling

14. On 5 March 2010, Mr Costeja González, a Spanish national resident in Spain, lodged with the AEPD a complaint against La Vanguardia Ediciones SL, which publishes a daily newspaper with a large circulation, in particular in Catalonia (Spain) (‘La Vanguardia’), and against Google Spain and Google Inc. The complaint was based on the fact that, when an internet user entered Mr Costeja González’s name in the search engine of the Google group (‘Google Search’), he would obtain links to two pages of

- La Vanguardia's newspaper, of 19 January and 9 March 1998 respectively, on which an announcement mentioning Mr Costeja González's name appeared for a real-estate auction connected with attachment proceedings for the recovery of social security debts.
15. By that complaint, Mr Costeja González requested, first, that La Vanguardia be required either to remove or alter those pages so that the personal data relating to him no longer appeared or to use certain tools made available by search engines in order to protect the data. Second, he requested that Google Spain or Google Inc. be required to remove or conceal the personal data relating to him so that they ceased to be included in the search results and no longer appeared in the links to La Vanguardia. Mr Costeja González stated in this context that the attachment proceedings concerning him had been fully resolved for a number of years and that reference to them was now entirely irrelevant.
 16. By decision of 30 July 2010, the AEPD rejected the complaint in so far as it related to La Vanguardia, taking the view that the publication by it of the information in question was legally justified as it took place upon order of the Ministry of Labour and Social Affairs and was intended to give maximum publicity to the auction in order to secure as many bidders as possible.
 17. On the other hand, the complaint was upheld in so far as it was directed against Google Spain and Google Inc. The AEPD considered in this regard that operators of search engines are subject to data protection legislation given that they carry out data processing for which they are responsible and act as intermediaries in the information society. The AEPD took the view that it has the power to require the withdrawal of data and the prohibition of access to certain data by the operators of search engines when it considers that the locating and dissemination of the data are liable to compromise the fundamental right to data protection and the dignity of persons in the broad sense, and this would also encompass the mere wish of the person concerned that such data not be known to third parties. The AEPD considered that that obligation may be owed directly by operators of search engines, without it being necessary to erase the data or information from the website where they appear, including when retention of the information on that site is justified by a statutory provision.
 18. Google Spain and Google Inc. brought separate actions against that decision before the Audiencia Nacional (National High Court). The Audiencia Nacional joined the actions.
 19. That court states in the order for reference that the actions raise the question of what obligations are owed by operators of search engines to protect personal data of persons concerned who do not wish that certain information, which is published on third parties' websites and contains personal data relating to them that enable that information to be linked to them, be located, indexed and made available to internet users indefinitely. The answer to that question depends on the way in which Directive 95/46 must be interpreted in the context of these technologies, which appeared after the directive's publication.

[...]

Consideration of the questions referred

[...]

88. In the light of all the foregoing considerations, the answer to Question 2(c) and (d) is that Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, in order to comply with the rights laid down in those provisions and in so far as the conditions laid down by those provisions are in fact satisfied, the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.

89. By Question 3, the referring court asks, in essence, whether Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as enabling the data subject to require the operator of a search engine to remove from the list of results displayed following a search made on the basis of his name links to web pages published lawfully by third parties and containing true information relating to him, on the ground that that information may be prejudicial to him or that he wishes it to be 'forgotten' after a certain time.

[...]

92. As regards Article 12(b) of Directive 95/46, the application of which is subject to the condition that the processing of personal data be incompatible with the directive, it should be recalled that, as has been noted in paragraph 72 of the present judgment, such incompatibility may result not only from the fact that such data are inaccurate but, in particular, also from the fact that they are inadequate, irrelevant or excessive in relation to the purposes of the processing, that they are not kept up to date, or that they are kept for longer than is necessary unless they are required to be kept for historical, statistical or scientific purposes.

93. It follows from those requirements, laid down in Article 6(1)(c) to (e) of Directive 95/46, that even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.

[...]

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 2(b) and (d) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data are to be interpreted as meaning that, first, the activity of a search engine consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference must be classified as 'processing of personal data' within the meaning of Article 2(b) when that information contains personal data and, second, the operator of the search engine must be regarded as the 'controller' in respect of that processing, within the meaning of Article 2(d).**
2. **Article 4(1)(a) of Directive 95/46 is to be interpreted as meaning that processing**

of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State.

3. Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, in order to comply with the rights laid down in those provisions and in so far as the conditions laid down by those provisions are in fact satisfied, the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.
4. Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, when appraising the conditions for the application of those provisions, it should *inter alia* be examined whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name, without it being necessary in order to find such a right that the inclusion of the information in question in that list causes prejudice to the data subject. As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.

39.

COURT OF JUSTICE OF THE EUROPEAN UNION 19 October 2016, Case C-582/14. Patrick Breyer v. Bundesrepublik Deutschland.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 2(a) and 7(f) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
- 2 The request has been made in proceedings between Mr. Patrick Breyer and the

Bundesrepublik Deutschland (Federal Republic of Germany) concerning the registration and storage by the latter of the internet protocol address ('IP address') allocated to Mr. Breyer when he accessed several internet sites run by German Federal institutions.

[...]

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 13 Mr Breyer has accessed several websites operated by German Federal institutions. On the websites, which are accessible to the public, those institutions provide topical information.
- 14 With the aim of preventing attacks and making it possible to prosecute 'pirates', most of those websites store information on all access operations in logfiles. The information retained in the logfiles after those sites have been accessed include the name of the web page or file to which access was sought, the terms entered in the search fields, the time of access, the quantity of data transferred, an indication of whether access was successful, and the IP address of the computer from which access was sought.
- 15 IP addresses are series of digits assigned to networked computers to facilitate their communication over the internet. When a website is accessed, the IP address of the computer seeking access is communicated to the server on which the website consulted is stored. That connection is necessary so that the data accessed maybe transferred to the correct recipient.
- 16 Furthermore, it is clear from the order for the reference and the documents before the Court that internet service providers allocate to the computers of internet users either a 'static' IP address or a 'dynamic' IP address, that is to say an IP address which changes each time there is a new connection to the internet. Unlike static IP addresses, dynamic IP addresses do not enable a link to be established, through files accessible to the public, between a given computer and the physical connection to the network used by the internet service provider.
- 17 Mr Breyer brought an action before the German administrative courts seeking an order restraining the Federal Republic of Germany from storing, or arranging for third parties to store, after consultation of the websites accessible to the public run by the German Federal institutions' online media services, the IP address of the applicant's host system except in so far as its storage is unnecessary in order to restore the availability of those media in the event of a fault occurring.
- 18 Since Mr Breyer's action at first instance was dismissed, he brought an appeal against that decision.
- 19 The court of appeal varied that decision in part. It ordered the Federal Republic of Germany to refrain from storing or arranging for third parties to store, at the end of each consultation period, the IP address of the host system from which Mr Breyer sought access, which was transmitted when he consulted publicly accessible websites of the German Federal institutions' online media, where that address is stored together with the date of the consultation period to which it relates and where Mr Breyer has revealed his identity during that use, including in the form of an electronic address mentioning his identity, except in so far as that storage is not necessary in order to restore the dissemination of those media in the event of a fault occurring.²⁰ Accord-

ing to the court of appeal, a dynamic IP address, together with the date on which the website was accessed to which that address relates constitutes, if the user of the website concerned has revealed his identity during that consultation period, personal data, because the operator of that website is able to identify the user by linking his name to his computer's IP address.

21 However, the court of appeal held that Mr. Breyer's action could not be upheld in other situations. If Mr. Breyer does not reveal his identity during a consultation period, only the internet service provider could connect the IP address to an identified subscriber. However, in the hands of the Federal Republic of Germany, in its capacity as provider of online media services, the IP address is not personal data, even in combination with the date of the consultation period to which it relates, because the user of the websites concerned is not identifiable by that Member State.

22 Mr Breyer and the Federal Republic of Germany each brought an appeal on a point of law before the Bundesgerichtshof (Federal Court of Justice, Germany) against the decision of the appeal court [...].

23 The referring court states that the dynamic IP addresses of Mr. Breyer's computer stored by the Federal Republic of Germany, acting in its capacity as an online media services provider, are, at least in the context of other data stored in daily files, specific data on Mr. Breyer's factual circumstances, given that they provide information relating to his use of certain websites or certain internet files on certain dates.

24 Nevertheless, the data stored does not enable Mr. Breyer to be directly identified. The operators of the websites at issue in the main proceedings can identify Mr. Breyer only if the information relating to his identity is communicated to them by his internet service provider. The classification of those data as 'personal data' thus depends on whether Mr. Breyer is identifiable.

[...]

26 If the dynamic IP addresses of Mr. Breyer's computer, together with the date of the relevant consultation period, were to be considered as constituting personal data, the referring court asks whether the storage of those IP addresses at the end of that consultation period is authorised by Article 7(f) of that directive.

27 In that connection, the Bundesgerichtshof (Federal Court of Justice) states, first, that under Paragraph 15(1) of the TMG, online media services providers may collect and use the personal data of a user only to the extent that that is necessary to facilitate and charge for the use of those media. Second, the referring court states that, according to the Federal Republic of Germany, storage of those data is necessary to guarantee the security and continued proper functioning of the online media services that it makes accessible to the public, in particular, enabling cyber attacks known as 'denial-of-service' attacks, which aim to paralyse the functioning of the sites by the targeted and coordinated saturation of certain web servers with huge numbers of requests, to be identified and combated.

[...]

Consideration of the questions referred for a preliminary ruling

31 The referring court asks essentially whether Article 2(a) of Directive 95/46 must be interpreted as meaning that a dynamic IP address registered by an online media services provider when a person accesses a website that that provider makes accessible to the

public constitutes, with regard to that service provider, personal data within the meaning of that provision, where, only a third party, in the present case the internet service provider, has the additional data necessary to identify him.

[...]

40 In that connection, it is clear from the wording of Article 2(a) of Directive 95/46 that an identifiable person is one who can be identified, directly or indirectly.

[...]

47 Although the referring court states in its order for reference that German law does not allow the internet service provider to transmit directly to the online media services provider the additional data necessary for the identification of the data subject, it seems however, subject to verifications to be made in that regard by the referring court that, in particular, in the event of cyber attacks legal channels exist so that the online media services provider is able to contact the competent authority, so that the latter can take the steps necessary to obtain that information from the internet service provider and to bring criminal proceedings.

48 Thus, it appears that the online media services provider has the means which may likely reasonably be used in order to identify the data subject, with the assistance of other persons, namely the competent authority and the internet service provider, on the basis of the IP addresses stored.

49 Having regard to all the foregoing considerations Article 2(a) of Directive 95/46 must be interpreted as meaning that a dynamic IP address registered by an online media services provider when a person accesses a website that the provider makes accessible to the public constitutes personal data within the meaning of that provision, in relation to that provider, where the latter has the legal means which enable it to identify the data subject with additional data which the internet service provider has about that person.

50 The referring court asks essentially whether Article 7(f) of Directive 95/46 must be interpreted as precluding the legislation of a Member State under which an online media services provider may collect and use a user's personal data without his consent only to the extent necessary in order to facilitate, and charge for, the specific use of those services by the user concerned, and under which the purpose of ensuring the general operability of those services cannot justify use of the data beyond the end of the particular use of them.

[...]

56 Pursuant to Article 7(f) of Directive 95/46, personal data may be processed if 'processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection under Article 1(1)' of the Directive.

57 The Court has held that Article 7 of Directive 95/46 sets out an exhaustive and restrictive list of cases in which the processing of personal data can be regarded as being lawful and that the Member States cannot add new principles relating to the lawfulness of the processing of personal data or impose additional requirements that have the effect of amending the scope of one of the six principles provided for in that article [...].

[...]

On those grounds, the Court (Second Chamber) hereby rules:

1. Article 2(a) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data must be interpreted as meaning that a dynamic IP address registered by an online media services provider when a person accesses a website that the provider makes accessible to the public constitutes personal data within the meaning of that provision, in relation to that provider, where the latter has the legal means which enable it to identify the data subject with additional data which the internet service provider has about that person.
2. Article 7(f) of Directive 95/46 must be interpreted as precluding the legislation of a Member State, pursuant to which an online media services provider may collect and use personal data relating to a user of those services, without his consent, only in so far as that the collection and use of that data are necessary to facilitate and charge for the specific use of those services by that user, even though the objective aiming to ensure the general operability of those services may justify the use of those data after a consultation period of those websites.

40.

EUROPEAN COURT OF HUMAN RIGHTS 7 February 2012.

Von Hannover v. Germany (no. 2).

Procedure

1. The case originated in two applications (nos. 40660/08 and 60641/08) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Monegasque national, Princess Caroline von Hannover, and a German national, Prince Ernst August von Hannover (“the applicants”), on 22 August and 15 December 2008 respectively.
2. The applicants alleged that the refusal by the German courts to grant an injunction against any further publication of photos of them infringed their right to respect for their private life as guaranteed by Article 8 of the Convention.

[...]

The facts

I. The circumstances of the case

A. Background to the cases

11. Since the early 1990s the first applicant has been trying – often through the courts – to prevent the publication of photos about her private life in the press.
12. Two series of photos, published in 1993 and 1997 respectively in three German magazines and showing the first applicant with the actor Vincent Lindon or her husband, had been the subject of three sets of proceedings in the German courts and, in particular, leading judgments of the Federal Court of Justice of 19 December 1995 and of the Federal Constitutional Court of 15 December 1999 dismissing the first applicant’s claims.
13. Those proceedings were the subject of the *Von Hannover v. Germany* judgment of 24

June 2004 (no. 59320/00, ECHR 2004VI) in which the Court held that the court decisions had infringed the first applicant's right to respect for her private life, a right guaranteed by Article 8 of the Convention.

[...]

B. The photos in issue

15. Relying on the Court's judgment in the first applicant's case, the applicants subsequently brought several sets of proceedings in the civil courts seeking an injunction against any further publication of photos that had appeared in German magazines.

1. *The photos published in the magazine Frau im Spiegel*

16. The first three photos were published by the publishing company Ehrlich & Sohn GmbH & Co. KG in the magazine *Frau im Spiegel*.

(a) The first photo

17. The first photo, which appeared in issue no. 9/02 of 20 February 2002, shows the applicants out for a walk during their skiing holiday in St Moritz [...].

A photo of Prince Rainier with his daughter Princess Stéphanie and a photo of Prince Albert of Monaco taken during the Olympic Games in Salt Lake City appeared on the same page.

(b) The second photo

18. The second photo shows the applicants out for a walk in St Moritz [...].

(c) The third photo

19. The third photo shows the applicants in a chair lift in Zürs am Arlberg during their skiing holiday [...].

2. *The photo published in the magazine Frau Aktuell*

20. The publishing company WZV Westdeutsche Zeitschriftenverlag GmbH & Co. KG published in issue no. 9/02 of 20 February 2002 of the magazine *Frau Aktuell* the same photo (or a virtually identical one) as the one that had appeared the same day in the magazine *Frau im Spiegel* no. 9/02.

[...]

The law

[...]

II. Alleged violation of article 8 of the Convention

73. The applicants complained of the refusal by the German courts to grant an injunction against any further publication of the photo that had appeared on 20 February 2002 in the magazines *Frau im Spiegel*, issue no. 9/02, and *Frau aktuell*, issue no. 9/02. They alleged that there had been a violation of their right to respect for their private life, as guaranteed by Article 8 of the Convention, [...].

A. Admissibility

75. The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It notes further that no other ground for declaring it inadmissible has been established and that it must therefore be declared admissible.

[...]

3. *The Court's assessment*

[...]

(d) Conclusion

124. The Court observes that, in accordance with their case-law, the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, they attached fundamental importance to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken.
125. The Court also observes that the national courts explicitly took account of the Court's relevant case-law. Whilst the Federal Court of Justice had changed its approach following the *Von Hannover* judgment, the Federal Constitutional Court, for its part, had not only confirmed that approach, but also undertaken a detailed analysis of the Court's case-law in response to the applicants' complaints that the Federal Court of Justice had disregarded the Convention and the Court's case-law.
126. In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision.

For these reasons, the Court unanimously

1. *Disjoins* the application in the case of *Axel Springer AG v. Germany* (no. 39954/08) from the present applications;
2. *Declares* the present applications admissible;
3. *Holds* that there has been no violation of Article 8 of the Convention.

41.

EUROPEAN COURT OF HUMAN RIGHTS 7 February 2012.

Axel Springer AG v. Germany.

Procedure

1. The case originated in an application (no. 39954/08) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a public limited company incorporated under German law, Axel Springer AG ("the applicant company"), on 18 August 2008.
2. Relying on Article 10, the applicant company complained about the injunction imposed on it against reporting on the arrest and conviction of a well-known actor for a drug-related offence.
3. The application was initially allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court – "the Rules"). On 13 November 2008 a Chamber of that Section decided to give notice of the application to the Government. On 30 March 2010 the Chamber, after deciding to join the present application to the applications *Von Hannover v. Germany* (nos. 40660/08 and 60641/08) concerning the refusal by the German courts to grant an injunction against any further publication of two photos, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

[...]

The facts**I. The circumstances of the case**

9. The applicant is a public limited company whose registered office is in Hamburg. It publishes the *Bild*, a daily newspaper with a large circulation. The present case concerns the publication by the newspaper of two articles about X, a well-known television actor. Between May 1998 and November 2003 X had played the part of Police Superintendent Y, the hero of a television series broadcast on a private television channel in the evenings, until 2005 [...].
10. On 14 June 2003 the applicant company revealed that X had been convicted of unlawful possession of drugs.

[...]

A. X's arrest

11. At approximately 11 p.m. on 23 September 2004 X was arrested at the Munich beer festival (*Oktoberfest*) for possession of cocaine. In a sworn statement (*eidesstattliche Versicherung*) a journalist from the applicant company declared that she had asked the police present at the scene whether X had been arrested and, if so, on what grounds. The police had confirmed that X had been arrested in the Käfer tent in possession of cocaine, without giving any further details.
12. According to that statement, the journalist had then contacted the public prosecutor, W., from the public prosecutor's office of Munich Regional Court I, in charge of relations with the press, and had asked him for information. W. had confirmed that X had been arrested in the Käfer tent in possession of cocaine [...].

B. The articles in issue**1. The first article**

13. In its 29 September 2004 edition, the applicant company's daily newspaper, the *Bild*, published the following headline in large type on its front page:
"Cocaine! Superintendent Y caught at the Munich beer festival." [...]
The following headline appeared on page twelve of the daily:
"TV star X caught in possession of cocaine. A bretzel (*Brezn*), a beer mug [containing a litre of beer – *Maß*] and a line of coke (*Koks*)." [...]

The article was accompanied by three photos of X, one on the first page and the other two on page twelve.

[...]

2. The second article

15. In its 7 July 2005 edition the *Bild* printed the following headline on its inside pages:
"TV series Superintendent X confesses in court to having taken cocaine. He is fined 18,000 euros!" [...]

The article was accompanied by a photo of X.

[...]

II. Alleged violation of article 10 of the Convention

53. The applicant company complained about the injunction imposed on it against reporting on the arrest and conviction of X. It relied on Article 10 of the Convention, [...].

A. Admissibility

54. The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 a) of the Convention. It notes further that no other ground for

declaring it inadmissible has been established and that it must therefore be declared admissible.

[...]

3. *The Court's assessment*

75. The parties agreed that the judicial decisions given in the present case constituted an interference with the applicant company's right to freedom of expression as guaranteed by Article 10 of the Convention.
76. Such interference contravenes the Convention if it does not satisfy the requirements of paragraph 2 of Article 10. It therefore falls to be determined whether the interference was "prescribed by law", had an aim or aims that is or are legitimate under Article 10 § 2 and was "necessary in a democratic society" for the aforesaid aim or aims.
77. It is common ground between the parties that the interference was prescribed by Articles 823 § 1 and 1004 § 1 of the Civil Code, read in the light of the right to protection of personality rights. They also agree that it pursued a legitimate aim – namely, the protection of the reputation or rights of others – within the meaning of Article 10 § 2 of the Convention, which, according to the Court's case-law, can encompass the right to respect for private life within the meaning of Article 8. The parties disagree, however, as to whether the interference was "necessary in a democratic society".

[...]

(c) **Conclusion**

110. In conclusion, the grounds advanced by the respondent State, although relevant, are not sufficient to establish that the interference complained of was necessary in a democratic society. Despite the margin of appreciation enjoyed by the Contracting States, the Court considers that there is no reasonable relationship of proportionality between, on the one hand, the restrictions imposed by the national courts on the applicant company's right to freedom of expression and, on the other hand, the legitimate aim pursued.
111. Accordingly, there has been a violation of Article 10 of the Convention.

III. Application of article 41 of the Convention

112. Article 41 of the Convention [...]

For these reasons, the Court

1. *Disjoins*, unanimously, the applications in the case of *Von Hannover v. Germany* (nos. 40660/08 and 60641/08) from the present application;
2. *Declares*, unanimously, the application admissible;
3. *Holds*, by twelve votes to five, that there has been a violation of Article 10 of the Convention;
4. *Holds*, by twelve votes to five,
 - (a) that the respondent State is to pay the applicant company, within three months, the following amounts:
 - (i) EUR 17,734.28 (seventeen thousand seven hundred and thirtyfour euros and twenty-eight centimes), plus any tax that may be chargeable, in respect of pecuniary damage;
 - (ii) EUR 32,522.80 (thirty-two thousand five hundred and twentytwo euros and eighty centimes), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple in-

terest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicant company's claim in respect of just satisfaction.

42.

EUROPEAN COURT OF HUMAN RIGHTS 25 September 2018.

Denisov v. Ukraine.

Procedure

1. The case originated in an application (no. 76639/11) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Ukrainian national, Mr Anatoliy Oleksiyovych Denisov ("the applicant"), on 8 December 2011.

[...]

3. The applicant alleged, in particular, that his dismissal from the position of president of a court of appeal had not been carried out in conformity with Article 6 § 1 of the Convention and constituted an unlawful and disproportionate interference with his private life, contrary to Article 8 of the Convention.

[...]

7. The applicant and the Government each filed written observations on the admissibility and merits of the application. In addition, third-party comments were received from the International Commission of Jurists, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

[...]

The facts

I. The circumstances of the case

10. The applicant was born on 6 July 1948 and lives in Kyiv.
11. The applicant's judicial career started in 1976, when he was first elected to the post of judge of a district court. During his judicial career the applicant held the position of president in several courts.
12. On 22 December 2005 the applicant was elected to the post of judge of the Kyiv Administrative Court of Appeal by the Ukrainian Parliament.
13. On 10 November 2006 the applicant was appointed, by the President of Ukraine, as acting president of the Kyiv Administrative Court of Appeal. On 6 February 2009 he was appointed president of that court by the Council of Judges of Ukraine (a body of judicial self-governance). He was appointed for a five-year term, it being understood that he would reach the retirement age in July 2013, before the end of that term.

[...]

The law

I. Alleged violation of article 6 § 1 of the convention as regards the principles of an independent and impartial tribunal

38. The applicant complained under Article 6 § 1 of the Convention that the proceedings

before the HCJ and the HAC concerning his removal from the position of president of the Kyiv Administrative Court of Appeal had not been compatible with the requirements of independence and impartiality. He complained, in addition, that the HAC had not provided a sufficient review of his case, thereby impairing his right of access to a court.

[...]

A. Admissibility

[...]

3. The Court's assessment

43. It is common ground between the parties that Article 6 § 1 is not applicable under its criminal limb. Indeed, the proceedings at issue did not relate to the determination of a criminal charge, and for this reason the criminal limb does not apply [...].

(a) The general requirements for the applicability of the civil limb of Article 6 § 1

[...]

(ii) Application of these principles to the present case

47. Applying these principles to the present case, the Court observes, first of all, that there was a “dispute” concerning the exercise of the right to hold the position of president of a court. As regards the issue of whether such a “right” could be said, at least on arguable grounds, to be recognised in domestic law, it has to be noted that the applicant was appointed to the position of president of the Kyiv Administrative Court of Appeal for a five-year term and his appointment for such tenure was not disputed at the domestic level. The applicant was provided with specific remuneration for his service as president of the court and his dismissal from this position was subject to certain substantive and procedural conditions. In the light of the above, and given that there was no dispute between the parties as to the existence of the right in question, there is no ground for considering that the applicant’s right to serve in that administrative position was not recognised under domestic law. Despite his appointment for a five-year period, the applicant’s right to hold the position of president of the court was limited in time by the fact that he was due to reach the retirement age in 2013, before the expiry of that period [...].

48. The Court further observes that the dispute was “genuine” as the parties differed as to whether the applicant could continue to hold his administrative position. Moreover, the dispute was “serious”, having regard to the role of the president of a court [...] and to the direct pecuniary consequences for the applicant resulting from his removal from that administrative position. In that regard the Government’s argument that the reduction in salary was insignificant for the applicant is not convincing. The applicant’s calculation of pecuniary damage in his domestic claim was limited only to the short period, which had elapsed at that stage, because the principal purpose of the claim was to secure his reinstatement in the position of president of the court. However, the pecuniary consequences were not insignificant from the perspective of the whole period which remained for the applicant to serve as president.

49. Lastly, the dispute was “directly decisive” for the right at issue because it resulted in the premature termination of the applicant’s exercise of that right.

(b) As to the “civil” nature of the right in dispute

50. The Government contested the applicability of Article 6, arguing that the dispute was

in the area of public law and that, consequently, there was no “civil” right at issue.

[...]

(ii) *Application of these principles to the present case*

53. In the light of the above principles, the Government’s argument that the civil limb of Article 6 § 1 is not applicable for the sole reason that the applicant’s dispute falls within the field of public law and there is no “civil” right at stake is not convincing. As shown above, a public-law dispute may bring the civil limb into play if the private-law aspects predominate over the public-law ones in view of the direct consequences for a civil pecuniary or non-pecuniary right. Furthermore, the Court follows the criteria set out in *Vilho Eskelinen and Others* and applies a general presumption that such direct consequences for civil rights exist in “ordinary labour disputes” involving members of the public service, including judges [...].
54. Indeed, the present case concerned an “ordinary labour dispute” given that it essentially affected (i) the scope of the work which the applicant was required to perform as an employee and (ii) his remuneration as part of his employment relationship [...]. Having regard to these two aspects, there is no reason to conclude that there was no “civil” element in the applicant’s dispute or that such an element was insufficiently significant to bring the “civil” limb of Article 6 into play.
55. Applying the *Vilho Eskelinen* test further, it is not disputed that domestic law provides for access to a court in the case of claims concerning dismissal from administrative positions in the judiciary. Accordingly, Article 6 applies under its civil head.
56. It follows that the Government’s preliminary objection as to the applicability of Article 6 § 1 of the Convention must be dismissed.
57. The Court further notes that this complaint is not manifestly illfounded within the meaning of Article 35 § 3 (a) of the Convention. It is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

[...]

2. The Court’s assessment

[...]

(v) Conclusion

81. Accordingly, the HCJ failed to ensure an independent and impartial examination of the applicant’s case, and the subsequent review of his case by the HAC did not put those defects right.
82. There has therefore been a violation of Article 6 § 1 of the Convention.

II. Alleged violation of article 8 of the Convention

83. The applicant complained under Article 8 of the Convention that his right to respect for his private life had been violated by his dismissal from the position of president of the Kyiv Administrative Court of Appeal.

[...]

C. The Court’s assessment

Admissibility

(a) Preliminary remarks

92. The Court notes that the present case concerns an employment-related dispute between an individual and a State. The decision to dismiss the applicant was taken by a State

authority. In the assessment of whether or not a private-life issue under Article 8 of the Convention is raised in such a case, there is a strong tie between the questions of applicability and the merits [...].

[...]

(v) *Conclusions: the scope of Article 8 in employment-related disputes*

115. The Court concludes from the above case-law that employment-related disputes are not *per se* excluded from the scope of “private life” within the meaning of Article 8 of the Convention. There are some typical aspects of private life which may be affected in such disputes by dismissal, demotion, non-admission to a profession or other similarly unfavourable measures. These aspects include (i) the applicant’s “inner circle”, (ii) the applicant’s opportunity to establish and develop relationships with others, and (iii) the applicant’s social and professional reputation. There are two ways in which a private-life issue would usually arise in such a dispute: either because of the underlying reasons for the impugned measure (in that event the Court employs the reason-based approach) or – in certain cases – because of the consequences for private life (in that event the Court employs the consequence-based approach).
116. If the consequence-based approach is at stake, the threshold of severity with respect to all the above-mentioned aspects assumes crucial importance. It is for the applicant to show convincingly that the threshold was attained in his or her case. The applicant has to present evidence substantiating consequences of the impugned measure. The Court will only accept that Article 8 is applicable where these consequences are very serious and affect his or her private life to a very significant degree.

[...]

(c) **Application of the general principles to the present case**

[...]

127. Next, the Court takes note of the applicant’s argument that, after he had occupied positions as president of a court over a period of twentyfive years, the position of president of the Kyiv Administrative Court of Appeal had represented the apex of his legal career and his dismissal had undermined his peers’ opinion of his competence. However, the applicant did not specify how this alleged loss of esteem, even assuming that it affected the core of his professional reputation, had caused him serious prejudice in his professional environment. In any event, the Court does not have sufficient material to conclude that the alleged loss of esteem reached the high degree of seriousness required by Article 8 of the Convention, as discussed in paragraphs 116 and 117 above.
128. In particular, the applicant did not substantiate how his dismissal from his position had affected his further career as a judge. The Court notes that the applicant’s dismissal did not preclude his reappointment, even though this latter consideration may have been purely theoretical, because of his advanced age. In any event, the measure did not have a significant effect as to its duration because it was limited by the applicant’s remaining period of service in the judiciary before he was due to reach the retirement age, about two years later [...].
129. As regards social reputation in general, the criticism by the authorities did not affect a wider ethical aspect of the applicant’s personality and character. Even though the applicant’s dismissal was based on the findings of breaches of official duties in the administration of justice, it did not contain any accusation of intentional misconduct or

criminal behaviour. The applicant's moral values were not called into question and no reproaches of this nature can be identified in the impugned decisions

[...]

133. Accordingly, measuring the applicant's subjective perceptions against the objective background and assessing the material and nonmaterial impact of his dismissal on the basis of the evidence presented before the Court, it has to be concluded that the dismissal had limited negative effects on the applicant's private life and did not cross the threshold of seriousness for an issue to be raised under Article 8 of the Convention.
134. Given that neither the reasons for the applicant's dismissal were linked to nor that the consequences of that measure affected his "private life" within the meaning of Article 8, the Court finds that this Article is not applicable. The Government's objection in this respect should therefore be upheld and the complaint must be dismissed as incompatible *ratione materiae* with the Convention pursuant to Article 35 §§ 3 (a) and 4. In the light of this conclusion, it is not necessary to rule on the Government's second objection, based on Article 35 § 3 (b) of the Convention.

III. Alleged violations of article 18 of the Convention and article 1 of protocol no. 1

[...]

136. The Court notes that the applicant's complaint under Article 18 of the Convention was raised for the first time in 2017, in the applicant's submissions to the Grand Chamber. The complaint was therefore lodged outside the six-month time-limit and must be declared inadmissible in accordance with Article 35 §§ 1 and 4 of the Convention.
137. As to the applicant's complaint under Article 1 of Protocol No. 1, this Article applies only to a person's existing possessions and does not create a right to acquire property [...]. Future income cannot be considered to constitute "possessions" unless it has already been earned or is definitely payable [...]. The applicant's dismissal from the post of court president precluded him from receiving a higher salary in that position and applying for higher retirement benefits at a later stage. However, this additional income has not actually been earned. Neither can it be argued that it was definitely payable. In these circumstances, this complaint is incompatible *ratione materiae* with the provisions of the Convention and the Protocols thereto and must be rejected in accordance with Article 35 §§ 3 (a) and 4.

[...]

For these reasons, the Court

1. *Declares* admissible, unanimously, the complaint under Article 6 § 1 of the Convention as regards the principles of an independent and impartial tribunal;
2. *Declares* inadmissible, by a majority, the complaint under Article 8 of the Convention;
3. *Declares* inadmissible, unanimously, the complaints under Article 18 of the Convention and Article 1 of Protocol No. 1 to the Convention;
4. *Holds*, unanimously, that there has been a violation of Article 6 § 1 of the Convention as regards the principles of an independent and impartial tribunal;
5. *Holds*, unanimously, that it is not necessary to examine the admissibility and merits of the remaining complaints;
6. *Holds*, unanimously,
 - (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applica-

- ble at the date of settlement:
- (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, this amount to be paid into the bank account designated by the applicant's representatives, this amount to be paid into the bank account designated by the applicant's representatives;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
7. *Dismisses*, by sixteen votes to one, the remainder of the applicant's claim for just satisfaction.

43.

EUROPEAN COURT OF HUMAN RIGHTS 24 February 1998.**Botta v. Italy.****Procedure**

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 4 December 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 21439/93) against the Italian Republic lodged with the Commission under Article 25 by an Italian national, Mr Maurizio Botta, on 30 July 1992.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Italy recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 8 and 14 of the Convention.

[...]

As to the facts**I. The circumstances of the case**

8. Mr. Botta, who was born in 1939 and lives in Trezzano sul Naviglio, is physically disabled.
9. In August 1990 he went on holiday to the seaside resort of Lido degli Estensi, near to the town of Comacchio (Ferrara province) with a friend, who is also physically disabled. There he discovered that the bathing establishments were not equipped with the facilities needed to enable disabled people to gain access to the beach and the sea (particularly special access ramps and specially equipped lavatories and washrooms), in breach of Italian legislation, which required a clause obliging private beaches to facilitate the access of disabled people to be added to the relevant concession contracts and made provision for compliance to be enforced by the competent local authorities. According to Comacchio District Council, the compulsory clause was, however, only added to concession contracts signed after the adoption of the provisions concerned.
10. The applicant asserts that he was for a time able to gain access in his vehicle to certain public beaches without facilities, but was later prevented from doing so because a barri-

er had been erected across the entrance by order of the Ravenna harbour-master.

11. On 26 March 1991 the applicant sent a letter to the mayor of Comacchio asking him to take the necessary measures to remedy the shortcomings noted the previous year. No reply was received.
 12. In August 1991 Mr. Botta returned to Lido degli Estensi, where he found that none of the measures requested had been implemented, although they were mandatory. He was therefore obliged to ask the local coastal authority for permission to drive his vehicle onto a public beach without facilities [...].
- In an undated memorandum the coastal authority gave him permission to drive onto a public beach without facilities in his vehicle for a limited period expiring on 31 August 1991.
13. [...] On 5 May 1992 the public prosecutor's office submitted that the proceedings should be discontinued.
 14. In an order of 12 May 1992 the judge responsible for preliminary investigations (*giudice per le indagini preliminari*) attached to the Ferrara District Court ordered the discontinuation of the proceedings on the ground that, having completed his inquiry, he had not found any evidence that the offence defined in Article 328 of the Criminal Code had been committed, given that the beaches' concession contracts all contained a clause which obliged bathing establishments to make the beaches accessible to disabled people and to install at least one changing cubicle and one lavatory for their use [...].
- On 16 September 1992 he was informed by telephone that the proceedings relating to his complaint had been discontinued.
17. According to information supplied by the applicant and not contradicted by the Government, although some of the private beaches in Lido degli Estensi have subsequently installed changing cubicles and lavatories for disabled people, in July 1997 none of them had yet built a ramp designed to permit disabled people to gain access to the beach and the sea. On 29 August 1997 Comacchio District Council informed the registry of the Court of the adoption, on 11 August 1997, of the resort's new improvements plan, under which compliance with the law on bathing establishments had to be achieved by 30 April 1999 at the latest.

[...]

As to the law

I. Alleged violation of article 8 of the Convention

[...]

28. In the Commission's view, the sphere of human relations at issue in the present case concerned a particularly broad range of social relations. The rights asserted by the applicant were social in character, concerning as they did participation by disabled people in recreational and leisure activities associated with beaches, the scope of which went beyond the concept of legal obligation inherent in the idea of "respect" for "private life" contained in paragraph 1 of Article 8. [...] As States had a wide margin of appreciation regarding the choice of the means to be employed to discharge the obligations set forth in the relevant legislation, the right asserted by the applicant fell outside the scope of Article 8.

In any event, the social nature of the right concerned required more flexible protection machinery, such as that set up under the European Social Charter. Article 8 was ac-

cordingly inapplicable.

[...]

31. The Court must determine whether the right asserted by Mr. Botta falls within the scope of the concept of “respect” for “private life” set forth in Article 8 of the Convention.
32. Private life, in the Court’s view, includes a person’s physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings [...].
33. [...] While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves [...]. However, the concept of respect is not precisely defined. In order to determine whether such obligations exist, regard must be had to the fair balance that has to be struck between the general interest and the interests of the individual, while the State has, in any event, a margin of appreciation.
34. The Court has held that a State has obligations of this type where it has found a direct and immediate link between the measures sought by an applicant and the latter’s private and/or family life [...].
35. In the instant case, however, the right asserted by Mr. Botta, namely the right to gain access to the beach and the sea at a place distant from his normal place of residence during his holidays, concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant’s private life.

Accordingly, Article 8 is not applicable.

II. Alleged violation of article 14 of the Convention taken in conjunction with article 8

36. Article 14 of the Convention [...]
37. Relying on Article 14 taken in conjunction with Article 8, the applicant asserted that he was the victim of discrimination against him as a disabled person in the exercise of fundamental rights secured to all. [If the concept of discrimination covered all cases in which an individual was treated less favourably than another individual, without proper justification, then a disabled person suffered different, or differentiated, treatment, without objective or reasonable justification, in relation to people who were not disabled [...]. Moreover, it was the Court’s practice to consider the particular circumstances of a given case in order to decide whether there had been any discriminatory treatment; it did not assess the impugned domestic rules in the abstract but rather the manner in which they had been applied to the person concerned.
38. The Government and the Commission rejected this argument.
39. According to the Court’s case-law, “Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to ‘the enjoyment of the rights and freedoms’ safeguarded by

those provisions. Although the application of Article 14 does not presuppose a breach of one or more of those provisions – and to this extent it is autonomous –, there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter” [...].

As the Court has concluded that Article 8 is not applicable, Article 14 cannot apply to the present case.

For these reasons, the Court unanimously

1. *Holds* that Article 8 of the Convention is not applicable;
2. *Holds* that Article 14 of the Convention is not applicable.

44.

EUROPEAN COURT OF HUMAN RIGHTS 25 June 2019.

Nicolae Virgiliu Tanase v. Romania.

Procedure

1. The case originated in an application (no. 41720/13) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Romanian national, Mr. Nicolae Virgiliu Tanase (“the applicant”), on 21 June 2013.

[...]

