

**Freedom of Expression and Information and  
the Case Law of  
the European Court of Human Rights  
and the Court of Justice of the EU.  
Overview and highlights 2014**

Conference Paper

JUSTICE FOR FREE EXPRESSION IN 2014

A review of global freedom of expression jurisprudence in 2014

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**Regional Courts and their jurisprudence in 2014: an increasingly important role?**

1. What happened in 2014? Most important decisions and why?
2. Is there evidence of the regional influence of the decisions? Of their influence beyond the regions?
3. Are regional Courts cross-referencing each other? Referencing other jurisdictions?
4. Are regional courts emerging as the most progressive judicial actors as far as FoE is concerned? Or is the overall picture more blurred?
5. What are the most important issues on the agenda of regional courts in 2015?

This report contains the material in support of the presentation on 10 March 2015 at Columbia University NY, on the role of regional courts in protecting the right of freedom of expression and information. It reviews the role and jurisprudence of the European regional courts in 2014 with regard the right to freedom of expression and information. The report especially highlights the judgments and decisions delivered by the European Court of Human Rights in Strasbourg. It also depicts the most important issues on the agenda for 2015, by referring to the freedom of expression cases actually pending before the Grand Chamber of the European Court of Human Rights.

## Introduction

The case law of the European Court of Human Rights (ECtHR) shows how the Court's rulings over a period of 35 years<sup>1</sup> have helped to create an added value for the protection of freedom of expression, journalistic freedom, freedom of the media and public debate in the member states of the European Convention. In nearly 600 cases the ECtHR found violations of the right to freedom of expression and information as guaranteed by Article 10 ECHR, hence developing a higher level of protection compared to that in the defendant national states' jurisdictions. Under Article 10 ECHR interferences with the right to freedom of expression and information can only be justified when they are prescribed by law, pursue one of the legitimate aims under Article 10 § 2 ECHR and in as far as the interference is proportionate and justifiable. Any interference with the right to freedom of expression and information amounts to a violation of Article 10 ECHR, unless it has a legal and legitimate basis and is pertinently justified as corresponding to a pressing social need, hence being "necessary in a democratic society". The European Court's jurisprudence has clearly reduced the possibilities of interferences with the right guaranteed under Article 10 ECHR, by emphasizing precisely the characteristics of a democratic society in terms of tolerance, broadmindedness, pluralism and the importance of participation in public debate, including the protection of expressions, ideas and information that "*shock, offend or disturb*". Very analogue to Article 10 ECHR, Article 11 of the EU-Charter of Fundamental Rights guarantees the right to freedom of expression and information, including media pluralism. Also the case law of the Court of Justice of the EU reflects the application of the right to freedom of expression, by referring in some cases to Article 10 ECHR and/or to Article 11 of the EU-Charter for Fundamental Rights.

### Some characteristics of the right to freedom of expression in Europe

A crucial aspect that has helped to develop and enforce the right to freedom of expression "without interference by public authority and regardless of frontiers", is the *strict scrutiny* by the European Court of interferences with an impact on the freedom of expression on *matters of public interest*, especially regarding the freedom of political expression and the role of the press as "*public watchdog*". The recognition by the European Court of a *horizontal effect* of Article 10, assessing interferences with the right to freedom of expression by private persons or corporate organisations, and of the *positive obligations* for member states to protect and effectively create an environment for guaranteeing the right to freedom of expression has further extended the scope of that right in Europe. Another important factor that contributes to a substantial impact of Article 10 is the high

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<sup>1</sup> ECtHR 26 April 1979, Case No. 6538/74, *Sunday Times (n° 1) v. UK*, was the first judgment in which the Court found a violation of Article 10 ECHR, as an injunction against the newspaper because of contempt of court was considered not being necessary in a democratic society for maintaining the authority of the judiciary, referring *inter alia* to the right of the public to be properly informed about matters of public interest. In the meantime more than a thousand judgments concern aspects related to the right to freedom of expression, media and journalism (see [www.hudoc.echr.coe.int](http://www.hudoc.echr.coe.int)). For a general analysis, see D. Voorhoof, "Freedom of Expression, Media and Journalism under the European Human Rights System: Characteristics, Developments, and Challenges", in: P. Molnár (ed.), *Free Speech and Censorship Around the Globe* (Budapest - New York: Central European University Press: 2015), 59-104. An overview including a database on the most important case law of the ECtHR on freedom of expression, media and journalism can be found in an e-book on the subject, published by the European Audiovisual Observatory (Strasbourg: Iris). The first edition was published in December 2013 and an updated version (including 2014 case law) is to be published in May 2015: [http://www.obs.coe.int/documents/205595/2667238/IRIS+Themes+III+\(final+9+December+2013\).pdf/2e748bd5-7108-4ea7-baa6-59332f885418](http://www.obs.coe.int/documents/205595/2667238/IRIS+Themes+III+(final+9+December+2013).pdf/2e748bd5-7108-4ea7-baa6-59332f885418).

level of protection the Court has recognized vis-à-vis *journalistic sources, whistleblowers, gathering of news and information*, and more recently, *the right of access to information* held by public authorities. The Court has significantly upgraded freedom of expression of individuals, journalists, artists, academics, opinion leaders, NGOs and activists regarding their rights to receive, gather, express and impart information contributing to public debate in society. The Court also explicitly recognized the right of individuals to *access the internet*. In a ruling against the blocking of online content (on Google Sites), it asserted that the internet has now become one of the principal means of exercising the right to freedom of expression and information.<sup>2</sup>

### **Restrictive trends?**

However, some restrictive trends in the approach of the Strasbourg Court have been identified, especially in a number of Grand Chamber judgments. The outcome and rationale of some judgments in which the Court has found no violation of the right to freedom of expression have raised concerns regarding the future level of protection of press freedom in Europe compared to the “traditional” high standards of the Strasbourg case law in this matter.<sup>3</sup>

The (near) future will show whether the European Court of Human Rights will keep on playing its role as ultimate guarantor of human rights in Europe and will be able to stand firm against the political pressure that has been felt the last few years surrounding the legitimacy and supervisory role of the European Court in securing human rights in the member states. This context may go some way in explaining the shift in direction surrounding the protection of freedom of expression and press freedom by the European Court in some of its judgments.<sup>4</sup>

### **Or toward a higher standard of freedom of expression in Europe?**

Surveying the European Court’s jurisprudence of the last years shows however that the Court’s case law related to Article 10 of the Convention is still maintaining high standards of freedom of expression, media pluralism and protection of journalists, hence obliging member states to secure within their jurisdictions a higher threshold of freedom of expression and information. A series of recent judgments, also in 2014,<sup>5</sup> clearly illustrate the awareness by the European Court of the utmost importance of freedom of expression and information in a democratic society. Especially the multiple

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<sup>2</sup> ECtHR 18 December 2012, Case No. 3111/10, *Ahmed Yildirim v. Turkey*. See also ECtHR 10 March 2009, Case Nos. 3002/03 and 23676/03, *Times Newspapers Ltd. (n° 1-2) v. UK*.

<sup>3</sup> R. Ó Fathaigh and D. Voorhoof, “The European Court of Human Rights, Media Freedom and Democracy,” in M. Price, S. Verhulst, and L. Morgan, eds., *Routledge Handbook of Media Law* (New York: Routledge, 2013), 107-124 and R. Ó Fathaigh and D. Voorhoof, “A review of the European Court's Freedom of Expression Cases in 2013”, in *Proceedings of the Columbia University Global Freedom of Expression Project*, Expert Meeting, 25-26 February 2014, 13 p., at <http://globalfreespeech.columbia.edu/report/europe-and-central-asia/review-european-courts-freedom-expression-cases-2013>

<sup>4</sup> See e.g. recently ECtHR 16 January 2014, Case No. 45192/09, *Tierbefreier e.V. v. Germany*; ECtHR 30 January 2014, Case No. 34400/10, *De Lesquen du Plessis-Casso (n° 2) v. France*; ECtHR 4 February 2014, Case No. 11882/10, *Pentikäinen v. Finland* (referred to Grand Chamber) and ECtHR 29 April 2014, Case No. 23605/09, *Salumäki v. Finland*.

<sup>5</sup> In 2014 the ECtHR found 47 violations of the right to freedom of expression and information. In 12 judgments it found no violation of that right. In other cases it relied on Article 10 in order to justify that there had not been a violation of Article 8 (right of privacy or right of reputation) in cases of alleged privacy breaching or defamatory media reporting. For a general overview about the ECtHR in 2014, see the annual report of the ECtHR on [http://www.echr.coe.int/Documents/Annual\\_Report\\_2014\\_ENG.pdf](http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf).

references in the Court's recent case law to the danger of a "*chilling effect*"<sup>6</sup> and its impact on the finding of unjustified interferences with media and journalists' and NGOs rights, help to secure a higher standard of freedom of expression and information through the interpretation and the application of Article 10 of the Convention.

The way Article 10 of the Convention has been interpreted and applied by the ECtHR and has been promoted by the Council of Europe has undoubtedly helped to upgrade and improve the level of freedom of expression and media freedom in countries that became member states of the European Convention after the fall of the Berlin Wall (9 November 1989), such as the Baltic states (Estonia, Lithuania and Latvia), the Czech Republic and Slovenia.<sup>7</sup> But also in countries that already had a long-standing constitutional and democratic tradition, the right to freedom of expression and information has been broadened, strengthened and updated under the influence of Article 10 of the European Convention, especially regarding discussions on matters of public interest, in protecting newsgathering activities and journalistic sources, whistleblowing, access to public documents, media pluralism and internet freedom. In other Council of Europe member states that have less solid democratic institutions or that have experienced growing pains as they have moved toward democracy (such as in Turkey, Azerbaijan, Russia, Georgia, Armenia, Moldova, Serbia, Ukraine and Hungary), the issue of press freedom and freedom of (political) expression is still very problematic. Article 10 of the Convention has become a crucial instrument, however, to motivate, to stimulate or even to compel the national authorities of these countries to abstain from interfering in freedom of speech and press freedom, to respect freedom of public debate, political expression and critical journalism to a higher degree and to promote media pluralism and internet freedom.

As Article 10 ECHR and the Court's case law is applicable in the 47 member states of the Council of Europe, from Norway to Cyprus, from Iceland to Azerbaijan and from Portugal to Russia, it affects the freedom of expression of about 900 million people living in or under the jurisdictions bound by the ECHR.

### **Structure of the 2014 report and brief overview of the case law on freedom of expression and information in Europe**

The first part of this report offers an overview of the most important 2014 (final) judgments delivered by the ECtHR. These judgments are clustered under the following items, emphasising the most important cases or trends in 2014:

- ***the right of access to official documents as protected by Article 10 ECHR,***
- ***the protection of whistleblowers under Article 10 ECHR,***
- ***freedom of political speech and criticizing public persons and politicians,***
- ***the balancing of Article 8 and 10 ECHR in relation to privacy and the right of reputation,***
- ***the findings of continuing abuse of anti-terror law restricting freedom of expression in Turkey,***
- ***and the repetitive violations of the rights of protesters and the right to peaceful assembly and public demonstration in Russia.***

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<sup>6</sup> E.g., when criminal law is applied to prosecute and sanction journalists while reporting on matters of public interest, or in cases of prior restraint or when severe sanctions are imposed on media of journalists, or when journalists are prohibited no longer to exercise their profession .