3. Relying on Articles 3, 6 § 1 and 13 of the Convention the applicant alleged that the investigation carried out by the domestic authorities into the circumstances of his car accident was inadequate and excessively lengthy. He also alleged that the domestic authorities had failed to adequately safeguard his right to a court and to an effective remedy with regard to his claims. Moreover, they had failed to adequately safeguard his right to have his claims examined within a reasonable time. Finally, he alleged inhuman and degrading treatment suffered by reason of the manner in which the authorities had handled the aforementioned investigation.

[...]

The facts

I. The circumstances of the case

11. The applicant was born in 1943 and lives in Ploiești.

A. The background to the case

12. At around 8.40 p.m. on 3 December 2004 the applicant, who at the time was a judge serving with the Dâmbovița County Court, was involved in a car accident. Throughout the domestic proceedings and in his application to the Court, he alleged, *inter alia*, that a third party – a certain D.I. – had crashed his car into the back of the applicant’s car. As a result of this impact, the applicant’s car had been shunted into the back of a stationary military lorry, of which the driver was a certain J.C.P.
13. Following the collision with the applicant’s car, D.I.’s car bounced off the applicant’s car and collided with another car which had been driving on the oncoming lane (hereinafter “the fourth driver”). The fourth driver was never the subject of any investigation.

[...]

The law

I. Scope of the case and characterisation of the complaints

B. The Court's assessment

[...]

87. The Court takes the view that it should examine the applicant's complaints relating to the conduct of the criminal investigation from the angle of the procedural rights and corresponding obligations enshrined in each of the above-mentioned provisions. It also considers that it should take the opportunity offered by the present case to elucidate the scope of the procedural guarantees embodied in each of these provisions in the area under review.
88. With regard to the applicant's second category of complaints, the Court notes that this category concerns his allegations of having been subjected to humiliation and ill-treatment by the authorities involved in the investigation.
89. Given the specific nature of the applicant's allegation in this regard, the Court is unable to accept the Government's argument that this complaint could be sufficiently addressed by examining it in the above-mentioned context of the respondent State's procedural obligations [...]. Consequently, the Court takes the view that the complaint relating to the applicant's treatment by the authorities involved in the investigation warrants a separate examination, to be carried out under the substantive limb of Article 3 of the Convention.
90. In the light of the foregoing considerations, the Court will proceed to examine, first, the applicant's complaints relating to the conduct of the criminal investigation, and subsequently the complaint about his treatment by the authorities involved in the investigation.

II. Complaints relating to the conduct of the criminal investigation

[...]

A. As regards the alleged violation of Articles 2, 3 and 8 of the Convention

92. The applicant complained that the criminal investigation had been excessively lengthy and ineffective.

1. Admissibility

[...]

(b) Applicability of Articles 2, 3 and 8

[...]

(ii) The Court's assessment

(α) Elements concerning the applicant's situation to be taken into account for the assessment of the case

111. In the instant case, the Court notes that the applicant was involved in a car accident which, according to the expert opinion of 27 June 2005, endangered his life. His car was caught between two other vehicles, one of them driving the other one being parked. As a result, the applicant suffered serious internal injuries and fractures of his limbs and bones as well as serious treatment complications which required 200 to 250 days of medical care. Subsequently, he appears to have been left with longterm serious physical and psychological aftereffects, including a disability.
112. In this regard the Court cannot accept the Government's submissions that the physical after-effects suffered by the applicant, including part of his reduced mobility, were not the result of the accident. The Court notes that the available medical documents in

fact show that following the accident the applicant suffered polytrauma, posttraumatic mesentery rupture, and fractured and/or displaced bones and body parts. As a result he had undergone several surgeries, including surgery involving the removal of part of his intestines, and had required a lower tracheotomy because of respiratory complications which seem to have appeared during his hospitalisations, even if the applicant may already have had a malignant tumour of the larynx and asthma before the accident [...].

114. The Court notes that the authorities appear to have considered the possibility that the applicant was himself partly responsible for the accident because he had failed to drive preventively. However, the questions whether the applicant had been fully or at least partly responsible for the major injuries he suffered and whether he had been driving under the influence of alcohol were not elucidated by the investigation.

(β) *Article 3*

[...]

– *Application of the general principles in the instant case*

122. The Court notes that it is beyond dispute that the severity of suffering, physical or mental, attributable to a particular measure or event has been a significant consideration in many of the cases where the Court has ruled Article 3 applicable, and that the absence of any intention to harm, humiliate or debase a person cannot conclusively rule out a finding of a violation of Article 3.

123. However, in the Court's view, in line with the approach confirmed above, bodily injuries and physical and mental suffering experienced by an individual following an accident which is merely the result of chance or negligent conduct cannot be considered as the consequence of "treatment" to which that individual has been "subjected" within the meaning of Article 3. Indeed, as already indicated in paragraphs 116-118 such treatment is in essence, albeit not exclusively, characterised by an intention to harm, humiliate or debase an individual, by a display of disrespect for or diminution of his or her human dignity, or by the creation of feelings of fear, anguish or inferiority capable of breaking his or her moral and physical resistance. No such elements feature in the applicant's case.

124. It follows that the part of the applicant's complaints under Article 3 relating to the conduct of the investigation is incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 §§ 3 (a) and 4.

(χ) *Article 8*

[...]

– *Application of the general principles in the instant case*

129. The Court notes that there can be no doubt that the applicant was seriously injured as a result of the traffic accident. The question arises whether such personal injury raises an issue relating to the applicant's private life within the meaning of Article 8.

130. In this regard, the Court notes, first, that the applicant's injuries resulted from his having voluntarily engaged in an activity – driving a motor vehicle on a public road – which was essentially an activity that took place in public [...]. It is true that by its very nature, this activity involved a risk that serious personal harm might occur in the event of an accident [...]. However, that risk was minimised by traffic regulations aimed at ensuring road safety for all road users, including through the proper separation of vehicles on the road. Secondly, the accident did not occur as the result of an act of

violence intended to cause harm to the applicant's physical and psychological integrity. Nor could it be assimilated to any of the other types of situations where the Court has previously found the State's positive obligation to protect physical and psychological integrity engaged.

131. Against this background, the Court does not discern any particular aspect of human interaction or contact which could attract the application of Article 8 of the Convention in this case.
132. It follows that the applicant's complaint under Article 8 relating to the conduct of the investigation is incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 §§ 3 (a) and 4.

(δ) *Article 2*

[...]

– *Application of the general principles in the instant case*

146. The Court notes that at the time of the incident the applicant was involved in an activity potentially liable to result in serious threats to a person's life. It also notes that, over the years, driving has become a strictly regulated activity and considerable efforts have been made to improve road-traffic safety. Moreover, road safety depends on many factors, including the quality of the roads and the training provided to prospective drivers.

[...]

149. In the applicant's case, his involvement in the above-mentioned activity resulted in him being severely injured. Even though his injuries did not ultimately lead to his actual death, the forensic expert deemed them sufficiently severe to endanger his life. His injuries required emergency and long-term medical treatment and repeated hospitalisations and had left him with long-term psychological and physical after-effects. Having regard to the state of the evidence, the Court sees no reason to doubt that in the circumstances of applicant's case, at the time of the accident, there was an arguable claim that his injuries were sufficiently severe to amount to a serious danger to his life.
150. In the light of the above, in particular the life-threatening injuries sustained by the applicant, the Court concludes that Article 2 is applicable.

(ε) *Conclusion*

151. Against this background, in so far as the Articles 3 and 8 of the Convention are invoked, the Court considers the part of the applicant's complaints relating to the conduct of the investigation incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 §§ 3 (a) and 4.
152. However, the Court considers that the Government's objection concerning the applicability of Article 2 of the Convention to this part of the applicant's complaints must be dismissed.
153. The Court will therefore continue to examine this part of the complaints exclusively under the procedural limb of Article 2 of the Convention.
154. The Court considers that this part of the complaints is not manifestly illfounded within the meaning of Article 35 § 3 (a) of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

[...]

(b) The Court's assessment

[...]

(ii) *The application of the general principles in the instant case*

[...]

174. At the outset, the Court deems irrelevant the civil proceedings brought by the applicant on 28 November 2006 against the insurance company and later the lease company, because these proceedings concerned the alleged liability of these companies for non-fulfilment of their obligations under contracts concluded with him and not the tort liability of D.I. or J.C.P. as a result of the actions or omissions of the latter.

[...]

178. In the light of the above considerations, the Court holds that the Government's objection on grounds of non-exhaustion of domestic remedies must be dismissed.

[...]

182. [...] The Court does not find sufficient grounds to conclude that the investigation or collection of evidence was ultimately insufficiently thorough. The domestic authorities' decision to discontinue the proceedings was not taken hastily or arbitrarily, and followed years of investigative work which resulted in the accumulation of a large body of evidence, including forensic and technical elements. That evidence addressed questions raised within the framework of the criminal proceedings, including matters regarding the conduct of the drivers involved and the causes of the accident.

183. The Court notes that the authorities dismissed some of the applicant's requests for collection of evidence although he considered them relevant to the case. However, the domestic authorities must be allowed some discretion in deciding which evidence is relevant to the investigation.

[...]

185. [...] Therefore it considers that, in the absence of any apparent lack of thoroughness in the authorities' examination of the circumstances surrounding the applicant's accident, their decision not to prosecute does not suffice to find the respondent State liable under its procedural obligation arising from Article 2 of the Convention.

186. Having regard to the overall assessment of the criminal investigation, the Court concludes that it cannot be said that the legal system as applied in the present case failed to adequately deal with the applicant's case. Therefore, it finds no violation of Article 2 of the Convention.

B. As regards the alleged violation of Article 6 § 1 of the Convention

1. Right of access to a court

187. The applicant complained that it had been impossible to obtain a decision on the merits of his civil claim following the road-traffic accident in which he had been involved.

(a) Admissibility

188. The Court notes that neither party disputed the applicability of Article 6 § 1 under its civil limb and it sees no reason to hold otherwise. The applicant's claim for damages based on an offence allegedly committed by one of the drivers involved in the accident was a claim based on his civil rights. Article 6 § 1 is, for that reason, applicable to the dispute relating to those rights [...]. The Court would add that the question whether Article 6 § 1 under its civil limb was applicable during the criminal proceedings which the applicant specifically joined as a civil party is a separate one, which will be examined below.

189. The Court further notes that this complaint is not manifestly illfounded within the meaning of Article 35 § 3 (a) of the Convention. It also finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

(b) Merits

[...]

(ii) *The Court's assessment*

[...]

(β) *The application of the general principles in the instant case*

[...]

199. In the present case, at the time when the applicant joined the criminal proceedings as a civil party, he could have brought separate civil proceedings against J.C.P. and D.I. instead. While the available evidence and the Government's explanations indicate that such proceedings might have been stayed pending the outcome of the criminal proceedings, the Court notes that no evidence was provided by the parties to suggest that the applicant could not have obtained a determination of the merits of his civil claims on the conclusion of the criminal proceedings.

200. Moreover, the discontinuation of the criminal proceedings against J.C.P. and D.I. did not bar the applicant from lodging a separate civil action against them with a civil court once he became aware of the final judgments of the criminal courts upholding the public prosecutor's offices' decision to discontinue the criminal proceedings. Furthermore, as explained by the Government, it would have been possible for the applicant to argue that the limitation period for bringing a separate civil claim did not run during the pendency of the criminal proceedings with civil claims. Therefore, such an action was not necessarily destined to fail.

201. In the light of the foregoing considerations it cannot be said that the applicant was denied access to court for a determination of his civil rights.

202. It follows that there has been no violation of Article 6 § 1 of the Convention in this regard.

2. *Reasonable time*

203. The applicant complained that the investigation into the circumstances of the accident had been unreasonably long.

(a) Admissibility

204. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

(b) Merits

[...]

209. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the particular case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities, and what was at stake for the applicant in the dispute [...].

210. The Court observes that the criminal investigation opened into the circumstances of the applicant's accident was of considerable factual complexity and involved several possibilities that the investigators had to explore. It also notes that the procedural complexity of the case increased because of the repeated forensic and technical expert

reports needed in order to clarify the circumstances of the accident.

211. The Court further notes that, even though the applicant was assisted by legal counsel during the initial stages of the criminal investigation, he was unavailable to the investigators on account of his medical condition, that he repeatedly challenged the investigators and the judges involved in the examination of his case, that he asked for transfers of his case, that he requested several expert and technical reports, challenging the conclusions of the latter, and that he lodged an appeal on points of fact and of law against a final judgment which was not amenable to appeal. While the applicant cannot be held responsible for his medical condition and for taking full advantage of certain remedies available to him under domestic law, the national authorities cannot be held accountable either for the resulting increase in the length of the proceedings [...].

[...]

214. Therefore, having regard to the proceedings as a whole, there has been no violation of the “reasonable time” requirement enshrined in Article 6 § 1 of the Convention in the instant case.

C. As regards the alleged violation of Article 13 of the Convention taken in conjunction with Article 2

[...]

(b) The Court’s assessment

217. The Court notes that Article 13 of the Convention guarantees the availability at the national level of a remedy by which to complain of a breach of the Convention rights and freedoms. Therefore, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision, there must be a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief [...].

[...]

219. The Court first notes that it declared admissible the applicant’s complaint under Article 2 of the Convention. Even though, for the reasons given above, it did not find a violation of this provision, it nevertheless considered that the complaint raised by the applicant thereunder raised serious questions of fact and law requiring examination on the merits. The Court therefore considers that the applicant had an arguable complaint concerning that Article for the purposes of Article 13 of the Convention [...]. The Court notes, however, that the applicant’s complaint under Article 13 does not concern any other issue than that of the ineffectiveness of the criminal investigation, an issue which the Court has examined already under Article 2. In the light of that examination, it does not consider it necessary to examine the complaint also under Article 13.

III. Complaint relating to the treatment of the applicant by the authorities involved in the investigation

221. The applicant complained that the treatment to which he had been subjected by reason of the manner in which the authorities had handled the investigation had amounted to inhuman and degrading treatment. As already stated above, the Court will examine this complaint under the substantive head of Article 3 of the Convention. The provisions of this article are described above.

[...]

B. The Court's assessment

225. The Court notes from the outset that the Government raised a preliminary objection and argued that this complaint was incompatible *ratione materiae* with the provisions of the Convention.
226. The Court further notes that in some previous cases it has taken into account the manner in which the national authorities handled an investigation in order to examine whether their conduct constituted inhuman or degrading treatment in breach of the substantive limb of Article 3.
227. This case-law seems to have developed mainly in respect of the relatives of disappeared persons [...]. The Court reiterates that the phenomenon of disappearances imposes a particular burden on the relatives of missing persons, who are kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty [...].
228. The Court further notes that in such cases, a variety of factors are taken into account by the Court in its assessment of whether the manner in which the investigation was handled amounted in itself to treatment contrary to Article 3 for the relatives of the victims. Relevant elements include the closeness of the family tie, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court has emphasised, however, that the essence of such breach does not necessarily lie in the fact of the disappearance of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention [...]. In finding that the authorities' conduct disclosed a level of severity which raised an issue under and breached Article 3, the Court gave weight for instance to the authorities' indifference and callousness in dealing with the applicants' concerns and the acute anguish and uncertainty which the applicants had suffered as a result and continued to suffer [...].
229. The Court also notes that it has applied the principles laid down in the cases mentioned above in some exceptional situations outside the context of disappearance [...].
230. The Court observes, however, that the applicant's case does not fall within any of the circumstances examined in the abovementioned case-law.
231. In the light of the facts of the case and of all the evidence in its possession, the Court does not discern in the applicant's situation any appearance of a violation of Article 3 of the Convention. It follows that this complaint is manifestly ill-founded and must be dismissed in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court

1. *Joins*, unanimously, the Government's objection of non-exhaustion of domestic remedies raised in respect of the complaints concerning the conduct of the criminal investigation to the merits and dismisses it;
2. *Declares*, by a majority, the complaint concerning the procedural limb of Article 3 of the Convention inadmissible;
3. *Declares*, by a majority, the complaint concerning Article 8 of the Convention inadmissible;
4. *Declares*, by a majority, the complaint concerning Article 2 of the Convention admissible;
5. *Holds*, by thirteen votes to four that there has been no violation of Article 2 of the

- Convention;
6. *Declares*, unanimously, the complaints concerning Article 6 § 1 of the Convention admissible;
 7. *Holds*, by sixteen votes to one that there has been no violation of Article 6 § 1 of the Convention with regard to the complaint concerning the right of access to a court;
 8. *Holds*, by ten votes to seven, that there has been no violation of Article 6 § 1 of the Convention with regard to the complaint concerning the length of the criminal investigation;
 9. *Holds*, unanimously, that there is no need to examine separately the complaint under Article 13 taken in conjunction with Article 2 of the Convention;
 10. *Declares*, unanimously, the complaint concerning the substantive limb of Article 3 of the Convention inadmissible.

45.

EUROPEAN COURT OF HUMAN RIGHTS 3 April 2012.

Gillberg v. Sweden.

Procedure

1. The case originated in an application (no. 41723/06) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Swedish national, Mr Christopher Gillberg (“the applicant”), on 10 October 2006.

[...]

3. The applicant alleged, in particular, that in civil proceedings concerning access to various research material, and in subsequent criminal proceedings against him, his rights under Articles 6, 7, 8, 10 and 13 of the Convention had been breached.

[...]

The facts

I. The circumstances of the case

6. The applicant was born in 1950 and lives in Gothenburg.
7. He is a professor, specialising in child and adolescent psychiatry, at the University of Gothenburg.
8. In the period between 1977 and 1992 a research project was carried out at the University of Gothenburg in the field of neuropsychiatry focusing on the incidences of AttentionDeficit Hyperactivity Disorder (ADHD) or Deficits in Attention, Motor Control and Perception (DAMP) in children. The aim was to elucidate the significance thereof and associated problems from a long-term perspective. Parents to a group of one hundred and fortyone preschool children volunteered to participate in the study, which was followed up every third year. Certain assurances were made to the children’s parents and later to the young people themselves concerning confidentiality. The research papers, called the Gothenburg study, were voluminous and consisted of a large number of records, test results, interview replies, questionnaires and video and audio tapes. It contained a very large amount of privacy-sensitive data about the children and their relatives. Several doctoral theses have been based on the Gothenburg study.

The material was stored by the Department of Child and Adolescent Psychiatry, of which the applicant was director. The project was originally set up and started by other researchers but the applicant had subsequently taken over the responsibility for completing the study.

9. The applicant alleged that the Ethics Committee of the University of Gothenburg in their permits had made it a precondition that sensitive information about the individuals participating in the study would be accessible only to the applicant and his staff and that therefore the applicant promised absolute confidentiality to the patients and their parents.
10. The Government maintained in their observations that they had been unable to find the permits referred to by the applicant, thus they could not confirm that the permits contained requirements of "absolute secrecy". Instead the Government had located four research applications to the Ethics Committee of the University of Gothenburg (dated 13 January 1978, 26 January 1984, 9 October 1984 and 24 March 1988) according to which the applicant bore the main responsibility for the study in 1988 and, together with his wife, also in 1984, but not for the study in 1978. Concerning the issue of secrecy, the research applications can be summarised as follows: In the first application, it was stated that it would not be possible to identify individual children and that the research team did not intend to register any case records. In the first of the two applications submitted in 1984, it was stated that the project leader - being a medical doctor - was bound by professional secrecy and was to be responsible for the registers set up within the research project, that the registers were to be made non-personalised after the study had been carried out and that the results were to be presented in a way that would make it impossible to identify different individuals. Furthermore, if data registers were to be used, the Data Inspection Board's (*Datainspektionen*) instructions were to be followed. In an additional application from the same year, concerning *inter alia* the use of social registers, it was stated that it would not be possible to identify different individuals through the data processing that was to be carried out and that only the project leader was to have access to the identification code. The application from 1988 contains the same language as the application submitted in January 1984.

[...]

13. The assurance of confidentiality given to the participants in the study in 1984 had the following wording:

"All data will be dealt with in confidence and classified as secret. No data processing that enables the identification of your child will take place. No information has been provided previously or will be provided to teachers about your child except that when starting school she/he took part in a study undertaken by Östra Hospital and its present results will, as was the case for the previous study three years ago, be followed up."

[...]

The law

I. Alleged violation of articles 6 and 13 of the Convention

54. The applicant complained under Articles 6 and 13 of the Convention that in the civil proceedings concerning access to the research material he did not have a standing before the Administrative Court of Appeal and the Supreme Administrative Court.

Admissibility

55. In its two initial judgments of 6 February 2003 the Administrative Court of Appeal laid down that K and E were entitled to have access to the documents requested. In its two subsequent judgments of 11 August 2003 the Administrative Court of Appeal decided on the conditions that would apply in connection with the release of the documents to them. Subsequently, in two separate judgments of 4 May 2004 the Administrative Court of Appeal annulled the decisions by the University of Gothenburg of 27 January 2004 and 2 February 2004 to refuse respectively to grant access to K and to impose a new condition on E in order to give him access to the research material. The judgments by the Administrative Court of Appeal had therefore settled the question of access.
56. Several times the applicant's requests for relief for substantive defects to the Supreme Administrative Court were refused because he could not be considered a party to the case. Such decisions were taken on 4 April and 5 November 2003, 28 September 2004 and 1 July 2005, thus more than six months before 10 October 2006, which is the date on which the application was lodged before the Court.
57. It follows that this part of the application has been submitted too late and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention

II. Alleged violation of article 7 of the convention

58. The applicant also complained under Article 7 of the Convention that in the criminal proceedings he was punished without law because he did not have a standing in the civil proceedings.

Admissibility

59. The Court has examined the applicants' complaint under Article 7 of the Convention as it was submitted for the first time in his observations of 12 January 2009, which is more than six months after leave to appeal to the Supreme Court was refused on 25 April 2006 in the criminal proceedings.
60. It follows that this part of the application has been submitted too late and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

[...]

IV. Alleged violation of articles 8 and 10 of the Convention relating to the criminal proceedings against the applicant

65. The applicant also complained that the outcome of the criminal proceedings infringed his rights under Article 8 or Article 10 of the Convention, notably because allegedly the promise of confidentiality was imposed on him as a precondition for carrying out his research by the public authority, the Ethics Committee of the University of Gothenburg.

A. Admissibility

66. The Government submitted that this part of the application should be declared inadmissible for non-exhaustion of domestic remedies.
67. They maintained that Swedish law provided a remedy in the form of compensation for both pecuniary and non-pecuniary damage in respect of any violation of the Convention, including the violations alleged in the present case and that the applicant had failed to avail himself of this remedy.
68. The said remedy had been established for the first time by a Supreme Court judgment of 9 June 2005, whereby compensation for pecuniary and nonpecuniary damage on

account of excessive length of criminal proceedings was awarded. Subsequently, by decision of 4 May 2007 and judgments of 21 September and 28 November 2007 the Supreme Court had examined compensation claims on the basis of Articles 2, 5 and 8 of the Convention and had, in the two former cases, found the individual entitled to compensation for non-pecuniary damage due to violations of Articles 5 and 8 respectively [...].

[...]

74. The Court finds that, in the instant case, it could not be required of the applicant to pursue the remedy invoked by the Government. The Government's objection as to the exhaustion of domestic remedies must therefore be dismissed.

75. It also noted that this part of the application is not manifestly illfounded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. The merits of the complaint under Article 8 of the Convention

[...]

3. The Court's assessment

104. The Court reiterates that the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person [...].

[...]

106. In the Court's view the conviction of the applicant was in accordance with the law, namely Chapter 20, Article 1 of the Penal Code, and it pursued legitimate aims, namely preventing disorder and crime, and the protection of the rights and freedoms of others.

[...]

113. In the Court's view, while different interpretations of the legislation at issue cannot be excluded, it does not overstep the State's margin of appreciation in this case if the Court of Appeal found that the assurances of confidentiality cited above could not take precedence over the law as it stood. The decision thereon did not appear arbitrary.

[...]

117. Finally, the sentence imposed on the applicant cannot be said to be disproportionate.

118. In these circumstances, there are no elements which could suggest that the Court of Appeal's judgment was arbitrary or disproportionate to the legitimate aims pursued.

119. Accordingly, the Court considers that in the present case there has been no violation of Article 8 of the Convention.

B. The merits of the complaints under Article 10 of the Convention

[...]

121. It notes from the outset that the applicant was not prevented from exercising his "positive" right to freedom of expression under the provision: rather he was convicted for failing to make the disputed documents available in compliance with the judgments of the Administrative Court of Appeal.

[...]

126. In these circumstances, the Court is not convinced that the outcome of the criminal proceedings against the applicant amounted to an interference with his rights within the meaning of Article 10 of the Convention, but finds it unnecessary to examine this issue further since in any event it finds that there has been no violation of Article 10 for the reasons stated when examining the complaint under Article 8 of the Convention,

and concludes that there are no elements which could suggest that the Court of Appeal's judgment was arbitrary or disproportionate to the legitimate aims pursued, namely preventing disorder and crime, and the protection of the rights of others.

127. Accordingly, the Court considers that in the present case there has been no violation of Article 10 of the Convention.

For these reasons, the Court

1. *Declares* unanimously the complaint under Articles 8 and 10 relating to the criminal proceedings against the applicant admissible and the remainder of the application inadmissible;
2. *Holds* by five votes to two that there has been no violation of Article 8 of the Convention;
3. *Holds* unanimously that there has been no violation of Article 10 of the Convention.

46.

EUROPEAN COURT OF HUMAN RIGHTS 13 November 2017.

Jankauskas v. Lithuania (No. 2).

Procedure

1. The case originated in an application (no. 50446/09) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Lithuanian national, Mr Ramūnas Jankauskas ("the applicant"), on 9 September 2009.

[...]

3. The applicant complained about the Lithuanian authorities' decision to strike his name off the list of trainee advocates.

[...]

The facts

I. The circumstances of the case

5. The applicant was born in 1972 and lives in Pakruojis.

A. The applicant's conviction

6. In 1996 the applicant graduated from the Lithuanian Police Academy with a degree in law. He worked as an investigator at Šiauliai city police headquarters.
7. On 3 October 2000 the Šiauliai Regional Court established that from 1995 to 1996, when he had been working as an investigator, the applicant had several times solicited and sometimes succeeded in getting bribes for discontinuing criminal proceedings. The victims of the applicant's crimes, who were suspects in criminal proceedings or their relatives, had been threatened and sometimes harassed sexually by the applicant. He would tell them that "the case would end badly (*blogai baigsis*)" if they did not meet his demands. The Šiauliai Regional Court found that such actions amounted to the intentional crimes of abuse of office (Article 285 of the Criminal Code) and bribery (Article 282 of the Criminal Code). The court also noted that the applicant had not acknowledged his guilt, but had instead tried to justify his criminal acts and avoid taking responsibility for them in any way possible. The trial court sentenced him to eight years' deprivation of liberty in a correctional labour colony under a strict regime, ordered the confiscation of all his property, and prohibited him from working in law

- enforcement or the justice system for five years.
8. The applicant's conviction was upheld by the Court of Appeal on 29 June 2001 and by the Supreme Court on 18 December 2001.
 9. In 2003, upon entry into force of the new Criminal Code, the Šiauliai Regional Court requalified the applicant's sentence to four years and seven months' deprivation of liberty. The applicant was released from prison on 8 September 2003 after serving his sentence.
 10. By a ruling of 17 June 2005 the Šiauliai Regional Court expunged the applicant's conviction from his criminal record. The court noted that the applicant had served his sentence. He had been convicted of crimes of medium severity. The court also took account of the fact that the applicant had not committed any violations of administrative law, had been bringing up a child alone, had been described in positive terms by people at his place of residence and at his workplace, had drawn the right conclusions from the crimes he had committed, and had promised not to commit any crimes in the future. The ruling was not appealed against and became enforceable.

[...]

The law

II. Alleged violation of article 8 of the Convention

51. The applicant complained that his being removed from the list of trainee advocates had been in breach of his right to respect for his private life, had no legal basis and had been discriminatory. He also argued that the Court of Honour's examination of his disciplinary case had been unfair.
52. Although the applicant relied on Articles 6, 7, 8 and 14 of the Convention when making his complaints, the Court considers, in the light of the materials in the file, that they fall to be examined on the basis of Article 8 alone, which, in so far as relevant, [...].

A. Admissibility

[...]

2. The Court's assessment

(a) As to the admissibility of the complaint *ratione materiae*

56. The Court reiterates that Article 8 of the Convention "protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world" [...].
57. The Court has further held that restrictions on registration as a member of certain professions (for instance, lawyer or notary), which could to a certain degree affect the applicant's ability to develop relationships with the outside world undoubtedly fall within the sphere of his or her private life [...].
58. [...] The Court is ready to accept that the Lithuanian authorities' decision to remove him from the list of trainee advocates did affect his ability to pursue his professional activity and that there were consequential effects on the enjoyment of his right to respect for his "private life" within the meaning of Article 8 [...].

[...]

(c) Conclusion

60. The Court also notes that this complaint is not manifestly illfounded within the meaning of Article 35 § 3 (a) of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

[...]

2. The Court's assessment*(a) Whether there was an interference*

69. The parties have disputed whether the decision to dismiss the applicant from the list of trainee advocates had an impact on his professional activities and thus on his private life. [...] It is not unreasonable to hold that the Bar Association's decision to dismiss the applicant, together with the reasons given by the Court of Honour and the civil courts, only additionally dented the applicant's name, which must have further hampered his professional reputation [...].

70. That being so, the Court will proceed on the assumption that the applicant's dismissal as a trainee advocate constituted an interference with his right to respect for his private life within the meaning of Article 8 of the Convention.

(b) Whether the interference was justified

71. The above-mentioned interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", pursuing one or more of the legitimate aims listed therein, and being "necessary in a democratic society" in order to achieve the aim or aims concerned.

(i) Whether the interference was in accordance with the law

72. The Court firstly notes that the Court of Honour and the civil courts relied on Article 8 (4) of the Law on the Bar when holding that the applicant was not of high moral character. Contrary to the applicant's assertion, the disciplinary sanction was not based on Article 8 (1) of that law, which at the material time read that a person may not become an advocate because of a criminal conviction. Furthermore, the Court of Appeal also relied on points 12.1 and 13.2 of the Code of Ethics, which also applies to trainee advocates [...].

(ii) Whether the interference pursued a legitimate aim

73. The Court also accepts the Government's argument that the interference in question served the aim of protecting the rights of others. That was also noted by the Court of Honour, and reiterated by the Vilnius Regional Court and the Supreme Court, which underlined the advocates' obligations towards society and the need to safeguard the good functioning of the justice system overall.

(iii) Whether the interference was "necessary in a democratic society"

[...]

76. The Court has also held that any criminal proceedings entail certain consequences for the private life of an individual who has committed a crime. They are compatible with Article 8 of the Convention provided that they do not exceed the normal and inevitable consequences of such a situation.

[...]

79. The Court also notes that neither the Court of Honour, nor any civil court ever stated that the applicant was permanently barred from becoming an advocate. Indeed, it transpires from Article 8 of the Law on the Bar as it stands today, that the applicant in principle remains free to prove, with time, that he has restored his reputation.[...] The Court therefore is satisfied that in the present case the domestic courts carried out a careful analysis and sought to strike a balance between the protection of the applicant's

- private life and the need to protect the rights of others and the justice system as a whole.
80. [...] The Court cannot but note the statement of the president of the Court of Honour that those other lawyers, unlike the applicant, had not hidden a previous conviction from the Bar Association [...]. The Court observes that the requirements on reputation applied to them were somewhat comparable to those applied to advocates because the severity and nature of the crime, or expiry of the conviction, determined whether a person could be held as being morally fit to take up those jobs [...].
 81. Lastly, the Court turns to the applicant's argument about bias on the part of the President of the Court of Honour. The applicant was able to put that complaint to the civil courts, which examined and dismissed it as unfounded. The Court finds that the applicant therefore had the possibility to have the Bar Association's findings to be reviewed by the civil courts, an independent and impartial judicial authority. There is nothing in the procedure followed by those courts that would lead this Court to a conclusion that the applicant was deprived of an opportunity to prove his complaints under Article 8 and/or the that decision-making process leading to measures interfering with his Article 8 rights was unfair [...].
 82. In these circumstances, the Court considers that the interference with the applicant's right to respect for his professional activity, as part of his private life, did not exceed what was "necessary in a democratic society" for pursuing the legitimate aim of protecting the rights of others by ensuring the good and proper functioning of the justice system.
- (c) *Conclusion*
83. The foregoing considerations are sufficient to enable the Court to conclude that there has been no violation of Article 8 of the Convention.

For these reasons, the Court unanimously

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 8 of the Convention.

47.

EUROPEAN COURT OF HUMAN RIGHTS 5 September 2017.

Bărbulescu v. Romania.

Procedure

1. The case originated in an application (no. 61496/08) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian national, Mr Bogdan Mihai Bărbulescu ("the applicant"), on 15 December 2008.
- [...]
3. The applicant complained, in particular, that his employer's decision to terminate his contract had been based on a breach of his right to respect for his private life and correspondence as enshrined in Article 8 of the Convention and that the domestic courts had failed to comply with their obligation to protect that right.

[...]

The facts

I. The circumstances of the case

10. The applicant was born in 1979 and lives in Bucharest.
11. From 1 August 2004 to 6 August 2007 he was employed in the Bucharest office of S., a Romanian private company (“the employer”), as a sales engineer. At his employer’s request, for the purpose of responding to customers’ enquiries, he created an instant messaging account using Yahoo Messenger, an online chat service offering real-time text transmission over the internet. He already had another personal Yahoo Messenger account.
12. The employer’s internal regulations prohibited the use of company resources by employees in the following terms:

Article 50 [...]

13. The regulations did not contain any reference to the possibility for the employer to monitor employees’ communications.
14. It appears from documents submitted by the Government that the applicant had been informed of the employer’s internal regulations and had signed a copy of them on 20 December 2006 after acquainting himself with their contents.
15. On 3 July 2007 the Bucharest office received and circulated among all its employees an information notice that had been drawn up and sent by the Cluj head office on 26 June 2007. The employer asked employees to acquaint themselves with the notice and to sign a copy of it [...].

Because of repeated [disciplinary] offences *vis-à-vis* her superior, [as well as] her private use of the internet, the telephone and the photocopier, her negligence and her failure to perform her duties, Ms B.A. was dismissed on disciplinary grounds! Take a lesson from her bad example! Don’t make the same mistakes!

[...]

18. On 13 July 2007 at 4.30 p.m. the applicant was summoned by his employer to give an explanation. In the relevant notice he was informed that his Yahoo Messenger communications had been monitored and that there was evidence that he had used the internet for personal purposes, in breach of the internal regulations. Charts were attached indicating that his internet activity was greater than that of his colleagues [...].
19. On the same day, the applicant informed the employer in writing that he had used Yahoo Messenger for work-related purposes only.

[...]

24. The applicant challenged his dismissal in an application to the Bucharest County Court (“the County Court”). He asked the court, firstly, to set aside the dismissal; secondly, to order his employer to pay him the amounts he was owed in respect of wages and any other entitlements and to reinstate him in his post; and thirdly, to order the employer to pay him 100,000 Romanian lei (approximately 30,000 euros) in damages for the harm resulting from the manner of his dismissal, and to reimburse his costs and expenses.

[...]

29. The applicant appealed to the Bucharest Court of Appeal (“the Court of Appeal”). He repeated the arguments he had submitted before the first-instance court and contended in addition that that court had not struck a fair balance between the interests at stake, unjustly prioritising the employer’s interest in enjoying discretion to control its em-

ployees' time and resources. He further argued that neither the internal regulations nor the information notice had contained any indication that the employer could monitor employees' communications.

30. The Court of Appeal dismissed the applicant's appeal in a judgment of 17 June 2008 [...].
31. In the meantime, on 18 September 2007 the applicant had lodged a criminal complaint against the statutory representatives of S., alleging a breach of the secrecy of correspondence. On 9 May 2012 the Directorate for Investigating Organised Crime and Terrorism (DIICOT) of the prosecutor's office attached to the Supreme Court of Cassation and Justice ruled that there was no case to answer, on the grounds that the company was the owner of the computer system and the internet connection and could therefore monitor its employees' internet activity and use the information stored on the server, and in view of the prohibition on personal use of the IT systems, as a result of which the monitoring had been foreseeable. The applicant did not avail himself of the opportunity provided for by the applicable procedural rules to challenge the prosecuting authorities' decision in the domestic courts.

[...]

The law

I. Alleged violation of article 8 of the Convention

55. The applicant submitted that his dismissal by his employer had been based on a breach of his right to respect for his private life and correspondence and that, by not revoking that measure, the domestic courts had failed to comply with their obligation to protect the right in question. He relied on Article 8 of the Convention, [...].

C. Applicability of Article 8 of the Convention

[...]

2. *The Court's assessment*

[...]

70. [...] The Court acknowledges that everyone has the right to live privately, away from unwanted attention [...]. It also considers that it would be too restrictive to limit the notion of "private life" to an "inner circle" in which the individual may live his or her own personal life as he or she chooses, thus excluding entirely the outside world not encompassed within that circle [...]. Article 8 thus guarantees a right to "private life" in the broad sense, including the right to lead a "private social life", that is, the possibility for the individual to develop his or her social identity. In that respect, the right in question enshrines the possibility of approaching others in order to establish and develop relationships with them [...].
71. The Court considers that the notion of "private life" may include professional activities [...].
72. Furthermore, as regards the notion of "correspondence", it should be noted that in the wording of Article 8 this word is not qualified by any adjective, unlike the term "life". And indeed, the Court has already held that, in the context of correspondence by means of telephone calls, no such qualification is to be made. In a number of cases relating to correspondence with a lawyer, it has not even envisaged the possibility that Article 8 might be inapplicable on the ground that the correspondence was of a professional nature [...]. Furthermore, it has held that telephone conversations are covered by

the notions of “private life” and “correspondence” within the meaning of Article 8 [...]. In principle, this is also true where telephone calls are made from or received on business premises [...]. The same applies to emails sent from the workplace, which enjoy similar protection under Article 8, as does information derived from the monitoring of a person’s internet use

[...]

74. Applying these principles in the present case, the Court first observes that the kind of internet instant messaging service at issue is just one of the forms of communication enabling individuals to lead a private social life. At the same time, the sending and receiving of communications is covered by the notion of “correspondence”, even if they are sent from an employer’s computer. The Court notes, however, that the applicant’s employer instructed him and the other employees to refrain from any personal activities in the workplace. This requirement on the employer’s part was reflected in measures including a ban on using company resources for personal purposes.

[...]

76. The Court observes in addition that despite this requirement on the employer’s part, the applicant exchanged messages of a personal nature with his fiancée and his brother. Some of these messages were of an intimate nature (*ibid.*).

77. The Court considers that it is clear from the case file that the applicant had indeed been informed of the ban on personal internet use laid down in his employer’s internal regulations.

[...]

81. In the light of all the above considerations, the Court concludes that the applicant’s communications in the workplace were covered by the concepts of “private life” and “correspondence”. Accordingly, in the circumstances of the present case, Article 8 of the Convention is applicable.

D. Compliance with Article 8 of the Convention

[...]

(c) Application of the above general principles in the present case

124. The Court observes that the domestic courts held that the interests at stake in the present case were, on the one hand, the applicant’s right to respect for his private life, and on the other hand, the employer’s right to engage in monitoring, including the corresponding disciplinary powers, in order to ensure the smooth running of the company. It considers that, by virtue of the State’s positive obligations under Article 8 of the Convention, the national authorities were required to carry out a balancing exercise between these competing interests.

125. The Court observes that the precise subject of the complaint brought before it is the alleged failure of the national courts, in the context of a labour-law dispute, to protect the applicant’s right under Article 8 of the Convention to respect for his private life and correspondence in an employment context. Throughout the proceedings the applicant complained in particular, both before the domestic courts and before the Court, about his employer’s monitoring of his communications via the Yahoo Messenger accounts in question and the use of their contents in the subsequent disciplinary proceedings against him.

[...]

131. The Court notes that the domestic courts correctly identified the interests at stake – by referring explicitly to the applicant’s right to respect for his private life – and also the applicable legal principles (see paragraphs 28 and 30 above) [...].

[...]

139. Having regard to the foregoing, the Court finds that the Court of Appeal’s conclusion that a fair balance was struck between the interests at stake is questionable. Such an assertion appears somewhat formal and theoretical. The Court of Appeal did not explain the specific reasons linked to the particular circumstances of the applicant and his employer that led it to reach that finding.

[...]

141. Having regard to all the above considerations, and notwithstanding the respondent State’s margin of appreciation, the Court considers that the domestic authorities did not afford adequate protection of the applicant’s right to respect for his private life and correspondence and that they consequently failed to strike a fair balance between the interests at stake. There has therefore been a violation of Article 8 of the Convention.

II. Application of article 41 of the Convention

142. Article 41 of the Convention [...]

For these reasons, the Court

1. *Holds*, by eleven votes to six, that there has been a violation of Article 8 of the Convention;
2. *Holds*, by sixteen votes to one, that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
3. *Holds*, by fourteen votes to three,
 - (a) that the respondent State is to pay the applicant, within three months, EUR 1,365 (one thousand three hundred and sixty-five euros) in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicant;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses*, unanimously, the remainder of the applicant’s claim for just satisfaction.

48.

EUROPEAN COURT OF HUMAN RIGHTS 24 July 2018.

Lozovyye v. Russia.

Procedure

1. The case originated in an application (no. 4587/09) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Russian nationals, Mr. Andrey Mikhaylovich Lozovoy and Ms. Tamara Vasilyevna Lozovaya (“the applicants”), on 10 November 2008.
2. The Russian Government (“the Government”) were represented initially by Mr. G.

Matyushkin, the Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr. M. Galperin.

3. The applicants complained about the domestic authorities' failure to notify them of their son's death.
4. On 8 June 2010 the application was communicated to the Government. The parties submitted written observations on the admissibility and merits.

The facts

I. The circumstances of the case

5. The applicants are Russian nationals who were born in 1952 and 1954 respectively and live in the town of Belomorsk in the Republic of Karelia.

A. The applicants' son's death and criminal proceedings on a murder charge

6. On 1 December 2005 the applicants' son, Mr. M. Lozovoy, was killed in St Petersburg. Criminal proceedings were instituted against a Mr. O. on a charge of murder.
7. On 18 January 2006 Ms. L., an investigator of the Primorskiy district prosecutor's office in St Petersburg, asked the head of the Primorskiy district police to identify relatives of the deceased; to establish their place of residence and to summon them to the prosecutor's office for the purpose of granting them victim status in the criminal case.
8. A week later the applicants' son was buried under his full name in St Petersburg. A record in a cemetery registration log indicated that the body had been unclaimed.
9. On 30 January 2006 the investigator, having concluded that it was impossible to identify relatives of the deceased, assigned the status of victim in the criminal case to a representative of the municipal authorities. The following day police officials informed the investigator that operative measures undertaken by them to identify Mr. M. Lozovoy's relatives had not produced any results.
10. On 2 February 2006 the applicants contacted Ms. L. and informed her of their intention to come to St Petersburg to take part in the criminal proceedings.
11. Despite that notification by the applicants, five days later Ms. L. sent the criminal case file to the Primorskiy District Court for trial.
12. Sometime later the applicants were invited to take part in the criminal proceedings in the capacity of victims.
13. On 14 February 2006 the applicants were allowed to exhume their son's remains. Two days later they buried him in Belomorsk.
14. On 6 June 2006 the Primorskiy District Court found Mr. O. guilty of having murdered the applicants' son and sentenced him to six years' imprisonment.
15. On the same day, responding to the applicants' complaints about the authorities' failure to notify them of their son's death, the District Court issued an interim decision (*частное постановление*) in respect of the investigator, Ms. L. The decision, sent to the Primorskiy District Prosecutor, in so far as relevant, reads as follows:
"[...] It follows that the victims' rights envisaged by the law in force were substantially violated in the course of the preliminary investigation [...]."

[...]

The law

I. Alleged violation of article 8 of the Convention

26. The applicants complained under Articles 6 and 13 of the Convention of the authorities' failure to duly notify them of their son's death, as a result of which they had been

left in a state of ignorance of their son's whereabouts for a very long time and stripped of an opportunity to give their son a proper burial.

[...]

B. The Court's assessment

1. Admissibility

30. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

2. Merits

[...]

(b) Compliance with Article 8 of the Convention

36. The Court reiterates that although the object of Article 8 is essentially that of protecting an individual against an arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life [...].

37. The substance of the applicants' complaint is not that the State acted in a certain way but that it failed to act [...]

[...]

40. The Court observes that there was no explicit obligation on the domestic authorities under Russian law to notify relatives of an individual who had died as a result of a criminal act [...].

[...]

42. Nonetheless, in the Court's view this lack of clarity with regard to the domestic legal framework and practice is not sufficient in itself to find a violation of the respondent State's positive obligations under Article 8 of the Convention in the present case.

[...]

46. In these circumstances and given the personal information about Mr M. Lozovoy that was available to the domestic authorities after his death, the Court concludes that the authorities did not act with reasonable diligence and therefore did not comply with their positive obligation in the present case.

47. There has accordingly been a violation of Article 8 of the Convention.

II. Alleged violation of article 6 § 1 of the Convention

48. The applicants complained under Articles 6 § 1 and 13 of the Convention of difficulties in having access to and about the outcome of the civil proceedings for compensation for the damage sustained [...].

49. The Court has examined these complaints and considers that [...] they either do not meet the admissibility criteria set out in Articles 34 and 35 of the Convention or do not disclose any appearance of a violation of the rights and freedoms enshrined in the Convention or the Protocols thereto.

50. It follows that this part of the application must be rejected in accordance with Article 35 § 4 of the Convention.

III. Application of article 41 of the Convention

51. Article 41 of the Convention [...]

For these reasons, the Court unanimously

1. *Declares* the complaint that the authorities failed to properly notify them of their son's death admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicants, jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the Russian roubles at the rate applicable at the date of settlement:
 - (i) EUR 539 (five hundred and thirty-nine euros), plus any tax that may be chargeable to them, in respect of pecuniary damage;
 - (ii) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to them, in respect of non-pecuniary damage;
 - (iii) EUR 374 (three hundred and seventy-four euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

49.

EUROPEAN COURT OF HUMAN RIGHTS 10 April 2007.

Evans v. The United Kingdom.

Procedure

1. The case originated in an application (no. 6339/05) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Ms Natallie Evans ("the applicant"), on 11 February 2005.

[...]

3. On 27 February 2005 the President of the Chamber decided to indicate to the Government, under Rule 39 of the Rules of Court, that, without prejudice to any decision of the Court as to the merits of the case, it was desirable in the interests of the proper conduct of the proceedings that the Government take appropriate measures to ensure that the embryos, the destruction of which formed the subject-matter of the applicant's complaints, were preserved until the Court had completed its examination of the case. On the same day, the President decided that the application should be given priority treatment, under Rule 41; that the admissibility and merits should be examined jointly, in accordance with Article 29 § 3 of the Convention and Rule 54A; and, under Rule 54 § 2 (b), that the Government should be invited to submit written observations on the admissibility and merits of the case.

[...]

The facts

The circumstances of the case

6. The applicant was born in October 1971 and lives in Wiltshire. The facts, as found by Mr

Justice Wall (“Wall J”), who heard the parties’ oral evidence, are as follows.

A. The IVF treatment

7. On 12 July 2000 the applicant and her partner, J, commenced treatment at the Bath Assisted Conception Clinic (“the clinic”). The applicant had been married and had been referred for fertility treatment at the clinic with her husband in 1995, but had not pursued it because of the breakdown of her marriage.
8. On 10 October 2000 the applicant and J were informed, during an appointment at the clinic, that preliminary tests had revealed that the applicant had serious pre-cancerous tumours in both ovaries, and that her ovaries would have to be removed. They were told that because the tumours were growing slowly, it would be possible first to extract some eggs for in vitro fertilisation (“IVF”), but that this would have to be done quickly.
9. [...] The applicant asked the nurse whether it would be possible to freeze her unfertilised eggs, but was informed that this procedure, which had a much lower chance of success, was not performed at the clinic. At that point J reassured the applicant that they were not going to split up, that she did not need to consider the freezing of her eggs, that she should not be negative and that he wanted to be the father of her child. Wall J found that J gave these assurances in good faith, because at that time he loved the applicant, genuinely wanted a child with her and wanted to support her during a very difficult period.
10. Thereafter, the couple entered into the necessary consents, by signing the forms required by the 1990 Act.

Immediately beneath the title to the form appeared the following words:

“NB – do not sign this form unless you have received information about these matters and have been offered counselling. You may vary the terms of this consent at any time except in relation to sperm or embryos which have already been used. Please insert numbers or tick boxes as appropriate.”

J ticked the boxes which recorded his consent to use his sperm to fertilise the applicant’s eggs in vitro and the use of the embryos thus created for the treatment of himself and the applicant together. He further ticked the box headed “Storage”, opting for the storage of embryos developed in vitro from his sperm for the maximum period of 10 years and also opted for sperm and embryos to continue in storage should he die or become mentally incapacitated within that period. The applicant signed a form which, while referring to eggs rather than sperm, essentially replicated that signed by J. Like J, she ticked the boxes providing for the treatment of herself and for the treatment “of myself with a named partner.”

11. On 12 November 2001 the couple attended the clinic and eleven eggs were harvested and fertilised. Six embryos were created and consigned to storage. On 26 November the applicant underwent an operation to remove her ovaries. She was told that she should wait two years before attempting to implant any of the embryos in her uterus.

[...]

The law

I. Admissibility of the application

[...]

44. The Court considers that the application as a whole raises questions of law which are sufficiently serious that their determination should depend on an examination of the

merits. No other ground for declaring it inadmissible has been established. The application must therefore be declared admissible. Pursuant to Article 29 § 3 of the Convention, the Court will now consider the merits of the applicant's complaints.

II. Alleged violation of article 2 of the Convention

45. The applicant complained that the provisions of English law requiring the embryos to be destroyed once J withdrew his consent to their continued storage violated the embryos' right to life, contrary to Article 2 of the Convention, which reads as follows:

"1. Everyone's right to life shall be protected by law. ..."

46. The Court recalls, however, that in *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-..., it held that, in the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere. Under English law, as was made clear by the domestic courts in the present applicant's case, an embryo does not have independent rights or interests and cannot claim—or have claimed on its behalf—a right to life under Article 2.

47. There has not, accordingly, been a violation of that provision in the present case.

III. Alleged violation of article 8 of the Convention

48. The applicant contended that the provisions of Schedule 3 to the 1990 Act, which permitted J to withdraw his consent after the fertilisation of her eggs with his sperm, violated her rights to respect for private and family life under Article 8 of the Convention, [...].

B. The Court's assessment

56. The Court observes at the outset that, like the Court of Appeal, it accepts the facts as found by the High Court, which had the benefit of hearing the witnesses in person. In particular, it accepts that J acted in good faith in embarking on the IVF treatment with the applicant, but that he did so only on the basis that their relationship would continue.

[...]

59. The Court does not in any event find it to be of central importance whether the case is examined in the context of the State's positive or negative obligations. The boundaries between the two types of obligation under Article 8 do not always lend themselves to precise definition and the applicable principles are similar. In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in both cases the State enjoys a certain margin of appreciation [...].

[...]

69. For the above reasons, the Court finds that, in adopting in the 1990 Act a clear and principled rule, which was explained to the parties to IVF treatment and clearly set out in the forms they both signed, whereby the consent of either party might be withdrawn at any stage up to the point of implantation of an embryo, the United Kingdom did not exceed the margin of appreciation afforded to it or upset the fair balance required under Article 8 of the Convention.

There has not therefore been a violation of Article 8 of the Convention.

III. Alleged violation of article 14 of the Convention taken in conjunction with article 8

70. The applicant further complained of discrimination contrary to Article 14 taken in conjunction with Article 8. [...].

She reasoned that a woman who was able to conceive without assistance was subject to no control or influence over how her fertilised eggs developed; from the moment of fertilisation she alone determined the future of the embryo. In contrast, the applicant, together with all women dependent on IVF to have children, was at the whim of the sperm donor, who had the power under the 1990 Act to prevent her from having the embryos implanted.

71. The Government submitted that there was no discrimination under the 1990 Act between women who conceive through intercourse and those who use IVF, because the transfer to the woman of the embryo created in vitro was the equivalent of the fertilisation of the egg inside a woman following sexual intercourse. The 1990 Act did create a distinction between women undergoing IVF treatment before implantation of the embryo, on the basis of whether or not the male gamete provider continued to consent to the process, but, even if this distinction amounted to a relevant difference of treatment for the purposes of Article 14, it was objectively justified.

72. The Court has found above that the applicant's rights under Article 8 of the Convention were engaged, and Article 14 is therefore applicable.

[...]

74. The Court is not required to decide in the present case whether the applicant could properly complain of a difference of treatment as compared to another woman in an analogous position, because it considers, in common with the Court of Appeal, that the reasons given for finding that there was no violation of Article 8 also afford a reasonable and objective justification under Article 14 [...].

75. Consequently, there has been no violation of Article 14 of the Convention in the present case.

IV. Rule 39 of the rules of court

76. The Court recalls that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

77. It considers that the indication made to the Government under Rule 39 of the Rules of Court must continue in force until the present judgment becomes final or until the Panel of the Grand Chamber of the Court accepts any request by one or both of the parties to refer the case to the Grand Chamber under Article 43 of the Convention.

For these reasons, the Court

1. *Declares* the application admissible, unanimously;
2. *Holds*, unanimously, that there has been no violation of Article 2 of the Convention;
3. *Holds*, by five votes to two, that there has been no violation of Article 8 of the Convention;
4. *Holds*, unanimously, that there has been no violation of Article 14 of the Convention, taken in conjunction with Article 8;

5. *Decides* to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings that the Government take appropriate measures to ensure that the embryos are preserved until such time as the present judgment becomes final or further order.

50.

EUROPEAN COURT OF HUMAN RIGHTS 10 November 2015.

Couderc and Hachette Filipacchi Associés v. France.

Procedure

1. The case originated in an application (no. 40454/07) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Ms Anne-Marie Couderc, a French national, and Hachette Filipacchi Associés, a company incorporated under French law (“the applicants”), on 24 August 2007.

[...]

3. The applicants alleged that there had been an unjustified breach of their right to freedom of expression (Article 10 of the Convention).

[...]

The Court heard addresses by Ms de Percin and Mr de Bergues.

The facts

I. The circumstances of the case

8. The applicants are the publication director and the publishing company, respectively, of the weekly magazine *Paris Match*. Ms Anne-Marie Couderc was born in 1950 and lives in Levallois-Perret. The company Hachette Filipacchi Associés has its registered office in Levallois-Perret.

A. Factual background to the case

9. On 3 May 2005 the British newspaper the *Daily Mail* published an article headlined “Is this boy the heir to Monaco?”, describing the disclosures by a woman, Ms Coste, who claimed that her son’s father was Albert Grimaldi, who had become reigning prince of Monaco (“the Prince”) following the death of his father on 6 April 2005. The article mentioned a forthcoming publication in *Paris Match*, and set out its core elements. It was accompanied by three photographs, one of which showed the Prince holding the child in his arms and was captioned “His successor to the throne? Prince Albert with Alexandre”.
10. On the same day, having been informed that an article was about to appear in *Paris Match*, Prince Albert served notice on the applicants to refrain from publishing it.
11. On 4 May 2005 the German weekly magazine *Bunte* published the interview with Ms Coste. The front cover of the magazine was headlined “Prinz Albert ist der Vater meines Kindes” (“Prince Albert is the father of my child”). It was illustrated by two photographs of the Prince: in one of them he was pictured alongside Ms Coste, and in the other he held the child in his arms.
12. On the same day various Internet sites relayed the news.

[...]

15. This interview was illustrated by five photographs of the Prince with the child and three of the Prince with Ms Coste. In particular, a double-page spread (pages 50 and 51) consisted in a photograph of the Prince holding the child in his arms, headlined “Alexandre ‘is Albert’s son’ says his mother”, followed by this text:

“A little boy who knows how to say only two words: daddy and mummy. A little boy who does not seem troubled by the huge gulf between the two cultures from which he comes. His name is Alexandre, a conqueror’s name, an emperor’s name. He was born in Paris on 24 August 2003. His mother asks that he does not grow up clandestinely, ‘like Mazarine’. For that reason, she is now disclosing his existence, which poses no threat to any republic or any dynasty. Because in Togo, the country of his maternal family, all children, whether or not they are born to lawfully married couples, are entitled to an official father. For the moment, the little boy with black curls isn’t interested in knowing whether he is a prince or not. His mother just has to lean towards him and he is happy. There’s already a king in the house... him.”

The photograph was also accompanied by the following captions:

“The 47-year-old new sovereign of Monaco had not been known to have any long-term relationship. Today Nicole Coste, an air hostess whom he met eight years ago, claims that they have had a son.”

“He’s never been seen smiling like this before: Prince Albert succumbs to Alexandre’s charm.”

16. Four photographs of the Prince holding the child in his arms were published on pages 52, 53, 56 and 57, and were also accompanied by captions and/or subheadings [...].

17. On 10 May 2005 Ms. Coste issued a statement indicating that she had agreed to give an interview to *Paris Match*, for publication in the edition of 5 May 2005, had carefully reread its wording, and had herself handed over the photographs showing the Prince with Alexandre. She specified that she had taken those photographs, and that she had taken them with the Prince’s full consent. She issued a further statement indicating that she had handed these photographs over to the media for publication without charge. She added that her son had been recognised before a notary, that the notarial deed had been signed on 15 December 2003 and that it had been agreed on that date that the deed would be sent to the district hall of the 14th *arrondissement* of Paris immediately after Prince Rainier’s death. She stated that she had attempted, by all amicable means, to find a compromise with the Prince’s lawyer, and that it was the fact that the Prince had failed to honour his undertaking which had induced her to bring the matter to the public’s attention. With regard to the media, she stated: “they have merely helped my son and myself to have Alexandre officially recognised.”

[...]

The law

I. Alleged violation of article 10 of the Convention

45. The applicants alleged that the judgment against them amounted to unjustified interference in the exercise of their right to freedom of information. They relied on Article 10 of the Convention, [...].

A. The Chamber judgment

46. The Chamber noted that the judgment against the applicants made no distinction between information which formed part of a debate on a matter of public interest and that which merely concerned details of the Prince’s private life. Accordingly, in spite of

the margin of appreciation left to States in this matter, it held that there was no reasonable relationship of proportionality between, on the one hand, the restrictions imposed by the courts on the applicants' right to freedom of expression and, on the other, the legitimate aim pursued. It therefore concluded that there had been a violation of Article 10 of the Convention [...].

[...]

D. The Court's assessment

79. The Court notes that it is common ground between the parties that the impugned court judgment constituted an interference with the applicants' exercise of their right to freedom of expression, protected by Article 10 of the Convention. Nor is it contested that the interference was prescribed by law, in that it was based on Articles 9 and 1382 of the Civil Code, and pursued a legitimate aim, namely, the protection of the rights of others within the meaning of Article 10 § 2 of the Convention – in the present case the Prince's right to private life and to protection of his own image. The Court agrees with this assessment.
80. However, the applicants expressed reservations concerning the lawfulness and legitimacy of the interference in question, considering that the national courts' interpretation of the concept of private life was too broad, and complained that there had been no thorough weighing up of the competing interests involved. That being stated, the Court considers that these arguments concern the assessment of whether the interference was necessary, and are not such as to call into question its lawfulness or the legitimate aim.
81. The dispute in the instant case therefore relates to the question whether the interference was "necessary in a democratic society".

[...]

2. Application of these principles to the present case

94. The Court notes that the impugned article consisted of an interview with Ms Coste, who disclosed that the Prince was the father of her son. The article also provided details about the circumstances in which she had met the Prince, their intimate relationship, their mutual feelings, his reaction to the news of her pregnancy and the manner in which he behaved with the child. It was illustrated by photographs of the Prince holding the child or accompanied by Ms Coste, in both private and public contexts.

[...]

(a) The issue of the contribution to a debate of public interest

96. The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on freedom of expression when a matter of public interest is at stake [...]. The margin of appreciation of States is reduced where a debate on a matter of public interest is concerned [...]. In the circumstances of the present case, it is therefore essential to determine at the outset whether the content of the interview disclosing the Prince's fatherhood could be understood as constituting information such as to "contribute to a debate on a matter of public interest".

[...]

116. In this case, however, having regard to the nature of the information in issue, the Court finds no reason to doubt that, in publishing Ms. Coste's account, the applicants could be understood as having contributed to the coverage of a subject of public interest.

(b) How well known is the person concerned and what is the subject of the news report?

(i) Consequences of the classification as a “public figure”

[...]

121. Thus, the Court has found in particular that politicians inevitably and knowingly lay themselves open to close scrutiny of their every word and deed by both journalists and the public at large [...]. Furthermore, this principle applies not only to politicians, but to every person who is part of the public sphere, whether through their actions [...].

[...]

124. In the present case, the Court notes that the Prince is a person who, through his birth as a member of a ruling family and his public functions, both political and representative, as Head of State, is undeniably a prominent public figure. The domestic courts ought therefore to have considered the extent to which this prominence and those public functions were capable of influencing the protection which could be afforded to his private life. Yet they refrained from including this circumstance in their assessment of the facts submitted for their examination. Thus, although it reiterated that an exception could be made to the principle of protection of private life whenever the facts disclosed could give rise to a debate on account of their impact given the status or function of the person concerned, the Versailles Court of Appeal drew no conclusion from that consideration in the present case. Equally, the Court of Cassation merely stated, in a general manner, that “every person, whatever his rank, birth, fortune or present or future functions, [was] entitled to respect for his private life”.

125. Indeed, given that the expectation of protection of private life may be reduced on account of the public functions exercised, the Court considers that, in order to ensure a fair balancing of the interests at stake, the domestic courts, in assessing the facts submitted for their examination, ought to have taken into account the potential impact of the Prince’s status as Head of State, and to have attempted, in that context, to determine the parts of the impugned article that belonged to the strictly private domain and what fell within the public sphere.

(ii) The subject of the publication

126. [...] The Court considers that the existence of his relationship with her was no longer purely a matter concerning his private life.

[...]

128. In addition, in securing the impugned publication, Ms Coste was motivated by a personal interest, namely obtaining official recognition for her son, as is clearly reflected in the article [...].

[...]

(e) Content, form and consequences of the impugned article

[...]

138. In this regard, the Court notes firstly that, in exercising their profession, journalists make decisions on a daily basis through which they determine the dividing line between the public’s right to information and the rights of others to respect for their private lives. They thus have primary responsibility for protecting individuals, including public figures, from any intrusion into their private life. The choices that they make in this regard must be based on their profession’s ethical rules and codes of conduct.

[...]

142. The Court has already had occasion to state that punishing a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so [...]. It considers that the same approach should prevail in the circumstances of the present case, given that, over and above the Prince's private life, the impugned publication concerned a matter of public interest, especially since the details provided by Ms Coste about her relationship with the Prince were not such as to undermine his reputation or arouse contempt towards him [...]. Indeed, it is not disputed that Ms Coste's account of her life and her personal relationship with the Prince was sincere and that it was faithfully reported by the applicants. In addition, there is no cause to doubt that, in publishing this account, the applicants' intention was to communicate to the public news that was of general interest.
143. Moreover, it was for the domestic courts to assess the impugned interview in such a way as to differentiate and weigh up what, in Ms Coste's personal remarks, was likely to fall within the core area of the Prince's private life (compare *Ojala and Etukeno Oy*, cited above, § 56, and *Ruusunen*, cited above, § 51) and what could be of legitimate interest to the public. Yet they failed to do so, denying that there was any "topical" value to the news about the existence of the Prince's son and finding that it did not form part of "any debate on a matter of public interest which would have justified its being reported ... on the grounds of legitimate imparting of information to the public".

[...]

148. The Court considers that, while there is no doubt in the present case that these photographs fell within the realm of the Prince's private life and that he had not consented to their publication, their link with the impugned article was not tenuous, artificial or arbitrary [...]. Their publication could be justified by the fact that they added credibility to the account of events. At the time of their publication, given that Ms Coste had been unable to obtain the notarial deed recognising her son, she had at her disposal no other evidence which would have enabled her to substantiate her account and enable the applicants to forgo publication of the photographs. In consequence, although publication of these photographs had the effect of exposing the Prince's private life to the public, the Court considers that they supported the account given in the article, which has already been found to have contributed to a debate of public interest.
149. Furthermore, taken alone or in conjunction with the accompanying text (be this the headlines, subheadings and captions, or the interview itself), these photographs were not defamatory, pejorative or derogatory for the Prince's image [...]; indeed, the latter did not allege that there had been damage to his reputation.
150. Lastly, with regard to the consequences of the disputed article, the Court notes that shortly after the article was published, the Prince publicly acknowledged his paternity. The Versailles Court of Appeal held in this connection that he had been "obliged" to provide a public explanation about a matter relating to his private life. For its part, the Court considers that the consequences of the publication must be put into perspective, in the light of the articles which had previously appeared in the *Daily Mail* and in *Bunte*. However, in the present case the domestic courts do not appear to have eval-

uated the consequences in the wider context of the international media coverage already given to the events described in the article. Thus, they attached no weight to the fact that the secrecy surrounding the Prince's paternity had already been undermined by the previous articles in other media.

(f) The severity of the sanction

151. The Court reiterates that in the context of assessing proportionality, irrespective of whether or not the sanction imposed was a minor one, what matters is the very fact of judgment being given against the person concerned, including where such a ruling is solely civil in nature [...]. Any undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing future media coverage of similar questions.

[...]

(g) Conclusion

153. In the light of all of the above-mentioned considerations, the Court considers that the arguments advanced by the Government with regard to the protection of the Prince's private life and of his right to his own image, although relevant, cannot be regarded as sufficient to justify the interference in issue. In assessing the circumstances submitted for their appreciation, the domestic courts did not give due consideration to the principles and criteria as laid down by the Court's case-law for balancing the right to respect for private life and the right to freedom of expression. They thus exceeded the margin of appreciation afforded to them and failed to strike a reasonable balance of proportionality between the measures restricting the applicants' right to freedom of expression, imposed by them, and the legitimate aim pursued.

The Court therefore concludes that there has been a violation of Article 10 of the Convention.

II. Application of article 41 of the Convention

154. Article 41 of the Convention [...]

For these reasons, the Court unanimously

1. *Holds* that there has been a violation of Article 10 of the Convention;
2. *Holds*
 - (a) that the respondent State is to pay the applicants, jointly, within three months, EUR 15,000 (fifteen thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to them;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
3. *Dismisses* the remainder of the applicants' claim for just satisfaction.

51.

EUROPEAN COURT OF HUMAN RIGHTS 21 February 2002.

Wolfgang Schüssel v. Austria.

The facts

The applicant, Wolfgang Schüssel, is an Austrian national, who was born in 1945 and lives in Vienna. He is represented before the Court by Mr. W. Suppan, a lawyer practising

in Vienna.

A. The circumstances of the case

At the material time the applicant was Deputy Prime Minister of Austria in a coalition Government formed by the Austrian Social-democratic Party (*Sozialdemokratische Partei Österreichs*) and the applicant's party, namely the Austrian Peoples' Party (*Österreichische Volkspartei*). In the 1995 election campaign the applicant had been nominated by his party as candidate for the office of Prime Minister.

In November 1995 the Austrian Social-democratic Party and the Group of Social-democratic Trade Unionists distributed stickers showing a picture of the applicant's face half overlapped by the face of Mr Haider, the leader of the Austrian Freedom Party (*Freiheitliche Partei Österreichs*), headed by the following text: "The social security slashers and the education snatchers share a common face" (*"Sozialabbau und Bildungsklau haben ein Gesicht"*).

On 21 November 1995 the applicant brought proceedings under section 78 of the Copyright Act (*Urheberrechtsgesetz*).

On 28 November 1995 the Vienna Commercial Court (*Handelsgericht*) granted the applicant's request for a preliminary injunction prohibiting the defendants from publishing and disseminating the applicant's picture, in the event that his legitimate interests were thereby injured, firstly, in that the accompanying text alleged that he was a "social security slasher" and an "education snatcher" or, secondly, in that his face was distorted by being overlapped with the face of a politician of an opposing party, that of Jörg Haider.

In its reasoning, the Commercial Court noted that section 78 of the Copyright Act protected anyone against abuse of his or her picture in public. A person in the public eye, in particular one who had entered the public arena of his or her own motion, was not protected in this public capacity. The applicant had put himself at the centre of his party's election campaign. As his party's top candidate, he could be regarded as endorsing its positive statements and had to accept being the target of its opponents' criticism. Thus, the use of his picture by political opponents was not in itself contrary to section 78 of the Copyright Act. However, while the applicant had to accept admissible criticism directed against the party represented by him, an infringement of his legitimate interests was conceivable regarding attacks on his privacy or personal disparagement which went beyond the limits of acceptable criticism. This consideration applied in particular where his picture was used in a distorted manner. In the present case, the applicant did not have to accept the distorted use of his picture "melted" with the picture of a political opponent.

[...] It found that the combination of the applicant's picture with disparaging expressions suggesting that he was insensitive to social needs and was stealing educational opportunities violated his legitimate interests.

On 15 December 1995 the Vienna Commercial Court dismissed the objection (*Widerspruch*) of the defendants.

On 18 October 1996 the Vienna Court of Appeal (*Oberlandesgericht*), upon the defendants' appeal, confirmed the preliminary injunction order as to the prohibition to publish a distorted picture of the applicant, but lifted it as regards the prohibition to publish it accompanied by the incriminated text.

The Court of Appeal confirmed that the applicant did not have to accept the publication of his distorted picture overlapped with the picture of a political opponent. However, as to

- the accompanying text, it found that the expressions “social security slashers” and “education snatchers”, though being blunt, were no more than the usual graphic wording applied in an election campaign. The average citizen would conclude that the applicant advocated reducing social assistance and making budgetary cuts in the education system. The statement could not be understood as to contain an allegation of theft within the meaning of the Criminal Code, nor did it suggest that the applicant was generally insensitive to social needs.
- On 28 January 1997 the Supreme Court, upon the defendants’ appeal on points of law, quashed the Appeal Court’s decision and dismissed the applicant’s request for a preliminary injunction.
- The Supreme Court observed that, when examining whether the publication of a picture violated legitimate interests within the meaning of section 78 of the Copyright Act, it had to be taken into account whether the person concerned was well-known. However, even where a well-known politician was concerned, there were limits to the admissible publication of his picture. Such limits applied where the publication intruded on a politician’s privacy, where his picture was distorted or where it was accompanied by a text which connected him with events with which he had nothing to do or attributed political convictions to him which he did not hold. [...]
- The Supreme Court went on to say that political debate and the shaping of public opinion was sometimes impossible without having recourse to graphic wording. It recalled that political debate was protected by the right to freedom of expression as guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. [...] A politician inevitably and knowingly laid himself open to close scrutiny of his every word and deed by journalists, the public at large and his political opponents. Thus, as his party’s top candidate, the applicant had to accept that his political opponents used disparaging words to describe his political aims.
- As to the question of whether the publication of the applicant’s picture overlapping with Mr Haider’s was contrary to section 78 of the Copyright Act, the Supreme Court contested the appellate court’s view. [...] The picture showed the applicant as he had presented himself in the election campaign without making his features ugly or repulsive. [...] On the whole, this was an admissible political statement rather than a personal disparagement of the applicant. [...]
- The Commercial Court, referring to the Supreme Court’s reasoning, dismissed the applicant’s request that the defendants be prohibited from publishing his picture in the event that his legitimate interests were thereby injured, firstly, in that the accompanying text alleged that he was a “social security slasher” and an “education snatcher” or, secondly, in that his face was distorted by being overlapped by the face of a politician of an opponent party, in particular Jörg Haider’s.
- On 18 September 1997 the Vienna Court of Appeal dismissed the applicant’s appeal. As to the applicant’s complaint that the witness requested by him had not been heard, the court found that the question of what impression was conveyed by the sticker at issue was a matter of legal assessment to be carried out by the court.
- On 24 February 1998 the Supreme Court dismissed the applicant’s appeal on points of law. It found that the applicant’s submissions in the main proceedings did not raise any relevant new facts as compared to the preliminary injunction proceedings.
- [...]

The law

1. The applicant raises a number of issues relating to the alleged unfairness of the proceedings concerning his request to prohibit the publication of his picture. He relies on Article 6 § 1 of the Convention, [...]

The Court notes that, in the present case, two sets of proceedings, namely preliminary injunction proceedings followed by the main proceedings were conducted. As regards compliance with Article 35 § 1 of the Convention, the Court recalls that in a previous similar case it found that the preliminary injunction proceedings and the main proceeding under section 78 of the Copyright Act had to be considered as a whole and that, thus, the six-month time-limit started running from the date of service of the Supreme Court's decision in the main proceedings [...].

As to the applicant's complaint that the Supreme Court wrongly regarded the impugned statement as a value judgment and failed to give reasons in this respect, the Court recalls that it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention [...].

Insofar as the applicant complains that this assessment deprived him of the possibility to adduce evidence that the statement was untrue, he overlooks that even where a statement amounts to a value judgment, it may depend on a factual basis which is itself susceptible to proof [...]. However, neither in the preliminary proceedings nor in the main proceedings did the applicant attempt to adduce any evidence in order to show that there was no factual basis for stating that he advocated budgetary cuts in the area of social and educational policy.

In these circumstances, the Court finds that there is no indication of a violation of Article 6 § 1 of the Convention.

It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. The applicant complains that the Austrian Courts failed to protect him against the publication of his distorted picture accompanied by a disparaging text and therefore violated his right to respect for his private life. He relies on Article 8 of the Convention [...].

[...] The Court recalls that Article 8 taken in conjunction with the obligation to secure the effective exercise of Convention rights imposed by Article 1 of the Convention, may involve a positive obligation on the State to provide a measure of protection for an individual's private life in relation to the exercise by third parties of the right to freedom of expression bearing in mind the duties and responsibilities referred to in Article 10. The absence of a remedy in relation to the publication of information relating to private affairs may constitute a lack of respect for private life [...].

In the present case the Court notes at the outset that section 78 of the Copyright Act provides a remedy against publication of a person's picture. Persons in the public eye are not - as a matter of principle - excluded from the protection afforded. The decisions given in the present case clearly show that even a leading politician such as the applicant may be protected against the publication of his picture where it constitutes an intrusion upon his privacy, where his picture is distorted or where it is accompanied by disparaging statements.

Applying these principles to the particular circumstances of the present case, the Supreme Court correctly weighed the general interest in an open political debate as protected by

Article 10 of the Convention against the applicant's interest in protection against the publication of his picture. Giving detailed reasons, it found that neither the accompanying text nor the fact that the applicant's picture was half overlapped by the picture of another leading politician went beyond the limits of what is acceptable in the context of political battle in general and against the background of an electoral campaign in particular. In arriving at this conclusion, the Supreme Court had guidance from the present Court's established case-law under Article 10 of the Convention, according to which the limits of acceptable criticism are wider with regard to a politician than as regards a private individual [...].

In conclusion, the Court finds that the facts of the case do not disclose any indication of lack of respect for the applicant's private life.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

3. Having regard to its considerations under Article 8, the Court finds that the applicant's complaint under Article 14 of the Convention that he, as a politician, was treated less favourably than the average citizen as regards protection against the publication of his picture, does not raise a separate issue.

For these reasons, the Court unanimously

Declares the application inadmissible.

52.

EUROPEAN COURT OF HUMAN RIGHTS 04 September 2009.

Standard Verlags GmbH v. Austria (No. 2).

Procedure

1. The case originated in an application (no. 21277/05) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Standard Verlags GmbH ("the applicant company"), on 3 June 2005.
2. The applicant was represented by Ms M. Windhager, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador F. Trauttmansdorff, Head of the Law Department at the Federal Ministry of European and International Affairs.
3. The applicant company alleged a violation of its right to freedom of expression.
4. On 3 May 2007 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

The facts

I. The circumstances of the case

5. The applicant, a limited liability company with its seat in Vienna, is the owner of the daily newspaper Der Standard.
6. In its issue of 14 May 2004 Der Standard published an article in the domestic politics section under the heading "Gossip mongering" ("Kolportiert"). The article, which was entitled "A society rumour" ("Ein bürgerliches Gerücht") commented on certain ru-

mours relating to the marriage of Mr Klestil, the then Federal President. The article also appeared on the website of Der Standard. It read as follows:

“If the stories circulating between the outlying district of Döbling and the city centre are to be believed, there is only one topic of conversation at the moment among the so-called upper crust of Viennese society: the marriage of the departing presidential couple Thomas Klestil and Margot Klestil-Löffler [bold print in the original]. Rumour has it that not only is he about to leave office, but she is about to leave him. The latter claim has of course set tongues wagging furiously in bourgeois – and not- so-bourgeois – circles. People here like nothing better than to be able to express outrage about one of their own.

In addition to the allegedly less-than-blissful domestic situation on the Hohe Warte [the Federal President’s residence], there has been persistent gossip recently about the supposedly close ties between the First Lady, who is her husband’s junior by 22 years, and other political figures. Head of the FPÖ parliamentary group Herbert Scheibner [bold print in the original], for instance, is reported to be close to her (Scheibner has accompanied the presidential couple on a number of foreign trips). Ms Löffler is also said to be well acquainted with the husband of the Canadian ambassador (unsurprisingly, given her post as head of the American department of the Foreign Affairs Ministry).