<sup>7</sup> See the positive developments in these countries reflected in the press freedom indexes of Reporters without Borders and Freedom House.

The last part of the 2014 overview of the case law of the ECtHR refers to two decisions finding no breach of Article 10 ECHR in cases related to interferences with the *protection of journalistic sources* and *searching of the newsroom*. The review ends with a short analysis of two controversial judgments by the Grand Chamber, only indirectly dealing with the right to freedom of expression: the cases of *Fernández Martínez v. Spain* and *S.A.S v. France*, both mainly focussing on *freedom of religion*.

This report also refers to the protection of fundamental rights in the EU and its 28 member states. Specifically the role of the Court of Justice of the EU (CJEU) in 2014 with regard to the protection of the right to freedom of expression and information (Art. 11 EU-Charter) will be highlighted by referring to some of its judgments related to copyright protection and enforcement of copyright when interfering with the right to freedom of expression and information. Another perspective of attention is the EU Court's case law regarding data protection and how the protection of privacy and personal data can affect the right to freedom of expression and information, as illustrated in the *Google Spain*-judgment (CJEU 13 May 2014).

Due to a lack of sufficient relevant information over the year 2014 this report does not further elaborate on question 2 ("2. Is there evidence of the regional influence of the decisions? Of their influence beyond the regions?"). With regard to question 3 ("3. Are regional Courts cross-referencing each other? Referencing other jurisdictions?") the answer for both the ECtHR and the CJEU is "no", as none of the analysed judgments in 2014 referred in its motivation to jurisprudence of other regional human rights courts, nor any other jurisdictions outside Europe. The European case law in 2014 on freedom of expression is based on the interpretation of the European Convention on Human Rights (ECtHR), eventually some references to policy documents of the Council of Europe (Committee of Ministers and Parliamentary Assembly) and the EU-law (CJEU), without finding any further inspiration or authoritative arguments outside the jurisdictions of the ECHR and the EU.

Whether the ECtHR and the CJEU showed in 2014 to be "progressive judicial actors as far as freedom of expression is concerned" (question 4) is substantiated by the many references in the first part of this report to the case law of both courts creating in a large amount of cases a higher threshold of protection of freedom of expression and information. A few judgments or decisions in which the ECtHR accepted occasionally far reaching or controversial interferences might give a more "blurred" picture, although the overall conclusion is that both courts in 2014 have applied or secured extra guarantees or a higher level of protection for freedom of expression in the European member states of the Council of Europe and the European Union. A few examples which go in the other direction will be briefly presented.

The final part of this report looks further ahead into 2015, as the Grand Chamber of the ECtHR is expected to deliver a series of judgments with a potentially high impact on the freedom of expression in Europe, as these all concern crucial aspects of the interpretation and application of the right to freedom of expression and information under the ECHR. Of the actually (on 10 March 2015) 24 cases referred to the Grand Chamber, ten concern alleged violations of Article 10 of the Convention. It is obvious that the outcome of these Grand Chamber judgments will have an impact on the future development, the level and the characteristics of the protection of the right to freedom of expression in Europe and on the freedom of media, internet and journalism in this "region" of the world. Hence 2015 will be an important year for the right to freedom of expression, journalism and

media freedom in Europe. The Grand Chamber judgments which are expected to be delivered in 2015 applying Article 10 ECHR will undoubtedly attract our attention in the next report, reviewing the European 2015 case law on freedom of expression and information.

At the very moment of the end-editing of this report, the Grand Chamber in a judgment of 23 April 2015 has overruled an earlier finding of non-violation of the right to freedom of expression of a lawyer (Chamber, Fifth Section, 11 July 2013): with an extensively elaborated motivation the Grand Chamber comes to the conclusion that the applicant lawyer's conviction for defamation of two investigative judges violated Article 10 of the Convention. It finds that the lawyer, Morice, in the newspaper *Le Monde* had expressed value judgments with a sufficient factual basis and that his remarks concerning a matter of public interest, had not exceeded the limits of the right to freedom of expression.<sup>8</sup> If this judgment, delivered by a unanimous Grand Chamber, sets the tune for the coming Grand Chamber judgments applying Article 10 of the European Convention, we can look forward to more interesting rulings from the Strasbourg Court strictly scrutinising interferences at national level with the right to freedom of expression and information.

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<sup>8</sup> See I. Høedt-Rasmussen and D. Voorhoof, "A great victory for the whole legal profession", *Strasbourg Observers Blog* 6 May 2015, <http://strasbourgobservers.com/2015/05/06/a-great-victory-for-the-overall-profession-of-lawyers/#more-2848>

## **1. Most important (final) judgments and decisions by the ECtHR**

### **1.1. Access to official documents under the protection of Article 10 ECHR: ECtHR 24 June 2014, Roşianu v. Romania, Appl. No. 27329/06.**

The ECtHR has reiterated, once more, that collecting information and guaranteeing access to documents held by public authorities is a crucial right for journalists in order to be able to report on matters of public interest, helping to implement the right of the public to be properly informed on such matters. In the case of Ioan Romeo Roşianu, a presenter of a regional television programme, the Court came to the conclusion that the Romanian authorities have violated Article 10 ECHR by refusing access to the documents of a public nature Roşianu had requested for at Baia Mare, a city in the north of Romania. The Court's judgment clarifies that efficient enforcement mechanisms are necessary in order to make the right of access to public documents under Article 10 practical and effective.

In his capacity as a journalist, Roşianu had contacted the Baia Mare municipal authorities, requesting disclosure of several documents, as part of his investigation how public funds were used by the city administration. His requests were based on the provisions of Law no. 544/2001 on freedom of public information. As the reply by the mayor did not contain the requested information, Roşianu applied to the administrative court. In three separate decisions, the Cluj Court of Appeal ordered the mayor to disclose the majority of the requested information. The Court of Appeal noted that, under Article 10 of the European Convention on Human Rights and Law no. 544/2001 on freedom of public information, Roşianu was entitled to obtain the information in question, which he intended to use in his professional activity. The letters sent by the mayor of Baia Mare did not represent adequate responses to those requests. The Cluj Court of Appeal ordered the mayor to pay the applicant 700 euros in respect of non-pecuniary damage, and held that his refusal to disclose the requested information amounted to a denial of the right to receive and impart information, guaranteed by Article 10 of the European Convention. Roşianu applied for enforcement of the decisions, but the mayor refused to comply. The decisions delivered by the Cluj Court of Appeal remained unenforced.

Roşianu complained about the failure to execute the judicial decisions, relying on Article 6 § 1 (right to a fair trial/access to court). Relying on Article 10 ECHR he alleged that the failure to execute the decisions of the Cluj Court of Appeal amounted to a violation of his right to freedom of expression.

With regard to the complaint under Article 6 § 1 of the Convention, it is observed that the mayor had suggested Roşianu to come in person to the town hall to obtain several thousand photocopied pages, against payment for the reproduction costs, but that the domestic courts had concluded that such an invitation could not possibly be considered as an execution of a judicial decision ordering the disclosure of information of a public nature. The European Court finds that the non-enforcement of the final judicial decisions ordering disclosure to Mr Roşianu of public information had deprived Roşianu of an effective access to a court, which amounted to a violation of Article 6 § 1 ECHR.

With regard to the complaint under Article 10, the Court notes that Roşianu was involved in the legitimate gathering of information on a matter of public importance, namely the activities of the Baia Mare municipal administration. The Court reiterates that in view of the interest protected by Article 10, the law cannot allow arbitrary restrictions which may become a form of indirect

censorship should the authorities create obstacles to the gathering of information. Gathering information is indeed an essential preparatory step in journalism and is an inherent, protected part of press freedom. Given that the journalist's intention had been to communicate the information in question to the public and thereby to contribute to the public debate on good public governance, his right to impart information had clearly been impaired. The Court finds that there had not been adequate execution of the judicial decisions in question. It also observes that the complexity of the requested information and the considerable work in order to select or compile the requested documents had been referred to solely to explain the impossibility of providing that information rapidly, but could not be a sufficient or pertinent argument to refuse access to the requested documents. The Court concludes that the Romanian authorities had adduced no argument showing that the interference in Roşianu's right had been prescribed by law, or that it pursued one or several legitimate aims, hence finding a violation of Article 10 of the Convention. The Court holds that Romania is to pay the applicant 4.000 euros in respect of non-pecuniary damage and 4.748 euros in respect of costs and expenses.

### **1.2. Protection of whistleblowing: ECtHR 21 October 2014, Matúz v. Hungary, Appl. No. 73571/10.**

In its judgment in the case of Matúz v. Hungary the European Court confirms the importance of whistleblower protection. The case concerns the dismissal of a television journalist, Gábor Matúz, working for the State television company *Magyar Televízió Zrt.*, after having revealed several instances of alleged censorship by one of his superiors. Matúz first contacted the television company's president and sent a letter to its board, informing them that the cultural director's conduct in modifying and cutting certain programme content amounted to censorship. A short time later an article appeared in the online version of a Hungarian daily newspaper, containing similar allegations and inviting the board to end censorship in the television company. A few months later Matúz published a book containing detailed documentary evidence of censorship exercised in the State television company. Subsequently Matúz was dismissed with immediate effect. Matúz challenged his dismissal in court, but he remained unsuccessful in his legal action in Hungary. After exhausting all national remedies, he lodged a complaint in Strasbourg, arguing a violation of his rights under Article 10 of the Convention. He submitted that he had the right and obligation to inform the public about alleged censorship at the national television company. The Hungarian government argued that by publishing the impugned book without prior authorisation and by revealing confidential information in that book, Matúz had breached his duties, leading to his summary – and justified – dismissal.

The ECtHR accepts that the legitimate aim pursued by the impugned measure was the prevention of the disclosure of confidential information as well as "the protection of the reputation or rights of others" within the meaning of Article 10 § 2 of the Convention. Once more the central question is whether the interference was "necessary in a democratic society". The Court refers to its standard case law on freedom of expression and journalistic reporting on matters of public interest, and also observes that the present case bears a certain resemblance to the cases *Fuentes Bobo v. Spain* and *Wojtas-Kaleta v. Poland* in which it found violations of Article 10 in respect of journalists who had publicly criticised the public television broadcaster's management. Where the right to freedom of expression of a person bound by professional confidentiality is being balanced against the right of employers to manage their staff, the relevant criteria have been laid down in the Court's case-law

since its Grand Chamber judgment in the case of *Guja v. Moldova* (§§ 74-78). These criteria are: (a) public interest involved in the disclosed information; (b) authenticity of the information disclosed; (c) the damage, if any, suffered by the authority as a result of the disclosure in question; (d) the motive behind the actions of the reporting employee; (e) whether, in the light of the duty of discretion owed by an employee toward his or her employer, the information was made public as a last resort, following disclosure to a superior or other competent body; and (f) severity of the sanction imposed. The Court emphasises that the content of the book essentially concerned a matter of public interest and it confirms that it was not in dispute that the documents published by Matúz were authentic and that his comments had a factual basis. The Court also notes that the journalist had included the confidential documents in the book with no other intention than to corroborate his arguments on censorship, and that there was no appearance of any gratuitous personal attack, either (par. 46). Furthermore, the decision to make the impugned information and documents public was based on the experience that neither his complaint to the president of the television company nor letters to the board had prompted any response. Hence the Court “is satisfied that the publication of the book took place only after the applicant had felt prevented from remedying the perceived interference with his journalistic work within the television company itself – that is, for want of any effective alternative channel”. The Court also notes that “a rather severe sanction was imposed on the applicant”, namely the termination of his employment with immediate effect. The ECtHR is of the opinion that the approach by the Hungarian judicial authorities neglected to sufficiently apply the right of freedom of expression. The Court concludes that the interference with the applicant’s right to freedom of expression was not “necessary in a democratic society”. Accordingly, the Court unanimously finds that there has been a violation of Article 10 of the Convention.<sup>9</sup>

**1.3. Freedom of political speech and criticizing public persons and politicians: ECtHR 10 July 2014, Axel Springer AG v. Germany (No. 2), Appl. No. 48311/10 and ECtHR 17 April 2014, Broşa v. Germany, Appl. No. 5709/09.**

**Axel Springer AG v. Germany (No. 2): violation of Article 10 ECHR.**

In a judgment of 10 July 2014, the European Court found that the publication by the daily newspaper *Bild* of suspicions concerning the former German Chancellor Gerhard Schröder was covered by journalistic freedom. In Strasbourg, the publisher of *Bild*, Axel Springer AG, had lodged a complaint arguing that the German courts had interfered with the right to freedom of expression and critical press reporting in a way that violated Article 10 of the Convention.