The fact that the President’s wife took a few days off recently to organise the move from the official residence to the couple’s newly renovated home in Hietzing fuelled further speculation. So much so, in fact, that Klestil – never squeamish about putting his emotions on display – had the following pre-emptive statement published in his information bulletin, *News* [an Austrian weekly]: ‘Rumours of a separation are nothing but idle gossip’ he said. He added: As of 8 July we will be embarking on a new phase of our life together. Any assertions to the contrary are untrue.

Be that as it may, the people are concerned for the well-being of their President. Apparently, the public information desk of the President’s Office has recently had more callers than ever before enquiring about the state of the President’s marriage. And more than a few of the callers made their enquiries in the ultra-refined tones of Schönbrunn.”

7. The article was accompanied by a picture of Mr Klestil and Mrs Klestil-Löffler, looking in different directions.

[...]

The law

Alleged violation of article 10 of the Convention

34. The applicant company complained that the courts’ decision in the proceedings under the Media Act and under the Civil Code violated its right to freedom of expression as provided in Article 10 of the Convention, [...].

35. The Government contested that argument.

[...]

B. Merits

[...]

2. The Court’s assessment

42. The Court finds that the domestic courts’ judgments given in the two sets of proceedings under the Media Act constituted an interference with the applicant’s right to freedom of expression.

43. It was not in dispute that that interference was “prescribed by law”, namely by sections 6 and 7 of the Media Act, nor that it served a legitimate aim, namely the protection of the rights and reputation of others. The parties’ submissions concentrated on whether the interference had been “necessary in a democratic society”.

[...]

48. The Court has accepted that the right of the public to be informed can in certain special circumstances even extend to aspects of the private life of public figures, particularly where politicians are concerned (see Von Hannover, cited above, § 64, with reference to Editions Plon, cited above, § 53). However, anyone, even if they are known to the general public, must be able to enjoy a “legitimate expectation” of protection of and respect for their private life (see Von Hannover, cited above, § 69).

49. In the present case, it is not in dispute that all three claimants in the proceedings under the Media Act were public figures. At the time of publication of the impugned article, Mr Klestil was the Federal President of Austria, Mrs Klestil-Loeffler, his wife, was herself a high-ranking official at the Foreign Ministry and Mr Scheibner was a leading politician of the Freedom Party. The parties’ opinions differ in particular as to whether the article made any contribution to a debate of general interest.

50. The Court observes in this context that section 7 of the Media Act protects the strictly personal sphere of any person’s life against being discussed or portrayed in a way liable to undermine him or her in public, except where the statements published are true and directly related to public life.

[...]

54. Having regard to these considerations, the Court finds the domestic courts did not transgress their margin of appreciation when interfering with the applicant company’s right to freedom of expression.

55. Furthermore the Court considers that the measures imposed on the applicant company, namely the order to pay compensation to the claimants and to publish the judgments were not disproportionate to the legitimate aim. In sum, the interference with the applicant company’s right to freedom of expression could thus reasonably be considered necessary in a democratic society for the protection of the reputation and rights of others within the meaning of Article 10 § 2 of the Convention.

56. There has consequently been no violation of Article 10 of the Convention.

For these reasons, the Court

1. *Declares* unanimously the complaint that the courts’ decisions in the proceedings under the Media Act violated the applicant company’s right to freedom of expression admissible and the remainder of the application inadmissible;

2. *Holds* by five votes to two that there has been no violation of Article 10 of the Convention.

EUROPEAN COURT OF HUMAN RIGHTS 25 February 2009.**Armonienė v. Lithuania.****Procedure**

1. The case originated in an application (no. 36919/02) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Lithuanian national, Judita Armonienė (“the applicant”), on behalf of her late spouse Laimutis Armonas (“the husband”) on 2 October 2002.

[...]

3. The applicant alleged that the State had failed to fulfil its obligation to secure respect for her family’s private life as a result of the derisory sum of non-pecuniary damages awarded in her husband’s favour, even though a serious violation of the family’s privacy had been committed by a major newspaper. In addition, the applicant claimed a violation of her husband’s right to an effective domestic remedy as the national law imposed a low ceiling on compensation for non-pecuniary damage caused by the unlawful public dissemination of information by the mass media about a person’s private life.
4. On 7 September 2005 the Court decided to give notice to the Government of the applicant’s complaints under Article 8 of the Convention. On the same date, the Court decided to apply Article 29 § 3 of the Convention and to examine the merits of the complaints at the same time as their admissibility.

The facts**I. The circumstances of the case**

5. The applicant’s family lived in the village of Ažuolpamušio, Pasvalys district. Her husband died on 15 April 2002.
6. Prior to his death, on 31 January 2001 the biggest Lithuanian daily newspaper, *Lietuvos Rytas*, published a front page article entitled “Pasvalys villages paralysed by the fear of death: residents of the remote Lithuanian area shackled by the AIDS threat” [...].

[...]

7. The husband instituted proceedings in the Vilnius City Third District Court, suing the newspaper for non-pecuniary damages [...].
8. On 19 July 2001 the court ruled in his favour [...].
9. The husband appealed to the Vilnius Regional Court. On 8 October 2001 the court dismissed the appeal, agreeing with the lower court’s reasoning.
10. As mentioned above, the husband died on 15 April 2002.
11. On 24 April 2002 the Supreme Court upheld the appellate court’s decision [...]. The court observed that by printing the article the newspaper had committed two violations: first, it had published information which was not true and which debased the husband’s honour and reputation, and, secondly, it had published data about his private life without his consent. However the Supreme Court ruled that the lower courts had come to the well-founded conclusion that the husband had not proved that the defendant had published information about him deliberately and, therefore, there was no ground to increase the amount of compensation for non-pecuniary damage fivefold, as envisaged by Article 54 § 1 of the Law on the Provision of Information to

the Public.

[...]

The law

I. Alleged violation of article 8 of the Convention

22. The applicant complained that the State had failed to secure her family's right to respect for their private life as a result of the derisory sum of non-pecuniary damages awarded to her late husband, even though the domestic courts had found that a serious violation of his privacy had been committed by the newspaper *Lietuvos Rytas*. She also argued that the national legislation did not provide an effective remedy from the point of view of Article 8 of the Convention as it limited the maximum amount of non-pecuniary damages for a so-called "unintentional" breach of privacy by the mass media. The applicant relied on Articles 1, 8 and 13 of the Convention.
23. From the outset the Court notes that the applicant's complaint cannot be dealt with under Article 1 of the Convention, which is a framework provision that cannot be breached on its own [...]. Moreover, in the Court's view, the complaint under Article 13 as to the absence of an effective domestic remedy is subsidiary to the complaint under Article 8 of the Convention that the State did not ensure respect for the private life of the applicant's family. Therefore the Court finds it appropriate to analyse the applicant's complaints solely under Article 8 of the Convention, [...].

A. Admissibility

[...]

29. [...] In the present case the Court considers that the close relatives of Laimutis Armonas, in particular his spouse and their minor child, have an interest of their own to ensure that his right to privacy is respected even if he died before the final domestic decision, as any statement violating this right not only affected the deceased's reputation but also that of his family [...]. The Court is of the opinion that the link between the publication and the deceased is not exclusive and it cannot be claimed that the article had no bearing at all on the person of the applicant [...]. In these circumstances the Court finds that the applicant has standing to bring the present proceedings in her husband's stead.
30. The Court notes the Government's argument that the husband could not have claimed to be a victim of a violation of Article 8 of the Convention as the domestic courts had clearly established a violation of his right to respect for private life and had awarded appropriate compensation. However, the Court emphasises that a decision or measure favourable to an applicant is not in principle sufficient to deprive him or her of the status of a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention [...]. The Court recognises that the domestic courts determined the violation of the husband's right to private and family life. However, the Court finds that the question of victim status as regards the redress for this violation is inextricably linked to the merits of the complaint. Therefore, it considers that both questions should be joined and examined together. The Court also observes that the applicant's complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that the complaint is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

[...]

3. The Court's assessment

[...]

(b) Application of these general principles to the present case

42. The Court notes that the publication of the article about the state of health of the applicant's husband, namely that he was HIV-positive, as well as the allegation that he was the father of two children by another woman who was also suffering from AIDS, were of a purely private nature and therefore fell within the protection of Article 8 [...]. The Court takes particular note of the fact that the family lived not in a city but in a village, which increased the impact of the publication on the possibility that the husband's illness would be known by his neighbours and his immediate family, thereby causing public humiliation and exclusion from village social life. In this respect the Court sees no reason to depart from the conclusion of the national courts, which acknowledged that there had been interference with the family's right to privacy.
43. [...] The Court sees no such legitimate interest and agrees with the finding of the Vilnius City Third District Court, which held that making public information about the husband's state of health, indicating his full name, surname and residence, did not correspond to any legitimate public interest. In the Court's view, the publication of the article in question, the sole purpose of which was apparently to satisfy the prurient curiosity of a particular readership, cannot be deemed to contribute to any debate of general interest to society [...].
44. Furthermore, the Court attaches particular significance to the fact that, according to the newspaper, the information about the husband's illness had been confirmed by employees of the AIDS centre. It cannot be denied that publication of such information in the biggest national daily newspaper could have a negative impact on the willingness of others to take voluntary tests for HIV. In this context, it is of special importance that domestic law provides appropriate safeguards to discourage any such disclosures and the further publication of personal data.
- [...]
46. The Court agrees with the Government that a State enjoys a certain margin of appreciation in deciding what "respect" for private life requires in particular circumstances [...]. The Court also acknowledges that certain financial standards based on the economic situation of the State are to be taken into account when determining the measures required for the better implementation of the foregoing obligation. The Court likewise takes note of the fact that the Member States of the Council of Europe may regulate questions of compensation for non-pecuniary damage differently, as well as the fact that the imposition of financial limits is not in itself incompatible with a State's positive obligation under Article 8 of the Convention. However, such limits must not be such as to deprive the individual of his or her privacy and thereby empty the right of its effective content.
47. The Court recognises that the imposition of heavy sanctions on press transgressions could have a chilling effect on the exercise of the essential guarantees of journalistic freedom of expression under Article 10 of the Convention [...]. However, in a case of an outrageous abuse of press freedom, as in the present application, the Court finds

that the severe legislative limitations on judicial discretion in redressing the damage suffered by the victim and sufficiently deterring the recurrence of such abuses, failed to provide the applicant with the protection that could have legitimately been expected under Article 8 of the Convention. This view is confirmed by the fact that the impugned ceiling on judicial awards of compensation contained in Article 54 § 1 of the Law on the Provision of Information to the Public was repealed by the new Civil Code soon after the events in the present case.

48. In the light of the foregoing considerations, the Court rejects the Government's preliminary objection as to the applicant's victim status and concludes that the State failed to secure the applicant's right to respect for her family's private life.

There has therefore been a violation of Article 8 of the Convention.

V. Application of article 41 of the Convention

49. Article 41 of the Convention [...].

For these reasons, the Court

1. *Joins to the merits* the Government's objection as to the applicant's victim status and rejects it unanimously;
2. *Declares* unanimously the application admissible;
3. *Holds* by six votes to one that there has been a violation of Article 8 of the Convention;
4. *Holds* by four votes to three
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,500 (six thousand five hundred euros) in respect of non-pecuniary damage plus any tax that may be chargeable, this sum being converted into the national currency of that State at the rate applicable on the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

54.

EUROPEAN COURT OF HUMAN RIGHTS 20 May 1999.

Bladet Tromsø and Stensaas v. Norway.

Procedure

1. The case was referred to the Court, as established under former Article 19 of the Convention, by the European Commission of Human Rights ("the Commission") on 24 September 1998 and by the Norwegian Government ("the Government") on 29 October 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 21980/93) against the Kingdom of Norway lodged with the Commission under former Article 25 by a limited liability company established under Norwegian law, *Bladet Tromsø A/S*, which publishes the newspaper *Bladet Tromsø*, and its former editor, Mr. Pål Stensaas, who is a Norwegian national, on 10 December 1992.
2. The Commission's request referred to former Articles 44 and 48 and to the declaration

whereby Norway recognised the compulsory jurisdiction of the Court (former Article 46); the Government's application referred to former Articles 44 and 48. The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention.

[...]

The facts

I. The circumstances of the case

A. Background to the case

6. The first applicant is a limited liability company, *Bladet Tromsø A/S*, which publishes the daily newspaper *Bladet Tromsø* in the town of Tromsø. The second applicant, Mr Pål Stensaas, was its editor. He was born in 1952 and lives at Nesbrua, near Oslo.

Tromsø is a regional capital of the northern part of Norway. It is the centre of the Norwegian seal hunting industry and has a university which includes an international polar research centre.

At the relevant time *Bladet Tromsø* had a circulation of about 9,000 copies. Like other local newspapers in Norway, it was used as a regular source by the Norwegian News Agency ("NTB").

7. Mr Odd F. Lindberg had been on board the seal hunting vessel *M/S Harmoni* ("the *Harmoni*") during the 1987 season as a freelance journalist, author and photographer. Several of his articles pertaining to that season had been published by *Bladet Tromsø*. These had not been hostile to seal hunting. On 3 March 1988 Mr. Lindberg applied to the Ministry of Fisheries to be appointed seal hunting inspector for the 1988 season on board the *Harmoni*. Following his appointment on 9 March 1988 he served on board the *Harmoni* from 12 March to 11 April 1988, when the vessel returned to its port in Tromsø. Thereafter, and until 20 July 1988, *Bladet Tromsø* published twenty-six articles on Mr Lindberg's inspection.

8. On 12 April 1988 *Bladet Tromsø* printed an interview with Mr. Lindberg in which he stated, *inter alia*, that certain seal hunters on the *Harmoni* had violated the 1972 Seal Hunting Regulations (*forskrifter for utøvelse av selfangst*) – as amended in 1980 – issued by the Ministry of Fisheries [...].

[...]

10. [...] Mr. Lindberg recommended that there should be a seal hunting inspector on every vessel and that compulsory training should be organised for all first-time hunters. Their knowledge of the regulations should also be tested. Finally, Mr. Lindberg recommended an amendment to the regulations as regards the killing of mature seals in self-defence.

[...]

The law

I. Alleged violation of article 10 of the Convention

49. The applicants complained that the Nord-Troms District Court's judgment of 4 March 1992, against which the Supreme Court refused leave to appeal on 18 July 1992, had constituted an unjustified interference with their right to freedom of expression under Article 10 of the Convention,

[...].

50. It was common ground between those appearing before the Court that the impugned measures constituted an “interference by [a] public authority” with the applicants’ right to freedom of expression as guaranteed under the first paragraph of Article 10. Furthermore, there was no dispute that the interference was “prescribed by law” and pursued a legitimate aim, namely “the protection of the reputation or rights of others” and thus fulfilled two of the conditions for regarding the interference as permissible under the second paragraph of this Article. The Court arrives at the same conclusion on these issues.

The dispute in the case under consideration relates to the third condition, that the interference be “necessary in a democratic society”. The applicants and the Commission argued that this condition had not been complied with and that Article 10 had therefore been violated. The Government contested this contention.

[...]

B. The Court’s assessment

[...]

2. Application of those principles to the present case

61. In the instant case the Nord-Troms District Court found that two statements published by *Bladet Tromsø* on 15 July 1988 and four statements published on 20 July were defamatory, “unlawful” and not proved to be true. One statement – “Seals skinned alive” – was deemed to mean that the seal hunters had committed acts of cruelty to the animals. Another was understood to imply that seal hunters had committed criminal assault on and threat against the seal hunting inspector. The remaining statements were seen to suggest that some (unnamed) seal hunters had killed four harp seals, the hunting of which was illegal in 1988. The District Court declared the statements null and void and, considering that the newspaper had acted negligently, ordered the applicants to pay compensation to the seventeen plaintiffs.

The Court finds that the reasons relied on by the District Court were relevant to the legitimate aim of protecting the reputation or rights of the crew members.

62. As to the sufficiency of those reasons for the purposes of Article 10 of the Convention, the Court must take account of the overall background against which the statements in question were made. Thus, the contents of the impugned articles cannot be looked at in isolation of the controversy that seal hunting represented at the time in Norway and in Tromsø, the centre of the trade in Norway. It should further be recalled that Article 10 is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population [...]. Moreover, whilst the mass media must not overstep the bounds imposed in the interests of the protection of the reputation of private individuals, it is incumbent on them to impart information and ideas concerning matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Consequently, in order to determine whether the interference was based on sufficient reasons which rendered it “necessary”, regard must be had to the public-interest aspect of the case.

[...]

64. The most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of

discouraging the participation of the press in debates over matters of legitimate public concern [...].

[...]

67. As regards the nature and degree of the defamation, the Court observes that the four statements to the effect that certain sealers had killed female harp seals were found defamatory, not because they implied that the hunters had committed acts of cruelty to the animals, but because the hunting of such seals was illegal in 1988, unlike the year before. According to the District Court, "the statements [did] not differ from allegations of illegal hunting in general". Whilst these allegations implied reprehensible conduct, they were not particularly serious [...]. Thus, while some of the accusations were relatively serious, the potential adverse effect of the impugned statements on each individual seal hunter's reputation or rights was significantly attenuated by several factors. In particular, the criticism was not an attack against all the crew members or any specific crew member [...].
68. As regards the second issue, the trustworthiness of the Lindberg report, it should be observed that the report had been drawn up by Mr. Lindberg in an official capacity as an inspector appointed by the Ministry of Fisheries to monitor the seal hunt performed by the crew of the *Harmoni* during the 1988 season. In the view of the Court, the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research. Otherwise, the vital public-watchdog role of the press may be undermined.
69. The Court does not attach significance to any discrepancies, pointed to by the Government, between the report and the publications made by Mr. Lindberg in *Bladet Tromsø* one year before in quite a different capacity, namely as a freelance journalist and an author.
70. The newspaper was, it is true, already aware from the reactions to Mr. Lindberg's statements in April 1988 that the crew disputed his competence and the truth of any allegations of "beastly killing methods". It must have been evident to the paper that the Lindberg report was liable to be controverted by the crew members. Taken on its own, this cannot be considered decisive for whether the newspaper had a duty to verify the truth of the critical factual statements contained in the report before it could exercise its freedom of expression under Article 10 of the Convention.

[...]

72. Having regard to the various factors limiting the likely harm to the individual seal hunters' reputation and to the situation as it presented itself to *Bladet Tromsø* at the relevant time, the Court considers that the paper could reasonably rely on the official Lindberg report, without being required to carry out its own research into the accuracy of the facts reported. It sees no reason to doubt that the newspaper acted in good faith in this respect.

73. On the facts of the present case, the Court cannot find that the crew members' undoubted interest in protecting their reputation was sufficient to outweigh the vital public interest in ensuring an informed public debate over a matter of local and national as well as international interest. In short, the reasons relied on by the respondent State, although relevant, are not sufficient to show that the interference complained of was "necessary in a democratic society". Notwithstanding the national authorities'

margin of appreciation, the Court considers that there was no reasonable relationship of proportionality between the restrictions placed the applicants' right to freedom of expression and the legitimate aim pursued. Accordingly, the Court holds that there has been a violation of Article 10 of the Convention.

II. Application of article 41 of the Convention

74. *Bladet Tromsø A/S and Mr. Pål Stensaas* sought just satisfaction under Article 41 of the Convention, [...].

For these reasons, the Court

1. *Holds* by thirteen votes to four that there has been a breach of Article 10 of the Convention;
2. *Holds* unanimously that the respondent State is to pay the applicants, within three months,
 - (a) for pecuniary damage, 323,342 (three hundred and twenty-three thousand three hundred and forty-two) Norwegian kroner;
 - (b) for costs and expenses, 370,199 (three hundred and seventy thousand one hundred and ninety-nine) Norwegian kroner;
 - (c) for additional interest, 65,000 (sixty-five thousand) Norwegian kroner;
3. *Holds* unanimously that simple interest at an annual rate of 12% shall be payable from the expiry of the above-mentioned three months until settlement;
4. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

55.

EUROPEAN COURT OF HUMAN RIGHTS 17 December 2004.

Pedersen and Baadsgaard v. Denmark.

Procedure

1. The case originated in an application (no. 49017/99) against the Kingdom of Denmark lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Danish nationals, Mr Jørgen Pedersen and Mr Sten Kristian Baadsgaard ("the applicants"), on 30 December 1998. In the summer of 1999 the second applicant died. His daughter and sole heir, Ms Trine Baadsgaard, decided to pursue the application.
2. The applicants complained of the length of criminal proceedings against them. They furthermore alleged that their right to freedom of expression had been violated in that the Supreme Court judgment of 28 October 1998 disproportionately interfered with their right as journalists to play a vital role as "public watchdog" in a democratic society.

[...]

The facts

I. The circumstances of the case

A. The television programmes produced by the applicants

10. The applicants were two television journalists. At the relevant time they were employed by one of the two national television stations in Denmark, Danmarks Radio [...]. It was estimated that approximately 30% of all viewers above the age of 12 saw the programmes. The programmes, described as documentaries, were called "Convicted of Murder" (*Dømt for mord*) and "The Blind Eye of the Police" (*Politiets blinde øje*)

respectively and dealt with a murder trial in which on 12 November 1982 the High Court of Western Denmark (*Vestre Landsret*) had convicted a person, hereafter called X, of murdering his wife on 12 December 1981 between approximately 11.30 a.m. and 1 p.m. X was sentenced to twelve years' imprisonment. On appeal, the Supreme Court (*Højesteret*) upheld the sentence in 1983. On 13 September 1990, following his release on probation, X requested the Special Court of Revision (*Den Særlige Klageret*) to re-open the case.

The applicants had started to prepare the programmes in March 1989, establishing contact with witnesses through advertising in the local paper and via police reports.

[...]

1. *The first programme: "Convicted of Murder"*

13. Following the broadcast of the first programme on 17 September 1990, the applicants were charged with defamation on the ground that they had unlawfully connected the friend of X's wife ("the schoolteacher") with the death of two women referred to, one being X's wife. The defamation case ended on 14 December 1993 before the High Court with a settlement according to which the applicants were to pay the schoolteacher 300,000 Danish kroner (DKK), apologise unreservedly, and give an undertaking never to broadcast the programme again.

2. *The second programme: "The Blind Eye of the Police"*

14. The applicants alleged that the chief superintendent, in a telephone conversation with Mr Pedersen at some unknown time before the broadcast of the second programme, had declined to participate in the programme.

[...]

The law

I. Alleged violation of article 6 of the Convention

41. Complaining of the length of the criminal proceedings, the applicants relied on Article 6 § 1 of the Convention, [...].

A. Period to be taken into consideration

[...]

44. [...] It is common ground between the parties that the proceedings ended on 28 October 1998, when the Supreme Court gave its judgment. Thus, the total length of the proceedings which the Court must assess under Article 6 § 1 of the Convention was five years, nine months and nine days.

[...]

B. Reasonableness of the length of the proceedings

[...]

2. *The Court's assessment*

(a) Complexity of the case

48. The Court considers that certain features of the case were complex and time-consuming.

(b) Conduct of the applicants

49. [...] In these circumstances, the Court finds that the applicants' conduct contributed to some extent to the length of the proceedings.

(c) Conduct of the national authorities

50. [...] Finally, the proceedings before the Supreme Court, which commenced on 3 Octo-

ber 1997 and ended on 28 October 1998, thus lasting one year and twenty-five days, did not disclose any periods of unacceptable inactivity.

(d) Conclusion

51. Making an overall assessment of the complexity of the case, the conduct of all concerned as well as the total length of the proceedings, the Court considers that the latter did not go beyond what may be considered reasonable in this particular case. Accordingly, there has been no violation of Article 6 § 1 of the Convention in respect of the length of the proceedings.

II. Alleged violation of article 10 of the Convention

52. The applicants submitted further that the judgment of the Danish Supreme Court amounted to a disproportionate interference with their right to freedom of expression guaranteed by Article 10 of the Convention, [...].

[...]

C. The Court's assessment

[...]

(b) Application of the above principles in the instant case

71. [...] Freedom of expression is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly [...]. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog” [...].

[...]

78. The Court observes in this connection that protection of the right of journalists to impart information on issues of general interest requires that they should act in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism [...]. Under the terms of paragraph 2 of Article 10 of the Convention, freedom of expression carries with it “duties and responsibilities”, which also apply to the media even with respect to matters of serious public concern. Moreover, these “duties and responsibilities” are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the “rights of others”. Thus, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations [...]. Also of relevance for the balancing of competing interests which the Court must carry out is the fact that under Article 6 § 2 of the Convention individuals have a right to be presumed innocent of any criminal offence until proved guilty [...].

During the domestic proceedings the applicants never endeavoured to prove their allegation, which was declared null and void. However, relying on Article 10 of the Convention and Article 269 § 1 of the Penal Code, the applicants claimed that, even if their questions amounted to an allegation, the latter could not be punishable because it had been disseminated in view of an obvious general public interest and in view of the in-

terests of other parties.

The Court must therefore examine whether the applicants acted in good faith and complied with the ordinary journalistic obligation to verify a factual allegation. This obligation required that they should have relied on a sufficiently accurate and reliable factual basis which could be considered proportionate to the nature and degree of their allegation, given that the more serious the allegation, the more solid the factual basis has to be.

[...]

87. [...] Accordingly, in the Courts' view, the fact that the police in Frederikshavn had failed to comply with section 751(2) of the Administration of Justice Act, whether taken alone or together with the taxi driver's statement, could not provide a sufficient factual basis for the applicants' accusation that the chief superintendent had actively tampered with evidence.

[...]

89. Even assuming that the applicants' programmes and the taxi driver's testimony were instrumental in the reopening of the proceedings and the acquittal of X, the Court notes that none of those subsequent events, whether the reopening decision or the retrial, in any way supported the theory that led the applicants to include a serious allegation against the chief superintendent in their programme "the Blind Eye of the Police" broadcast on 22 April 1991.

[...]

91. In assessing the necessity of the interference, it is also important to examine the way in which the relevant domestic authorities dealt with the case, and in particular whether they applied standards which were in conformity with the principles embodied in Article 10 of the Convention. A perusal of the Supreme Court's judgment reveals that that court fully recognised that the present case involved a conflict between the right to impart information and protection of the reputation or rights of others, a conflict it resolved by weighing the relevant considerations in the light of the case-law under the Convention. Thus, the Supreme Court clearly recognised that the applicants' intention, in the programme, of undertaking a critical assessment of the police investigation was legitimate in relation to the role of the media as public watchdog. However, having balanced the relevant considerations, that court found no basis for the applicants to make such a serious allegation against the named chief superintendent as they did, in particular because they had sufficient other opportunities to achieve the aims of the programme.

92. Having regard to the various elements above and to the nature and force of the accusation, the Court sees no cause to depart from the Supreme Court's finding that the applicants lacked a sufficient factual basis for the allegation, made in the television programme broadcast on 22 April 1991, that the named chief superintendent had deliberately suppressed a vital piece of evidence in the murder case [...].

[...]

94. Having regard to the foregoing, the Court considers that the conviction of the applicants and the sentences imposed on them were not disproportionate to the legitimate aim pursued, and that the reasons given by the Supreme Court in justification of those measures were relevant and sufficient. The interference with the applicants' exercise

of their right to freedom of expression could therefore reasonably be regarded by the national authorities as necessary in a democratic society for the protection of the reputation and rights of others.

95. There has accordingly been no violation of Article 10 of the Convention.

For these reasons, the Court

1. *Holds* unanimously that there has been no violation of Article 6 of the Convention;
2. *Holds* by nine votes to eight that there has been no violation of Article 10 of the Convention.

56.

EUROPEAN COURT OF HUMAN RIGHTS 18 August 2004.

Éditions Plon v. France.

Procedure

1. The case originated in an application (no. 58148/00) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Editions Plon, a company incorporated under French law with its registered office in Paris (“the applicant company”), on 9 June 2000.

[...]

3. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

[...]

5. The applicant company and the Government each filed observations on the merits.

The facts

I. The circumstances of the case

A. Background to the case

6. On 8 November 1995 the applicant company acquired the publishing rights for a book entitled *Le Grand Secret* (“The Big Secret”) from a Mr. Gonod, a journalist, and a Dr Gubler, who had been private physician to President Mitterrand for several years. The book gave an account of the relations between Dr Gubler and the President, describing how the former had organised a medical team to take care of the latter, who had been diagnosed with cancer in 1981, a few months after he had first been elected President of France. It recounted in particular the difficulties Dr Gubler had encountered in concealing the illness, given that President Mitterrand had undertaken to issue a health bulletin every six months.

The book was due to be published in mid-January 1996, while President Mitterrand was still alive. However, following the President’s death on 8 January 1996, the authors and Editions Plon decided to postpone its publication.

7. On 10 January 1996 the daily newspaper *Le Monde* published an article which revealed that President Mitterrand had been suffering from prostate cancer since the beginning of his first seven-year term of office and pointed out that the public had not been officially informed about his illness until 1992. The article also stated that President

- Mitterrand had dismissed Dr Gubler in 1994, choosing instead to be treated with medicine described by the applicant company as “alternative”. Those revelations were the subject of extensive comment in the media [...]. On 12 January 1996, however, *Le Monde* published a statement by the President of the National Council of the *ordre des médecins* (Medical Association) to the effect that “according to the information in [his] possession, the President [had] received perfectly appropriate treatment”. Furthermore, on 11 January 1996 the President’s widow and children had issued a statement emphasising that they maintained their trust in the medical team that had looked after him.
8. As Dr Gubler considered that his reputation had been called into question, it was decided to publish *Le Grand Secret* on 17 January 1996. The following text appeared on the back cover:

“On 10 May 1981 François Mitterrand was elected President of France.

On 16 November 1981, six months later, medical examinations revealed that the head of State was suffering from cancer. Statistically, he had between three months and three years to live.

A handful of doctors resolved to fight the illness, driven by the obsession to save the President and to obey his instruction that the French public should know nothing about the matter. It became a State secret.

Only Claude Gubler, private physician to François Mitterrand during his two terms of office, could have provided us with the astonishing account of how the President cheated death for years, taking each day at a time.

These revelations will transform our image of a man who led France for fourteen years.”

[...]

The law

I. Alleged violation of article 10 of the Convention

21. The applicant company alleged a violation of its right to freedom of expression. It submitted that the domestic courts’ injunctions prohibiting it from distributing the book *Le Grand Secret* had not been prescribed by law, had not pursued a legitimate aim and had not been “necessary in a democratic society”; it further complained that the “exorbitant” award of damages which it had also been ordered to pay had not been proportionate to the aim pursued. It relied on Article 10 of the Convention, [...].

A. Whether there was interference

22. The Court notes that the French courts prohibited the applicant company – initially on a temporary basis, and later permanently – from continuing to distribute a book it had published and ordered it to pay damages on account of the publication. It is clear, therefore, that the applicant company has suffered “interference by public authority” with its exercise of the right guaranteed by Article 10 of the Convention; indeed, that was not disputed between the parties. In this connection, the Court considers it necessary to point out that publishers, irrespective of whether they associate themselves with the content of their publications, play a full part in the exercise of freedom of expression by providing authors with a medium [...].
23. Such interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It must therefore be determined whether it was “prescribed by law”, pursued one or more of the legitimate aims set out in that paragraph and was “necessary in a democratic society” to achieve those aims.

B. Whether the interference was justified

1. "Prescribed by law"

(b) The Court's assessment

26. The Court reiterates that a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice [...].
27. The Court notes that Article 4 of the Code of Conduct for Medical Practitioners provides that the duty of professional confidentiality by which medical practitioners are bound, "established in the interests of patients, shall apply to all medical practitioners as provided by law" and covers "everything that has come to the attention of medical practitioners in the practice of their profession, that is, not only what has been confided in them but also what they have seen, heard or understood". Breaching professional confidence is an offence punishable under Article 226-13 of the Criminal Code [...].
- [...]
29. [...] It appears from the reasoning of the judgment of 27 May 1997 that the Paris Court of Appeal applied this principle in holding that François Mitterrand's heirs were entitled to compensation for the effects of the book's publication, the decision to publish having been taken on 8 November 1995, the date of the publishing contract – that is, before the President's death.
30. Lastly, under the first paragraph of Article 809 of the New Code of Civil Procedure, the urgent-applications judge "may order at any time, even in the event of a serious dispute, ... such measures to preserve or restore the present position as are necessary either to prevent imminent damage or to put an end to a manifestly unlawful infringement".
31. In short, the applicant company cannot maintain that it was unable to foresee "to a reasonable degree" the likely legal consequences of the publication of *Le Grand Secret*, including the question of civil liability and the possibility of an injunction being issued. The Court therefore concludes that the interference in issue was "prescribed by law" within the meaning of the second paragraph of Article 10 of the Convention.

2. Legitimate aim

[...]

(b) The Court's assessment

34. [...] It is not for the Court to determine whether the civil liability incurred on account of the breach of medical confidentiality comes, in abstract terms, under the first of these legitimate aims, the second or both at once [...].

Accordingly, the interference in issue pursued at least one of the "legitimate aims" set out in the second paragraph of Article 10 of the Convention.

3. "Necessary in a democratic society"

[...]

(b) The Court's assessment

(i) General principles

42. The Court would first reiterate the fundamental principles established by its case-law on Article 10 [...].

[...]

(ii) Application to the present case

44. Among the measures taken in the present case, the French civil courts prohibited the applicant company, initially on a temporary basis and then permanently, from continuing to distribute *Le Grand Secret*. The book, by Mr Gonod, a journalist, and Dr Gubler, private physician to President Mitterrand for a number of years, gave an account of relations between Dr Gubler and the President, describing how the former had organised a medical team to take care of the latter, who had been diagnosed with cancer in 1981, a few months after he had first been elected President of France. In particular, it described the difficulties Dr Gubler had encountered in trying to conceal the illness, given that President Mitterrand had undertaken to issue a health bulletin every six months. The Court considers that the book was published in the context of a wide-ranging debate in France on a matter of public interest, in particular the public's right to be informed about any serious illnesses suffered by the head of State, and the question whether a person who knew that he was seriously ill was fit to hold the highest national office. Furthermore, the secrecy which President Mitterrand imposed, according to the book, with regard to his condition and its development, from the moment he became ill and at least until the point when the public was informed (more than ten years afterwards), raised the public-interest issue of the transparency of political life. As freedom of the "press" was thus at stake, the French authorities had only a limited margin of appreciation to decide whether there was a "pressing social need" to take the measures in question against the applicant company. The Court must therefore determine whether such a need existed.

45. That said, the Court considers that a distinction should be made between the interim injunction and the measures taken in the main proceedings. It reiterates in this connection that the need to interfere with freedom of expression may be present initially yet subsequently cease to exist (see, on this point, *Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216).

(α) The interim injunction

[...]

52. According to the judgment of 23 October 1996, the decision to maintain indefinitely the ban on distribution was intended to "put an end to the injury suffered by the victim and to prevent the recurrence of the damage that would necessarily result from resumption of the distribution of the piece of writing". The court held that the time that had elapsed since François Mitterrand's death could not have had the effect of "definitively putting an end to the infringement observed when the book was published and rendering lawful [its] distribution", and the fact that information contained in *Le Grand Secret* had been divulged by the media was not "capable of preventing the injury and damage that would result for the claimants from resumed distribution of the book". The court added that the only means of achieving this was to ban the book; it pointed out in this connection that "[i]n view of the space they occupy, the above passages from *Le Grand Secret*, which disclose facts covered by the rules of medical confidentiality, cannot be

separated from the rest of the book without depriving it of its fundamental content and thereby disfiguring it”.

53. [...] Furthermore, by the time of the civil court’s ruling on the merits, not only had some 40,000 copies of the book already been sold, but it had also been disseminated on the Internet and had been the subject of considerable media comment. Accordingly, by that stage the information in the book was to a large extent no longer confidential in practice. Consequently, the preservation of medical confidentiality could no longer constitute an overriding requirement [...].
54. The measure appears all the more disproportionate to the “legitimate aim” pursued, namely the protection of the rights of François Mitterrand and his heirs, in that it was imposed in addition to the order requiring the applicant company to pay damages to the President’s heirs.
55. In conclusion, on 23 October 1996, when the Paris *tribunal de grande instance* gave judgment on the merits, there was no longer a “pressing social need” justifying the continued ban on distribution of *Le Grand Secret*. There has therefore been a violation of Article 10 of the Convention from that date onwards.

[...]

57. Having regard to the conclusion it has reached (see paragraph 55 above), the Court considers that it is not necessary to examine separately this aspect of the complaint, whose relevance, moreover, is not apparent.

II. Application of article 41 of the Convention

58. Article 41 of the Convention [...]

For these reasons, the Court unanimously

1. *Holds* that there has been no violation of Article 10 of the Convention on account of the interim injunction by the urgent-applications judge prohibiting the continued distribution of the book *Le Grand Secret*;
2. *Holds* that there has been a violation of Article 10 of the Convention on account of the decision by the civil court in the main proceedings to keep the prohibition in force after 23 October 1996;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 26,449.87 (twenty-six thousand four hundred and forty-nine euros eighty-seven cents) for costs and expenses, inclusive of value-added tax;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant’s claims for just satisfaction.

EUROPEAN COURT OF HUMAN RIGHTS 15 February 2008.**Pfeifer v. Austria.****Procedure**

1. The case originated in an application (no. 12556/03) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Austrian national, Mr. Karl Pfeifer (“the applicant”), on 7 April 2003.

[...]

3. The applicant alleged that the Austrian courts had failed to protect his reputation against defamatory allegations made in a magazine.

[...]

The facts**I. The circumstances of the case**

6. The applicant is a freelance journalist who lives in Vienna. From 1992 to 1995 he was the editor of the official magazine of the Vienna Jewish community.

A. Background

7. In the beginning of 1995 the Academy of the Austrian Freedom Party (*Freiheitliche Partei Österreichs*) published an article in its yearbook, written by P., a professor of political sciences at Münster University. The article was entitled “Internationalism against nationalism: an eternal mortal enmity?” and alleged that the Jews had declared war on Germany in 1933. Moreover, it trivialised the crimes of the Nazi regime.
8. In February 1995 the applicant published a commentary on this article in the magazine of the Vienna Jewish community. It was entitled “Freedom Party’s 1995 yearbook with (neo-)Nazi tones”. He criticised P. in harsh terms for using Nazi terminology and disseminating ideas which were typical of the “Third Reich”. More specifically, he accused P. of reviving the old Nazi lie of a worldwide Jewish conspiracy and of confounding the roles of perpetrators and victims.
9. Subsequently, P. brought defamation proceedings under Article 111 of the Criminal Code (*Strafgesetzbuch*) against the applicant. The Vienna Regional Criminal Court (*Landesgericht für Strafsachen*) acquitted the applicant. Its judgment was upheld on 4 May 1998 by the Vienna Court of Appeal (*Oberlandesgericht*), which found that the applicant’s criticism constituted a value judgment which had a sufficient factual basis in the numerous quotations from P.’s article. Having regard to the publication of P.’s article in the yearbook of a political party and given the highly sensitive topic, the applicant’s criticism, though harsh, was not excessive.
10. Two years later, in April 2000, the Vienna Public Prosecutor’s Office brought proceedings against P. on charges under the National Socialism Prohibition Act [...].
11. On 8 June 2000 the weekly *Zur Zeit*, a right-wing magazine whose chief editor M. was the former Chairperson of the Freedom Party’s Academy, published a two-and-a-half-page article with the headline “The deadly terror of virtue” (“*Tödlicher Tugendterror*”). It referred to the applicant’s criticism of P.’s article in 1995 and alleged that the applicant’s comment had unleashed a manhunt which had eventually resulted in the death of the victim[...].