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<sup>9</sup> See also D. Voorhoof, “Whistleblower protection for journalist who alarmed public opinion about censorship on TV”, *Strasbourg Observers Blog* 25 November 2014, <http://strasbourgobservers.com/2014/11/25/whistleblower-protection-for-journalist-who-alarmed-public-opinion-about-censorship-on-tv/#more-2698>. This judgment was awarded as the best 2014 judgment of the ECtHR by Strasbourg Observers: <http://strasbourgobservers.com/2015/02/12/the-results-are-in-poll-on-best-and-worst-ecthr-judgment-of-2014/#more-2757>. According to the organisers of the poll *Matúz v. Hungary* won, “because it clearly confirms the ECtHR’s strong commitment to providing much needed protection to whistleblowers’ freedom of expression in times when this is – politically speaking – a far from obvious, and therefore quite courageous, judicial position to take”. See also the *Recommendation on the protection of whistleblowers*, Committee of Ministers of the Council of Europe of 30 April 2014, at <https://wcd.coe.int/ViewDoc.jsp?id=2188855&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383> and: [http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2014\)7E.pdf](http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2014)7E.pdf)

An article in *Bild* had repeated a series of suspicions and doubts on the part of Mr Thiele – the deputy president of the Liberal Democratic Party’s (FDP) parliamentary group – with regard to Schröder’s appointment as chairman of the supervisory board of the German-Russian consortium *Konsortium Nordeuropäische Gaspipeline* (NEGP). Thiele had insinuated that Mr Schröder had resigned from his political functions because he had been offered a lucrative post in the consortium headed by the Russian company *Gazprom*. In this regard, references were made to an agreement on construction of a pipeline that has been signed in April 2005, in the presence of Mr Schröder and the Russian President Vladimir Putin. Having complained to the German courts, Mr Schröder obtained an order banning further publication of the passage which reported Mr Thiele’s comments and insinuations of corruption.

The European Court sharply disagrees with the reasoning and findings of the German courts. The Court refers to the relevant criteria it has taken into consideration in earlier cases (see *Von Hannover v. Germany* (No. 2) and *Axel Springer AG v. Germany* (No. 1)), when dealing with the conflicting rights of freedom of expression guaranteed by Article 10 and the right to protection of one’s reputation under Article 8 of the Convention as part of the right to private life.

First the Court notes that the article in *Bild* did not recount details of Mr Schröder’s private life with the aim of satisfying public curiosity, but related to Mr Schröder’s conduct in the exercise of his term of office as Federal Chancellor and his controversial appointment to a German-Russian gas consortium shortly after he ceased to hold office as Chancellor. Furthermore, there were sufficient facts which could justify suspicions with regard to Mr Schröder’s conduct, and such suspicions amounted to the expression of a value judgment, without concrete allegations of Schröder having committed criminal offences. The Court also observes that Mr Thiele’s questions were not the only comments to be reproduced in the *Bild* article, but supplemented a series of statements made by different political figures from various political parties.

The Court could also not subscribe to the German courts’ opinion that the article in *Bild* ought also to have contained elements in favour of the former Chancellor. The former Chancellor had a duty to show a much greater degree of tolerance than a private citizen. In the political arena, freedom of expression is of the utmost importance and the press has a vital role as public “watchdog”. The punishment of a journalist for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to discussions of matters of public interest. The Court also considers that a newspaper cannot be required to verify systematically the merits of every comment made by one politician about another, when such comments are made in the context of a current political debate. As to the severity of the measure imposed, the Court notes that although only a civil-law ban on further publication of the impugned passage in the *Bild* article had been imposed, it nonetheless considers that this prohibition could have had a chilling effect on the newspaper’s freedom of expression.

The Court concludes unanimously that *Bild* has not exceeded the limits of journalist freedom in publishing the disputed passage. The German courts have not established convincingly that there existed any pressing social need for placing the protection of Mr Schröder’s reputation above the newspaper’s right to freedom of expression and the general interest in promoting this freedom where issues of public interest were concerned. There had therefore been a violation of Article 10 of the Convention.

### **Brosa v. Germany: violation of Article 10 ECHR.**

The ECtHR has also delivered an interesting judgment on the right to freedom of political expression, situated in pre-election time, in the case of Brosa v. Germany. The applicant, Mr Ulrich Brosa alleged that a court injunction in Germany, prohibiting him from distributing a leaflet that he had drawn up on the occasion of mayoral elections, had violated his right to freedom of expression. The injunction at issue prohibited Brosa from distributing a leaflet in which he called not to vote for a candidate, F.G., for local mayor who allegedly provided cover for a neo-Nazi organisation, Berger-88. The injunction also prevented Brosa from making other assertions of fact or allegations which might depict F.G. as a supporter of neo-Nazi organisations. Any contravention was punishable by a fine of up to 250.000 euros or by imprisonment of up to six months. The German courts found that to claim that someone was supporting a neo-Nazi organisation amounted to an infringement of that individual's honour and social reputation and to his personality rights, while Brosa had failed to provide sufficient evidence to support his allegation against F.G. In Strasbourg, Brosa complained that the injunction had breached his right to freedom of expression, as provided for in Article 10 of the Convention.

Examining the particular circumstances of the case, the Court refers to the following elements to be taken into account: (1) the position of the applicant, (2) the position of the plaintiff in the domestic proceedings, (3) the subject matter of the publication and finally (4) the classification of the contested statement by the domestic courts. As to the position of Brosa, the Court notes that he is a private individual, participating however in a public discussion on the political orientation of an association. F.G. was an elected town councillor who was running for the office of mayor at the material time. This status of F.G. as a politician made the limits of acceptable criticism wider than as regards a private individual. The subject matter of the publication concerned a leaflet asking citizens not to vote for F.G. as mayor, primarily on the basis of his attitude vis-à-vis an association with an extremist right-wing orientation. Brosa's leaflet, disseminated in the run-up to the mayoral elections was therefore of a political nature on a question of public interest at the material time and location, leaving only little scope for restrictions on political speech or on debate of questions of public interest. As regards the qualification of the impugned statement by the domestic courts, the Court considers it to consist of two elements: firstly, the allegation that the association Berger-88, was a neo-Nazi organisation that, moreover, was particularly dangerous; and, secondly, the allegation that F.G. had "covered" for the organisation. The Court admits that, in substance, the reference to the neo-Nazi background and the dangerous character of Berger-88 was not devoid of a factual basis, while the Court also reminds to the fact that the association was monitored by the German Intelligence Services on suspicion of extremist tendencies. The European Court holds the opinion that that the German courts in this case required a disproportionately high degree of factual proof to be established. It also considers that the statement that F.G. has covered the neo-Nazi organisation at issue, was part of an ongoing debate. The Court finds that this statement had a sufficient factual basis, referring to F.G.'s public statements, emphasizing that the association had no extreme right wing tendencies and calling Brosa's statements "false allegations". According to the Court Brosa's leaflet did not exceed the acceptable limits of criticism. Therefore the Court comes to the conclusion that the German courts failed to strike a fair balance between the relevant interests and to establish a "pressing social need" for putting the protection of the personality rights of F.G. above Brosa's right to freedom of expression, even in the context of a civil injunction rather than criminal charges or

monetary compensation claims. Under these circumstances, the Court considers that the domestic courts overstepped the margin of appreciation afforded to them and that the interference was disproportionate to the aim pursued and not “necessary in a democratic society”. There has been, accordingly, a violation of Article 10 of the Convention. The Court holds that Germany is to pay Brosa 3.000 euros in respect of non-pecuniary damage and 2.683 euros in respect of costs and expenses.<sup>10</sup>

**Other relevant cases:**

**- ECtHR 17 April 2014, Mladina dd. Ljubljana v. Slovenia, Appl. No. 20981/10: violation of Article 10 ECHR.**

Insulting a MP as “cerebral bankrupt” in an article in a magazine was considered being protected by Article 10 ECHR. The Court interprets the impugned statement as an expression of strong disagreement, even contempt for S.P.’s position, rather than a factual assessment of his intellectual abilities. Viewed in this light, the description of the parliamentarian’s speech and conduct can be regarded as a sufficient foundation for the author’s statement. The author’s critical opinions were coloured by a number of evocative, exaggerated expressions. But as Article 10 protects both the content and the form of expression the Court considers that even offensive language, which may fall outside the protection of freedom of expression if its sole intent is to insult, may be protected by Article 10 when serving merely stylistic purposes. The Court also considers that the statement did not amount to a gratuitous personal attack on S.P. and the Court also points out that political invective often spills over into the personal sphere, this being the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society.

**- ECtHR 14 October 2014, Stankiewicz and others v. Poland, Appl. No. 48723/07: violation of Article 10 ECHR.**

The case concerns allegations about bribery by a government official. The allegations were part of a newspaper article published by two journalists. The journalists alleged that the Head of the Private Office of the Minister of Health (*Szef Gabinetu Politycznego Ministra Zdrowia*), W.D., had demanded a bribe from representatives of a pharmaceutical company, offering in return his assistance in having a drug manufactured by the company placed on the list of drugs refunded within the framework of the national health care scheme. The Polish courts held that the article had infringed the personal rights of W.D. and that the applicants’ conduct had been unlawful within the meaning of Article 24 of the Civil Code read in conjunction with the relevant provisions of the 1984 Press Act and infringed the claimant’s reputation and trust that was necessary in the exercise of his public duties. The two journalists were ordered to publish an apology in their newspaper and to pay EUR 1,100 in court fees and to reimburse the costs of EUR 1,550 to W.D. The ECtHR however considers this interference with the right to freedom of expression of the two journalists as a breach of Article 10 ECHR. It is obvious for the ECtHR that the matters discussed in the applicants’ article concerned issues of public interest while the limits of acceptable criticism are wider with regard to a person holding a public office than with regard to a private individual. The Court finds that the national courts applied an overly rigorous approach to the assessment of the journalists’ professional conduct. In contrast with

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<sup>10</sup> See also R. O’ Fathaigh and D. Voorhoof, “German Court Injunction Banning Political Leaflet Violated Article 10: Brosa v. Germany”, *Strasbourg Observers Blog* 21 May 2014 , <http://strasbourgobservers.com/2014/05/21/german-court-injunction-banning-political-leaflet-violated-article-10-brosa-v-germany/#more-2419>

the findings of the domestic courts, the ECtHR considers that the applicants complied with the tenets of responsible journalism. The research done by the applicants before the publication of their allegations was in good faith and complied with the ordinary journalistic obligation to verify the facts from reliable sources. The European Court is of the view that the allegations against W.D. were underpinned by a sufficient factual basis. It should also be noted that the content and the tone of the article was on the whole fairly balanced. The applicants, having approached a number of sources, gave as objective picture as possible of W.D. and offered him to present his version of the relevant events and to comment on the allegations raised. W.D.'s version of events was presented in the article. In the instant case, the domestic courts did not take into account the status of W.D. and the wider limits of permissible criticism applicable to politicians or public officials. Nor did they appreciate that the subject-matter of the publication concerned issues of public interest or the role of the press as a "public watchdog". In consequence, the judicial authorities did not carry out a careful balancing exercise between the right to impart information and protection of the reputation or rights of others. Therefore the reasons relied on by the respondent State to justify the interference with the journalists' right to freedom of expression, although relevant, are not sufficient to show that that interference was "necessary in a democratic society". There has accordingly been a violation of Article 10 of the Convention.

**- ECtHR 21 October 2014, Erla Hlynsdottir v. Iceland (no. 2), Appl. No. 54125/10: violation of Article 10 ECHR**

In this case an Icelandic journalist had been convicted for defamation after reporting that the director of a Christian rehabilitation centre and his wife had been involved in sex games with patients of the centre. The ECtHR finds a violation of Article 10 of European Convention on Human Rights, arguing that the national courts did not pertinently balance the right to freedom of expression with the right to reputation. The Court refers to "*the essential function the press fulfils in a democratic society*" as a central factor for its determination in the present case. In *Erla Hlynsdottir (no. 2)*, the European Court criticizes the Icelandic domestic courts for not conducting their own evaluation of the impugned statements and for not sufficiently motivating why an interference with the journalist's right to freedom of expression corresponded to a pressing social need in the case at issue. Accordingly, the Court establishes that when national courts face claims for alleged defamatory statements published by media, they have to carry on their own assessment in order to verify if the journalist had sufficient factual proof to substantiate the allegations. The Court continues by emphasizing that "*in cases such as the present one the national margin of appreciation is further circumscribed by the interest of democratic society in enabling the press to exercise its vital role of 'public watchdog' in imparting information of serious public concern*" (§ 57). According to the Court it also requires "*the most careful scrutiny*" when national authorities interfere with the right to freedom of expression and journalistic reporting in a manner that might discourage the participation of the press in debates over matters of legitimate concern for society. The Court finds that the reporting was balanced and that the journalist had conducted responsible journalism and acted in good faith. However, while assessing the attempts of journalists to verify facts of the article, the Court pertinently reiterates that it is not up to the European Court, nor to the domestic judicial authorities to decide what techniques of reporting should be used by journalists.

The unanimous judgment and the reasoning by the European Court in this case reflect the awareness in Strasbourg of the importance of upholding high standards of critical, factually based, investigative reporting on matters of public interest, which inevitably may cause harm to the reputation of public

figures involved in embezzlement of public funds or sexual abuse as in the case at issue. It is reassuring to notice that in case of a conviction for defamation of a journalist in such circumstances, the European Court applies the most strict scrutiny under Article 10 of the Convention, especially when interferences at national level are capable of discouraging the participation of the press in debates over matters of legitimate public concern.<sup>11</sup>

**- ECtHR 15 May 2014, Taranenko v. Russia, Appl. No. 19554/05: Slogan “Putin resign”. Violation of Article 11 (in relation with Article 10) ECHR, cf. infra.**

**- The Court however found no violation of Article 10 ECHR in ECtHR 2 December 2014, Albrecht Kieser and Peter Tralau-Kleinert v. Germany Appl. No. 18748/10 (decision).**

The ECtHR dismissed the applicants’ complaints, as it considered the defamatory allegations of a very serious nature, presented as statements of fact rather than value judgments, while the allegations turned out to lack a factual basis. The applicants not only expressed a personal opinion and commented on events in the past, they gave the impression of revealing publicly unknown incidents concerning the role of a family during the Nazi regime. The Court also observes that the applicants were given the opportunity to prove the veracity of the published information and that the standard of proof applied by the domestic courts in those proceedings did not make this task unreasonable or impossible in the circumstances (compare with ECtHR 17 April 2014, *Brosa v. Germany*, Appl. No. 5709/09, § 48, *cf. supra*). Therefore the Court is satisfied that the findings of the domestic courts were based on acceptable assessments of the relevant facts. The domestic courts’ decisions reveal moreover that they had carefully examined whether the applicants had fulfilled their journalistic obligation of properly verifying their statements of fact before disseminating them. They came to the conclusion that, having regard to the gravity of the allegations and the political sensitivity of the subject, the applicants failed to provide sufficient proof for the statements. As to whether there were grounds for dispensing the applicants from their ordinary obligation to verify their statements, the Court first notes that the allegations raised in the article were of a serious nature. The Court underlines that the applicants not only failed to verify the authority of their sources, but also failed to present their story in a reasonably balanced manner. Moreover it is not apparent that they gave the members of the family the opportunity to defend themselves in advance. Therefore, there were no grounds for dispensing the applicants from their journalistic obligations. Finally, with regard to whether the measures taken against the applicants at domestic level were proportionate to the legitimate aim pursued, the Court points out that the applicants did not face criminal proceedings, nor were they ordered to pay damages. In fact, in the civil proceedings, the domestic courts only ordered the applicants to refrain from creating such impressions as those published in the article, subject to a penalty of up to 250,000 euros for each contravention, a reasonable measure where a person’s reputation has been tarnished by published information. As the application disclosed no appearance of a violation of Article 10 of the Convention, the ECtHR decided to reject the application as being manifestly ill-founded pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

**- No blanket immunity for heads of state in order to guarantee their right of freedom of speech and protect them against libel action: ECtHR 2 December 2014, Urechean and Pavlicenco v. Moldova,**

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<sup>11</sup> See also F. Kusari and D. Voorhoof, “Iceland case: Conviction of journalist for reporting about sex abuses in a Christian rehabilitation centre violated Article 10 ECHR”, *Strasbourg Observers Blog* 12 November 2014 <http://strasbourgobservers.com/2014/11/12/conviction-of-journalist-for-reporting-about-sex-abuses-in-a-christian-rehabilitation-centre-violated-article-10-echr>

**Appl. Nos. 27756/05 and 41219/07: violation of Article 6 § 1 ECHR.**

In a case against Moldova, the European Court decided that a blanket immunity in defamation proceedings in order to guarantee the free speech rights of a president is to be considered as breaching Article 6 § 1 (right of access to a court) of the European Convention on Human Rights. The Court has been called to examine many cases concerning limitation of the right of access to a court in defamation cases by operation of parliamentary immunity, but this was the first occasion on which the Court had to address the immunity from a civil libel suit from which a president or a head of State benefits.

The applicants in this case, Mr Urechean and Mrs Pavlicenco, were politicians of opposition parties at the time. In two television programmes the president of the Republic of Moldova had been interviewed by journalists on various topics such as the economy, justice, foreign relations and elections. In the interviews the president stated, among other things, that Mr Urechean as the mayor of Chişinău had created “a very powerful mafia-style system of corruption”. About Mrs Pavlicenco the president stated that she “came straight from the KGB”. Both politicians brought libel suits against the president, but the Moldovan courts held that the president enjoyed immunity and could not be held liable for opinions which he expressed in the exercise of his mandate. Before the European Court Urechean and Pavlicenco contended that the refusal of the domestic courts to examine the merits of their libel actions constituted a violation of their right of access to a court, as guaranteed by Article 6 § 1 of the Convention.

It was undisputed that there was a limitation of the applicants’ right of access to a court as a result of the refusal of the domestic courts to examine the merits of their libel actions against the president. The parties also agreed that the limitation of their right was prescribed by law and pursued a legitimate aim. While the applicants considered that the immunity enjoyed by a president should be narrower than that enjoyed by MPs, the Government argued the contrary and maintained that it should be wider. The Court, for its part, is not ready to accept either of these positions and it examines, as in the cases concerning parliamentary immunity, whether in the circumstances of the case a fair balance was struck between the competing interests involved, namely between the public’s interest in protecting the president’s freedom of speech in the exercise of his functions and the applicants’ interest in having access to a court and obtaining a reasoned answer to their complaints.

The Court finds that, in the circumstances of the case, such a fair balance had not been struck. Although a head of State’s task is not, unlike that of an MP, to be actively involved in public or political debates, the Court considers that it should be acceptable in a democratic society for States to afford some functional immunity to their heads of State in order to protect their free speech in the exercise of their functions and to maintain the separation of powers in the State. Nevertheless, such immunity, being an exception from the general rule of civil responsibility shall be regulated and interpreted in a clear and restrictive manner. In particular the Court is of the opinion that the Moldovan courts had not addressed the question of whether the then president of Moldova had made the statements about the applicants in the exercise of his mandate. Nor did the relevant constitutional provision define the limits of presidential immunity in libel actions. The Court furthermore observes that the immunity afforded to the president was perpetual and absolute: the applicants could not have had access to the courts even after the expiry of his mandate, and moreover, the president’s immunity against libel actions could not be lifted. The Court considers that

conferring such blanket immunity on the Head of State in the application of the rule of immunity was to be avoided.

The lack of alternative means of redress is another issue that has been considered by the Court, as the Government submitted that the applicants, being politicians, should have resorted to the media to express their points of view on the President's allegations about them. The Court however is not persuaded that the applicants had at their disposal an effective means of countering the accusations made against them by the head of State during the television interviews at issue.

The Court concludes, by four votes to three, that the manner in which the immunity rule was applied in the instant case constituted a disproportionate restriction on the applicants' right of access to a court and hence constituted a violation of Article 6 § 1 of the Convention. According to the three dissenting judges, the Moldovan courts had sufficiently motivated that the opinions expressed by the president during the television interviews fell within the exercise of his mandate and related to public life. They also emphasise the fairness of the judicial proceedings at the national level. According to the dissenters, the applicants could have relied on their right of reply or on other national legislation providing for a number of alternative means of redress in cases of defamation of honour, dignity and professional reputation, while these means were not illusory and could be achieved in practice. Furthermore, in their capacity as politicians the applicants fell within the category of persons open to close scrutiny of their acts, not only by the press but also – and above all – by bodies representing the public interest, thus the risk of some uncompensated damage to reputation being inevitable. For these reasons the dissenters support the presidential immunity, finding no violation of Article 6 § 1 ECHR.

#### **1.4. Balancing Article 8 (privacy/reputation/image) with Article 10 ECHR and the application of the “Von Hannover/Axel Springer AG”-criteria (GC 7 February 2012) in defamation and privacy cases**

Another characteristic of the 2014 case law is that the Court's jurisprudence, in cases of alleged breach of privacy and defamation, balances the rights under Article 8 and 10, applying the well-structured format developed by the Grand Chamber in its judgments of 7 February 2012 (*Von Hannover v. Germany* (no. 2) and *Axel Springer AG v. Germany*). In such cases, the Courts evaluates step by step the six criteria of the balancing test of the right to privacy and reputation and the right to freedom of expression, namely (1) the contribution to a debate of general interest, (2) the subject of the report and if it concerned a public figure, (3) the prior conduct of the person concerned, (4) the method of obtaining the information and its veracity, (5) the content, form and consequences of the media content and (6) the severity of the sanction imposed. Some cases concern an application because of alleged violation of Article 8: these applications are lodged against the findings by national authorities that the press reporting was guaranteed under Article 10. In other cases the applicant journalists, editors of publishers complain about the violation of their rights under Article 10, as the domestic courts have allegedly overprotected the rights under Article 8 of the Convention.