12. The applicant brought defamation proceedings under Section 6 of the Media Act (*Mediengesetz*) against the publishing company owning *Zur Zeit*.
13. On 20 March 2001 the Vienna Regional Criminal Court found that the article fulfilled the elements of defamation and ordered the defendant company to pay the applicant compensation under section 6 of the Media Act. In addition the defendant was ordered to publish the judgment.
14. The Regional Court noted that the impugned article accused the applicant of being morally responsible for P.'s death. Certain facts were undisputed, namely that the applicant had written a critical commentary on P.'s article, that P. had been charged under the Prohibition Act and that he had died before the opening of the trial. However, the allegation that the applicant was part of a "hunting society", that is, a group of persons persecuting P. and eventually causing his death, amounted to a statement of fact, the truth of which had not been established. In particular, the defendant company had not offered any proof for the causal link between the applicant's article and P.'s death. Even if the statement were to be treated as a value judgment, it was excessive as it presented a conclusion which went far beyond what could reasonably be based on the underlying facts. Thus, it transgressed the limits of criticism permitted by Article 10 of the Convention.
15. On 15 October 2001 the Vienna Court of Appeal set the judgment aside on an appeal by the defendant.
16. It found that the impugned article contained a value judgment which was, however, not excessive. The use of the term "hunting society" did not imply coordinated activities of a group of persons with the aim of destroying P.'s existence. Thus, the article could be understood as implying that the applicant's and other persons' activities had eventually caused P.'s death but it did not contain an accusation of their having foreseen or planned this outcome. The factual basis was sufficient to attribute some moral responsibility for P.'s death to the applicant and a number of other persons who had been active either by criticising P. in the media or by bringing actions against him in the courts. As regards the applicant, the article referred to his critical commentary on P.'s publication, thereby enabling the reader to assess whether or not he shared the opinion expressed in the impugned article. Moreover, the reader was aware that the article was written from a political and ideological point of view and involved a certain degree of exaggeration. In sum, it remained within the limits of permissible criticism set by Article 10 of the Convention.

[...]

The law

I. Alleged violation of article 8 of the Convention

25. The applicant complained that the Austrian courts had failed to protect his reputation against the allegations contained in Mr. M.'s letter to the subscribers to *Zur Zeit*. He relied on Article 8 of the Convention, [...].
26. The Government contested that argument.

A. Admissibility

27. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

[...]

2. The Court's assessment

33. As to the applicability of Article 8, the Court reiterates that "private life" extends to aspects relating to personal identity, such as a person's name or picture, and furthermore includes a person's physical and psychological integrity [...]. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" [...].
 34. The Court has found the publication of a person's photo to fall within the scope of his or her private life even where the person concerned was a public figure [...].
 35. What is at issue in the present case is a publication affecting the applicant's reputation. [...] The Court found that a person's reputation, which was affected by the publication of a book, was protected by Article 8 as part of the right to respect for private life and had to be balanced against the right to freedom of expression [...] relating to a complaint under Article 8, the right to protection of one's reputation against allegedly defamatory statements in newspaper articles was considered to fall within the scope of "private life" [...].
 36. The Court notes that the applicant did not complain of an action by the State but rather of the State's failure to protect his reputation against interference by third persons.
 37. The Court reiterates that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference [...]. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation [...].
 38. The main issue in the present case is whether the State, in the context of its positive obligations under Article 8, has achieved a fair balance between the applicant's right to protection of his reputation, which is an element of his "private life" and the other party's right to freedom of expression guaranteed by Article 10 of the Convention [...].
- [...]
48. Even if the statement were to be understood as a value judgment in so far as it implied that the applicant and others were morally responsible for P's death, the Court considers that it lacked a sufficient factual basis. The use of the term "member of a hunting society" implies that the applicant was acting in cooperation with others with the aim of persecuting and attacking P. There is no indication, however, that the applicant, who merely wrote one article at the very beginning of a series of events and did not take any further action thereafter, acted in such a manner or with such an intention. Furthermore, it needs to be taken into account that the article written by the applicant, for its part, did not transgress the limits of acceptable criticism.
 49. In those circumstances the Court is not convinced that the reasons advanced by the domestic courts for protecting freedom of expression outweighed the right of the applicant to have his reputation safeguarded. The Court therefore considers that the domestic courts failed to strike a fair balance between the competing interests involved. There has accordingly been a violation of Article 8 of the Convention.

II. Application of article 41 of the Convention

50. Article 41 of the Convention [...].

For these reasons, the Court

1. *Declares* the application admissible unanimously;
2. *Holds* by five votes to two that there has been a violation of Article 8 of the Convention;
3. *Holds* by five votes to two
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of non-pecuniary damage and EUR 10,000 in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

58.

EUROPEAN COURT OF HUMAN RIGHTS 29 March 2016.

Bédat v. Switzerland.

Procedure

1. The case originated in an application (no. 56925/08) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swiss national, Mr. Arnaud Bédat ("the applicant"), on 7 November 2008. Having originally been designated by the initials A.B., the applicant subsequently agreed to the disclosure of his name.

[...]

3. The applicant alleged that the fine imposed on him in criminal proceedings for having published information covered by the secrecy of criminal investigations had violated his right to freedom of expression as secured by Article 10 of the Convention.

[...]

The facts

I. The circumstances of the case

8. The applicant is a journalist by profession. On 15 October 2003 he published an article in the weekly magazine *L'Illustré* entitled "*Drame du Grand-Pont à Lausanne – la version du chauffard – l'interrogatoire du conducteur fou*" ("Tragedy on the Lausanne Bridge – the reckless driver's version – Questioning of the mad driver"). The article in question concerned a set of criminal proceedings against M.B., a motorist who had been remanded in custody after an incident on 8 July 2003 in which he had rammed his car into pedestrians, before throwing himself off the Lausanne Bridge (Grand-Pont). The incident, in which three people had died and eight others had been injured, had caused much emotion and controversy in Switzerland [...].
9. The article continued with a summary of the questions put by the police officers and the investigating judge and M.B.'s replies. It also mentioned that M.B. had been "charged

with premeditated murder [*assassinat*] and, in the alternative, with murder [*meurtre*], grievous bodily harm, endangering life and serious traffic offences”, and that he “appear[ed] to show no remorse”. The article was accompanied by several photographs of letters which M.B. had sent to the investigating judge [...].

[...]

11. It appears from the file that the applicant’s article was not the only piece to have been published on the Lausanne Bridge tragedy. The authorities responsible for the criminal investigation had themselves decided to inform the press of certain aspects of the investigation, which had led to the publication of an article in the *Tribune de Genève* on 14 August 2003.
12. M.B. did not lodge a complaint against the applicant. However, criminal proceedings were brought against the applicant on the initiative of the public prosecutor for having published secret documents. It emerged from the investigation that one of the parties claiming damages in the proceedings against M.B. had photocopied the case file and lost one of the copies in a shopping centre. An unknown person had then brought the copy to the offices of the magazine which had published the impugned article.
13. By an order of 23 June 2004, the investigating judge sentenced the applicant to one month’s imprisonment, suspended for one year.
14. Following an application by the applicant to have the decision set aside, the Lausanne Police Court, by a judgment of 22 September 2005, replaced the prison sentence with a fine of 4,000 Swiss francs (CHF) (approximately 2,667 euros). At the hearing on 13 May 2015, in reply to a question from the Court, the applicant’s representative stated that the sum of CHF 4,000 had been advanced by his client’s employer and that his client was intending to refund it after the proceedings before the Court. He also confirmed that the amount set by the criminal court had taken account of the applicant’s previous record.
15. The applicant lodged an appeal on points of law [...].
16. The applicant lodged a public-law appeal and an appeal on grounds of nullity with the Federal Court, which on 29 April 2008 dismissed the appeals. Its decision was served on the applicant on 9 May 2008. The relevant passages from the decision follow:
 - “7. In short, the appellant submits that his conviction for a breach of Article 293 of the Criminal Code is contrary to federal law. He does not challenge the fact that the information which he published falls within the ambit of Article 293 of the Criminal Code. He does, on the other hand, submit, under an interpretation of Articles 293 and 32 of the Criminal Code in the light of the principles inferred from Article 10 ECHR by the European Court of Human Rights, that having received that information in good faith without obtaining it unlawfully, he had the duty as a professional journalist, under Article 32 of the Criminal Code, to publish it owing to what he sees as the obvious interest of the so-called ‘Lausanne Bridge’ case to the general public in French-speaking Switzerland.
 - 7.1. In accordance with Article 293 of the Criminal Code (Publication of secret official deliberations), anyone who, without being entitled to do so, makes public all or part of the documents, investigations or deliberations of an authority which are secret by law or by virtue of a decision taken by that authority, acting within its powers, will be punished by a fine. Complicity in such acts is also punishable. The court may decide

- not to impose any penalties if the secret thus made public is of minor importance [...]
- 7.2. In the present case the offence with which the appellant is charged concerned the publication of records of interviews and correspondence contained in the case file of a live criminal investigation [...]. The law also specifies that the following are bound by secrecy *vis-à-vis* anyone who does not have access to the case file: the judges and judicial staff (save in cases where disclosure would facilitate the investigation or is justified on public-order, administrative or judicial grounds; see Article 185 CPP/VD), and also the parties, their friends and relatives, their lawyers, the latter's associates, consultants and staff, and any experts and witnesses [...].
- 7.3. As a general rule, the reason for the confidentiality of judicial investigations, which applies to most sets of cantonal criminal proceedings, is the need to protect the interests of the criminal proceedings by anticipating risks of collusion and the danger of evidence being tampered with or destroyed. Nevertheless, the interests of the accused must not be disregarded either, particularly *vis-à-vis* the presumption of innocence and, more broadly, the accused's personal relations and interests [...], as well as the need to protect the opinion-forming process and the decision-making process within a State authority, as protected, precisely, by Article 293 of the Criminal Code. The European Court of Human Rights has already had occasion to deem such a purpose legitimate in itself. The aim is to maintain the authority and impartiality of the judiciary in accordance with the wording of Article 10 § 2 ECHR, which also mentions the protection of the reputation or rights of others [...].
- [...]
- 8.1. [...] It is true that the 'Lausanne Bridge case' attracted extensive media coverage [...]. However, this circumstance alone, alongside the unusual nature of the accident, is insufficient to substantiate a major public interest in publishing the confidential information in question [...].
- 8.2. The other two factors relied upon by the appellant concern his behaviour (good faith in access to information and mode of publication).
- [...]
- 8.2.2. [...] In the instant case the cantonal court ruled that the tone adopted by the appellant in his article showed that his main concern was not, as he claims, to inform the general public about the State's conduct of the criminal investigation [...].
- 8.3. The appellant also submitted that the records of interviews and the letters would in any case be mentioned in subsequent public hearings. He inferred from this that preserving the confidentiality of this information could therefore not be justified by any 'pressing social need' [...].
- 8.4. Lastly, the appellant did not explicitly criticise the amount of the fine imposed on him. Nor did he challenge the refusal to grant him a probationary period after which the fine would be struck out (former Article 49, point 4, in conjunction with former Article 106, paragraph 3, of the Criminal Code) under Swiss law [...].
- 8.5. It follows from the foregoing that the appellant disclosed a secret within the meaning of Article 293, paragraph 1, of the Criminal Code and that he cannot rely on any justifying factor in his favour. The decision appealed against does not violate federal law as interpreted in the light of the Convention provisions relied upon by the appellant."
- [...]

The law

24. The applicant complained that his criminal conviction had resulted in a violation of his right to freedom of expression as provided in Article 10 of the Convention, [...].

A. The Chamber judgment

[...]

26. The Chamber then stated that the impugned article originated from a set of judicial proceedings initiated following an incident which had occurred under exceptional circumstances, which had immediately aroused interest among the public and which had prompted many media outlets to cover the case and its handling by the criminal justice system. In the impugned article the applicant looked at the character of the accused and attempted to understand his motives, while highlighting the manner in which the police and judicial authorities were dealing with him, a man who seemed to be suffering from psychiatric disorders. The Chamber therefore concluded that the article had addressed a matter of public interest.
27. However, the Chamber noted that the applicant, an experienced journalist, must have known that the documents that had come into his possession were covered by the secrecy of judicial investigations. That being the case, he ought to have complied with the relevant legal provisions.
28. In weighing up the competing interests at stake, the Chamber found that the Federal Court had merely noted that the premature disclosure both of the records of interviews and of the letters sent by the accused to the judge had necessarily infringed both the presumption of innocence and, more broadly, the accused's right to a fair trial. However, the article in issue had not addressed the matter of the accused's guilt and had been published more than two years before the first hearing at his trial for the alleged offences. Furthermore, the accused had been tried by courts made up exclusively of professional judges, with no lay jury participating, which also reduced the risks of articles such as the present one affecting the outcome of the judicial proceedings.

[...]

31. Finally, although the fine had been imposed for a "minor offence" and heavier penalties, including prison sentences, could be imposed for the same offence, the Chamber considered that because of its significant deterrent effect, the fine imposed in the instant case had been disproportionate to the aim pursued.

[...]

C. The Court's assessment**1. Existence of an interference "prescribed by law" and pursuing a "legitimate aim"**

44. In its judgment of 1 July 2014, the Chamber noted that there had been no disagreement between the parties as to the fact that the applicant's conviction had constituted an interference with his exercise of the right to freedom of expression as secured under Article 10 § 1 of the Convention.
45. Nor had it been disputed that the interference was prescribed by law, that is to say the Criminal Code and the Code of Criminal Procedure of the Canton of Vaud.
46. Furthermore, in its judgment the Chamber found that the impugned measure had pursued legitimate aims, namely preventing "the disclosure of information received in confidence", maintaining "the authority and impartiality of the judiciary" and protecting "the reputation [and] rights of others"; this was also not contested by the parties.

47. The Grand Chamber sees no reason to depart from the Chamber's conclusions on these three points.

2. *Necessity of the interference "in a democratic society"*

[...]

(b) *Application of these principles to the present case*

55. In the present case, the applicant's right to inform the public and the public's right to receive information come up against equally important public and private interests which are protected by the prohibition on disclosing information covered by the secrecy of criminal investigations. Those interests are the authority and impartiality of the judiciary, the effectiveness of the criminal investigation and the right of the accused to the presumption of innocence and protection of his private life [...].

(i) *How the applicant came into possession of the information in issue*

56. The Court reiterates that the manner in which a person obtains information considered to be confidential or secret may be of some relevance for the balancing of interests to be carried out in the context of Article 10 § 2 [...].

[...]

(ii) *Content of the impugned article*

58. The Court reiterates that the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism [...].

Furthermore, Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. Consequently, it is not for this Court, or for the national courts for that matter, to substitute their own views for those of the press as to what reporting technique should be adopted by journalists [...].

[...]

61. On this point the Court likewise sees no weighty reason to call into question the fully reasoned decision of the Federal Court.

(iv) *Influence of the impugned article on the criminal proceedings*

68. [...] The Court reiterates that it is legitimate for special protection to be afforded to the secrecy of a judicial investigation, in view of what is at stake in criminal proceedings, both for the administration of justice and for the right of persons under investigation to be presumed innocent [...].

69. In the instant case, even though the impugned article did not openly support the view that the accused had acted intentionally, it was nevertheless set out in such a way as to paint a highly negative picture of him, highlighting certain disturbing aspects of his personality and concluding that he was doing "everything in his power to make himself impossible to defend".

It is undeniable that the publication of an article slanted in that way at a time when the investigation was still ongoing entailed an inherent risk of influencing the course of proceedings in one way or another, whether in relation to the work of the investigating judge, the decisions of the accused's representatives, the positions of the parties claiming damages, or the objectivity of the trial court, irrespective of its composition.

70. The Grand Chamber considers that a government cannot be expected to provide *ex post facto* proof that this type of publication actually influenced the conduct of a given

set of proceedings. The risk of influencing proceedings justifies *per se* the adoption by the domestic authorities of deterrent measures such as prohibition of the disclosure of secret information [...].

71. The Federal Court was therefore right to hold, in its judgment of 29 April 2008, that the records of interviews and the accused's correspondence had been "discussed in the public sphere, before the conclusion of the investigation, before the trial and out of context, in a manner liable to influence the decisions taken by the investigating judge and the trial court".

(v) *Infringement of the accused's private life*
[...]

73. Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves [...]. That also applies to the protection of a person's picture against abuse by third parties [...].

[...]

76. [...] Furthermore, the information disclosed by the applicant was highly personal, and even medical, in nature, including statements by the accused's doctor, as well as letters sent by the accused from his place of detention to the investigating judge responsible for the case. The Court takes the view that this type of information called for the highest level of protection under Article 8; that finding is especially important as the accused was not known to the public and the mere fact that he was the subject of a criminal investigation, albeit for a very serious offence, did not justify treating him in the same manner as a public figure, who voluntarily exposes himself to publicity [...].

77. In its judgment of 1 July 2014, the Chamber held that the protection of the accused's private life, particularly the secrecy of correspondence, could have been ensured by means less damaging to the applicant's freedom of expression than a criminal conviction. The Chamber took the view that in order to uphold his rights under Article 8 of the Convention, the accused could have had recourse to the civil-law remedies available to him under Swiss law.

The Court considers that the existence of those civil-law remedies under domestic law for the protection of private life does not release the State from its positive obligation deriving, in each individual case, from Article 8 of the Convention *vis-à-vis* a person accused in criminal proceedings.

78. At all events, as regards the particular circumstances of the present case, it should be noted that when the impugned article was published the accused was in prison, and therefore in a situation of vulnerability. Moreover, there is nothing in the case file to suggest that he was informed of the publication of the article and of the nature of the information it provided. In addition, he was probably suffering from mental disorders, thus increasing his vulnerability. In those circumstances, the cantonal authorities cannot be blamed for considering that, in order to fulfil their positive obligation to protect M.B.'s right to respect for his private life, they could not simply wait for M.B. himself

to take the initiative in bringing civil proceedings against the applicant, and for consequently opting for an active approach, even one involving prosecution.

[...]

(vii) *Conclusion*

82. In view of the foregoing, and having regard to the margin of appreciation available to States and to the fact that the exercise of balancing the various competing interests was properly conducted by the Federal Court, the Court concludes that there has been no violation of Article 10 of the Convention.

For these reasons, the Court

Holds, by fifteen votes to two, that there has been no violation of Article 10 of the Convention.

59.

EUROPEAN COURT OF HUMAN RIGHTS 21 November 2013.

Putistin v. Ukraine.

Procedure

1. The case originated in an application (no. 16882/03) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Vladlen Mikhaylovich Putistin (“the applicant”), on 12 May 2003.
2. The applicant was granted leave to present his own case under Rule 36 § 2 in fine of the Rules of the Court. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Nazar Kulchytsky.
3. The applicant complained of a breach of the right to protection of his reputation as a result of the domestic courts’ refusal to rectify defamatory information about his father that had been published in the newspaper *Komsomolska Pravda*. He invoked Article 10 of the Convention.
4. On 16 November 2010 the Court decided to give notice of the application to the Government.

The facts

I. The circumstances of the case

5. The applicant, Mr Vladlen Mikhaylovich Putistin, was born in 1934 and lives in Kyiv.
6. The facts of the case, as submitted by the parties, may be summarised as follows.
 - A. Background to the case
 7. The applicant is the son of Mr Mikhail Putistin, a former Dynamo Kyiv football club player who competed in the 1936 USSR football championship when the club took second place in the competition. On 9 August 1942 the applicant’s father participated in the legendary “Death Match” between FC Start – a team mostly composed of professional football players of FC Dynamo Kyiv who were working in a bakery in Kyiv at that time - and a team of pilots from the German Luftwaffe, air defence soldiers and airport technicians (“Flakelf”). The match is known for the humiliating defeat of Flakelf (FC Start defeated Flakelf by a score of 5 - 3), despite the Flakelf players’ alleged display of lack of sportsmanship, which included physical challenges on their

opponents, threats of sanctions against them and unfair refereeing by an SS officer. The victory of FC Start in that match allegedly resulted in serious repercussions for its players, who were arrested and sent to a local concentration camp where four of the players were eventually executed.

8. In 2002 the Kyiv authorities commemorated the 60th anniversary of that match. The commemorations received wide media coverage.
- B. Proceedings instituted against Komsomolska Pravda newspaper
9. On 3 April 2001 the newspaper Komsomolska Pravda published an article named “The Truth about the Death Match” (original title: “Правда о Матче Смерти”) and was written by O.M., a journalist from that newspaper. In the article she recounted a plan to make a film based on the events surrounding the match of 1942. The article contained an interview with the future director and producer of the film, A.S. and D.K. It also featured a picture of the match poster from 1942 which included the names of all of the footballers who had played in that match. The article mentioned the names of four Dynamo Kyiv players who had been executed (Kuzmenko, Klimenko, Korotkikh and Trusevych), but did not name the applicant’s father [...].
10. In July 2001 the applicant instituted proceedings against the newspaper Komsomolska Pravda and the above-mentioned journalist on the grounds that they had disseminated untrue information about his father contained in the article above. He sought rectification of this information. He also wished to receive compensation for non-pecuniary damage.
11. In particular, the applicant claimed that the article suggested that the applicant’s father had collaborated with the occupying police force and the Gestapo in 1942 [...].
12. On 25 December 2001 the Obolonsky District Court of Kyiv rejected the applicant’s claim. It held that the applicant:
 - was not a person who was directly affected by the publication;
 - the article was about a film script and contained neither the name of the applicant’s father nor the applicant’s name and it also made no allegation of the applicant’s father having collaborated with the Gestapo.
13. On 13 March 2002 the Kyiv City Court of Appeal upheld that judgment. In particular, the court of appeal found that the judgment of the first instance court was lawful and well-substantiated.
14. On 15 November 2002 the Supreme Court rejected an appeal by the applicant on points of law.

[...]

The law

I. Alleged violation of article 8 of the Convention

27. Although invoking Articles 6 § 1 and 10 of the Convention, the applicant complained, in substance, of a breach of the right to protection of his and his family’s reputation as a result of the domestic courts’ refusal to order the rectification of the allegedly defamatory information about his father published in the Komsomolska Pravda newspaper.
28. The Court, as the master of the characterisation to be given in law to the facts of the case, considers that this complaint falls to be considered under Article 8 of the Convention, [...].

A. Admissibility

29. The Government raised no objection as to the admissibility of this complaint. The Court notes that the applicant's complaint in respect of the proceedings instituted against the Komsomolska Pravda newspaper is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits of the applicant's complaints

[...]

2. The Court's assessment

[...]

(b) Application of the general principles to the present case

[...]

38. The Court can accept that the applicant was affected by the article, but only in an indirect manner [...]. The level of impact was thus quite remote.
39. The domestic courts were obliged to have regard to the rights of the newspaper and the journalist and had to balance these against the rights of the applicant. The Court notes that whilst the article did not purport to contribute directly to an historical debate, it nevertheless constituted a form of participation in the cultural life of Ukraine in that it informed the public of a proposed film on an historical subject. It was neither provocative nor sensationalist. Against the newspaper's right to freedom of expression, the remoteness of the interference with the applicant's Article 8 rights had to be weighed.
40. In these circumstances, that is, where the applicant's Article 8 rights were marginally affected and only in an indirect manner by an article which reproduced statements by the maker of a proposed historical film, the Court considers that the domestic courts did not fail to strike an appropriate balance between the applicant's rights and those of the newspaper and the journalist.
41. In view of the above considerations, the Court finds no violation of Article 8 of the Convention in the present case.

II. Other proceedings brought by the applicant

[...]

43. The applicant further complained under Article 6 § 1 and Article 10 of the Convention that the judgments of the domestic courts had been unfair and unfavourable. He further mentioned, with respect to the proceedings against Komsomolska Pravda, *Argumenty i Fakti* and *Fakty i Kommentari* that the domestic courts did not assess the facts of the cases correctly and have misapplied domestic procedural and substantive law. However, it is not the task of the Court to act as a court of appeal or, as is sometimes stated, as a court of fourth instance, in respect of the decisions taken by domestic courts [...].
44. In the light of the material in its possession and insofar as the matters complained of are within its competence, the Court finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols as well.
45. It follows that this part of the application must be declared inadmissible as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

1. *Declares* the applicant's complaint under Article 8 of the Convention concerning proceedings against "Komsomolskaya Pravda" newspaper admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 8 of the Convention.

60.

EUROPEAN COURT OF HUMAN RIGHTS 20 December 2018.

Jishkariani v. Georgia.

Procedure

1. The case originated in an application (no. 18925/09) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Georgian national, Ms Mariam Jishkariani ("the applicant"), on 9 January 2009.
[...]
3. The applicant complained that the domestic courts had failed to protect her right to reputation under Article 8 of the Convention against defamatory statements made by the then Minister of Justice.
4. On 17 January 2017 the complaint under Article 8 was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

The facts

I. The circumstances of the case

5. The applicant was born in 1965 and lives in Tbilisi.

A. Background

6. The applicant is a psychiatrist and a founder and director of the Rehabilitation Centre for Victims of Torture "Empathy", a nongovernmental organisation ("the NGO").
7. On 4 October 2003 the applicant's NGO concluded an agreement with the Ministry of Justice ("the Ministry") and undertook, among other tasks, to create a psychosocial rehabilitation office in Tbilisi Prison no. 1. The agreement specified that, depending on the availability of resources, the NGO was to involve specialists, use clinical laboratory and diagnostic methods, and provide medication to inmates if treatment was prescribed. It was to provide quarterly progress reports to the Ministry and make suggestions on how to solve the social problems it identified through its activities. The Ministry undertook to support the proper functioning of the rehabilitation office and to designate a coordinator from the Ministry's Medical Department in order to ensure the implementation of the contract.
8. On 3 August 2004 the applicant became member of the Public Monitoring Commission overseeing the implementation of the inmates' rights and competent to issue recommendations if any irregularities were observed. Presidential order no. 309 issued to that end specified that the members of the Commission could enter all prisons during the working hours without prior authorisation. The persons concerned had the right to meet inmates in private and access any documentation except that which was classified as confidential.

9. On 29 November 2004 the then Minister of Justice created the Inmates' Mental Health Research and Monitoring Commission. It included seven State and non-State mental health experts, including the applicant. The document did not elaborate on the specific functions of the Commission or its members.
10. On 10 September 2005 Mr L.Ts. – an inmate placed in the prison hospital in view of his mental health issues – physically assaulted the Director and the head doctor of the prison hospital (“the incident of 10 September 2005”). He had been transferred to the prison hospital by the director of the Medical Department of the Ministry (“the Medical Department”), based on the applicant’s medical opinion to that end. In an unrelated incident that happened at around the same time, an inmate died of a complication in his health problems and it was reported that numerous others were waiting in vain to be admitted to the hospital. Both incidents attracted wide media coverage in view of the allegations of corruption and mismanagement in the medical management of the penal system. Some members of the civil society contended that the transfers to the prison hospital were not implemented adequately and objectively but were based on suspicious arrangements within the Ministry.
11. On 11 September 2005 an investigation was opened into the incident of 10 September 2005 on account of an alleged abuse of official power. On an unspecified date the applicant was questioned as a witness.

[...]

B. Statements made in respect of the applicant

13. On 16 September 2005, while speaking live on a private television channel, Rustavi 2, about allegations of corruption and mismanagement within the Ministry and its Medical Department, the Minister, Mr K.K., stated:
 “I am impelled to specify surnames and specific facts... Mariam Jishkariani, the president of non-governmental organisation [Empathy] and a member of the [public] monitoring council [for penal institutions] has been ... grossly exceeding her powers and writing medical conclusions concerning specific persons, bypassing the commission [set up for that purpose]. I have those conclusions on my desk. The investigation has them already and practically speaking a full assessment will be carried out which will reveal whether this was done for the sake of pretty eyes or whether it was precisely the type of business that this shameless person – I cannot call her anything else – has found for herself. Because it was owing precisely to Jishkariani’s scribbles on a piece of paper that [two allegedly healthy inmates who later assaulted doctors] found themselves in the prison hospital without any legal grounds for that ...”
- [...]
16. The Rustavi 2 TV channel also transmitted brief comments made by representatives of the civil society, including the Public Defender, who were involved in the public monitoring of the prisons. They noted that the accusations levelled by the Minister had been groundless in view of the fact that the transfers of inmates to and from the prison hospital had been within the exclusive competency of the Ministry.
- [...]
18. On 20 September 2005 the daily newspaper *Rezonansi* published an interview with the Minister. He discussed allegations of corruption in the management of medical facilities in the penal system [...].

[...]

The law

I. Alleged violation of article 8 of the Convention

34. The applicant complained that the domestic courts' refusal to protect her reputation against the publicly voiced unconfirmed accusations of corruption and fraudulent behaviour by the then Minister of Justice amounted to a violation of her rights under Article 8 of the Convention.

[...]

35. The Government contested that argument.

A. Admissibility

36. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

[...]

b) Application of the above principles to the present case

(i) Seriousness of the accusations underlying the Minister's statements

47. The publicly voiced clear insinuations by the Minister that the applicant, together with the director of the Medical Department of the Ministry, had been involved in the issuing of wrong medical reports concerning prisoners' health in exchange for money, and that she was under criminal investigation were serious. They gave the impression that she had committed crimes, and must have affected her reputation as a medical professional and an active representative of the civil society. Therefore, the accusations attained a requisite level of seriousness as they could harm the applicant's reputation under Article 8 of the Convention.

(ii) Contribution to a debate of general interest

48. The Court agrees with the domestic courts' assessment that a debate on an important subject of general interest existed at the material time.

[...]

49. In the circumstances of the present case, the statements aimed at clarifying the procedures and possible deficiencies in the management of the medical services of the prisons were part of a public debate on the matter.

(iii) How well-known the applicant was, the applicant's conduct prior to the dissemination of the impugned statements, and the subject of the statements

50. The Court observes that the applicant, an established mental health professional and an active member of civil society, as well as the person responsible for the inmates' rehabilitation project in prison and a member of the Inmates' Mental Health Research and Monitoring Commission was regarded by the domestic courts as a public figure rather than a private person for the purposes of the Freedom of Speech and Expression Act.

51. The debate and the impugned statements did not concern the applicant's private life but her public activities in the abovementioned domain. Considering the applicant's position and activities in prison, including the medical assessment of prisoners, the Court does not see any reason to depart from the domestic courts' finding concerning the applicant's status as a public figure, acting in an official capacity, the extent of acceptable criticism in her respect being thus wider than in respect of ordinary citizens

- [...].
- (iv) *The content, form and consequences of the statements*
52. The Court has already noted that the Minister's accusations were serious and gave the impression that the applicant had committed crimes. Yet, the domestic courts concluded that the statements constituted the Minister's opinions aimed at contributing to an important public discussion on the matter, to be tolerated by the applicant in view of her status as a public figure. They therefore held, in essence, that the impugned statements constituted value judgments which were not excessive. However, none of the domestic courts elaborated on how a serious factual allegation against a named individual could constitute a value judgment and contribute to a debate of general interest.
53. In the circumstances of the present case, even assuming that the Court were to accept the classification of the accusation voiced against the applicant as a value judgment, the Court reiterates that under its settled case-law, even where a statement amounts to a value judgment there must exist a sufficient factual basis to support it, failing which it will be excessive [...].
54. The Court will therefore consider the veracity of the statements made by the Minister which, owing to his position, carried particular weight and invited the confidence of the public. This prompted all the more the need to verify their accuracy.
- (v) *Method of obtaining the information and its veracity*
55. The Minister had argued that the inmate implicated in the incident of 10 September 2005 and transferred to the prison hospital on the basis of the applicant's medical note had in fact been healthy, and the applicant was not entitled to make entries in the journal concerning inmates' health (see *ibid.*). He also clearly insinuated that the applicant had been involved in a corrupt scheme of issuing wrong medical conclusions in respect of healthy inmates so that the latter would be transferred to the prison hospital in exchange for money.
56. As concerns the first element, the domestic courts did not answer the applicant's argument that the medical documentation of the relevant inmate demonstrated that he had suffered from various health issues. The Court notes that while the inmate implicated in the incident of 10 September 2005 was transferred to the prison hospital based on the applicant's medical assessment of him, the findings of the General Inspectorate of the Ministry delivered after the impugned statements were made confirmed, as the applicant had argued, that the inmate in question was in fact suffering from various health issues, including mental problems and a head trauma.
57. As for the applicant's competency to make entries concerning the inmates' health in the relevant journal, the domestic courts did not rule on the matter.
58. However, even assuming that the second element of the Minister's accusation had been true and could have invited criticism towards the applicant, the main aspect of the Minister's statements and the civil litigation instituted by the applicant concerned the third element of the Minister's allegations, namely the veracity of the serious accusation that the applicant had issued wrong medical reports, placing healthy inmates in the prison hospital in exchange for money.
59. In this connection, the domestic courts agreed that the applicant had never been criminally investigated, and that the Minister's accusations "may have contained erroneous facts". Furthermore, the criminal investigation opened into the incident of 10 Septem-

ber 2005 which, as it appears from the case file, may have partly concerned the broader issue of mismanagement and corruption in the medical department of the Ministry, was discontinued on the grounds of the absence of a crime. Therefore, the Minister's accusations, even assuming that the Court were to accept the classification of the statements as value judgments, lacked a sufficient factual basis. Yet the domestic judicial authorities considered that the Minister had made an effort to verify the information before making his statements by commissioning an internal investigation on the matter.

60. The question that remains to be answered is whether the Minister had demonstrated due diligence in an attempt to verify the information he spread. The domestic legislation as applied by the domestic courts to the applicant's case required the applicant, not the Minister, to prove not only the falseness of the accusation levelled against her and the damage sustained, but also that the Minister had acted with apparent and gross negligence in disseminating the otherwise uncorroborated accusations.
61. Against this background, and bearing in mind the principles established by the Court when balancing rights and freedoms under Articles 8 and 10 of the Convention, the Court cannot accept the finding of the domestic courts that the Minister had shown due diligence in attempting to verify the veracity of the claims he had made or that the applicant had failed to demonstrate lack of diligence on his part. While the Minister had in fact commissioned an internal investigation, he did not wait for its completion. Nor was he in possession of other verified information against the applicant. Therefore, commissioning an inquiry without waiting for its outcome cannot be considered to be an effort living up to the standard of due diligence.
62. The Court reiterates in this connection that the Convention cannot be interpreted to require individuals to tolerate, in the context of their rights under Article 8 of the Convention, being publicly accused of criminal acts by Government officials who are expected by the public to possess verified information concerning those accusations, without such statements being supported by facts [...].
63. In the light of the foregoing, the Court is not convinced that the reasons advanced by the domestic courts for protecting the Minister's freedom of expression outweighed the right of the applicant to have her reputation safeguarded. The Court therefore considers that the domestic courts failed to strike a fair balance between the competing interests involved.

There has accordingly been a violation of Article 8 of the Convention.

II. Application of article 41 of the Convention

64. Article 41 of the Convention [...].

For these reasons, the Court unanimously

1. *Declares* the complaint under Article 8 of the Convention admissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 1,500 (one thousand five hundred euros) plus any tax that may be chargeable, in respect of non-pecuniary damage;

- (ii) EUR 1,833 (one thousand eight hundred and thirty-three euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

61.

EUROPEAN COURT OF HUMAN RIGHTS 24 May 2015.

Haldimann and others v. Switzerland.

Procedure

1. The case originated in an application (no. 21830/09) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Swiss nationals, Mr. Ulrich Mathias Haldimann ("the first applicant"), Mr. Hansjörg Utz ("the second applicant"), Ms. Monika Annemarie Balmer ("the third applicant") and Ms. Fiona Ruth Strebel ("the fourth applicant"), on 3 April 2009.

[...]

3. The applicants complained of an infringement of their right to freedom of expression as guaranteed by Article 10 of the Convention.

[...]

The facts

I. The circumstances of the case

[...]

8. In 2003 the third applicant, an editor of the *Kassensturz* television programme, prepared a report on practices employed in selling life- insurance products. The report was prompted by the annual reports of the Private Insurance Ombudsman for the Canton of Zürich and by letters which the programme's editors had received from viewers expressing their dissatisfaction with insurance brokers. *Kassensturz* is a long-running weekly consumer-protection programme on Swiss-German television (SF DRS).
9. The third applicant agreed with the first applicant (the editor-in-chief of SF DRS) and the second applicant (the editor in charge of the programme) that she would record meetings between customers and brokers, using a hidden camera, to provide evidence of the brokers' inadequate advice. It was decided that the meetings would be recorded in a private flat and that an insurance expert would then be asked to comment on them.
10. The fourth applicant, a journalist working for SF DRS, arranged a meeting with an insurance broker from company X, which took place on 26 February 2003. She pretended to be a customer interested in taking out life insurance. The SF DRS crew installed two hidden cameras (*Lipstickkameras*) in the room in which the meeting was to take place, transmitting the recording of the conversation to a neighbouring room where the third applicant and the insurance expert had taken up position, together with a camera operator and a technician who had been assigned to film the expert's views on the meeting.

11. Once the meeting had finished, the third applicant joined the broker and the fourth applicant in the room, introduced herself as an editor of *Kassensturz* and explained to the broker that the conversation had been filmed. The broker replied that he had suspected as much (“*Das habe ich gedacht*”). The third applicant told him that he had made some crucial errors during the meeting and asked him for his views, but he refused to comment.
12. The first and second applicants subsequently decided to broadcast part of the filmed meeting during a forthcoming edition of *Kassensturz*. They suggested that company X be invited to comment on the conversation and the criticism of the broker’s methods, and assured the company that his face and voice would be disguised and would therefore not be recognisable. Before the programme was broadcast, the applicants proceeded to pixelate the broker’s face so that only his hair and skin colour and his clothes could still be made out. His voice was also distorted.
[...]
15. On 29 August 2006 the single judge for criminal cases at the Dielsdorf District Court (Canton of Zürich) found the first three applicants not guilty of intercepting and recording the conversations of others (offences under Article 179 *bis* §§ 1 and 2 of the Criminal Code), and the fourth applicant not guilty of the unauthorised recording of conversations (Article 179 *ter* § 1 of the Criminal Code).
[...]
17. In a judgment of 5 November 2007, the Court of Appeal (*Obergericht*) of the Canton of Zürich found the first three applicants guilty of recording the conversations of others (Article 179 *bis* §§ 1 and 2 of the Criminal Code) and of breaching confidentiality or privacy by means of a camera (Article 179 *quater* §§ 1 and 2 of the Criminal Code). It also found the fourth applicant guilty of unauthorised recording of conversations (Article 179 *ter* § 1 of the Criminal Code) and breaching confidentiality or privacy by means of a camera (Article 179 *quater* §§ 1 and 2 of the Criminal Code). The first three applicants were given suspended penalties of fifteen day-fines of 350 Swiss francs (CHF), CHF 200 and CHF 100 respectively, while the fourth applicant received a penalty of five day-fines of CHF 30.
18. The applicants appealed jointly to the Federal Court against their convictions, relying in particular on the right to freedom of expression under Article 10 of the Convention. They argued that their recourse to the impugned technique had been necessary to achieve the aim pursued.
[...]
20. The Federal Court dismissed the remainder of the appeal [...].
21. On 24 February 2009 the Court of Appeal of the Canton of Zürich found the applicants guilty of breaching confidentiality or privacy by means of a camera, an offence under Article 179 *quater* of the Criminal Code. It therefore slightly reduced the penalties previously imposed on them [...].

The law

I. Alleged violation of article 10 of the Convention

24. The applicants complained of a violation of their right to freedom of expression as enshrined in Article 10 of the Convention, [...].
25. The Government contested that argument.

A. Admissibility

26. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

[...]

2. The Court's assessment

[...]

(a) Prescribed by law

[...]

39. The Court therefore considers that the applicants – as journalists and editors making television programmes for a living – could not have failed to realise that, by using a hidden camera without the consent of a person who was the subject of a report and by broadcasting the report without that person's permission, they were liable to a criminal penalty.

40. It thus concludes that the impugned interference was "prescribed by law" within the meaning of the second paragraph of Article 10 of the Convention.

[...]

(ii) Application of these principles in the present case

[...]

59. The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on freedom of expression in matters of public interest [...].

60. Admittedly, as noted above, the broker who was filmed without his knowledge was not a public figure. He had not given his consent to being filmed and could therefore have "had a reasonable expectation of privacy" as regards the conversation [...]. However, the report did not focus on the broker himself but on certain commercial practices employed within a particular profession. Furthermore, the meeting did not take place in the broker's offices or on any other business premises [...]. The Court therefore considers that the interference with the broker's private life was less serious than if the report had been personally and exclusively focused on him.

61. The way in which the information was obtained and its veracity are also important factors. The Court has previously held that the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism [...]. It observes in the present case that, although the parties referred to different sources, they nonetheless agreed in substance that the use of a hidden camera was not absolutely prohibited in domestic law, but could be accepted subject to strict conditions. It was not disputed among the parties that the use of this technique was permitted only where there was an overriding public interest in the dissemination of the relevant information, provided that such information could not be obtained by any other means. The Court has already established that the report concerned a matter of public interest. It considers that what is important at this stage is an assessment of the applicants' conduct. Although the broker might legitimately have felt that he had been deceived by the journalists, they nevertheless cannot be accused of having deliberately acted in breach of professional

ethics. They did not disregard the rules on journalism as laid down by the Swiss Press Council limiting the use of hidden cameras, but instead inferred – incorrectly, in the view of the Federal Court – that the subject of their report entitled them to obtain information by those means. The Court notes that the Swiss courts themselves were not unanimous on this question, since they acquitted the applicants at first instance before subsequently convicting them. That being so, the Court considers that the applicants should be given the benefit of the doubt as to whether they really intended to comply with the ethical rules applicable to the present case regarding the method used to obtain information.

62. As regards the facts of the case, their veracity has never been disputed. Whether it might have been of more interest to consumers, as the Government argued, to expose the scale of the alleged problems rather than their nature has no bearing on this finding.
63. The Court further reiterates that the way in which a report or photograph is published and the manner in which the person concerned is portrayed in it may also be factors to be taken into consideration [...]. The extent to which the report and photograph have been disseminated may also be an important factor, depending on whether the newspaper is a national or local one, and has a large or a limited circulation [...].
64. In the present case the Court observes that the applicants recorded a conversation featuring the images and sound of purported negotiations between the broker and the journalist. It considers that the recording itself entailed only limited interference with the broker's interests, given that only a restricted group of individuals had access to the recording, as the Government accepted.

[...]

66. The Court therefore considers, having regard to the circumstances of the case, that the interference with the private life of the broker – who, it reiterates, declined to comment on the interview – was not so serious [...] as to override the public interest in receiving information about alleged malpractice in the field of insurance brokerage.
67. Lastly, the Court must take into account the nature and severity of the sanction. It reiterates in this connection that, in some cases, a person's conviction in itself may be more important than the minor nature of the penalty imposed [...]. In the present case, although the pecuniary penalties of twelve day-fines for the first three applicants and four day-fines for the fourth applicant were relatively modest, the Court considers that the sanction imposed by the criminal court may be liable to deter the media from expressing criticism (*ibid.*, § 154), even though the applicants themselves were not denied the opportunity to broadcast their report.
68. Having regard to the foregoing, the Court considers that the measure in dispute in the present case was not necessary in a democratic society. There has therefore been a violation of Article 10 of the Convention.

II. Application of article 41 of the Convention

69. Article 41 of the Convention [...].

70. The applicants did not submit a claim for just satisfaction. Accordingly, there is no call to award them any sum on that account.

For these reasons, the Court

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by six votes to one, that there has been a violation of Article 10 of the Convention.

62.

EUROPEAN COURT OF HUMAN RIGHTS 13 January 2016.**Bremner v. Turkey.****Procedure**

1. The case originated in an application (no. 37428/06) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Australian national, Mr. Dion Ross Bremner (“the applicant”), on 28 August 2006.

[...]

3. The applicant alleged, in particular, an infringement of his right to respect for his private life.

[...]

The facts**I. The circumstances of the case**

7. The applicant was born in 1967 and lives in Strathfield in Australia.

8. At the material time he had been a correspondent with an Australian newspaper in Turkey. He had also been working voluntarily for a bookshop specialising in books on Christianity.

9. On 24 June 1997 he appeared in a television documentary broadcast in the framework of the programme *Son çare* (“Last Resort”), hosted by Ms. Hülya Koçyiğit.

A. The content of the report

10. During the programme the hostess introduced the documentary by pointing out that it concerned covert activities conducted in Turkey by “foreign pedlars of religion” (*yabancı din tüccarları*) [...]. The voiceover explained that the aim of the programme was not to judge any specific religion but to show that whatever their nationalities or religious beliefs, the pedlars of religion all used the same methods.

11. The voiceover explained that the programme producers had been contacted by a certain A.N., who lived in Samsun. This person had been intrigued by an advertisement asking “would you like to read books free of charge?”, and had replied. In return, he had received a number of books by mail, all of them concerning Christianity. He had written back and had once again received books on the same subject. The second dispatch had been accompanied by a letter thanking him for his interest in the subject.

12. There had subsequently been a telephone exchange between A.N. and the sender, who had proved to be the applicant.

13. After that exchange it had been agreed that the applicant would travel to Samsun to meet A.N.

14. It was at that point that A.N. had decided to inform the programme producers and to invite them to make a documentary on the subject.

[...]

16. According to the voiceover, the applicant had then presented the teachings of the Bible. He had continued by comparing Christianity with other religions, emphasising his own beliefs. However, that sequence was not shown, on the grounds that the aim of the documentary was not to discuss the merits of specific beliefs but to expose the methods used.

17. A.N. and the applicant had arranged to meet up again the next day in an apartment, again accompanied by a group of A.N.'s friends purportedly desirous of learning about the Christian religion.
18. During that second meeting the applicant had explained that he was not alone but was part of a group working throughout Turkey. He had said that premises could be rented in Samsun for the converts, but that he would have to talk to his "boss" about that. The question of where the money would come from was difficult, but an open, intelligent attitude had to be adopted to such matters because converts could be accused of having changed religions thanks to pecuniary considerations rather than conviction.
- [...]
24. The documentary then presented an interview between Ms Koçyigit and an academic from the Istanbul Faculty of (Islamic) Theology. The latter explained that Muslims were duty-bound to respect and believe in the divine nature of the holy books of all the monotheistic religions, pointing out that Islam was a religion of tolerance. However, he voiced his surprise at the covert nature of the activities shown in the documentary.
25. At the end of the programme the applicant was shown walking along carrying a bag. The voiceover described him as "Dion, the pedlar of religion, on his way to the police station to give a statement".

[...]

The law

I. Alleged violation of article 8 of the Convention

44. The applicant complained that the transmission of the documentary and the judicial authorities' dismissal of his claim for damages had infringed his right to respect for his private life as provided for in Article 8 of the Convention, [...].
45. The Government contested that argument.

A. Admissibility

46. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

[...]

2. The Court's assessment

[...]

b) Application of those principles to the present case

[...]

73. It notes that the documentary was critical and that it used offensive expressions such as "pedlar of religion" to describe the applicant. As regards the word "bigotry", although it is hardly flattering, the Court notes that it was not used in connection with the applicant but in relation to the practices of certain Muslim brotherhoods.
74. The Court considers that the use of the phrase "pedlar of religion" pointed to a value judgment. However, the veracity of such judgments cannot be demonstrated. Moreover, the Court reiterates that freedom of the press also covers possible recourse to a degree of exaggeration, or even provocation.
75. It considers that the impugned documentary did not comprise any gratuitous personal attack on the applicant [...]. Furthermore, the Court holds that it was also not a case

- of hate speech, since it did not incite to hatred or violence against a religious group or denigrate such a group's convictions and beliefs [...].
76. As regards the method used for producing the documentary, the Court considered that the use of hidden cameras should be restricted as a matter of principle, since that technique is highly intrusive and flouts the right to respect for private life. Nevertheless, the Court is aware of the importance of covert investigative methods for the production of certain types of documentaries. In some cases journalists are obliged to use hidden cameras, for instance where information is difficult to obtain by any other means [...].
- [...]
80. As regards the potential contribution to a public-interest debate of broadcasting images of the applicant, the Court sees nothing in the impugned documentary or in the parties' observations to substantiate any general-interest reasons for the journalists' decision to transmit the images of the applicant without taking any particular precautions, such as masking his face [...].
81. Under those conditions, broadcasting the images of the applicant without taking any precautions cannot be regarded as contributing to any debate of general interest to society, however great the social interest in the issue of religious proselytism.
- [...]
84. Having regard to all the foregoing considerations and despite the State's margin of appreciation in this sphere, the Court considers that, as regards the transmission of unpixellated and unblurred images of the applicant, the Turkish courts had failed to strike a fair balance between the competing interests. Their manner of dealing with the case had therefore failed to provide the applicant with adequate and effective protection for his image rights and therefore his private life.
85. There was accordingly a violation of Article 8 of the Convention. ...

IV. Application of article 41 of the Convention

93. Article 41 of the Convention [...]

For these reasons, the Court unanimously

1. *Declares* the complaint under Article 8 admissible ...;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the sum of EUR 7,500 (seven thousand five hundred euros) in respect of pecuniary damage;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

EUROPEAN COURT OF HUMAN RIGHTS 18 March 2019.**Kaboglu and Oran v. Turkey.****Procedure**

1. The case originated in an application (no. 1759/08) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Turkish nationals, Mr İbrahim Özden Kaboğlu and Mr Baskın Oran (“the applicants”), on 10 January 2008 (application no. 1759/08) and 15 July 2010 (applications nos. 50766/10 and 50782/10) respectively.

[...]

3. The applicants complained, in particular, of infringements of their rights to respect for private life and freedom of expression.
4. On 26 January 2017 notice of the complaints concerning violations of the applicants’ rights to respect for private life and freedom of expression was given to the Government, and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

The facts**I. The circumstances of the case**

5. The applicants were born in 1950 and 1945 and live in İstanbul and Ankara respectively. They are university professors specialising, *inter alia*, in human rights protection.

A. The facts common to the three applications*1. The applicants’ appointment to the Consultative Council on Human Rights*

6. On 5 February 2002 the applicants were appointed as members of the Consultative Council on Human Rights (“the Consultative Council”), a public body answerable to the Prime Minister which was set up under Law No. 4643 of 12 April 2001 and is responsible for providing the Government with opinions, recommendations, proposals and reports on the whole range of issues relating to the promotion and protection of human rights.
7. At its first meeting on 26 February 2003 the Consultative Council elected Mr Kaboğlu as its chairman. At its second meeting on 9 May 2003 the Consultative Council elected Mr Oran chairman of the Working Group on issues relating to minority and cultural rights.

[...]

The law**I. Joinder of the applications**

47. Given the similarity of the three applications in factual and legal terms, the Court decided to join them in accordance with Rule 42 § 1 of the Rules of Court.

II. Alleged violation of article 8 of the Convention

48. Relying on Article 8 of the Convention, the applicants complained that they had been unable to obtain compensation for the non-pecuniary damage sustained on account of the press articles which they claimed had comprised insults, threats and hate speech directed against them, infringed their dignity and been part of a “lynching campaign” geared to stirring up public feeling against them.

49. Further relying on Article 2 of the Convention, the applicants alleged, in the framework of application no.1759/08, that the authorities had failed to take the requisite action to protect them from the lynching campaign against them which had endangered their lives. They explained that it was customary practice in Turkey to intimidate, to frighten, [...] persons who had voiced opinions different from that of the majority in society [...]. They therefore accused the national authorities of having left them without protection *vis-à-vis* the hate speech and calls to violence against them set out in the press articles at issue, and of thus having helped encourage the death threats which they had received.
50. The Court notes that, as regards the applicants' allegation concerning the authorities' failure to protect them against the death threats and violent reactions, the applicants have not provided evidence of any possible concrete acts of violence perpetrated against them in the wake of the impugned articles. It reiterates, in this regard, that treatment which does not reach a level of severity sufficient to bring it within the ambit of Articles 2 and 3 may nonetheless breach the private-life aspect of Article 8, if the effects on the applicant's physical and moral integrity are sufficiently adverse [...]. It also notes that the only remedy which the applicants seem to have used in the present case was the civil action for damages which they lodged in respect of the impugned articles.
51. [...] The Court considers that the facts in issue should be assessed solely under Article 8 of the Convention, the relevant part of which provides:
- "1. Everyone has the right to respect for his private and family life, his home and his correspondence."

A. Admissibility

52. The Government raised an inadmissibility objection of failure to exhaust domestic remedies [...].
- [...]
54. The Court reiterates that an applicant must have made normal use of domestic remedies which are likely to be effective and sufficient and that, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required [...].
55. In the instant case, the Court notes that the applicants lodged actions for damages with the civil courts alleging interferences with their private lives on account of the insulting and threatening content of the impugned articles [...].
- [...]
57. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

[...]

2. The Court's assessment

[...]

(b) Application of those principles to the present case

72. The Court notes that the present applications concern press articles whose content the applicants claimed had interfered with their private lives, and had, in particular, damaged their reputations. As regards the right to protection of reputation, it reiterates

that that right, as an aspect of private life, falls within the scope of Article 8 of the Convention. The Court considers that in the present case, having regard to the virulent criticisms levelled against the applicants in the impugned articles, the infringement of their reputations reaches the requisite severity threshold for the application of Article 8 of the Convention.

[...]

81. In the instant case, the Court considers that the impugned articles used acerbic terms to express the authors' reaction to and indignation about the Consultative Council's report and to discredit its drafters, the applicants included, in the public mind. The Court takes the view that the provocative, aggressive and somewhat offensive style and content of the articles in question cannot, by and large, be considered as lacking an adequate factual basis and as being wantonly insulting in the context of the heated public debate on a report dealing with issues of vital importance to Turkish society.

[...]

83. [...] In that connection, it first of all notes that the articles had been published against the background of a heated public debate on the proposals put forward by the aforementioned report concerning effective protection for minority rights in Turkey. The Court acknowledges that this is a difficult subject liable to raise concerns in nationalist circles as to the unitary structure of the Turkish nation and State. The press statements and articles criticising the applicants were therefore published in the context of a reactionary campaign conducted by the said nationalist circles against the report and its main authors, that is to say the applicants. The latter had in fact exercised their freedom of expression by drafting that report, setting out their point of view on the status and place of minorities in a democratic society, without, however, using derogatory or insulting language in connection with those holding different views on the subject. The Court considered in that regard that in order to gauge the level of tension prevailing at that time, it is sufficient to recall, firstly, the incident at the press conference organised by the applicant İbrahim Kaboğlu, when in F.Y., a member of a nationalist-leaning trade union, tore up a copy of the report laid in front of Mr Kaboğlu, thus breaking up the conference, and secondly, the death threats received by the applicants, which forced the authorities to grant them special police protection and which, in the absence of an effective judicial reaction, led the Constitutional Court to find a violation of the applicant Baskın Oran's right to life and to freedom of expression.

[...]

85. [...] The Court takes the view that those phrases, taken in conjunction with the stigmatising expressions used throughout the impugned articles [...].

86. The Court considers that in the present case the risk should have been borne in mind that such articles might incite people to commit acts of violence against the applicants [...].

87. The Court considers therefore that the verbal attacks and physical threats made in the impugned articles in this context against the applicants were geared to repressing their intellectual personality, inspiring in them feelings of fear, anguish and vulnerability capable of humiliating and debasing them and of breaking their will to defend their ideas [...].

[...]

89. The Court considers that the conclusions adopted by the domestic courts are not such as to enable it to establish that they conducted an adequate balancing exercise between the applicants' right to respect for their private lives and the freedom of the press, pursuant to the aforementioned relevant criteria. Indeed, it holds that the judgments delivered by the domestic courts did not provide a satisfactory reply to the question whether freedom of the press could, in the circumstances of the instant case, justify the infringement of the applicants' right to respect for their private lives by passages of articles liable to amount to hate speech and a call to violence, and therefore likely to expose the applicants to public condemnation [...].
90. Having regard to the foregoing considerations, the Court finds that in the present case the domestic courts failed to strike a fair balance between the applicants' right to respect for their private lives and the freedom of the press. Therefore, there has been a violation of Article 8 of the Convention.

III. Alleged violations of articles 10 and 14 of the Convention

91. Relying on Article 10 of the Convention, the applicants alleged that the State authorities had failed in their positive obligation to safeguard the exercise of their right to freedom of expression against press articles geared to intimidating them and stifling the debate initiated by the report on minority rights.
92. Also relying on Article 14 of the Convention, the applicants alleged, in the framework of applications nos. 50766/10 and 50782/10, that they had suffered discrimination on the grounds of their opinions. In that regard, they submitted that the authorities had failed to protect them against infringements by third persons of their right to freedom of expression in response to the opinions which they had expressed in their report on minority rights.
93. Having regard to the violation found in respect of Article 8 of the Convention, the Court considers that it has considered the main legal issue arising in the present case. In view of all the facts of the case and the parties' pleadings, it holds that it is no longer necessary to examine separately the admissibility or the merits of the complaints under Articles 10 and 14 of the Convention [...].

IV. Application of article 41 of the Convention

94. Article 41 of the Convention [...]

For these reasons, the Court unanimously

1. *Decides* to join the applications;
2. *Declares* the applications admissible;
3. *Holds* that there has been a violation of Article 8 of the Convention;
4. *Holds* that there is no need to examine separately the admissibility or the merits of the complaints under Articles 10 and 14 of the Convention;
5. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 1,500 (one thousand five hundred euros) to each of the applicants, plus any tax that may be chargeable, in respect of non-pecuniary damage;

- (ii) EUR 4,000 (four thousand euros) jointly to both applicants, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

64.

EUROPEAN COURT OF HUMAN RIGHTS 22 May 2007.

Nikowitz and Verlagsgruppe News GmbH v. Austria.

Procedure

1. The case originated in an application (no. 5266/03) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr. Rainer Nikowitz, an Austrian national, and Verlagsgruppe News GmbH, a limited liability company with its registered office in Tulln, on 3 February 2003.

[...]

3. On 15 September 2005 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

The facts

The circumstances of the case

4. The applicant company is the owner and publisher of the weekly magazine *Profil*. The first applicant works as a journalist for the applicant company.
5. In the section of the issue of *Profil* of 3 September 2001 dealing with society matters the applicant company published, on page 124, a two-page article by the first applicant with the headline "*Ouch*" and the strapline "*Hermann Maier. Austria is limping. Rainer Nikowitz too is suffering from acute phantom pains as a result of the national broken leg.*" The article was accompanied by a portrait of Mr Maier together with the caption "*Hero Hermann's leg is causing millions of Austrians pain*".
6. The article was meant as an ironic essay on the reaction of the Austrian population and media scene to the road-traffic accident in which the Austrian ski-racing champion Hermann Maier had injured his leg some weeks before. In this context the article cited and commented on various statements from Austrian and German newspapers and Hermann Maier's Internet homepage. The article also mentioned one of Maier's competitors, the Austrian ski-racing champion Stefan Eberharter [...].
7. Subsequently, Mr Eberharter brought a private prosecution for defamation against the first applicant and a compensation claim under the Media Act (*Mediengesetz*) against the applicant company. He submitted that the above passage communicated a negative image of him as it suggested disdainful behaviour towards a colleague. Like all top athletes he earned the majority of his income from public-relations activities for sponsor companies. Because of the article in question he had already been repeatedly questioned about his attitude concerning Mr Maier's accident. If the suggested reproach

- of most objectionable competitiveness remained attached to him, this would entail a significant loss of value in his standing as a communication medium. His previous correspondence with the applicant company requesting it to publish his comment had remained unsuccessful.
8. On 6 December 2001 the Vienna Regional Criminal Court (*Landesgericht*), having held a hearing, convicted the first applicant of defamation under section 111 of the Criminal Code (*Strafgesetzbuch*) [...].
 9. The court noted that the offending passage was to be understood in the way it would be perceived by an average reader. The magazine *Profil* was aimed at an understanding and intellectual readership and the majority of readers could therefore be expected to discern the satirical and humorous content of the article and the passage in particular. This was not true, however, for a person who read the article only superficially and without the necessary concentration. Such a reader was confronted at the very beginning of the article, namely in its third paragraph, with the impugned passage suggesting that jealousy, rudeness and *schadenfreude* were obvious characteristics of Stefan Eberharter. The content of the offending statement could furthermore not be regarded as far-fetched, as in the milieu of skiing experts Stefan Eberharter was seen as the “eternal bridesmaid” in relation to Hermann Maier and known for his rather ribald expressions. Lastly, the rest of the article only informed the reader about the coverage of the accident in other media and did not say anything more about Stefan Eberharter’s character.
 10. The applicants appealed and submitted in particular that when assessing the meaning of the offending passage the court should not have applied the standard of a hasty and unfocused reader. In any event, the applicants’ right to freedom of artistic expression outweighed Mr Eberharter’s personal interests. The article at issue was a satirical and farcical essay on a subject of public interest. Stefan Eberharter was mentioned as the representative of all other ski-racing competitors who had no chance against the overpowering Hermann Maier. [...] The humorous nature of the article was already evident from its headline, strapline and first paragraphs. Furthermore, the applicant company regularly published the first applicant’s columns, whose satirical and humorous nature was therefore well-known to readers.
 11. On 26 June 2002 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the applicants’ appeal. [...] The court concluded that Stefan Eberharter’s personal interests outweighed the applicants’ right to freedom of artistic expression.

[...]

The law

I. Alleged violation of article 10 of the Convention

13. The applicants complained under Article 10 of the Convention that the Austrian courts’ judgments violated their right to freedom of expression.

Article 10 of the Convention, as far as relevant, [...].

14. The Government contested that argument.

A. Admissibility

15. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

[...]

24. In the present case, the domestic courts found that Mr. Eberharter's personal interests in having his reputation protected had outweighed the applicants' right to freedom of expression. They noted in this regard that the reported reaction had conveyed a negative image of a top athlete who was expected to win in fair competition instead of wishing his competitor serious bodily harm. An unfocused reader could not have been expected to discern the satirical and humorous content of the article and impugned passage. Besides, any reader would have assumed that there was a real background even behind comic exaggeration.
25. The Court cannot find that these are "relevant and sufficient" reasons to justify the interference at issue. It notes that the article dealt with the road traffic accident in which the well-known Austrian skiing champion Hermann Mayer had been injured, this incident having attracted the attention of the Austrian media at the time. The article, as was already evident from its headings and the caption next to Mr. Maier's photograph, was written in an ironic and satirical style and meant as a humorous commentary. Nevertheless, it sought to make a critical contribution to an issue of general interest, namely society's attitude towards a sports star. The Court is not convinced by the reasoning of the domestic courts and the Government that the average reader would be unable to grasp the text's satirical character and, in particular, the humorous element of the impugned passage about what Mr. Eberharter could have said but did not actually say. This passage could at most be understood as the author's value judgment on Mr. Eberharter's character, expressed in the form of a joke.
26. The Court notes that the impugned statement speculates on Mr. Eberharter's true feelings about his competitor's accident and suggests, firstly, that he was pleased because he expected to benefit from this incident and, secondly, that he hoped his competitor would be further weakened. The Court acknowledges that such feelings, if actually expressed, would seriously affect and damage any sportsman's good image. However, the Court does not find that the same can be said about this humorous passage, which clearly mentions that Mr. Eberharter made no such statement. The Court also notes in this regard that Mr. Eberharter had already previously commented on Mr. Maier's accident in public, obviously using different words. In sum, the Court considers that the impugned passage about Mr. Eberharter remains within the limits of acceptable satirical comment in a democratic society.
27. Moreover, the Court, having regard to the fact that the Austrian courts convicted the first applicant of defamation and ordered the applicant company to pay compensation and to publish the judgment, cannot adhere to the Government's argument that the Austrian courts showed moderation in interfering with the applicants' rights in the present case. In particular, as regards the first applicant, what matters is not that he was sentenced to a relatively minor suspended penalty, but that he was convicted at all [...].
28. It follows that the interference complained of was not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention. Consequently, there has been a violation of Article 10 of the Convention.

II. Application of article 41 of the Convention

29. Article 41 of the Convention [...]

For these reasons, the Court unanimously:

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 7,058.13 (seven thousand and fifty-eight euros thirteen cents) in respect of pecuniary damage;
 - (ii) EUR 4,831.40 (four thousand eight hundred and thirty-one euros forty cents) in respect of costs and expenses;
 - (iii) any tax that may be chargeable on the latter amount;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

65.

EUROPEAN COURT OF HUMAN RIGHTS 04 September 2009.
Standard Verlags GmbH v. Austria (No. 2).

Procedure

1. The case originated in an application (no. 21277/05) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Standard Verlags GmbH ("the applicant company"), on 3 June 2005.

[...]

3. The applicant company alleged a violation of its right to freedom of expression.

[...]

The facts**I. The circumstances of the case**

5. The applicant, a limited liability company with its seat in Vienna, is the owner of the daily newspaper Der Standard.
6. In its issue of 14 May 2004 Der Standard published an article in the domestic politics section under the heading "Gossip mongering" ("Kolportiert"). The article, which was entitled "A society rumour" ("Ein bürgerliches Gerücht") commented on certain rumours relating to the marriage of Mr. Klestil, the then Federal President. The article also appeared on the website of Der Standard. It read as follows:

"If the stories circulating between the outlying district of Döbling and the city centre are to be believed, there is only one topic of conversation at the moment among the so-called upper crust of Viennese society: the marriage of the departing presidential couple Thomas Klestil and Margot Klestil-Löffler [bold print in the original]. Rumour has it that not only is he about to leave office, but she is about to leave him. The latter claim has of course set tongues wagging furiously in bourgeois – and not- so-bourgeois – circles. People here like nothing better than to be able to express outrage about one of their own.

In addition to the allegedly less-than-blissful domestic situation on the Hohe Warte [the Federal President's residence], there has been persistent gossip recently about the supposedly close ties between the First Lady, who is her husband's junior by 22 years, and other political figures. Head of the FPÖ parliamentary group Herbert Scheibner [bold print in the original], for instance, is reported to be close to her (Scheibner has accompanied the presidential couple on a number of foreign trips). Ms. Löffler is also said to be well acquainted with the husband of the Canadian ambassador (unsurprisingly, given her post as head of the American department of the Foreign Affairs Ministry). [...]"

7. The article was accompanied by a picture of Mr. Klestil and Mrs Klestil-Löffler, looking in different directions.

A. The proceedings brought by Mr. Klestil and Mrs. Klestil-Löffler

8. On 18 May 2004 Mr. Klestil and Mrs. Klestil-Löffler brought proceedings under sections 6 and 7 of the Media Act (Mediengesetz) against the applicant company, claiming that the article published in Der Standard of 14 May 2004 reported on their marriage and family life and thus interfered with the strictly personal sphere of their lives.

[...]

10. The Regional Court, referring to section 7 of the Media Act, held that the applicant company had reported on the strictly personal sphere of the claimants' lives in a manner that was likely to undermine them in public. It analysed the contents of the impugned article as alleging, on the one hand, that Mrs. Klestil-Löffler intended to divorce and, on the other hand, that she had close contacts with two men, thus describing her as a double adulteress and Mr. Klestil as a deceived husband. In reply to the applicant company's defence that the article merely reported on a rumour, the Regional Court noted that even the dissemination of a rumour could breach section 7 of the Media Act, if it conveyed the impression that there was some truth in it.

11. As to the applicant company's request to take evidence in order to show that the rumour had actually been spread at the time, the court noted that in cases concerning an infringement of the strictly personal sphere of a person's life, section 7 § 2 of the Media Act excluded the proof of truth (Wahrheitsbeweis), unless the statement at issue was directly related to public life. Such a direct link would exist, for instance, where a publication reported on the state of health of the Federal President which might prevent him from exercising his functions. However, the state of his marriage did not have any bearing on his capacity to exercise his functions nor did it have any other link with public life.

12. In assessing the amount of compensation, the Regional Court had regard to the fact that Der Standard was a widely read newspaper and to the considerable degree of insult suffered by the claimants. In addition it noted that it was highly uncommon in Austria to report on (true or untrue) details of the private lives of politicians. Having regard to the above considerations and the need to deter other media from making similar publications, a relatively large amount of compensation appeared justified. The difference in the sums awarded was to the fact that the second claimant was described as a double adulteress, while the first claimant was "merely" depicted as a deceived husband.

13. The applicant company appealed. As a point of law it submitted that the Regional Court had wrongly refused its request for the taking of evidence. In its view the publication was directly related to public life within the meaning of section 7 § 2 of the

Media Act. The claimants, being public figures, had made their private life part of their “marketing strategy”. Like no other presidential couple before, they had kept the public informed about their marriage, starting with the first claimant’s divorce from his former wife and his remarriage, to the second claimant. Moreover, the first claimant had relied heavily on family values during his first electoral campaign. He therefore had to accept that the public had an interest in being informed about his private life.

14. As regards points of fact, the applicant company argued that the Regional Court had wrongly assessed the contents of the article at issue. Read in its proper context, the article did not state that Mrs. Klestil-Löffler actually intended to divorce and even less that she was an adulteress. On the contrary the article rather aimed at exposing the idle gossip propagated in certain upper-class circles. It clearly pointed to the absurdity of the rumour by explaining that the allegedly close ties of the second claimant with Mr. Scheibner and with the husband of the Canadian ambassador had perfectly unsuspecting reasons. Seen in that light, the article did not even relate to the strictly personal sphere of the presidential couple but made fun of the gossip in bourgeois society.
15. As regards the sentence the applicant company claimed that the compensation awards were excessive.
16. [...] On 9 December 2004 the Vienna Court of Appeal (Oberlandesgericht), on an appeal brought by Mr. Klestil’s estate, quashed the Regional Court’s decision.
17. By a judgment of 20 January 2005 the Vienna Court of Appeal upheld the Regional Court’s judgment of 15 June 2004.
18. [...] In sum, the Regional Court had rightly found that the publication at issue was not directly related to public life. Consequently, it had rightly refused to take the evidence proposed by the applicant company.
19. There was no basis for the applicant company’s assertion that the article was aimed at unveiling the hypocrisy of the so called upper crust of Viennese society or that it described the rumours about the claimants’ marriage as absurd. The Regional Court had rightly understood the article’s contents as conveying rumours about the Federal President’s marriage as if there was some truth in them.
20. Finally, as regards the amounts granted in compensation, the Court of Appeal found that deterring other media from similar publications was not a relevant criterion. Nevertheless the other considerations relied on by the Regional Court justified the compensation awards.

[...]

The law

Alleged violation of article 10 of the Convention

34. The applicant company complained that the courts’ decision in the proceedings under the Media Act and under the Civil Code violated its right to freedom of expression as provided in Article 10 of the Convention, [...].
35. The Government contested that argument.

[...]

B. Merits

[...]

2. The Court’s assessment

42. The Court finds that the domestic courts’ judgments given in the two sets of pro-

- ceedings under the Media Act constituted an interference with the applicant's right to freedom of expression.
43. It was not in dispute that that interference was "prescribed by law", namely by sections 6 and 7 of the Media Act, nor that it served a legitimate aim, namely the protection of the rights and reputation of others. The parties' submissions concentrated on whether the interference had been "necessary in a democratic society".
- [...]
46. In this context the Court reiterates that in cases like the present one, in which the Court has had to balance the protection of private life against freedom of expression, it has always stressed the contribution made by photos or articles in the press to a debate of general interest [...].
47. Another important factor to be taken into account is whether the person concerned exercised any official functions. The Court has underlined that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions and reporting details of the private life of an individual who does not exercise official functions [...].
48. The Court has accepted that the right of the public to be informed can in certain special circumstances even extend to aspects of the private life of public figures, particularly where politicians are concerned [...]. However, anyone, even if they are known to the general public, must be able to enjoy a "legitimate expectation" of protection of and respect for their private life [...].
49. In the present case, it is not in dispute that all three claimants in the proceedings under the Media Act were public figures [...].
50. The Court observes in this context that section 7 of the Media Act protects the strictly personal sphere of any person's life against being discussed or portrayed in a way liable to undermine him or her in public, except where the statements published are true and directly related to public life.
51. [...] Since Article 7 of the Media Act prohibits reporting on a person's strictly personal sphere in absolute terms if there is no direct link with public life, the courts refused to take evidence on whether the rumours at issue actually existed at the time.
52. The Court finds that the reasons given by the Austrian courts were "relevant" and "sufficient" to justify the interference. It observes that the courts fully recognised that the present case involved a conflict between the right to impart ideas and the right of others to protection of their private life. It cannot find that they failed properly to balance the various interests concerned. In particular the courts duly considered the claimants' status as public figures but found that the article at issue failed to contribute to any debate of general interest. They made a convincing distinction between information concerning the health of a politician which may in certain circumstances be a issue of public concern [...] and idle gossip about the state of his or her marriage or alleged extra-marital relationships. The Court agrees that the latter does not contribute to any public debate in respect of which the press has to fulfil its role of "public watchdog", but merely serves to satisfy the curiosity of a certain readership [...].
- [...]
54. Having regard to these considerations, the Court finds the domestic courts did not

transgress their margin of appreciation when interfering with the applicant company's right to freedom of expression.

55. [...] In sum, the interference with the applicant company's right to freedom of expression could thus reasonably be considered necessary in a democratic society for the protection of the reputation and rights of others within the meaning of Article 10 § 2 of the Convention.
56. There has consequently been no violation of Article 10 of the Convention.

For these reasons, the Court

1. *Declares* unanimously the complaint that the courts' decisions in the proceedings under the Media Act violated the applicant company's right to freedom of expression admissible and the remainder of the application inadmissible;
2. *Holds* by five votes to two that there has been no violation of Article 10 of the Convention.

66.

EUROPEAN COURT OF HUMAN RIGHTS 13 March 2006.

Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft GmbH (No. 3) v. Austria.

Procedure

1. The case originated in two applications (nos. 66298/01 and 15653/02) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. ("the applicant company"), on 9 February 2001 and on 27 March 2002 respectively.

[...]

3. The applicant company alleged that its conviction under the Media Act and the injunction issued against it under the Copyright Act were in violation with its right to freedom of expression under Article 10 of the Convention.

[...]

The facts

I. The circumstances of the case

9. The applicant is the owner and publisher of the weekly magazine "Profil".
10. In its issue 25/1998 of 15 June 1998 the applicant company published an article about Mr R., at that time a member of Parliament, and his cohabitee Mrs G. The article, with the title "Diary of an escape" and the subtitle "Report. Several myths are entwined around P. R.'s trip to Brazil. The reconstruction of a banal reality", described the couple's flight from Austria in April 1998 as Mr R. was suspected of having committed the offences of aggravated fraud (*Betrug*) and fraudulent conversion (*Untreue*). After an international arrest warrant had been issued, Mr R. was arrested in Brazil on 5 June 1998. At the time of the events, great public interest in the criminal proceedings against Mr R. existed. After Mr R.'s arrest, Mrs G. had given interviews on these events. The article was accompanied by a photo, which appeared on another page, showing Mrs G. standing beside Mr R.
11. The article and its context, namely a short text accompanying photos showing the

couple's hotel and a bar in Brazil, contained the following statements:
 "...Thus, the Lower Austrian mutation of 'Bonnie and Clyde' started on the last part of their trip, a four hour bus ride... (Also brach die niederösterreichische Mutation von Bonnie and Clyde zur letzten Etappe, einer vierstündigen Busfahrt...auf.)

[...]

The law

I. Alleged violation of article 10 of the Convention

32. The applicant company complained that its conviction under the Media Act and the injunction issued on it under the Copyright Act were in violation of its right to freedom of expression under Article 10 of the Convention.

[...]

A. Whether there was an interference

33. The Court notes that it is common ground between the parties that the applicant company's conviction under the Media Act and the injunction issued on it under the Copyright Act constituted an interference with the applicant company's right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention.

B. Whether the interference was justified

34. An interference contravenes Article 10 of the Convention unless it is "prescribed by law", pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" for achieving such an aim or aims.

1. *"Prescribed by law"*

35. The Court considers, and this was acknowledged by the parties, that the interference was prescribed by law, namely by Section 6 of the Media Act read in conjunction with Article 111 of the Criminal Code, and Section 78 of the Copyright Act respectively.

2. *Legitimate aim*

36. The Court further finds, and this was likewise not disputed between the parties, that the interference served a legitimate aim, namely "the protection of the reputation or rights of others" within the meaning of Article 10 § 2 of the Convention.

3. *"Necessary in a democratic society"*

[...]

(b) The Court's assessment

39. The Court recalls the essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds, particularly as regards the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation [...].

[...]