##### **1.4.a. Balancing Article 8 and 10 from the perspective of Article 8 and privacy protection: ECtHR 16 January 2014, *Lillo-Stenberg and Sæther v. Norway*, Appl. No. 13258/09.**

###### **Lillo-Stenberg and Sæther v. Norway: no violation of Article 8 ECHR.**

The applicants in this case are Lars Lillo-Stenberg and Andrine Sæther, a well-known musician and actress in Norway, who complained about press invasion of their privacy during their wedding on 20

August 2005. The European Court found that the Norwegian authorities did not fail to comply with its obligations under Article 8 (right to respect for private and family life) of the Convention, balancing the applicants' right to privacy with the right of freedom of expression by the media publishing the pictures at issue, as part of reporting about the wedding.

Without the couple's consent, the weekly magazine *Se og Hør* published a two-page article about the applicants' wedding accompanied by six photographs. The wedding took place outdoors on an islet in the Oslo fjord accessible to the public. The pictures were obtained by hiding and using a strong telephoto lens from a distance of approximately 250 meters. The pictures showed the bride, her father and bridesmaids arriving at the islet in a small rowing boat, the bride being brought to the groom by her father and the bride and groom returning to the mainland on foot by crossing the lake on stepping stones. The couple brought compensation proceedings against the magazine and won before the first two instances, but finally the Supreme Court found against the couple, by three votes to two. It considered that they had married in a place which was accessible to the public, easily visible, at a popular holiday location. Furthermore the article was neither offensive nor negative. Relying on Article 8 (right to respect for private and family life), Lars Lillo-Stenberg and Andrine Sæther complained that their right to respect for private life had been breached by the Supreme Court's judgment.

The European Court starts from the premise that the present case requires an examination of the fair balance that has to be struck between the applicants' right to the protection of their private life under Article 8 of the Convention and the publisher's right to freedom of expression as guaranteed by Article 10. The Court confirms "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. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof" and that "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". The Court again applies the criteria it considers relevant where the right of freedom of expression is being balanced against the right to respect for private life (see also *Von Hannover v. Germany* (no. 2) and *Axel Springer AG v. Germany*, 7 February 2012, Grand Chamber). These relevant criteria are : (i) contribution to a debate of general interest; (ii) how well known is the person concerned and what is the subject of the report?; (iii) prior conduct of the person concerned; (iv) method of obtaining the information and its veracity/circumstances in which the photographs were taken and (v) content, form and consequences of the publication. In the opinion of the European Court, both the majority and the minority of the Norwegian Supreme Court have carefully balanced the right of freedom of expression with the right to respect for private life, and explicitly took into account the criteria set out in the Court's case-law. The Court considered that there was an element of general interest in the article about the applicants' wedding and that the article did not contain any elements that could damage their reputation. Since the wedding took place in an area that was accessible to the public, easily visible, and a popular holiday location, it was likely to attract attention by third parties. Being well known public figures in Norway, these circumstances certainly lowered their legitimate expectation of privacy, while on the other hand no pictures were published of the private marriage ceremony itself. Although the Court considers that "opinions may differ on the outcome of a judgment", it sees no sufficient strong reasons to substitute its view for that of the

majority of the Norwegian Supreme Court. Having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the Supreme Court did not fail to comply with its obligations under Article 8 of the Convention. The interference with the right of privacy of the applicants was sufficiently justified by the right to freedom of expression of the magazine *Se og Hør*.

This case also indicates that if the Norwegian judicial authorities had come to a different result in finding a breach of privacy by *Se og Hør*, and if a case by the magazine would have been introduced as an alleged violation of Article 10, the ECtHR might have accepted the interference with the magazine's freedom of expression, referring to the margin of appreciation as well as to the circumstance that both the majority and the minority of the Norwegian Supreme Court have carefully balanced the right of freedom of expression with the right to respect for private life, and explicitly took into account the criteria set out in the Court's case-law which existed at the relevant time (notably *Von Hannover (no. 2)* and *Axel Springer AG*).

**Other relevant cases:**

**- ECtHR 14 January 2014, *Lavric v. Romania*, Appl. No. 22231/05: violation of Article 8 ECHR.**

In this case a public figure complained about the failure of the Romanian courts to convict a journalist for defaming her. The Romanian courts held that the litigious article was an allowable exaggeration and provocation, protected under Article 10 ECHR. The ECtHR however found this a violation of Article 8 ECHR. The Court considers that the accusations concerning the applicant's alleged corruption and incompetence were of a serious nature and were capable of affecting her in the performance of her duties and of damaging her reputation. A person's status as a politician or other public figure does not remove the need for a sufficient factual basis for statements which damage his or her reputation, even where such statements are considered to be value judgments, and not statements of fact. The Court notes that there is no indication that the applicant committed any offence of forgery or bribery in connection with the performance of her professional activity. In conclusion, the Court considers that the journalist failed to prove that he had written the articles with the professional care required of journalists. Therefore, it is not appropriate to make reference to the leeway generally permitted to journalists for provocation or exaggeration when articles concern public figures.

**- ECtHR 9 December 2014, *Yevgeniy Yakovlevich Dzhugashvili v. Russia*, Appl. No. 41123/10 (decision): no violation of Article 8 ECHR.**

The applicant, who is a grandson of Stalin, argued in Strasbourg that the Russian Courts had failed to protect his well-known ancestor from attacks on his reputation. In 2009 *Novaya Gazeta*, an opposition newspaper, published in its feature supplement, *Pravda Gulaga*, an article entitled "Beria pronounced guilty", which dealt with the shooting of Polish prisoners in Katyń in 1940. The article was written in accusatory terms in respect of the former USSR government and included, among others, statements in which Joseph Stalin was considered responsible for the Katyń massacre. It was stated in the newspaper article that "Stalin and the members of the Politburo of the VKP(b) who took a legally binding decision to shoot the Poles evaded moral responsibility for the extremely serious crime". Stalin was described as a "bloodthirsty cannibal". Having considered that the article slandered his grandfather, the applicant sued the publishing house, *Novaya Gazeta*, and the author, Mr Ya., for defamation. But the Russian courts dismissed the claim.

The ECtHR notes that the domestic courts considered the contribution made by the disputed publications to the debate of general interest, the role of the person concerned as well as the subject, the content, the form and the information value of the publications. Firstly, they based their reasoning on the premise that the publications contributed to the factual debate over the events of exceptional public interest and importance. Secondly, they found that the historic role of the applicant's ancestor called for a higher degree of tolerance to public scrutiny and criticism of his personality and his deeds. Finally, turning to the content and the form, the national courts noted the highly emotional character of some statements, but found them within the limits of acceptable criticism. The ECtHR also observes that the national courts explicitly took account of the Court's relevant case-law, including the general distinction between statements of facts and value judgments. Accordingly the Court considers that the domestic courts have struck a fair balance, required in the context of the State's positive obligations, between the journalist's freedom of expression under Article 10 and the applicant's right under Article 8 ECHR.

**1.4.b. Balancing Article 8 and 10 from the perspective of Article 10 in cases related to the right of reputation of public persons: ECtHR 10 July 2014, Axel Springer AG v. Germany (No. 2), Appl. No. 48311/10 (cf. *supra*); ECtHR 4 November 2014, Braun v. Poland, Appl. No. 30162/10; ECtHR 14 January 2014, Ruusunen v. Finland, Appl. No. 73579/10 and Ojala and Etukeno Oy v. Finland, Appl. No. 69939/10.**

**Braun v. Poland: violation of Article 10 ECHR.**

The applicant (a historian and film director) in this case was found liable of defamation in a civil case because of a statement during a radio debate in which he stated that a well-known professor in his country, J.M., had been a secret collaborator with the communist regime. The ECtHR considers that the statement was part of a public debate on an important issue. Most importantly the ECtHR is unable to accept the domestic courts' approach that required the applicant to prove the veracity of his allegations. It was not justified, in the light of the Court's case-law and in the circumstances of the case, to require the applicant to fulfil a standard more demanding than that of due diligence only on the ground that the domestic law had not considered him a journalist. The domestic courts, by following such an approach, had effectively deprived the applicant of the protection afforded by Article 10. Although the national authorities' interference with the applicant's right to freedom of expression may have been justified by a concern to restore the balance between the various competing interests at stake, the reasons relied on by the domestic courts cannot be considered relevant and sufficient under the Convention. This conclusion cannot be altered by the relatively lenient nature of the sanction imposed on the applicant. There has accordingly been a violation of Article 10 of the Convention.

**Ruusunen v. Finland and Ojala and Etukeno Oy v. Finland: no violation of Article 10 ECHR.**

These two cases concern the former Finnish Prime Minister's girlfriend's conviction for violating his privacy following disclosure of sexual encounters in a book she wrote and a publisher's conviction for publishing the memoir of the Prime Minister's girlfriend which had violated his privacy. In both cases the ECtHR finds no violation of Article 10 ECHR. The ECtHR accepts the domestic courts' finding that parts in the book describing the sex life of the Prime Minister and his girlfriend in the beginning of their relationship, the descriptions of their brief and passionate intimate moments as well as giving massages to each other, and accounts of their sexual intercourse, fell within the core area of the private life of the former Prime Minister. The ECtHR finds that the unauthorised publication of this

kind of information was conducive of causing the former Prime Minister suffering and contempt and it considered it necessary to restrict the applicants' freedom of expression in this respect in order to protect the former Prime Minister's private life. As the sanctions imposed only concerned fines, the ECtHR finds the interference reasonable and justified, in accordance with Article 10 § 2 ECHR. Hence it finds no violation of the right to freedom of expression of the applicants.

**1.5. Abuse of anti-terror law in Turkey continues: ECtHR 25 March 2014, Bayar (nos. 1-8) v. Turkey, Appl. Nos. 39690/06, 40559/06, 48815/06, 2512/07, 55197/07, 55199/07, 55201/07 and 55202/07: violations of Article 10 ECHR.**

In eight judgments of 25 March 2014 the ECtHR, once more, has found gross violations of the right to freedom of expression and information in Turkey. Each of the judgments concern the criminal conviction of publishing declarations from an illegal armed organisation in application of anti-terror law. The applicant in all of the eight cases is Hasan Bayar, the editor-in-chief of the *Ülkede Özgür Gündem* daily newspaper, based in Istanbul. In 2004 the newspaper published a series of statements and articles expressing, in various ways, the positions of the PKK (the Kurdistan Workers' Party), as well as statements by its leaders. It also published appeals from prisoners to the Turkish Government to negotiate with Mr Öcalan, the PKK leader. Other articles described events linked to Mr Öcalan's incarceration. Some of the statements from the PKK or Congra-Gel or PJA, a branch of the PKK, concerned the political situation of the Kurds, the role of women in society and appeals for democratisation and peace. One article, reproducing declarations of the leader of Congra-Gel, protested against the visit of the Turkish prime Minister to Iran. After the publication of each article, the public prosecutor charged Mr Bayar and the owner of the newspaper with spreading propaganda via the press and publishing material from an illegal armed organisation. On each occasion Mr Bayar and the owner of the newspaper were convicted in application of the anti-terrorism act nr. 3713 and they were ordered to pay a fine. Mr Bayar appealed to the Court of Cassation against each of these decisions, arguing that his rights guaranteed by Article 10 of the European Convention had been violated. But all the appeals by Mr Bayar were declared inadmissible.

The Strasbourg Court is of the opinion that Mr Bayar's right under Article 6 (right to a fair trial) is violated, as the Court of Cassation had wrongfully declared his appeals inadmissible. The ECtHR also finds that Mr Bayar's right to freedom of expression under Article 10 is violated, as the Court sees no pertinent reason to justify Mr Bayar's conviction. The Court says that it is aware of the difficulties the fight against terrorism was confronted with, but it emphasises at the same time the importance of the right to freedom of expression, by notifying that the impugned articles did not encourage violence, armed resistance or insurrection and did not constitute hate speech. According to the ECtHR this was crucial and it could not find any pertinent and sufficient reasons to justify any of the interferences with the editor-in-chief's right to freedom of expression.

**Other relevant cases:**

- ECtHR 21 January 2014, *Perihan and Mezopotamya Basın Tayin A.Ş. v. Turkey*, Appl. No. 21377/03
- ECtHR 17 June 2014, *Belek and Özkurt (nos. 2-7) v. Turkey*, Appl. Nos. (...) 10752/09
- ECtHR 17 June 2014, *Aslan and Sezen (nos. 1-2) v. Turkey*, Appl. Nos. 43217/04 and 15066/05

- **ECtHR 27 May 2014, Mustafa Erdoğan and Others v. Turkey, Appl. Nos. 346/04 and 39779/04**, in which the ECtHR found a violation of Article 10, due to an interference by the Turkish judicial authorities because of defamatory criticism on judges of the Constitutional Court expressed in an article in a magazine. When account is taken of the content of the article as a whole, and the context in which they were expressed, the Court is of the opinion that the impugned strong and harsh remarks contained in the article, set out in general terms, with respect to the judges of the Constitutional Court, cannot be construed as a gratuitous personal attack against the claimants. The Court also reaffirms that the courts, as with all other public institutions, are not immune from criticism and scrutiny. In particular, a clear distinction must be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or members of that court, an appropriate sanction would not, in principle, constitute a violation of Article 10 of the Convention. The Court considers that some of the language and expressions used in the article in question, notably those highlighted by the domestic courts, were harsh and that they could be perceived as offensive. They were, however mostly, value judgments, coloured by the author's own political and legal opinions and perceptions. In this connection, the Court also observes that they were based on the manner in which the Constitutional Court ruled on certain issues and that these rulings, including the dissolution of the *Fazilet* Party, were already subject to virulent public debate, as the applicant sought to demonstrate in the domestic proceedings. They could therefore be considered to have had a sufficient factual basis. The Court finally considers that the interference with the applicants' freedom of expression was not based on sufficient reasons to show that the interference complained of was necessary in a democratic society for the protection of the reputation and rights of others.<sup>12</sup>

- **ECtHR 21 October 2014, Murat Vural v. Turkey, Appl. No. 9540/07** (*cf. infra*, conviction of 13 year imprisonment for pouring paint on statue of Atatürk violated Article 10 ECHR).

#### **1.6. Denial of the rights of protesters and violations of the right to peaceful assembly and public demonstration continue in Russia: ECtHR 15 May 2014, Taranenko v. Russia, Appl. No. 19554/05**

The European Court's judgment in the case Taranenko v. Russia illustrates how Article 10 ECHR, in relation with Article 11 (freedom of assembly and association), protects collective action, expressive conduct and distribution of leaflets as a form of protected speech. The case concerns the detention and conviction of Ms Taranenko, a participant in a protest against the politics of President Putin in 2004. The protesters had occupied the reception area of the President's Administration building in Moscow and locked themselves in an office. They waved placards with "Putin, resign!" («Путин, уйди!») and distributed leaflets with a printed address to the President that listed ten ways in which he had failed to uphold the Russian Constitution, and a call for his resignation. One of the protesters, Taranenko, complained in Strasbourg about the way the Russian authorities afterwards have treated, detained, prosecuted and convicted here for participating in this protest action, claiming that her right to freedom of expression and her right of peaceful assembly had been violated.

The Court reiterates that "the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Thus,

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<sup>12</sup> See also H. Tomlinson and D. Voorhoof, "Case Law, Strasbourg: Erdoğan v Turkey, Criticising Judges and the importance of academic freedom", *Inform's Blog - The International Forum for Responsible Media Blog*, 30 May 2014

<http://inform.wordpress.com/2014/05/30/case-law-strasbourg-erdogan-v-turkey-criticising-judges-and-the-importance-of-academic-freedom-hugh-tomlinson-qc-and-dirk-voorhoof/>

it should not be interpreted restrictively". The Court also emphasizes that any measures interfering with freedom of assembly and expression "other than in cases of incitement to violence or rejection of democratic principles do a disservice to democracy and often even endanger it". The Court notes that the issues of freedom of expression and freedom of peaceful assembly are closely linked in the present case: "Indeed, the protection of personal opinions, secured by Article 10 of the Convention, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 of the Convention". The European Court underlines that the protest, although involving some disturbance of public order, had been largely non-violent and had not caused any bodily injuries. The participants in the protest action came to the President's Administration building to meet officials, hand over a petition criticising the President's policies, distribute leaflets and talk to journalists. The aim of the protesters in Moscow was indeed to obtain media-exposure, in which they effectively succeeded. The disturbance that followed was not part of their initial plan but a reaction to the guards' attempts to stop them from entering the building. In this context, the Court also examines with particular scrutiny the prison sentence as a sanction imposed by the national authorities for non-violent conduct. The Court finds in particular that while a sanction for Taranenko's actions might have been warranted by the demands of public order, her detention pending trial of almost one year and the suspended prison sentence of three years imposed on her had to have had a deterring effect on protesters. The Court considers the pre-trial detention and the prison sentence as an "unusually severe sanction" having a chilling effect on Taranenko and other persons taking part in protest actions. The Court refers to the "exceptional seriousness of the sanctions" as being disproportionate and therefore concludes that the interference had not been necessary in a democratic society for the purposes of Article 10. There had accordingly been a violation of Article 10 interpreted in the light of Article 11 of the Convention.

**Other relevant cases:**

- **ECtHR 12 June 2014, Primov a.o. v. Russia Appl. No. 17391/06: violation 11 ECHR.**

Protest ban by Russian authorities breached Article 11.

- **ECtHR 31 July 2014, Nemtsov v. Russia, Appl. No. 1774/11: violation of Article 11 ECHR**

In this case a leader of the opposition was arrested and convicted while participating in an authorized demonstration, for shouting anti-government slogans. Boris Nemtsov was a politician who has held in the past the posts of Nizhniy Novgorod governor, Deputy Prime Minister, and Minister for Energy. He later became one of the best-known opposition leaders in Russia, a founder of the political party the Union of Right Forces, and subsequently of the political movement Solidarnost. On 27 February 2015 Boris Nemtsov was assassinated in Moscow. In its judgment of 31 July 2014 the ECtHR notes the lack of any acknowledgments that the acts imputed to the applicant by the police, namely an attempted call for a spontaneous demonstration and the chanting of anti-government slogans, were by themselves protected by Articles 10 and 11 of the Convention. An order to stop those actions – had they truly occurred – required strong justification in order to be lawful. The courts dispensed with those considerations. The administrative proceedings against Nemtsov and his ensuing detention had the effect of discouraging him from participating in protest rallies or indeed from engaging actively in opposition politics. Undoubtedly, those measures had a serious potential also to deter other opposition supporters and the public at large from attending demonstrations and, more generally, from participating in open political debate. The chilling effect of those sanctions was further amplified by the fact that they targeted a well-known public figure, whose deprivation of

liberty was bound to attract broad media coverage. In view of the foregoing the ECtHR finds that the applicant's arrest and the charges against him had not been justified by a pressing social need. Therefore, the ECtHR concludes that the interference with the applicant's right to peaceful assembly could not be justified under the requirements of Article 11 § 2 of the Convention.

**Other cases of protest and disruptive or 'symbolic speech':**

**- ECtHR 23 September 2014, Vajnai v. Hungary, Appl. No. 6061/1: violation of Article 10 ECHR.**

The Court recalls that it has already found that the prosecution of a left-wing politician, participating in a peaceful demonstration for wearing a five-pointed red star on his jacket was an admissible complaint and constituted a violation of Article 10 ECHR.

**- ECtHR 30 October 2014, Shvydka v. Ukraine, Appl. No. 17888/12: violation of Article 10 ECHR.**

In the present case the applicant detached the ribbon from the wreath laid by the President of Ukraine at the monument to a famous Ukrainian poet on Independence Day, and that act was witnessed by many people. The applicant was arrested and was kept 10 days in detention. The applicant in this case submitted that, by having detached the ribbon with the inscription "President of Ukraine V.F.Yanukovych" from the wreath laid by Mr Yanukovych, she had expressed her utter disagreement with his policies, including oppression of the opposition. According to her, that act was also meant to express her protest against the imprisonment of the opposition leader Ms Yuliya Tymoshenko. Furthermore, the applicant sought to show her frustration with the constraints imposed on the public as a result of the security arrangements for Mr Yanukovych in the context of the wreath-laying ceremony. She emphasised that she had neither damaged the wreath itself nor disturbed public order. Having regard to the applicant's conduct and its context, the Court accepts that by her act she sought to convey certain ideas in respect of the President to the people around her. That act can therefore be regarded as a form of political expression. Accordingly, the Court considers that penalising the applicant for it with ten days' detention amounted to an interference with her right to freedom of expression. The Court accepted the finding by the domestic authorities that the act of the applicant could be qualified as "petty hooliganism" and could justify penalising her with a sanction envisaged by the relevant provision complied with the requirement of lawfulness. The Court is of the opinion however that the domestic courts applied to the applicant, a sixty-three-year-old woman with no criminal record, the harshest sanction for what in fact constituted a wrongdoing not involving any violence or danger. In doing so, the court referred to the applicant's refusal to admit her guilt, thus penalising her reluctance to change her political views. The Court sees no justification for that and considers the measure to be disproportionate to the aims pursued. The Court therefore concludes that the applicant's right to freedom of expression has been violated. There has accordingly been a violation of Article 10 of the Convention.