42. In the Court's view, however, the mere fact that the article at issue referred several times to Mrs G. as "Bonnie" was not sufficient to mislead the reader as to her implication in the offences of Mr R. The Court notes in this regard that the criminal proceedings against Mr. R., a Member of Parliament, had created great public interest at that time and that the nature and scope of Mr R.'s offences were well-known to the public. The article at issue did, however, not deal with the pending proceedings against Mr R. but only with his escape and subsequent arrest. It was in this context that the article

- mentioned Mrs G., the cohabitee of Mr R., who had fled the country with him.
43. The Court notes that Mrs G. and Mr R. had fled Austria in April 1998 and that Mr R. had been arrested in Brazil on 5 June 1998. The article, published on 15 June 1998, clearly did not intend to inform the reader about these events in itself which it presumed known to the public. Rather, as stated already in its title and subtitle, the article aimed to describe the more recent circumstances of the Mr R.'s escape and arrest. It did so in an ironic way, aiming to convey to the reader that the reality of this escape had been banal, contrary to what was claimed by certain rumours. As regards Mrs G., the article expressly stated that no suspicion existed against her.
44. [...] The Court cannot find that by using this allusion the applicant company transgressed the bounds of acceptable journalism. The Court is strengthened in its view by the fact that Mrs G., by fleeing with Mr R. and subsequently giving interviews on the subject, had entered into the public arena and, therefore, had to display a higher degree of tolerance.
45. Thus, in the light of the circumstances of the case as a whole and notwithstanding the national authorities' margin of appreciation, the Court considers that the conviction of the applicant company under the Media Act was not based on sufficient reasons for the purposes of Article 10. This finding makes it unnecessary for the Court to pursue the Government's further argument that, in view of the relatively low amount of compensation which the applicant company was ordered to pay, the Austrian courts' decisions could not be regarded as disproportionate.
- [...]
47. The Court notes that Mrs G., by accompanying Mr R., a member of parliament whose criminal proceedings were a subject of great public interest, in his escape, had entered the public arena and she, therefore, had to bear the consequences of her decision [...]. The photo at issue did not disclose any details of Mrs G.'s private life and she had not objected to having it taken. Furthermore, the impugned statements referring to Mrs G. and Mr R. as "Bonnie and Clyde" were not published in the context of a heading or a short text accompanying Mrs G.'s photo, but appeared on another page, namely in the text and context of the above-cited article. The Court, for the reasons given above, does not share the Government's arguments that this article misled the reader as to Mrs G.'s implication in the offences of Mr R. Accordingly, the connection with that text does not provide "relevant" and "sufficient" reasons justifying the contested injunction against publishing Mrs G.'s photo.
48. In conclusion, the Court finds that the Austrian courts when convicting the applicant company under the Media Act and issuing an injunction against the applicant company under the Copyright Act, overstepped their margin of appreciation, and that these measures were not necessary in a democratic society. There has, therefore, been a violation of Article 10 of the Convention.

II. Application of article 41 of the Convention

49. Article 41 of the Convention [...]

For these reasons, the Court unanimously

1. *Decides* to join the applications;
2. *Holds* that there has been a violation of Article 10 of the Convention in respect of the conviction of the applicant company under the Media Act and in respect of the

- injunction issued against the applicant company under the Copyright Act;
3. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant company;
 4. *Holds*
 - (a) that the respondent State is to pay the applicant within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 11,355.64 (eleven thousand three hundred and fifty five euros sixty four cents) in respect of pecuniary damage;
 - (ii) EUR 20,060.51 (twenty thousand and sixty euros fifty one cents) in respect of costs and expenses;
 - (iii) any tax that may be chargeable on the above amounts;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
 5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

67.

EUROPEAN COURT OF HUMAN RIGHTS 10 April 2019.

Khadija Ismayilova v. Azerbaijan.

Procedure

1. The case originated in two applications (nos. 65286/13 and 57270/14) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Azerbaijani national, Ms Khadija Rovshan qizi Ismayilova (*Xədicə Rövşən qızı İsmayilova* – "the applicant"), on 26 September 2013 and 31 July 2014 respectively.

[...]

3. The applicant alleged, in particular, that her rights under Articles 6, 8, 10 and 13 of the Convention had been breached, owing to the authorities' failure to protect her from unjustified intrusions into her private life linked to her work as a journalist.

[...]

The facts

I. The circumstances of the case

5. The applicant was born in 1976 and lives in Baku.

A. Background

6. The applicant worked as an investigative journalist since 2005. She worked as a staff reporter and director at the Azerbaijani service of Radio Free Europe/Radio Liberty ("Azadliq Radio"), whose broadcasts were often critical of the government, covering various topics, including corruption and violations of human rights. In addition, she worked as a regional coordinator for the Organised Crime and Corruption Reporting Project, where she trained journalists in investigation techniques and cross-border reporting. She has received a number of international awards for her journalistic activity.

7. In August 2010 and June 2011, before the events giving rise to the present case, the applicant had published and contributed to articles concerning the alleged involvement of the President's daughters in various commercial ventures. In early 2012 the applicant claimed that her research had uncovered that the presidential family controlled a mining consortium which had just been awarded a lucrative extraction licence by the Azerbaijani government.
[...]

B. Threatening letter and publication of videos depicting the applicant's intimate life

10. On 7 March 2012 the applicant received a letter enclosing six still images from a video taken in her bedroom with a hidden camera. Those images showed her engaged in sexual intercourse with a man who, according to the applicant, was her then boyfriend. The message accompanying the images stated: "Whore, refrain from what you are doing, otherwise you will be shamed! ☺" ("*Qəhbə, özünü yığışdır. Əks halda rüsvay olacaqsan! ☺*"). The letter had been sent by post from an address in Moscow. The sender's name as noted on the envelope was "Valeriy Mardanov".
11. The same images were also sent to two opposition newspapers, *Yeni Müsavat* and *Azadlıq*, which did not publish them.
12. On the same day the applicant made a statement, distributed through social media, that she would not cease her journalistic activity and would not be silenced.
13. On 9 March 2012 the applicant reported the above-mentioned letter to the prosecution authorities and lodged a formal request for an investigation, arguing that the letter amounted to blackmail related to her recent journalistic activities [...].
14. In the meantime, on 13 March 2012 the newspaper *Yeni Azərbaycan* (the official newspaper of the ruling New Azerbaijan Party) published an article titled "Khadija Ismaylova as she seems and as she is" [...].
15. On 14 March 2012 a video was posted online on a website named "musavat.tv", featuring scenes of a sexual nature involving the applicant and her then boyfriend, taken with the same camera hidden in her bedroom. Müsavat is a political opposition party, which indicated that it had nothing to do with the website and condemned the posting of the video. According to the applicant, the domain name "musavat.tv" was apparently chosen solely for the posting of the video, to create the suggestion of a link with the Müsavat party or its newspaper, *Yeni Müsavat*.
16. On 16 March 2012 the newspaper *Səs* published an article titled "Not surprising". The article spoke about a number of scandals in which various opposition politicians had been involved. At the end, the article briefly alluded to the incident involving the applicant, without going into much detail about it, but stating that it was not surprising that many opposition-oriented individuals were involved in "sex scandals".
17. On 5 April 2012 *Səs* published another article titled "Who should Khadija sue?" attacking the applicant for "immoral behaviour" and suggesting that the video scandal had been created by herself and her friends at "musavat.tv".
18. Several more articles attacking the applicant were published later in *Səs*.
[...]

E. The applicant's arrest and the criminal proceedings against her

62. In December 2014 the applicant was arrested and detained on the charge that she had

incited a former colleague to commit suicide. In February 2015 she was additionally charged with the criminal offences of large-scale misappropriation, illegal entrepreneurship, large-scale tax evasion and abuse of power in connection with her activity as the director of Azadliq Radio during the period from 1 July 2008 to 1 October 2010. The events relating to her arrest and detention are the subject of a separate application (no. 30778/15), in which the applicant raised complaints under Articles 5, 6 § 2, 10 and 18 of the Convention.

63. On 1 September 2015 the applicant was sentenced to seven and a half years' imprisonment. After a series of appeals, on 25 May 2016 she was acquitted in part and her sentence was reduced to three and a half years' imprisonment, conditionally suspended for five years. She was released from prison on the same day.

[...]

The law

I. Joinder of the applications

82. The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their similar factual and legal background.

II. Alleged violation of article 8 of the Convention in connection with the threatening letter and the secret filming and dissemination of intimate videos

83. In connection with the threatening letter, the secret installation of hidden cameras in her flat and the dissemination of secretly filmed videos depicting her private life, the applicant complained under Articles 8 and 13 of the Convention that: (a) the respondent State had breached its negative obligation by being directly responsible for the above-mentioned acts and by arranging a smear campaign against her in the press; or (b) alternatively, the respondent State had failed to meet its positive obligation to protect her right to respect for her home and private life, which included her physical and moral integrity, by failing to conduct an effective investigation in order to identify those responsible, and by not affording her a remedy against the investigating authorities' inactivity.

The Court considers that the complaint falls to be examined solely under Article 8 of the Convention, [...].

A. Admissibility

84. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

[...]

2. The Court's assessment

(a) Applicability of Article 8

[...]

106. There is thus no dispute as to the applicability of Article 8: the facts underlying the application, which included covert filming of the applicant in her own home and highly intimate aspects of her life, clearly concern a matter of "private life". The latter concept covers the physical and moral integrity of the person, as well as his or her sexual life [...].

107. The applicant also complained in terms of a breach of her right to respect for her home

and the Court recognises the extraordinary intensity of an intrusion into a person's home of the type complained of. It considers, however, that the totality of the facts giving rise to the present complaint can be examined principally in the light of the requirements of protection of "private life".

(b) *Positive or negative obligation*

[...]

114. In the light of the above considerations, and having had regard to the parties' arguments, the factual circumstances and the available material, the Court considers that the present complaint must be examined from the standpoint of the State's positive obligations under Article 8 of the Convention.

(c) *Compliance with the positive obligation*

[...]

116. The Court considers that the acts complained of were grave and an affront to human dignity: an intrusion into the applicant's home in the form of unauthorised entry into her flat and installation of wires and hidden video cameras inside the flat; a serious, flagrant and extraordinarily intense invasion of her private life in the form of unauthorised filming of the most intimate aspects of her private life, which had taken place in the sanctity of her home, and subsequent public dissemination of those video images; and receipt of a letter threatening her with public humiliation. Furthermore, the applicant is a well-known journalist and there was a plausible link between her professional activity and the aforementioned intrusions, whose purpose was to silence her.

117. This kind of invasion of private life was punishable under Article 156 of the Criminal Code, and the domestic authorities did, in fact, institute criminal proceedings in the present case. Having regard to the gravity of the above-mentioned acts [...], the Court considers that practical and effective protection of the applicant required that effective steps be taken in the framework of the criminal investigation with a view to identifying and prosecuting the perpetrator or perpetrators of those acts.

[...]

131. Having regard to the significant flaws in the manner in which the authorities investigated the case, as well as the overall length of the proceedings, the Court finds that the authorities failed to comply with their positive obligation to ensure the adequate protection of the applicant's private life by carrying out an effective criminal investigation into the very serious interferences with her private life. Having reached this finding, the Court does not consider it necessary to examine the applicant's other arguments raised in this respect.

132. There has accordingly been a violation of Article 8 of the Convention.

III. Alleged violation of article 8 of the Convention in connection with the publication of the authorities' report on the status of the investigation

133. The applicant complained under Article 8 of the Convention that the public disclosure of the personal information in the Status Report published by the authorities on 26 April 2012 constituted an unlawful and unjustified interference with her right to respect for her private and family life.

Article 8 of the Convention [...].

A. Admissibility

134. The Court notes that this complaint is not manifestly ill-founded within the meaning

of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

[...]

2. The Court's assessment

139. The Court notes that the concept of “private life” is a broad term not susceptible to exhaustive definition. As indicated in paragraph 106 above, it is a concept which covers the physical and psychological integrity of a person, and can therefore embrace multiple aspects of the person’s physical and social identity [...].
142. In the present case, the status report published in the press by the prosecution authorities disclosed the applicant’s home address, the fact of her relationship with her then boyfriend and his full name and occupation, the full names of her landlord and her family members, and the full names and occupations of her friends and colleagues. It also disclosed information about individuals to whom the applicant had sublet the flat during various periods, and the details of the financial arrangements between them. The Court considers that all of the above information, taken as a whole, related to the applicant’s “private life”. The Government did not expressly dispute this. While in the applicant’s view the above information also related to her “family life”, the Court considers that, in the context of the present case, the entirety of the information disclosed should be examined in the light of the requirements of protection of “private life” only.
143. The Court notes that the above information was obtained in the course of the criminal investigation. The applicant did not complain about the collection of the information, and the Court sees no issue arising under Article 8 in connection with such routine investigative steps as, for example, identifying the people who had visited the applicant’s flat or questioning them as witnesses.
144. However, the public disclosure of the above-mentioned information in a press release by the Prosecutor General’s Office and the Baku City Prosecutor’s Office clearly constituted an interference with the applicant’s right to respect for her private life.
145. In order to be justified under Article 8 § 2 of the Convention, any interference must be in accordance with the law, pursue one of the listed legitimate aims, and be necessary in a democratic society.
146. As to lawfulness, the applicant argued that the interference was in breach of Article 32 of the Constitution and the domestic legislation, in particular Article 199 of the CCrP, which prohibited disclosure by the investigating authorities of information constituting private secrets. The Government did not comment in detail on the issue of lawfulness, noting merely that the domestic courts had concluded that the publication of the status report had not breached the requirements of the domestic law concerning individuals’ privacy. In the circumstances of the present case, the Court does not consider it necessary to determine whether the interference was “in accordance with the law”, because in any event it lacked justification on other grounds.

[...]

]

148. The protection of the applicant’s privacy was paramount in the overall context of the case, given that the criminal investigation itself, which the authorities purportedly aimed to inform the public about, had been launched in connection with the unjustified and flagrant invasion of her private life. The situation itself called for the authorities

to exercise care in order not to compound further the already existing breach of the applicant's privacy.

149. Having regard to the above considerations, the Court finds that the interference was not justified.

150. There has accordingly been a violation of Article 8 of the Convention.

IV. Alleged violation of article 10 of the Convention

151. In connection with the incidents involving the threatening letter, the unauthorised installation of wires and hidden cameras in her flat, the dissemination of the covertly filmed videos and related newspaper articles in pro-government newspapers, the ineffectiveness of the investigation and lack of remedies against the inaction of prosecuting authorities, as well as the publication of the status report by the investigating authorities, the applicant further complained that the respondent State had breached its obligations under Articles 10 and 13 of the Convention.

The Court considers that the complaint falls to be examined solely under Article 10 of the Convention, [...].

A. Admissibility

152. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

[...]

2. The Court's assessment

158. The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest which the public is, moreover, entitled to receive [...]. The Court also reiterates that the key importance of freedom of expression as one of the preconditions for a functioning democracy is such that the genuine, effective exercise of this freedom is not dependent merely on the State's duty not to interfere, but may call for positive measures of protection, even in the sphere of relations between individuals [...].

159. Moreover, the Court has repeatedly stressed that interference with freedom of expression may have a "chilling effect" on the exercise of that freedom [...], and this is more so in cases of serious crimes committed against journalists, making it of utmost importance for the authorities to check a possible connection between the crime and the journalist's professional activity [...].

160. Having had regard to the parties' submissions and the circumstances of the case, the Court considers that the entirety of the applicant's complaint falls to be examined from the standpoint of the positive obligations of the respondent State under Article 10 of the Convention.

[...]

164. In such circumstances, having regard to the reports on the general situation concerning freedom of expression in the country and the particular circumstances of the present case, the Court considers that the threat of public humiliation and the acts resulting in the flagrant and unjustified invasion of the applicant's privacy were either linked to her journalistic activity or should have been treated by the authorities when investigating as if they might have been so linked. In this situation Article 10 of the

Convention required the respondent State to take positive measures to protect the applicant's journalistic freedom of expression, in addition to its positive obligation under Article 8 of the Convention to protect her from intrusion into her private life.

[...]

166. It follows that the respondent State has failed to comply with its positive obligation to protect the applicant in the exercise of her freedom of expression. There has accordingly been a violation of Article 10 of the Convention.

V. Alleged violation of article 6 of the Convention

167. The applicant further complained that in the civil proceedings concerning the status report of 26 April 2013 the domestic courts had failed to address essential issues raised by her and had failed to provide sufficient reasons for their decisions. [...]

168. The Government contested the applicant's arguments.

169. The Court notes that this complaint is linked to the second complaint under Article 8 and the complaint under Article 10 examined above and must therefore likewise be declared admissible.

170. Having regard to its findings under Articles 8 and 10 (see paragraphs 149-50 and 165 above), the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 6 of the Convention.

VI. Application of article 41 of the Convention

171. Article 41 of the Convention [...]

For these reasons, the Court unanimously

1. *Decides* to join the applications;
2. Declares the applications admissible;
3. *Holds* that there has been a violation of Article 8 of the Convention in connection with the domestic authorities' failure to comply with their positive obligation to investigate effectively very serious intrusions into the applicant's private life;
4. *Holds* that there has been a violation of Article 8 of the Convention in connection with the disclosure of the private information published in the authorities' report on the status of the investigation;
5. *Holds* that there has been a violation of Article 10 of the Convention;
6. *Holds* that there is no need to examine the complaint under Article 6 of the Convention;
7. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Azerbaijani manats at the rate applicable at the date of settlement:
 - (i) EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,750 (one thousand seven hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
8. *Dismisses* the remainder of the applicant's claim for just satisfaction.

68.

EUROPEAN COURT OF HUMAN RIGHTS 19 September 2017.**Payam Tamiz v. The United Kingdom.****The facts**

1. The applicant, Mr Payam Tamiz, is a British national, who was born in 1989 and lives in Maidstone. He was represented before the Court by Withers LLP, a firm of solicitors based in London.

[...]

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

1. *The background facts*

(a) Blogger.com

4. Google Inc. is a corporation registered in the United States and with its principal place of business there. It provides an Internet blog-publishing service via Blogger.com, a platform that allows any Internet user in any part of the world to create an independent blog free of charge. It includes design tools to help users create layouts for their blogs and, if they do not have their own web address, enables them to host their blogs on Blogger.com web addresses.

5. Blogger.com operates a “Content Policy” which sets out restrictions on what users can do using the service. This makes clear that content such as child pornography, or promoting race hatred, is prohibited. The policy is explained in the following terms:

“Blogger is a free service for communication, self-expression and freedom of speech. We believe that Blogger increases the availability of information, encourages healthy debate and makes possible new connections between people.

We respect our users’ ownership of and responsibility for the content they choose to share. It is our belief that censoring this content is contrary to a service that bases itself on freedom of expression.

In order to uphold these values, we need to curb abuses that threaten our ability to provide this service and the freedom of expression it encourages. As a result, there are some boundaries on the type of content that can be hosted with Blogger. The boundaries we have defined are those that both comply with legal requirements and that serve to enhance the service as a whole.”

6. In addition, Google Inc. operates a “Report Abuse” feature. There are eight grounds for reporting abuse, including “Defamation/Libel/Slander”. If the user selects ‘Defamation/Libel/Slander’, a second screen is displayed which makes it clear that the Blogger.com service is operated in accordance with US law, and that defamatory material will only be taken down if it has been found to be libellous (i.e. unlawful) by a court. According to Google Inc., the reason for this policy is that, given the volume of content uploaded by users of the Blogger.com service, it is usually not practicable for it to remove content without first receiving a court’s determination that the content is, in fact, libellous. Google Inc. is not in a position to adjudicate such disputes itself.

(b) The post on the “London Muslim” blog

7. On 27 April 2011 a piece appeared on the “London Muslim” blog, a blog hosted on the Blogger.com website. It contained a photograph of the applicant and the following

text:

“Payam Tamiz a Tory Muslim council candidate with a 5 o’clock shadow has resigned from the party after calling Thanet girls ‘sluts’.

Tamiz who on his Twitter page describes himself as an ‘ambitious British Muslim’ is bizarrely studying law so one would have thought this Tory prat with Star Trek Spock ears might have engaged the odd brain cell before making these offensive remarks.”

8. A number of anonymous comments were subsequently posted in response to the publication.

(c) The applicant’s response to the blog post

17. According to the applicant, on 28 or 29 April 2011 he used the “report abuse” function to indicate that he considered certain comments on the blog to be defamatory.

18. [...] The letter was passed by Google UK Ltd to Google Inc., which responded by email on 8 July 2011 seeking clarification of whether the comment was said to be untrue, since that was not apparent from the terms of the letter. The applicant responded on the same day confirming that comment A was “false and defamatory” and introducing a complaint about comment B.

19. On 19 July 2011 the “Blogger Team” at Google Inc. sent the applicant an email seeking permission to forward his complaint to the author of the blog page and confirming that they would not themselves remove the impugned comments. The applicant gave the necessary permission on 22 July 2011 and complained that comments C, D, E, F and G were also defamatory.

20. On 11 August 2011 Google Inc. forwarded the letter of claim to the blogger.

21. On 14 August 2011 the post and all the comments were removed by the blogger.

[...]

(c) The Supreme Court

41. The applicant sought permission to appeal to the Supreme Court. He argued that the judgment of the Court of Appeal did not strike the correct balance between Articles 6, 8 and 10 of the Convention and unlawfully denied him access to a court and deprived him of the means to vindicate his Article 8 rights.

42. On 1 July 2013 the Supreme Court refused permission to appeal on the basis that the applicant did not raise an arguable point of law.

[...]

The law

A. Alleged violation of Article 8 of the Convention

59. The applicant complained that in refusing him permission to serve a claim form on Google Inc., the respondent State was in breach of its positive obligation under Article 8 of the Convention to protect his right to reputation.

[...]

2. The Court’s assessment

[...]

80. Turning to the facts of the case at hand, in considering the gravity of the interference with the applicant’s Article 8 rights, the Court recalls that an attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to the personal enjoyment of the right to respect for private life [...]. This threshold test is important: as Article 19 noted in their intervention,

the reality is that millions of Internet users post comments online every day and many of these users express themselves in ways that might be regarded as offensive or even defamatory. However, the majority of comments are likely to be too trivial in character, and/or the extent of their publication is likely to be too limited, for them to cause any significant damage to another person's reputation.

81. In deciding whether that threshold has been met in the present case, the Court is inclined to agree with the national courts that while the majority of comments about which the applicant complains were undoubtedly offensive, for the large part they were little more than “vulgar abuse” of a kind – albeit belonging to a low register of style – which is common in communication on many Internet portals [...] and which the applicant, as a budding politician, would be expected to tolerate [...]. Furthermore, many of those comments (such as comments B, D, and E) which made more specific – and potentially injurious – allegations would, in the context in which they were written, likely be understood by readers as conjecture which should not be taken seriously.
82. Moreover, the Court notes that this is not a case in which no measures were in place to enable the applicant to protect his Article 8 rights. On the contrary, following publication of the impugned comments on the “London Muslim” blog, he had at least three options available to him to protect any perceived damage to his reputation. First of all, he could have brought libel proceedings against the authors of the comments [...]. Secondly, he could have pursued a claim against the author of the “London Muslim” blog. Thirdly, there was the option the applicant elected to pursue; namely, an action against Google Inc. as the owner of Blogger.com [...].

[...]

85. Moreover, although the applicant relied heavily on *Delfi*, the Court finds nothing in the judgment of the Grand Chamber that would cast doubt on that position [...].

[...]

89. The Court is therefore satisfied that the appropriate balancing exercise was conducted by the national courts, and that the reasons given for their decision were both “relevant and sufficient”.
90. In light of the above considerations, and having particular regard to the important role that ISSPs such as Google Inc. perform in facilitating access to information and debate on a wide range of political, social and cultural topics, the Court considers that the respondent State's margin of appreciation in the present case was necessarily a wide one. Furthermore, having discerned no “strong reasons” which would justify substituting its own view for those of the national courts [...], it finds that they acted within this wide margin of appreciation and achieved a fair balance between the applicant's right to respect for his private life under Article 8 of the Convention and the right to freedom of expression guaranteed by Article 10 of the Convention and enjoyed by both Google Inc. and its end users.
91. Accordingly, the applicant's Article 8 complaint must be rejected as manifestly ill-founded pursuant to Article 35 (3) (a) of the Convention.

B. Alleged violation of Article 13 read together Article 8 of the Convention

92. The applicant further asserted that by applying the test of “no substantial tort”, the domestic courts had denied him access to a remedy for the serious interference with his Article 8 rights caused by the publication of the comments.

93. Article 13 of the Convention [...].
94. In view of its conclusion at paragraph 91 above, the Court finds that the applicant's Article 8 complaint did not give rise to any arguable claim of a breach of a Convention right. Accordingly, Article 13 of the Convention does not apply [...]. This complaint must therefore be rejected as incompatible *ratione materiae* with the provisions of the Convention in accordance with Article 35 § 4.

For these reasons, the Court unanimously

Declares the application inadmissible.

69.

EUROPEAN COURT OF HUMAN RIGHTS 28 September 2018.

M.L. and W.W. v. Germany.

Procedure

1. The case originated in two applications (nos. 60798/10 and 65599/10) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two German nationals, M.L. ("the first applicant") and W.W. ("the second applicant"), on 15 and 29 October 2010 respectively.

[...]

3. The applicants alleged a violation of Article 8 of the Convention on account of the decision of the Federal Court of Justice not to prohibit various media outlets from making available on the Internet old reports – or transcripts thereof – concerning the applicants' criminal trial.

[...]

The facts

I. The circumstances of the case

6. The first and second applicants were born in 1953 and 1954 respectively. The first applicant lives in Munich and the second in Erding.
7. The applicants are half-brothers. On 21 May 1993, following a criminal trial based on circumstantial evidence, they were sentenced to life imprisonment for the 1991 murder of W.S, a very popular actor. They lodged an appeal on points of law which was dismissed in 1994. On 1 March 2000 the Federal Constitutional Court decided not to entertain their constitutional appeals (nos. 2 BvR 2017/94 and 2039/94) against the decisions of the criminal courts. An application to the Court lodged by the applicants concerning those proceedings (no. 61180/00) was rejected on 7 November 2000 by a three-judge committee on the grounds that the applicants had not lodged their constitutional appeals in accordance with the procedural rules laid down by the Federal Constitutional Court Act (unpublished decision).
8. The applicants lodged several applications for the reopening (*Wiederaufnahme*) of the proceedings, the most recent of which was submitted in 2004 and rejected in 2005. In the context of those proceedings the applicants contacted the press, providing them with documents connected to the reopening proceedings and other unspecified documents.

9. The first and second applicants were released on probation [...].
[...]

The law

I. Joinder of the applications

64. Given the similarity of the applications as to the facts and the substantive issues raised, the Court deems it appropriate to join them (Rule 42 § 1 of the Rules of Court).

II. Alleged violation of article 8 of the Convention

65. The applicants complained of the Federal Court of Justice's refusal to prohibit the media outlets concerned from keeping on their respective Internet portals the transcript of the *Deutschlandfunk* radio programme broadcast at the time of the events and the written reports published in old editions of *Der Spiegel* and *Mannheimer Morgen* concerning the applicants' criminal trial and their ensuing conviction for murder. The applicants alleged an infringement of their right to respect for their private life under Article 8 of the Convention, [...].

66. The Government contested that argument.

A. Admissibility

67. The Court notes that the applications are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

[...]

3. The Court's assessment

(b) Application of those principles to the present case

(i) Contribution to a debate of public interest

98. As regards the question of the existence of a debate of public interest, the Court observes that the Federal Court of Justice noted the considerable interest that the crime and the criminal trial had aroused at the time because of the seriousness of the facts and the high public profile of the victim [...].

[...]

101. Turning back to the present case the Court observes that the Federal Court of Justice, while acknowledging that the applicants had a very significant interest in no longer being confronted with their conviction, stressed that the public had an interest not only in being informed about a topical event, but also in being able to conduct research into past events. The Federal Court of Justice also pointed out that the media's task was to contribute to shaping democratic opinion by making old news items that were stored in their archives available to the public.

102. The Court fully agrees with this conclusion. It has consistently stressed the essential role played by the press in a democratic society [...], including through its websites and the establishment of digital archives, which contribute significantly to enhancing the public's access to information and its dissemination [...]. Moreover, according to the Court's case-law, the legitimate interest of the public in access to the public Internet archives of the press is protected under Article 10 of the Convention (*ibid.*), and particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive [...].

[...]

105. In so far as the applicants stressed that they were not requesting that the impugned reports be deleted, but only that their names no longer appear in them, the Court notes that rendering a report anonymous is certainly less detrimental to freedom of expression than the deletion of an entire report [...]. However, it reiterates that the approach to covering a given subject is a matter of journalistic freedom and that Article 10 of the Convention leaves it to journalists to decide what details ought to be published in order to ensure an article's credibility, provided that the choices which they make in that regard are based on their profession's ethical rules and codes of conduct [...]. The Court considers, like the third-party media outlets, that the inclusion in a report of individualised information such as the full name of the person concerned is an important aspect of the press's work [...], especially when reporting on criminal proceedings that have attracted considerable interest. It concludes that, in the present case, the availability of the impugned reports on the media outlets' websites at the time the applicants' requests were lodged continued to contribute to a debate of public interest which had not been diminished by the passage of a number of years.

[...]

(iii) *The prior conduct of the person concerned with regard to the media*

108. As regards the applicants' conduct since their conviction, the Court observes, as noted by the Federal Court of Justice, that they tried all "conceivable" legal remedies to have the criminal proceedings reopened [...].

109. [...] The Court concludes that the applicants, even as their release approached, therefore had only a limited legitimate expectation [...].

(iv) *The content, form and consequences of the publication*

[...]

111. As regards the subject matter, content and form of the files at issue, the Court sees no grounds for criticising the way in which the Federal Court of Justice assessed the reports by *Deutschlandradio* and *Mannheimer Morgen* [...].

112. As to the extent of dissemination of the reports, the Court notes the Federal Court of Justice's finding that, unlike the subject of a prime-time television broadcast, the information had had limited circulation owing to its limited accessibility and the fact that it did not appear on the news pages of the relevant media websites, but in sections clearly indicating that it was old news coverage [...].

[...]

(v) *The circumstances in which the photos were taken*

115. Finally, with regard to the photos in question, the Court notes that neither the applicants nor the civil courts expressed a view on the circumstances in which they were taken. However, it does not discern any compromising elements in those photos. It also observes, as the Federal Court of Justice correctly pointed out, that the images showed the applicants' appearance as it had been in 1994, that is, almost thirteen years before their release, a fact which reduced the likelihood of their being recognised by third parties on the basis of the photos.

(c) Conclusion

116. In view of the margin of appreciation available to the national authorities in such matters in weighing up diverging interests, the importance of maintaining access to reports whose lawfulness at the time of their publication is not contested, and the applicants'

conduct towards the press, the Court considers that there are no substantial grounds for it to substitute its assessment for that of the Federal Court of Justice. It cannot therefore be said that by refusing to grant the applicants' request the Federal Court of Justice failed to fulfil the German State's positive obligation to protect the applicants' right to respect for their private life within the meaning of Article 8 of the Convention. Accordingly, there has been no violation of that provision.

For these reasons, the Court unanimously

1. *Decides* to join the applications;
2. *Declares* the applications admissible;
3. *Holds* that there has been no violation of Article 8 of the Convention.

70.

EUROPEAN COURT OF HUMAN RIGHTS 17 October 2018.

Egill Einarsson v. Iceland (No. 2).

Procedure

1. The case originated in an application (no. 31221/15) against the Republic of Iceland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Icelandic national, Mr Egill Einarsson ("the applicant"), on 16 June 2015.

[...]

3. The applicant complained, under Article 8 of the Convention, that the domestic courts' judgments had entailed a violation of his right to respect for his private life.

[...]

The facts

I. The circumstances of the case

5. The applicant was born in 1980 and lives in Kópavogur. At the material time he was a well-known personality in Iceland who for years had published articles, blogs and books and appeared in films, on television and other media, under pseudonyms.
6. Some of the applicant's published views attracted some attention, as well as controversy. These included, *inter alia*, his views about women and their sexual freedom. In some instances his criticism had been directed towards named individuals, often women, and in some cases his words could have been construed to mean that he was in fact recommending that they should be subjected to sexual violence. The applicant had often justified such conduct by stating that the material had been meant in jest and that those who criticised him lacked a sense of humour [...].
7. In November 2011, an 18-year-old woman reported to the police that the applicant and his girlfriend had raped her. In January 2012 another woman reported to the police that the applicant had committed a sexual offence against her a few years earlier. Upon the completion of the police investigation the Public Prosecutor, on 15 June and 15 November 2012, dismissed the cases in accordance with Article 145 of the Act on Criminal Procedures, because the evidence which had been gathered was not sufficient or likely to lead to a conviction. The applicant submitted a complaint to the police about false accusations made against him by the two women. This case was also

- dismissed.
8. [...] A picture of the applicant was published on the front page, and in the interview the applicant discussed the rape accusation against him. The applicant stated several times that the accusations were false. He stated, *inter alia*, that it was not a priority for him for the girl's name to be disclosed and that he was not seeking revenge against her [...].
 9. On the same day a Facebook page was set up for the purpose of protesting about the interview and encouraging the editor of Monitor to remove the applicant's picture from its front page. Extensive dialogue took place on the site that day. Later that day, X posted a comment on the above-mentioned Facebook page which stated, *inter alia*: "This is also not an attack on a man for saying something wrong, but for raping a teenage girl ... It is permissible to criticise the fact that rapists appear on the cover of publications which are distributed all over town ...".
- [...]
11. On 17 December 2012, the applicant lodged defamation proceedings against X before the District Court of Reykjavík and asked for her to be punished, under the applicable provisions of the Penal Code, for publishing the statements in question [...].
 12. By a judgment of 1 November 2013, the District Court found that X's comment on Facebook had been defamatory and declared the statements null and void. However, the court dismissed the applicant's claim for the imposition on X of a criminal punishment under the Penal Code, as well as rejecting the claim to have X carry the cost of publishing the main content and reasoning of the judgment in a newspaper. Furthermore, the District Court did not award the applicant non-pecuniary damage and concluded, finally, that each party should bear its own legal costs.
 13. The judgment contained the following reasons:
 "[...] In light of the conclusion of the judgment, and taking account of all the facts, it is appropriate that each party bears its own legal costs [*er rétt að málskostnaður falli niður*]."
 14. By judgment of 18 December 2014 the majority of the Supreme Court (two out of three judges) upheld the District Court's decision to declare the statements null and void. Furthermore, the Supreme Court upheld the District Court's decision not to award damages to the applicant and that each party should bear its legal costs. In its assessment regarding that issue the Supreme Court referred to Article 73 (3) of the Constitution, the principle of proportionality and the reasoning of the District Court.
 15. The dissenting judge agreed with the majority to declare the impugned statements null and void. However, the judge found that the criteria set out in the Tort Liability Act for the granting of non-pecuniary damages were fulfilled in the case and the applicant should be awarded 200,000 ISK in non-pecuniary damages as well as his legal costs before the District Court and the Supreme Court.

[...]

The law

I. Alleged violation of article 8 of the Convention

20. The applicant complained that the Supreme Court judgment of 18 December 2014 entailed a violation of his right to respect for his private life as provided in Article 8 of the Convention. [...].
21. The Government contested that argument.

A. Admissibility

22. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

[...]

2. *The Court's assessment*

(a) The issue to be determined

29. The Court observes that in its judgment of 18 December 2014, the Supreme Court confirmed the District Court's conclusion, finding X's statements about the applicant to be defamatory, and declared them null and void as they violated the applicant's right to respect for his private life. However, the court did not award the applicant compensation or legal costs.
30. Therefore, the issue to be determined in the present case is not whether the applicant was protected against undisputed infringements of his right to respect for private life but whether, in the light of Article 8 of the Convention, the protection afforded to him, namely declaring the impugned statements null and void, was sufficient, or whether only an award of non-pecuniary damages and legal costs could afford the necessary protection of his right to respect for his private life under Article 8 of the Convention.

[...]

(c) Application of those principles to the present case

[...]

39. As regards the refusal to grant the applicant compensation for non-pecuniary damage, the Court recalls that domestic courts have a margin of appreciation in assessing how to remedy a finding at national level that a violation has occurred of the right to private life. In other words, the decision not to grant compensation does not in itself amount to a violation of Article 8 of the Convention. However, in its review, the Court will examine whether the national courts analysed the specific circumstances of the case, including the nature and gravity of the violation as well as the conduct of the applicant. On this basis, and in particular in light of the findings of the District Court, as analysed above, the Court finds that it cannot be held that the protection afforded to the applicant by the Icelandic courts, finding that he had been defamed and declaring the statements null and void, was not effective or sufficient with regard to the State's positive obligations or that the decision not to grant him compensation deprived the applicant of his right to reputation and, thereby, emptied the right under Article 8 of the Convention of its effective content.
40. As regards the legal costs, the Court notes that the domestic courts concluded, by virtue of Section 130 (3) of the Act on Civil Procedure, that each party should bear its own legal costs in the light of the outcome of the case and the facts as a whole. In this regard, the Court notes in particular that although the domestic courts accepted to declare the impugned statements null and void, they did not accept all of the applicant's claims. Against this background, it cannot be said that the domestic courts handled the issue of legal costs in a manner that appears unreasonable or disproportionate.
41. These elements are sufficient for the Court to conclude that the national authorities did not fail in their positive obligations towards the applicant but afforded him sufficient protection under Article 8 of the Convention. Accordingly there has been no violation

of this article.

For these reasons, the Court unanimously

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 8 of the Convention.

71.

EUROPEAN COURT OF HUMAN RIGHTS 24 July 2018.

Benedik v. Slovenia.

Procedure

1. The case originated in an application (no. 62357/14) against the Republic of Slovenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Igor Benedik.

[...]

3. The applicant alleged, in particular, that his right under Article 8 of the Convention had been breached because the police had unlawfully obtained information leading to his identification from his Internet service provider.

[...]

The facts

I. The circumstances of the case

5. The applicant was born in 1977 and lives in Kranj.

A. The investigation

6. In 2006 the Swiss law-enforcement authorities of the Canton of Valais conducted a monitoring exercise of users of the so-called “Razorback” network. The Swiss police established that some of the users owned and exchanged child pornography in the form of pictures or videos. Files containing illegal content were exchanged through the so-called “p2p” (peer-to-peer) file-sharing network in which each of the connected computers acted as both a client and a server. Hence, each user could access all files made available for sharing by other users of the network and download them for his or her use. Among the dynamic Internet Protocol (“IP”) addresses recorded by the Swiss police was also a certain dynamic IP address, which was later linked to the applicant.
7. Based on the data obtained by the Swiss police, on 7 August 2006 the Slovenian police, without obtaining a court order, requested company S., a Slovenian Internet service provider (hereinafter “the ISP”), to disclose data regarding the user to whom the above-mentioned IP address had been assigned at 1.28 p.m. on 20 February 2006. The police based their request on section 149b(3) of the Criminal Procedure Act [...], which required the operators of electronic communication networks to disclose to the police information on the owners or users of certain means of electronic communication whose details were not available in the relevant directory. In response, on 10 August 2006 the ISP gave the police the name and address of the applicant’s father, who was a subscriber to the Internet service relating to the respective IP address.
8. On 12 December 2006 the police proposed that the Kranj District State Prosecutor’s Office request the investigating judge of the Kranj District Court to issue an order demanding that the ISP disclose both the personal data of the subscriber and traffic

data linked to the IP address in question. On 14 December 2006 such a court order was obtained on the basis of section 149b(1) of the CPA and the ISP gave the police the required data.