**- ECtHR 21 October 2014, Murat Vural v. Turkey, Appl. No. 9540/07: violation of Article 10 ECHR.**

In this case the applicant was arrested and later convicted for the offence of contravening the Law on Offences Committed against Atatürk, as at several occasions the applicant had poured paint on the statue of Mustafa Kemal Atatürk, the founder and the first President of the Republic of Turkey. The applicant argued that he had carried out his actions with a view to expressing his dissatisfaction with those running the country in accordance with the Kemalist ideology, and to criticising the Kemalist ideology itself. The Government considered that defiling Atatürk's statues was considered to be an act of vandalism with the element of insulting Atatürk's memory. By virtue of the nation's deep sense

of respect and adoration for Atatürk, his memory was protected by law. The applicant was sentenced to a total of thirteen years, one month and fifteen days' imprisonment. The ECtHR reiterates that Article 10 of the Convention protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. Indeed, a review of the Court's case-law shows that Article 10 of the Convention has been held to be applicable not only to the more common forms of expression such as speeches and written texts, but also to other and less obvious media through which people sometimes choose to convey their opinions, messages, ideas and criticisms. The wearing or displaying of symbols has also been held to fall within the spectrum of forms of "expression" within the meaning of Article 10 of the Convention: as in two earlier cases (*Vajnai v. Hungary* and *Fratanoló v. Hungary*), the Court accepted that the wearing of a red star in public as a symbol of the international workers' movement must be regarded as a way of expressing political views and that the display of such vestimentary symbols fell within the ambit of Article 10 of the Convention. Similarly, the Court held that the display of a symbol associated with a political movement or entity, like that of a flag, was capable of expressing identification with ideas or representing them and fell within the ambit of expression protected by Article 10 of the Convention (*Fáber v. Hungary*). The Court also has held that opinions, as well as being capable of being expressed through the media of artistic work and the wearing or displaying of symbols as set out above, can also be expressed through conduct and that protests can constitute expressions of opinion within the meaning of Article 10 of the Convention. The Court also refers to another judgment in which it held that the applicant party's slogans, even if they had been accompanied by the burning of flags and pictures, were a form of expressing an opinion in respect of an issue of major public interest, namely the presence of Russian troops on the territory of Moldova (*Christian Democratic People's Party v. Moldova (no. 2)*). The Court continues by emphasizing that Article 10 of the Convention protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. Therefore the Court considers that the same can be said for any individual who may wish to convey his or her opinion by using non-verbal and symbolic means of expression. The Court notes that the applicant was convicted for having poured paint on statues of Atatürk, which, from an objective point of view, may be seen as an expressive act and that the applicant was not found guilty of vandalism, but of having insulted the memory of Atatürk. The Court says that it is aware that Atatürk, founder of the Republic of Turkey, is an iconic figure in modern Turkey and considers that the Parliament chose to criminalise certain conduct which it must have considered would be insulting to Atatürk's memory and damaging to the sentiments of Turkish society. Nevertheless, the Court is struck by the extreme severity of the penalty foreseen in domestic law and imposed on the applicant, that is over thirteen years of imprisonment. It also notes that as a result of that conviction the applicant has been unable to vote for over eleven years. In principle, the Court considers that peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence. While in the present case, the applicant's acts involved a physical attack on property, the Court does not consider that the acts were of a gravity justifying a custodial sentence as provided for by the Law on Offences against Atatürk. Thus, having regard to the extreme harshness and grossly disproportionate character of the punishment imposed on the applicant, the Court concludes that there has been a violation of Article 10 ECHR, such an interference not being "necessary in a democratic society".

**- ECtHR 11 February 2014, Martin Donat v. Germany and Maleen Fassnacht-Albers v. Germany Appl. Nos. 6315/09 and 12134/09 (decision) : no violation of Article 11 ECHR.**

In this case against Germany the ECtHR finds no violation of the right to peaceful demonstration, the applications were dismissed as manifestly ill-founded. The ECtHR considers that a short time of detention by the police was necessary in a democratic society, as both applicants had been reasonably suspected of coercion at the relevant time and the impugned police measures were proportionate to the legitimate aim of the prosecution of offences, although later the criminal proceedings against them have been discontinued on grounds of insignificance.

### **1.7. Protection of journalistic sources, destruction of sources and searching the newsroom.**

#### **ECtHR 30 September 2014, Colm Keena and Geraldine Kennedy v. Ireland (case of *The Irish Times*), Appl. No. 29804/10 (Decision): no violation of Article 10 ECHR.**

In this case the ECtHR was of the opinion that the deliberate destruction of journalistic “sources” in order to prevent access by the judiciary could not be justified under Article 10 ECHR. In the summer of 2009, the Irish Supreme Court issued a landmark opinion, overturning an order issued against the newspaper *The Irish Times* to answer questions about a leaked document it had received from an anonymous source. Few months later however, the Supreme Court decided that the newspaper was required to pay the legal costs of the government-created body that had sought the order, because the newspaper had destroyed its copy of the leaked document before the legal action had commenced. The ECtHR ruled in *Keena and Kennedy v. Ireland* that the imposition of costs on the newspaper, even though its action was successful, was not a violation of Article 10 ECHR. According to the Court the ECHR does not confer on individuals the right to take upon themselves a role properly reserved to the courts. As the domestic courts underscored, this is, effectively, what the applicants did through the deliberate destruction of the very documents that were at the core of the Tribunal’s inquiry. Even if, as the applicants submitted, they did not intend, at that point in time, to prevent full judicial examination of the issue, this was clearly the effect of their actions.

The ECtHR does not accept that the applicant journalists could not have reasonably foreseen that the Tribunal would react as it did when confidential information was published in a national newspaper or that it would take such steps as were available to it to uphold the integrity of the inquiry. It was after the Tribunal had signaled its right to have recourse to the courts and after it had ordered the production of documents that the applicant journalists decided to destroy the evidence that would be central to the courts’ resolution of the competing public interests in issue. While *Keena and Kennedy* complained of the chilling effect of the costs order on freedom of expression, the ECtHR considers that the order for costs in the circumstances of this case can have no impact on public interest journalists who vehemently protect their sources yet recognise and respect the rule of law. The Court can discern nothing in the costs ruling to restrict publication of a public interest story, to compel disclosure of sources or to interfere in any other way with the work of journalism. What the ruling signified was that all persons must respect the role of the courts, and that nobody, journalists included, may usurp the judicial function. The European Court considers that the true purport of the Supreme Court’s ruling was to signal that no party is above the law or beyond the lawful jurisdiction of the courts. Therefore, the ECtHR concludes that there was no interference with the applicants’ right to freedom of expression, and the complaint is considered manifestly ill-founded.<sup>13</sup>

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<sup>13</sup> For a critical analysis, see R. Ó Fathaigh, “Imposing Costs on Newspaper in Successful Source-Protection Case Did Not Violate Article 10”, *Strasbourg Observers Blog* 17 November 2014, <http://strasbourgobservers.com/2014/11/17/imposing-costs-on-newspaper-in-successful-source-protection-case-did-not-violate-article-10/#more-2691>

**ECtHR 27 May 2014, Stichting Ostade Blade v. The Netherlands, Appl. No. 8406/06 (Decision): no violation of Article 10 ECHR.**

In this decision, the ECtHR finds that a search and confiscation of computers and other editorial materials and data did not breach Article 10 of the Convention, mainly because the judicial authorities were trying to identify the perpetrator of a series of bomb attacks and that they had good reason to believe that the confiscated material at a magazine newsroom could help their investigation. The applicant foundation in this case is the publisher of the bi-weekly magazine “*Ravage*” which appeared once every two weeks. On 2 May 1996 the magazine issued a press release in which it announced the upcoming issue of the magazine, to be released the following day, which would include the letter of the Earth Liberation Front (“ELF”) claiming responsibility for three recent bomb attack that took place in Arnhem (“ELF’s letter”). The next day a search of the magazine’s premises took place following the issuance of a search warrant by the Arnhem Regional Court. The search took place under supervision of an investigating judge (*rechter-commissaris*) and was carried out in the context of criminal investigations against the perpetrators of the three bomb attacks that had occurred in Arnhem. When informed that the judicial authorities were in search of ELF’s letter, an editor of the magazine, Mr K., informed the investigative judge that the letter was not present on the premises. When it became apparent that it would take much time to make copies of all the relevant materials, the investigating judge asked Mr K. whether he wished the copying to continue at the magazine’s premises or whether he preferred the police to take the relevant materials away to continue copying somewhere else. Mr K. chose the latter. The police took four computers which included the subscriber database as well as lists of addresses, a large number of application forms of new subscribers, address wrappers, a diary (*agenda*), a telephone index (*telefoonklapper*), a typewriter, data of contact persons and other editorial materials as well as private data of the editors. The seized computers were returned to the magazine on 6 May and 9 May 1996. The investigating judge informed the applicant foundation’s lawyer that the computer files would not be shared with third parties without his permission, and that the police and public prosecutor were aware of this. As nothing relevant was found, a few weeks later, in a letter to the lawyer, the investigating judge stated that all the documents and had been destroyed. Complaints about the violation of the magazine’s right of privacy and freedom of expression under Article 8 and 10 of the Convention were dismissed by the Netherlands courts.

Invoking Article 10 of the Convention the applicant foundation complained that the search for the letter on the magazine’s premises had violated its right to receive and impart information. Invoking Article 13 in conjunction with Articles 8 and 10 ECHR it also complained that as it had not received any compensation, the interference by the authorities also violated its right to an effective remedy.

The ECtHR finds that the order to hand over the letter, which was followed by a search of the applicant foundation’s premises when it was not obeyed, constituted an interference with the applicant foundation’s right to “receive and impart information”, as set out in Article 10 § 1. The ECtHR however clarifies that it was not dealing with an interference restricting the protection of journalistic sources. According to the ECtHR it is undeniable that, even though the protection of a journalistic “source” properly so-called is not in issue, an order directed to a journalist to hand over original materials may have a chilling effect on the exercise of journalistic freedom of expression. The degree of protection under Article 10 of the Convention to be applied in the actual situation did not

reach the same level as that afforded to journalists when it comes to their right to keep their “sources” confidential. The distinction lies in that the latter protection is twofold, relating not only to the journalist, but also and in particular to the “source” who volunteers to assist the press in informing the public about matters of public interest. In the present case the magazine’s informant was not motivated by the desire to provide information which the public were entitled to know. On the contrary, the informant, was claiming responsibility for crimes which he had himself committed; his purpose in seeking publicity through the magazine *Ravage* was to don the veil of anonymity with a view to evading his own criminal accountability. For this reason, the ECtHR takes the view that he was not, in principle, entitled to the same protection as the “sources” in other cases, like in *Goodwin v. UK*, *Roemen and Schmit v. Luxembourg*, *Ernst and Others v. Belgium*, *Voskuil v. The Netherlands*, *Tillack v. Belgium*, *Financial Times v. UK*, *Sanoma v. The Netherlands* and *Telegraaf v. The Netherlands*. Turning to the question of “necessity in a democratic society”, the ECtHR notes that the original document received by the editorial board of the magazine *Ravage* was sought as a possible lead towards identifying a person or persons unknown who were suspected of having carried out a plurality of bomb attacks. Having regard to the inherent dangerousness of the crimes committed, the ECtHR is of the opinion that this constitutes sufficient justification for the investigative measures in issue. Furthermore the ECtHR takes into account that all materials seized were returned, with the exception of a typewriter ribbon which was destroyed, and that all information not relevant to the investigation was likewise destroyed, while there is no indication that the authorities had destroyed the confidentiality of information entrusted to the magazine’s editors. In the circumstances, which are further characterised by the fact that the search was occasioned by the wilful destruction of the letter, the Court is not disposed to lay the blame on the authorities. The ECtHR rejects the application as manifestly ill-founded, also with regard the alleged violation of Article 13 of the Convention.