9. On 12 January 2007 the investigating judge of the Kranj District Court issued an order to carry out a house search of the applicant's family home. The order indicated the applicant's father as the suspect. During the house search the police and the investigating judge of the Kranj District Court seized four computers and later made copies of their hard disks.
10. Based on a conversation with the applicant's family members, of which no record is available, the police changed the suspect to the applicant.
11. Reviewing the hard disks, the police found that one of them contained files with pornographic material involving minors [...].
- [...]
13. In his defence before the investigating judge, the applicant argued, *inter alia*, that he had not been aware of the content of the files in question. He also argued that the ISP had unlawfully, without a judicial warrant, passed his data, including his address, to the police.
14. On 5 March 2008 the investigating judge of the Kranj District Court, opened a judicial investigation against the applicant on the basis of a reasonable suspicion that he had committed the criminal offence of displaying, manufacturing, possessing and distributing pornographic material under section 187(3) of the Criminal Code. The judge noted, among other things, that the applicant's father had been the holder of the identified IP address and that the applicant had allegedly been logging into the respective program under the name of "Benet".
15. On 17 March 2008 the applicant's counsel lodged an appeal against the decision to open a judicial investigation. He argued, *inter alia*, that the evidence concerning the identity of the user of the respective IP address had been obtained unlawfully. That information concerned the traffic data and should therefore not have been obtained without a judicial warrant.
16. On 21 March 2008 an interlocutory panel of the court rejected the appeal finding that, although counsel had argued that the identity of the user of the IP address had been obtained unlawfully, he had not requested that certain documents be excluded from the file.

B. The trial

[...]

20. On 5 December 2008 the Kranj District Court found the applicant guilty of the criminal offence with which he had been charged. Based on the opinion of an expert in computer science, the District Court held that the applicant must have been aware of the 630 pornographic pictures and 199 videos involving minors which he had downloaded through p2p networks and made available for sharing with other users. The applicant was sentenced to a suspended prison term of eight months with a probation period of two years.

[...]

The law

I. Alleged violation of article 8 of the Convention

73. The applicant complained that his right to privacy had been breached because (i) the Internet service provider (hereinafter “the ISP”) had retained his alleged personal data unlawfully and (ii) the police had obtained subscriber data associated with his dynamic IP address and consequently his identity arbitrarily, without a court order, in breach of Article 8 of the Convention, [...].

A. Admissibility

1. *As regards the alleged unlawful retention of personal data by the Internet service provider (ISP)*

[...]

77. The Court notes that the Government objected to the applicant’s victim status with respect to this complaint. However, it does not consider it necessary to address this objection because this part of the application is in any event inadmissible for the following reasons.

78. The Court observes that the purpose of Article 35 § 1 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions. That rule is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. Thus the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic body, and in compliance with the formal requirements and time-limits laid down in domestic law [...].

79. In the present case, the applicant complained in his application to the Court of the retention by the ISP of what he alleged were his personal data. However, he has failed to exhaust domestic remedies in this regard as he had not made this complaint – at least in substance – in the domestic proceedings.

80. Consequently, this part of the application should be declared inadmissible under Article 35 §§ 1 and 4 of the Convention.

2. *As regards the disclosure of the subscriber information*

81. The Government argued that the applicant could not claim to be a victim because the subscriber information that the ISP had disclosed to the police concerned his father.

82. The applicant disputed that view. He argued that it was his privacy that had been breached, not the subscriber’s, and that the issue at stake was not that of ownership but that of the right to privacy.

83. The Court notes that this issue is closely related to the merits of the complaint and therefore joins the Government’s objection to the merits.

84. It considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

[...]

2. *The Court’s assessment*

(a) Preliminary observations and scope of the Court’s assessment

[...]

96. As a preliminary matter, the Court further notes that an IP address is a unique number assigned to every device on a network, which allows the devices to communicate with

each other. Unlike the static IP address, which is permanently allocated to a particular network interface of a particular device, a dynamic IP address is assigned to a device by the ISP temporarily, typically each time the device connects to the Internet [...]. The IP address alone enables certain details, such as the ISP to which the user is connected and a broader physical location, most likely the location of the ISP, to be determined. Most dynamic IP addresses can thus be traced to the ISP and not to a specific computer. To obtain the name and address of the subscriber using a dynamic IP address, the ISP is normally required to look up this information and for that purpose to examine the relevant connection data of its subscribers [...].

97. In the present case the information on the dynamic IP address and the time it had been assigned were collected by the Swiss police, who had carried out a monitoring exercise of users of the specific Internet network involving child pornography material. They forwarded the information to the Slovenian police, who obtained from the ISP the name and address of the subscriber associated with the dynamic IP address in question – the applicant’s father [...].

[...]

99. The Court reiterates in this connection that sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives, and that protection includes a need to identify the offenders and bring them to justice [...].

[...]

(α) *Nature of the interest involved*

[...]

109. [...] Therefore what would appear to be peripheral information sought by the police, namely the name and address of a subscriber, must in situations such as the present one be treated as inextricably connected to the relevant pre-existing content revealing data [...]. To hold otherwise would be to deny the necessary protection to information which might reveal a good deal about the online activity of an individual, including sensitive details of his or her interests, beliefs and intimate lifestyle.

110. In view of the above considerations, the Court concludes that the present case concerns privacy issues capable of engaging the protection of Article 8 of the Convention.

(β) *Whether the applicant was identified by the contested measure*

[...]

112. In the present context, the applicant was no doubt the user of the Internet service in question and it was his online activity that was monitored by the police. The Court further observes that the applicant used the Internet by means of what would appear to be his own computer at his own home. It is of little significance that the applicant’s name was not mentioned in the subscriber information obtained by the police. Indeed, it is not unusual for one household to have a single subscription to the Internet service used by several members of the family. The fact that they are not personally subscribed to the Internet service has no effect on their privacy expectations, which are indirectly engaged once the subscriber information relating to their private use of the Internet is revealed.

[...]

114. Having regard to the foregoing and bearing also in mind that the domestic courts did not dismiss the case on the grounds that the applicant had not been the subscriber to the Internet service in question, the Court concludes that this fact cannot be taken as a bar to the application of Article 8 in the present case. It accordingly dismisses the Government's objection concerning the alleged lack of victim status.

[...]

(δ) Conclusion

119. For all of the above reasons, the Court concludes that the applicant's interest in having his identity with respect to his online activity protected falls within the scope of the notion of "private life" and that Article 8 is therefore applicable to this complaint.

(c) Compliance with Article 8

[...]

(ii) Whether the interference was in accordance with the law

[...]

129. [...] However, the Court, having regard to its findings in the context of the applicability of Article 8, does not find the Constitutional Court's position on that question to be reconcilable with the scope of the right to privacy under the Convention [...]. The domestic authorities' reliance on section 149b (3) of the CPA was therefore manifestly inappropriate and, what is more, it offered virtually no protection from arbitrary interference.

130. In this connection, the Court notes that at the relevant time there appears to have been no regulation specifying the conditions for the retention of data obtained under section 149b (3) of the CPA and no safeguards against abuse by State officials in the procedure for access to and transfer of such data. As regards the latter, the police, having at their disposal information on a particular online activity, could have identified an author by merely asking the ISP provider to look up that information. Furthermore no independent supervision of the use of these police powers has been shown to have existed at the relevant time, despite the fact that those powers, as interpreted by the domestic courts, compelled the ISP to retrieve the stored connection data and enabled the police to associate a great deal of information concerning online activity with a particular individual without his or her consent.

[..]

134. Having considered all of the above, the Court concludes that there has been a violation of Article 8 of the Convention.

II. Application of article 41 of the Convention

135. Article 41 of the Convention [...]

For these reasons, the Court

1. *Decides*, by six votes to one, to join to the merits the Government's objection of the lack of victim status concerning the disclosure of the subscriber information under Article 8 of the Convention and *rejects* it;
2. *Declares*, by a majority, the complaint concerning the disclosure of the subscriber information under Article 8 of the Convention admissible and the remainder of the application inadmissible;
3. *Holds*, by six votes to one, that there has been a violation of Article 8 of the Convention;

4. *Holds*, unanimously, that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
5. *Holds*, by six votes to one,
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,522 (three thousand five hundred and twenty-two euros) plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

72.

EUROPEAN COURT OF HUMAN RIGHTS 10 December 2007.**Stoll v. Switzerland.****Procedure**

1. The case originated in an application (no. 69698/01) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swiss national, Mr Martin Stoll ("the applicant"), on 14 May 2001.

[...]

3. The applicant alleged that his conviction for publishing "secret official deliberations" had been contrary to Article 10 of the Convention.

[...]

The facts**I. The circumstances of the case**

7. In 1996 and 1997 negotiations were conducted between, among others, the World Jewish Congress and Swiss banks concerning compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts.
8. Against that background Carlo Jagmetti, who was the Swiss ambassador to the United States at the time, drew up on 19 December 1996 a "strategy paper", classified as "confidential", which was faxed to Thomas Borer, who was the head of the task force that had been set up to deal with the question within the Federal Department of Foreign Affairs in Berne. Copies were sent to nineteen other individuals and to the Swiss diplomatic missions in Tel Aviv, New York, London, Paris and Bonn.
9. The applicant obtained a copy. It seems clear that he could not have acquired possession of the document without a breach of professional confidence by a person whose identity remains unknown. On Sunday 26 January 1997 the Zürich Sunday newspaper the *Sonntags-Zeitung* published the following article by the applicant (*translation*):

"Mr Carlo Jagmetti insults the Jews

Secret document: 'Our adversaries are not to be trusted'

by [the applicant]

Berne/Washington – Another scandal involving the Swiss ambassador to the United States:

Carlo Jagmetti, in a confidential strategy paper on the assets of Holocaust victims, talks of the 'war Switzerland must wage', and of 'adversaries' who 'are not to be trusted'. The paper is classified as 'confidential' [...]. In his paper, Carlo Jagmetti mentions the possibility of concluding an agreement, because 'the Jewish organisations and Senator D'Amato must be placated as a matter of urgency'. He uses the word 'deal' in this context. Ambassador Jagmetti suggests 'payment of a lump sum' in order to settle 'all Jewish claims once and for all'. Then, he writes, 'everyone will be happy' [...].

11. A third article, which also appeared in the *Sonntags-Zeitung* on 26 January 1997 and was written by the editor Ueli Haldimann, was entitled "The ambassador with a bunker mentality" [...].
 12. On 5 November 1998 the Zürich District Office (*Statthalteramt des Bezirkes Zürich*) fined the applicant 4,000 Swiss francs (CHF) for contravening Article 293 of the Swiss Criminal Code (see "Domestic law and practice" below) in publishing the articles entitled "Mr Carlo Jagmetti insults the Jews" and "The ambassador in bathrobe and climbing boots puts his foot in it again".
 13. On 22 January 1999, following an application by the applicant to have the decision set aside, the Zürich District Court (*Bezirksgericht*) convicted him of an offence under Article 293 § 1 of the Swiss Criminal Code, but reduced the amount of the fine to CHF 800.
 14. In its decision the District Court, noting that prior to its publication by the applicant, the strategy paper had not been in the public domain, found that the issue of whether the content of the paper should ultimately be divulged was irrelevant. The document had been far from insignificant, as it contained an assessment of the delicate foreign-policy situation in which Switzerland found itself in relation to the assets of Holocaust victims deposited in Swiss banks [...]. The District Court held that carefully worded evaluations and assessments, provided on a regular basis, were an essential part of the exchange and formation of opinion among ambassadors [...]. Article 293 of the Swiss Criminal Code was designed to ensure freedom to form opinions without undue outside influence. In the instant case, the document in question had been aimed at assisting the head of the task force set up by the Government to form his opinion, and would therefore have influenced the country's handling of the issue concerned. Given its nature, publishing an internal document of that kind could have devastating consequences.
- [...]
17. The applicant lodged an appeal on grounds of nullity (*Nichtigkeitsbeschwerde*), which was dismissed by the Court of Appeal (*Obergericht*) of the Canton of Zürich on 25 May 2000.
 18. The applicant lodged an appeal on grounds of nullity and a publiclaw appeal (*staatsrechtliche Beschwerde*) with the Federal Court (*Bundesgericht*) [...].
 19. The Federal Court dismissed the applicant's appeals in two judgments dated 5 December 2000 (served on 9 January 2001) in which it upheld the decisions of the lower courts [...].
 20. Meanwhile, the Swiss Federal Council (*Bundesrat*) had requested the Swiss Press Council (*Presserrat*) to examine the case [...]. The Swiss Press Council acts as a complaints body

for media-related issues.

[...]

The law

I. Alleged violation of article 10 of the Convention

22. The applicant alleged that his conviction for publication of “secret official deliberations” amounted to interference with his freedom of expression within the meaning of Article 10 of the Convention. [...]

A. Whether there was interference

23. In the Court’s view, it is clear that the applicant’s conviction amounts to “interference” with the exercise of his freedom of expression. This, moreover, has not been disputed.

B. Whether the interference was justified

24. Such interference will be in breach of Article 10 unless it fulfils the requirements of paragraph 2 of that Article. It therefore remains to be determined whether the interference was “prescribed by law”, pursued one or more of the legitimate aims referred to in paragraph 2 and was “necessary in a democratic society” in order to achieve them.

1. “Prescribed by law”

25. The applicant did not dispute that the fine imposed on him had been “prescribed by law” within the meaning of Article 10 § 2.

26. The respondent Government submitted that the applicant’s conviction had been based on Article 293 of the Criminal Code (see “Relevant domestic law” above).

27. The Court sees no reason to adopt a different stance.

2. Legitimate aims

[...]

32. The Court merely notes that the parties agreed that the impugned measure had been designed to prevent the “disclosure of information received in confidence”; accordingly, it does not consider it necessary to examine whether the fine imposed on the applicant pursued any of the other aims referred to in Article 10 § 2.

3. “Necessary in a democratic society”

[...]

(b) The Court’s assessment

[...]

ii. Application of the above principles to the present case

[...]

47. [...] In the instant case, the criticism expressed in the impugned articles directly targeted a senior official, namely a member of the diplomatic corps with the rank of ambassador, who was in charge of a particularly important mission in the United States. The margin of appreciation of the Swiss courts was therefore narrower than in the case of a “private” individual.

48. The Court considers that the confidentiality of diplomatic reports is justified in principle, but cannot be protected at any price. Moreover, the role of the media as critic and watchdog also applies to matters of foreign policy.

[...]

52. The Court fully recognises the importance of protecting the work of the diplomatic corps from outside interference. However, it considers that the present case differs,

in terms of the nature of the information disclosed, from other cases raising similar issues, in that it does not concern the proper functioning of the State bodies responsible for “national security” and “public safety” in the strict sense, as maintained by the Government [...]. Regard being had to the fact that exceptions to freedom of expression must be strictly construed, the Court is not persuaded that the disclosure of aspects of the strategy to be adopted by the Swiss Government in the negotiations concerning the assets of Holocaust victims and Switzerland’s role in the Second World War was capable of prejudicing interests that were so important that they outweighed freedom of expression in a democratic society [...].

[...]

59. Having regard to the above considerations, the journalist’s conviction was not reasonably proportionate to the legitimate aim pursued, in view of the interest of a democratic society in ensuring and maintaining the freedom of the press.

Accordingly, there has been a violation of Article 10 of the Convention.

II. Application of article 41 of the Convention

60. Article 41 of the Convention [...]

For these reasons, the Court

1. *Holds*, by four votes to three, that there has been a violation of Article 10 of the Convention;
2. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

73.

EUROPEAN COURT OF HUMAN RIGHTS 4 February 2009.

Balsytė-Lideikienė v. Lithuania.

Procedure

1. The case originated in an application (no. 72596/01) against the Republic of Lithuania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Lithuanian national, Mrs Danutė Balsytė-Lideikienė (“the applicant”), on 23 May 2001.

[...]

3. The applicant alleged a violation of Article 6 § 1 of the Convention in that her case had been examined by the first-instance court without experts having been summoned to the hearing despite the fact that their conclusions had central value for the merits of the case. She also asserted that she had been unable to state her case before the Supreme Administrative Court because the latter had not held a hearing on appeal.

Relying on Article 10 of the Convention the applicant alleged that her right to freedom of expression had been violated because the State authorities had confiscated a calendar she had published and banned its further distribution.

[...]

The facts

I. The circumstances of the case

7. The applicant, Mrs Danutė Balsytė-Lideikienė, is a Lithuanian national, who was born in 1947. At present she lives in Lithuania.
8. The applicant is the founder and owner of a publishing company “Metskaitliai”. Since 1995 the company has published “Lithuanian calendar” (*Lietuvio kalendorius*), a yearly calendar with notes by the applicant and other contributors describing various historic dates from the perspective of its authors. The calendar could be purchased in bookstores. It was distributed in Lithuania and among Lithuanian immigrants living abroad.
9. On 4 January 2000 a Member of the Lithuanian Parliament (Seimas) distributed a public announcement, stating that the texts published in “Lithuanian calendar 2000” insulted persons of Polish, Russian and Jewish origin. The relevant parts of “Lithuanian calendar” read as follows:
[First page of the calendar]: “Lietuva – the land of the Lithuanians, as each footprint here bears traces of our Nation’s blood [...]”
10. The back cover of “Lithuanian calendar 2000” contained a map of the Republic of Lithuania. The neighbouring territories of the Republic of Poland, the Russian Federation and the Republic of Belarus were marked as “ethnic Lithuanian lands under temporary occupation”.
11. On 10 January 2000 a Seimas committee requested the Office of the Prosecutor General to investigate whether the publication was compatible with the Lithuanian Constitution and other legal acts.
[...]
17. At the end of January 2000 the security intelligence authorities seized a number of copies of “Lithuanian calendar 2000” in various bookstores in Lithuania. The distribution of the publication was stopped.
18. By a letter of 31 January 2000 the Prosecutor General informed the Prime Minister that, following the examination of the content of “Lithuanian calendar 2000”, no elements of a criminal offence (instigation of ethnic or racial hatred) had been found in the applicant’s releasing of the publication. However, the Prosecutor General held that in this respect the applicant should have been punished by way of the administrative procedure under Article 214¹² of the Code on Administrative Law Offences (Production, storage and distribution of information materials promoting ethnic, racial or religious hatred). He stated that the security intelligence authorities had applied to an administrative court for a penalty to be imposed on the applicant under the domestic provision [...].
[...]
22. The applicant appealed, claiming in particular a violation of Article 10 of the Convention. She also argued that she had been tried *in absentia*.
23. [...] The case was remitted for a fresh examination at first instance.
[...]
27. On 13 March 2001 the Vilnius City Second District Court found that by publishing and distributing “Lithuanian calendar 2000” the applicant had breached Article 214 of the Code on Administrative Offences. The court imposed an administrative penalty in the form of a warning on her, while the unsold copies of the calendar and the means to produce it were confiscated.

28. [...] The court also noted that “Lithuanian calendar 2000” had caused negative reactions from part of society as well as from the diplomatic representations of some neighbouring States, including Poland, Belarus and Russia [...]. Relying on the conclusion of the bibliographic expert report the Vilnius City Second District Court noted that the publication did not meet the prescribed standards because, among other things, the calendar contained no indication of the sources and literature that had been used, and the name of the author of each statement in the calendar was not provided. The court concluded that the applicant had prepared, published and distributed the calendar and was therefore responsible for its content.

[...]

31. In view of those circumstances and given the negligent nature of the offence, the court decided to impose an administrative warning under Article 30 of the Code on Administrative Law Offences, which was a milder administrative penalty than the fine of between LTL 1,000 and LTL 10,000 prescribed by Article 214.

[...]

33. The applicant appealed, claiming in particular that Article 10 of the Convention had been violated. She also complained that the first-instance court had not called the experts to the hearing, thereby violating her defence rights.

[...]

The law

I. Alleged violation of article 6 of the Convention

[...]

B. The Court’s assessment

1. Applicability of Article 6 of the Convention

[...]

54. As to the first criteria the Court acknowledges, and it was not disputed by the parties, that the Code on Administrative Law Offences is not characterised under domestic law as “criminal”. However, the indications furnished by the domestic law of the respondent State have only a relative value [...].

[...]

58. As to the nature of the penalty the Court attaches particular significance to Article 20 of the Code on Administrative Law Offences, which stipulates that the aim of administrative punishment is to punish offenders and to deter them from reoffending [...].

[...]

61. In sum, the general character of the legal provision infringed by the applicant together with the deterrent and punitive purpose of the penalty, as well as the severity of the punishment the applicant risked incurring, suffice to show that the offence in question was, in terms of Article 6 of the Convention, criminal in nature. Therefore the Court considers that Article 6 § 3 (d) is applicable in the instant case.

[...]

II. Alleged violation of article 10 of the Convention

[...]

B. The Court’s assessment

70. The Court finds it clear, and this has not been disputed, that there has been an

interference with the applicant's freedom of expression on account of the administrative penalty and the confiscation of the publication, which were applied under Articles 30¹ and 214¹² of the Code on Administrative Law Offences.

71. The above-mentioned interference contravened Article 10 of the Convention unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in paragraph 2 of Article 10 and was "necessary in a democratic society" for achieving such aim or aims. The Court will examine each of these criteria in turn.

1. *Prescribed by law*

72. The applicant and the Government did not question that the interference was in accordance with the law. Taking into consideration that the interference was prescribed by Articles 30¹ and 214¹² of the Code on Administrative Law Offences, the Court sees no reason to depart from the position of the parties.

2. *Legitimate aim*

73. The Court agrees with the Government's submissions that the punishment imposed aimed to protect the values laid out in Article 10 § 2 of the Convention, in particular the reputation and rights of the ethnic groups living in Lithuania and referred to in "Lithuanian calendar 2000". It remains to be determined whether the interference was necessary in a democratic society.

3. *"Necessary in a democratic society"*

74. According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment [...].

[...]

(a) **"Pressing social need"**

78. Turning to the facts of the present case, the Court notes that the applicant was sanctioned on the basis of the statements she had made in her capacity as an editor and publisher. Regarding the context in which "Lithuanian calendar 2000" was published, the Court has particular regard to the general situation of the Republic of Lithuania [...]. The Court also notes that the publication received negative reactions from the diplomatic representations of the Republic of Poland, the Russian Federation and the Republic of Belarus [...].

[...]

80. [...] Having regard to the margin of appreciation left to the Contracting States in such circumstances, the Court considers that the domestic authorities, in the circumstances of the case, did not overstep their margin of appreciation when they considered that there was a pressing social need to take measures against the applicant.

(b) **"Proportionality"**

[...]

85. Having regard to the foregoing, the Court considers that the applicant's punishment was not disproportionate to the legitimate aim pursued and that the reasons advanced by the domestic courts were sufficient and relevant to justify such interference. The interference with the applicant's right to freedom of expression could thus reasonably be considered necessary in a democratic society for the protection of the reputation or rights of others within the meaning of Article 10 § 2 of the Convention.

86. There has consequently been no breach of Article 10 of the Convention.

III. Application of article 41 of the Convention

87. Article 41 of the Convention [...]

For these reasons, the Court

1. *Holds* by six votes to one that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* unanimously that there has been no violation of Article 10 of the Convention;
3. *Holds* by six votes to one
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 2,000 (two thousand euros) for non-pecuniary damage;
 - (ii) EUR 1,645 (one thousand six hundred and forty-five euros) in respect of costs and expenses;
 - (iii) plus any tax that may be chargeable;
 these amounts are to be converted into the national currency of the respondent State at the rate applicable on the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

74.

EUROPEAN COURT OF HUMANS RIGHTS 13 December 2005.

İ.A. v. Turkey.

Procedure

1. The case originated in an application (no. 42571/98) against the Republic of Turkey lodged with the European Commission of Human Rights under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr İ.A. ("the applicant"), on 18 May 1998.

[...]

3. On 13 November 2003 the Court declared the application partly admissible.

The facts

I. The circumstances of the case

4. The applicant was born in 1960 and lives in France.
5. He is the proprietor and managing director of Berfin, a publishing house which in November 1993 published a novel by Abdullah Rıza Ergüven entitled "*Yasak Tümceler*" ("The forbidden phrases"). The book conveyed the author's views on philosophical and theological issues in a novelistic style. Two thousand copies of it were printed in a single run.
6. In an indictment of 18 April 1994, the Istanbul public prosecutor ("the public prosecutor") charged the applicant under the third and fourth paragraphs of Article 175 of the

- Criminal Code with blasphemy against “God, the Religion, the Prophet and the Holy Book” through the publication of the book in question.
7. The public prosecutor’s indictment was based on an expert report drawn up at the request of the press section of the Istanbul public prosecutor’s office by Professor Salih Tuğ, dean of the theology faculty of Marmara University at the material time. In his report of 25 February 1994 the expert observed:
- “... the author arbitrarily uses theories about the physical substance of the universe, creation and the existence of natural laws to sway readers’ minds towards the conclusions he wishes to be drawn from the book. In particular, in the passages on theology he imprisons readers within the limits of his own views, which are devoid of all academic rigour. ... He criticises the beliefs, ideas, traditions and way of life of Anatolian Turkish society by adopting the independent and nonconformist viewpoint of the leaders, thinkers and scientists of the Renaissance in order to enlighten and advise our people as he sees fit. ... This way of thinking, based on materialism and positivism, leads to atheism in that it renounces faith and divine revelation ... Although these passages may be regarded as a polemic in support of the author’s philosophical views, it may be observed that they also contain statements that imply a certain element of humiliation, scorn and discredit *vis-à-vis* religion, the Prophet and belief in God according to Islam ... In the author’s view, religious beliefs and opinions are mere obscurities, and ideas based on nature and reason are described as clear-sighted. The author describes religious faith as a ‘desert mirage’, a ‘primitive idea’ and ‘desert ecstasy’, and religious practices as ‘the primitivism of desert life’ ...”
- [...]
12. On 24 April 1996 the applicant submitted before the Court of First Instance that the book was neither blasphemous nor insulting within the meaning of the third paragraph of Article 175 of the Criminal Code and merely conveyed its author’s philosophical views.
13. In a judgment of 28 May 1996, the Court of First Instance convicted the applicant and sentenced him to two years’ imprisonment and a fine [...].
14. On 3 September 1996 the applicant appealed to the Court of Cassation. In his grounds of appeal he submitted that in the book in question the author had merely expressed his views, and challenged the content of the expert reports.
15. On 6 October 1997 the Court of Cassation upheld the impugned judgment.

[...]

The law

Alleged violation of article 10 of the Convention

19. The applicant alleged that his criminal conviction had infringed his right to freedom of expression. He relied on Article 10 of the Convention, [...].
- [...]
27. The issue before the Court therefore involves weighing up the conflicting interests of the exercise of two fundamental freedoms, namely the right of the applicant to impart to the public his views on religious doctrine on the one hand and the right of others to respect for their freedom of thought, conscience and religion on the other hand [...].
28. Pluralism, tolerance and broadmindedness are hallmarks of a “democratic society” [...]. Those who choose to exercise the freedom to manifest their religion, irrespective of

whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith [...].

[...]

30. The Court therefore considers that the measure taken in respect of the statements in issue was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. In that respect it finds that the measure may reasonably be held to have met a “pressing social need”.
31. The Court concludes that the authorities cannot be said to have overstepped their margin of appreciation in that respect and that the reasons given by the domestic courts to justify taking such a measure against the applicant were relevant and sufficient.
32. As to the proportionality of the impugned measure, the Court is mindful of the fact that the domestic courts did not decide to seize the book, and accordingly considers that the insignificant fine imposed was proportionate to the aims pursued.

There has therefore been no violation of Article 10 of the Convention.

For these reasons, the Court

Holds by four votes to three that there has been no violation of Article 10 of the Convention.

75.

EUROPEAN COURT OF HUMAN RIGHTS 25 August 1998.

Hertel v. Switzerland.

Procedure

1. The case was referred to the Court, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention, by a Swiss national, Mr Hans Ulrich Hertel (“the applicant”), on 29 May 1997 and thereafter by the European Commission of Human Rights (“the Commission”) and the Government of the Swiss Confederation (“the Government”) on 3 June and 15 July 1997 respectively. It originated in an application (no. 25181/94) against Switzerland lodged by the applicant with the Commission under Article 25 on 13 September 1994. Having been designated by the initials H.U.H. during the proceedings before the Commission, the applicant subsequently agreed to the disclosure of his identity.

The applications and request referred to Article 48 of the Convention, as amended by Protocol No. 9, which Switzerland has ratified. The object of the applications and request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 6 § 1, 8 and 10 of the Convention.

2. In response to the enquiry made in accordance with Rule 35 § 3 (d) of Rules of Court B, the applicant designated the lawyer who would represent him (Rule 31).

[...]

As to the facts

I. The circumstances of the case

7. Mr Hertel has a degree in technical sciences from the Zürich Federal Institute of Technology and is the author of a thesis submitted to the Zürich Institute of Veterinary

Sciences. He is now retired and lives at Wattenwil (Canton of Berne), where he conducts private research in his own laboratory. **A. The research paper published by the applicant and Professor Blanc and issue no. 19 of the *Journal Franz Weber***

1. *The research paper published by the applicant and Professor Blanc*
8. In collaboration with Mr Blanc, a professor at the University of Lausanne and a technical adviser at the Lausanne Federal Institute of Technology, Mr Hertel carried out a study of the effects on human beings of the consumption of food prepared in microwave ovens. Over a period of two months, the blood of eight volunteers who followed a macrobiotic diet was analysed before and after consuming eight types of food (some were cooked or defrosted in a microwave oven and the others were raw or cooked by conventional means). A research paper was written. It was dated June 1991 and entitled *Vergleichende Untersuchungen über die Beeinflussung des Menschen durch konventionell und im Mikrowellenofen aufbereitete Nahrung* ("Comparative study of the effects on human beings of food prepared by conventional means and in microwave ovens"), and it concluded as follows :

"[...] a significant relation was established between the absorption of microwave energy by the food and its transfer to the volunteers' blood. Thus this energy could be inductively transmitted to human beings by means of the food, a phenomenon governed by the laws of physics and confirmed in the literature [references to: Alfred Pitz, *Zellphysiologie des Krebses*, Akademie für Naturheilkunde, Munich, 1975; Günter Helmdach, *Die heutige Technik zerstört sich selbst*, Forschungsstelle für Dendroökologie, Auf der Brede 49, D-5608 Radevormwald, 1989].

The measurable effects on human beings of food treated with microwaves, as opposed to food not so treated, include changes in the blood which appear to indicate the initial stage of a pathological process such as occurs at the start of a cancerous condition."

2. *Issue no. 19 of the Journal Franz Weber*
9. The quarterly *Journal Franz Weber* devoted part of its nineteenth issue (January/February/March 1992) to the effects on human health of using microwave ovens.
10. On the cover there is a picture of the Reaper holding out one hand towards a microwave oven, together with the following title:
"The danger of microwaves: scientific proof [...]."
[...]

Proceedings before the Commission

26. Mr Hertel applied to the Commission on 13 September 1994. He alleged a violation of Articles 6, 8 and 10 of the Convention.
27. The Commission (Second Chamber) declared the application (no. 25181/94) admissible on 27 November 1996. In its report of 9 April 1997 (Article 31), it expressed the opinion that there had been a breach of Article 10 (ten votes to five) and that no separate issue arose under Article 6 § 1 or Article 8 of the Convention (unanimously). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment.

Final submissions to the Court

28. In his memorial the applicant said that he stood by the terms of his application and observations to the Commission.
29. The Government invited the Court to

“hold that there had been no violation of Article 10 of the Convention in the present case and that no separate issue arose under Article 8 or Article 6 § 1 of the Convention.”

As to the law

I. Alleged violation of article 10 of the Convention

30. The applicant submitted that the ban imposed on him by the Swiss courts under the Federal Unfair Competition Act of 19 December 1986 had infringed Article 10 of the Convention, [...].

The Government contested that submission; the Commission agreed with it.

31. The Court observes that Mr Hertel is prohibited, on pain of the penalties provided in Article 292 of the Criminal Code and Article 403 of the Code of Criminal Procedure, from stating that food prepared in microwave ovens is a danger to health and leads to changes in the blood of those who consume it that indicate a pathological disorder and present a pattern that could be seen as the beginning of a carcinogenic process, and from using, in publications and public speeches on microwave ovens, the image of death. It is clear therefore that the applicant has suffered an “interference by public authority” in the exercise of the right guaranteed by Article 10; indeed, that was not disputed. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It is therefore necessary to determine whether it was “prescribed by law”, motivated by one or more of the legitimate aims set out in that paragraph and “necessary in a democratic society” to achieve them.

A. “Prescribed by law”

32. The applicant disputed that the interference in issue was “prescribed by law”. In his submission, as he was not in the household electrical appliances market he could not reasonably have foreseen that by sending his research paper to the *Journal Franz Weber* he might be committing unfair competition within the meaning of the Act of 19 December 1986. Indeed, the scope of that Act was a matter of debate.

33. The Government replied that the prohibition on the applicant was based on sections 2, 3 and 9 of the Act of 19 December 1986 and on the Federal Court’s interpretation of those provisions. It was clear therefrom that even a person who was not a “competitor of the suppliers or buyers” of such goods could act “unfairly” within the meaning of that statute if he committed an “act of competition”, that is one likely to affect the market; whether or not there was a “subjective intention” to do so was irrelevant. As the dissemination of the statements in issue was liable to have an “objective impact” on the market in microwave ovens, Mr Hertel could not maintain that it had been unforeseeable that an injunction would be imposed on him under section 9.

34. The Commission came to the same conclusion.

35. The Court reiterates that a norm cannot be regarded as a “law” within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Again, whilst certainty is desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice [...].

36. [...] The UCA is not therefore confined in scope solely to economic agents: people, such as Mr Hertel, who are not market players are also concerned [...]
37. Furthermore, the Federal Court had already indicated before the occurrence of the events that gave rise to the present case that the applicability of the Act of 19 December 1986 was not conditional on the tortfeasor and the injured party being “competitors”; it had held that a journalist may, through his own articles or by reproducing articles written by others, be guilty of contravening some of the provisions of the Act [...].
38. The Court consequently accepts that it was “foreseeable” that the communication to the *Journal Franz Weber* of the research paper and its subsequent publication were liable to amount to an act of “competition” within the meaning of the UCA [...].

B. Legitimate aim

39. The applicant submitted that the aim pursued in the instant case – guaranteeing “fair” competition and therefore the protection of mere commercial interests – was not among those exhaustively set out in paragraph 2 of Article 10.

[...]

C. “Necessary in a democratic society”

43. Mr Hertel considered that the measure imposed on him had been disproportionate. It amounted to inordinate protection of the economic interests of the members of the complainant association, at the cost of his research papers being censored and his being prevented from taking part in scientific debate on the public-health issues raised by the use of microwave ovens.
44. The Government submitted that the interference in the applicant’s freedom of expression was aimed at guaranteeing fair and free competition in the interests of society as a whole. It had therefore met a pressing social need [...]. Lastly, in view of the margin of appreciation enjoyed by the Contracting States in respect of unfair competition, Article 10 had not been infringed.
45. The Commission came to the opposite conclusion.
- [...]
48. The Court observes that the applicant did no more than send a copy of his research paper to the *Journal Franz Weber*. He had nothing to do with the editing of issue no. 19 of that periodical or in the choice of its illustration, of which he became aware only after its publication. That is clear from Mr Weber’s statement of 14 April 1992 and was not called into question by either the Commercial Court of the Canton of Berne or by the Federal Court. Both courts held that the applicant’s liability derived from the fact that in sending his paper to the *Journal Franz Weber* he had accepted its being used in a simplified and exaggerated manner – as, given the periodical concerned, it had been foreseeable that it would be – and that, consequently, he had identified himself with the article in issue. As regards the content of issue no. 19 relating to microwave ovens, the applicant was thus neither author nor co-author of the title on the cover page, the editorial column [...] or of pages 3 to 10 [...]. The only parts that can be attributed to him are, with the exception of the titles and sub-titles appearing on them, pages 5 to 10, which contain an extract of the research paper (see paragraph 13 above). The Court notes that nowhere is it expressly proposed that microwave ovens be destroyed or boycotted or their use banned and that the applicant did not repeat the statements he made in 1989 and which had been published in issue no. 8 (April/May/June 1989)

of the *Journal Franz Weber* [...].

[...]

50. [...] The Court cannot help but note a disparity between that measure and the behaviour it was intended to rectify. That disparity creates an impression of imbalance that is materialised by the scope of the injunction in question. In that regard, although it is true that the injunction applies only to specific statements, it nonetheless remains the case that those statements related to the very substance of the applicant's views. The effect of the injunction was thus partly to censor the applicant's work and substantially to reduce his ability to put forward in public views which have their place in a public debate whose existence cannot be denied [...].

51. In the light of the foregoing, the measure in issue cannot be considered as "necessary" "in a democratic society". Consequently, there has been a violation of Article 10.

II. **Alleged violations of article 6 § 1 and article 8 of the Convention**

52. The applicant submitted that the measure imposed on him prevented him from communicating to others the result of his scientific work and damaged his "personality as a scientist"; he argued that that amounted to a violation of Article 8. He added that by ordering him not to associate symbols of death with microwave ovens, the Swiss courts had prohibited an act which he had not committed – since he had merely communicated his report to the *Journal Franz Weber* – and had no intention of committing; he complained on that basis that the measure was "unfair" and amounted to a breach of Article 6 § 1.

53. The Government maintained that no question arose under Article 8 and that the complaint under Article 6 § 1 was unfounded.

54. Having regard to its finding of a violation of Article 10, the Court, like the Commission, considers that no separate question arises under Article 6 § 1 or Article 8.

III. **Application of article 50 of the Convention**

55. Article 50 of the Convention [...]

For these reasons, the Court

1. *Holds* by six votes to three that there has been a violation of Article 10 of the Convention;
2. *Holds* unanimously that it is unnecessary to consider the complaints under Article 6 § 1 and Article 8 of the Convention;
3. *Holds* by eight votes to one
 - (a) that the respondent State is to pay the applicant, within three months, 40,000 (forty thousand) Swiss francs for costs and expenses;
 - (b) that simple interest at an annual rate of 5% shall be payable on that sum from the expiry of the above-mentioned three months until settlement;
4. *Dismisses* unanimously the remainder of the claim for just satisfaction.

This primer presents the legal framework of the extremely complex regulation of legacy and digital media in Europe by the European Union and the Council of Europe. The volume is divided in five chapters which take into account the European Convention of Human Rights and the Charter of Fundamental Rights of the EU; the regulation of broadcasting; digital communication platforms; data protection in the context of information and communication; and a plurality of other hot topics such as copyright protection, women's dignity, hate speech and fake news. All the chapters are linked to over 70 decisions of the Strasbourg and Luxembourg courts which are collected in a 300-page appendix.

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