#### **1.8. Fernández Martínez v. Spain and S.A.S. v. France: two controversial judgments by the Grand Chamber, finding no violation of the ECHR in cases related to the freedom of religion.<sup>14</sup>**

##### **ECtHR 12 June 2014, Fernández Martínez v. Spain, Appl. No. 56030/07: publicity in the press of married status of priest who supported criticism on the doctrine of the Catholic church can lead to termination of contract as teacher of Catholic religion and ethics: no violation of the ECHR**

From October 1991 onwards, the applicant was employed as a teacher of Catholic religion and ethics in a State-run secondary school of the region of Murcia under a renewable one-year contract. He was a former priest but in the meantime a married man and the father of five children. He was granted dispensation by the Pope from celibacy, with the consequence that he lost his clerical “state”. The applicant complained about the non-renewal of his contract of employment in 1997, after the publicity in the press that the applicant had given to his personal situation. It was not the applicant himself who published an article in the Murcian newspaper *La Verdad* about his views or his family life, but it was a journalist who wrote about a meeting of the Movement for Optional Celibacy” of priests (MOCEOP) and included both a photograph of the applicant and his family and a description of the views held by a group of former priests including the applicant.

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<sup>14</sup> See also <http://strasbourgobservers.com/2014/06/23/fernandez-martinez-v-spain-the-grand-chamber-putting-the-breaks-on-the-ministerial-exception-for-europe/> and <http://strasbourgobservers.com/2014/07/09/s-a-s-v-france-as-a-problematic-precedent/>

The Grand Chamber recognises that various Convention articles, in particular Articles 8, 9, 10 and 11, are relevant for the assessment of the case. Article 8 is relevant in so far as it encompasses the applicant's right to continue his professional life, his right to respect for his family life and his right to live his family life in an open manner. Article 9 is relevant in so far as it protects the applicant's right to freedom of thought and religion. Article 10 is relevant in so far as it protects the applicant's right to express his opinions about official Church doctrines and Article 11 in so far as it guarantees his right to be a member of an organisation holding specific views on issues concerning religion. In the Court's view, however, the main issue in the present application lies in the non-renewal of the applicant's contract. The Court states that the applicant did not complain about being prevented from holding and disseminating certain views or from being a member of the MOCEOP. The gist of his complaint is that he was not able to remain a teacher of the Catholic religion as a direct consequence of the publicity given to his family situation and of the fact that he was a member of the MOCEOP. For that reason the Grand Chamber takes the view, like the Chamber, that the application should be examined under Article 8 of the Convention.

The Court was called upon to rule on a conflict between two rights that are equally protected by the Convention. In such a case, it must weigh up the interests at stake. This balancing exercise concerns the applicant's right to his private and family life, on the one hand, and the right of religious organisations to autonomy, on the other. The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 of the Convention affords. It has a direct interest, not only for the actual organisation of those communities but also for the effective enjoyment by all their active members of the right to freedom of religion. Respect for the autonomy of religious communities recognised by the State implies, in particular, that the State should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them that might pose a threat to their cohesion, image or unity. That being said, a mere allegation by a religious community that there is an actual or potential threat to its autonomy is not sufficient to render any interference with its members' rights to respect for their private or family life compatible with Article 8 of the Convention. In addition, the religious community in question must also show, in the light of the circumstances of the individual case, that the risk alleged is probable and substantial and that the impugned interference with the right to respect for private life does not go beyond what is necessary to eliminate that risk and does not serve any other purpose unrelated to the exercise of the religious community's autonomy. Neither should it affect the substance of the right to private and family life.

With regard to the publicity given by the applicant to his situation as married priest, the ECtHR finds that in choosing to accept a publication about his family circumstances and his association with what the Bishop considered to be a protest-oriented meeting, he severed the special bond of trust that was necessary for the fulfilment of the tasks entrusted to him. Having regard to the importance of religious education teachers for all faith groups, it was hardly surprising that this severance would entail certain consequences. Thus, in the present case the problem lies in the fact that the applicant could be understood to have been campaigning in favour of his way of life to bring about a change in the Church's rules, and in his open criticism of those rules. In the Court's view, he had also expressed support for contraception and disagreement with the Catholic Church's positions on other

subjects such as abortion, birth control and the optional celibacy of priests. Although this kind of remark falls within the freedom of expression protected by Article 10 of the Convention, that does not mean that the Catholic Church was precluded from acting on them, in the enjoyment of its autonomy, which is also protected by the Convention, under Article 9. In this connection, the Court observes that in assessing the seriousness of the conduct of an individual employed by the Church it is necessary to take into account the proximity between the person's activity and the Church's proclamatory mission. In the present case, that proximity is clearly very close. In the Court's view, the fact of being seen as campaigning publicly in movements opposed to Catholic doctrine clearly runs counter to the duty of loyalty towards the Catholic Church. In addition, there is little doubt that the applicant, as former priest and director of a seminary, was or must have been aware of the substance and significance of that duty. The Court also refers to the fact that the applicant had been teaching adolescents, who were not mature enough to make a distinction between information that was part of the Catholic Church's doctrine and that which corresponded to the applicant's own personal opinion. The Grand Chamber finally noted that, for the purposes of the present case, a less restrictive measure for the applicant would certainly not have had the same effectiveness in terms of preserving the credibility of the Church. It thus does not appear that the consequences of the decision not to renew his contract were excessive in the circumstances of the case, having regard in particular to the fact that the applicant had knowingly placed himself in a situation that was completely in opposition to the Church's precepts.

The ECtHR also finds that the domestic courts took into account all the relevant factors in this case and, even though they emphasised the applicant's right to freedom of expression, they weighed up the interests at stake in detail and in depth. In conclusion, having regard to the State's margin of appreciation, the Court is of the view, by a narrow 8-9 split decision, that the interference with the applicant's right to respect for his private life was not disproportionate. Accordingly, there has been no violation of Article 8 of the Convention. The Court also held that there was no need to examine separately the complaints under Articles 9 and 10, taken separately or together with Article 14 of the Convention.

The eight dissenting judges *inter alia* emphasise that the termination of the contract was not based on any criticism publicly voiced by the applicant, but merely on his family situation and his membership of an association of married priests. They also refer to the fact that the majority conclude that "the applicant could be understood to have been *campaigning* in favour of his way of life to bring about a change in the Church's rules", referring to "his *open* criticism of those rules" (§ 137 and 141 "being seen as campaigning publicly"). The dissenters argue that such a conclusion cannot be drawn from the facts of the case.

**ECtHR 1 July 2014, S.A.S. v. France, Appl. No. 43835/11: "living together" and the so-called burqa-ban: no violation of the ECHR.**

The applicant in S.A.S. v. France is a devout Muslim wearing the burqa and niqab in accordance with her religious faith, culture and personal convictions. She complained of a violation of her right to respect for her private life, her right to freedom to manifest her religion or beliefs and her right to freedom of expression, together with discrimination in the exercise of these rights, because of a new law in France prohibiting for anyone to conceal their face in public places. She relied on Articles 8 (privacy), 9 (religion) and 10 of the Convention, taken separately and together with Article 14 (non-

discrimination). The Court is of the view that personal choices as to an individual's desired appearance, whether in public or in private places, relate to the expression of his or her personality and thus fall within the notion of private life. Consequently, the ban on wearing clothing designed to conceal the face in public places, pursuant to the French Law of 11 October 2010, falls under Article 8 of the Convention. That a category of religious people consequently are prevented from wearing in public places clothing that the practice of their religion requires them to wear, also raises an issue with regard to the freedom to manifest one's religion or beliefs (Article 9). The Court evaluated the applicant's argument solely from these two perspectives, leaving aside the Article 10 claim by the applicant. This is as such a remarkable approach, as the Court in other occasions had applied Article 10 in cases of wearing symbols, covered by the right to freedom of expression.

In evaluating whether the interference with the applicant's rights could be justified under Articles 8 § 2 and especially under Article 9 § 2 of the Convention, the Court dismissed some of the arguments of the French Government, such as the public safety argument and the respect for equality between men and women. The Court also takes the view that, however essential it may be, respect for human dignity cannot legitimately justify a blanket ban on the wearing of the full-face veil in public places. The Court is aware that the clothing in question is perceived as strange by many of those who observe it. It points out, however, that it is the expression of a cultural identity which contributes to the pluralism that is inherent in democracy. It notes in this connection the variability of the notions of virtuousness and decency that are applied to the uncovering of the human body. Moreover, the Court does not perceive any evidence capable of leading it to consider that women who wear the full-face veil seek to express a form of contempt against those they encounter or otherwise to offend against the dignity of others. Very surprisingly however the Court, referring to the "respect for the minimum set of values of an open and democratic society", accepts that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier. The Court indeed takes into account the respondent State's point that the face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court finds that the impugned ban can be regarded as justified in its principle in so far as it seeks to guarantee the conditions of "living together" in a society. It accepts that it falls within the powers of the State to secure "the conditions whereby individuals can live together in their diversity". Having regard in particular to the breadth of the margin of appreciation afforded to the respondent State in the present case, the Court finds that the ban imposed by the French Law of 11 October 2010 can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of "living together" as an element of the "protection of the rights and freedoms of others". Accordingly, there has been no violation either of Article 8 or of Article 9 of the Convention. The Court furthermore admits that the ban imposed by the Law of 11 October 2010 may have specific negative effects on the situation of Muslim women who, for religious reasons, wish to wear the full-face veil in public, but as this measure has an objective and reasonable justification for the reasons indicated previously, there is no violation of Article 14 of the Convention either.

After its finding of non-violation of the articles 8, 9 and 14, the Court is of the view that no issue arises under Article 10 of the Convention, taken separately or together with Article 14 of the Convention, that is separate from those that it has examined under Articles 8 and 9 of the Convention, taken separately and together with Article 14 of the Convention.

It is interesting to notice that the Grand Chamber refers in this judgment to its earlier case law on religious hate speech. The Court emphasises that a State which enters into a legislative process of introducing a ban on wearing clothing designed to conceal the face in public places, on the basis of Islamophobic motives, takes the risk of contributing to the consolidation of the stereotypes which affect certain categories of the population and of encouraging the expression of intolerance, when it has a duty, on the contrary, to promote tolerance. The Court reiterates that “remarks which constitute a general, vehement attack on a religious or ethnic group are incompatible with the values of tolerance, social peace and non-discrimination which underlie the Convention and do not fall within the right to freedom of expression that it protects (..)” (§ 149).

# 1.bis The CJEU, human rights, internet, protection of personal data and copyright

## Introduction

Case law of the Court of Justice of the EU (CJEU) of the last few years has accepted the delimitation of intellectual property and copyright law when conflicting with other fundamental rights.<sup>15</sup> In *Scarlet Extended v. Sabam* (2011) the CJEU made clear that “the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights”, including the right to freedom of expression and information guaranteed by Article 10 of the Convention.<sup>16</sup> The CJEU confirmed this approach in *Sabam v. Netlog NV* (2012), reiterating that an injunction requiring the installation of a filtering system that would involve monitoring all or most of the information stored by a hosting service provider in the interests of those right-holders, would be in breach with the right of information. The CJEU stated that such an 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”.<sup>17</sup> Again in 2014 the CJEU has delivered some interesting judgments **balancing copyright protection with the right to freedom of expression and information.**

In 2014 the CJEU has also delivered an interesting judgment with regard **E-Commerce and the limited liability of ISP’s.** The CJEU clarifies that since a newspaper company publishing an online version of its newspaper on its website has, in principle, knowledge about the information which it posts and exercises control over that information, it cannot be considered to be an “intermediary service provider” within the meaning of Articles 12 to 14 of Directive 2000/31.

Before presenting the 2014 case law of the CJEU balancing IP and copyright law with the right to freedom of expression and information and applying the principles of the E-commerce Directive on the liability of ISP’s and online news fora, a brief reference is made to probably the most (in)famous judgment of the CJEU in 2014, judgment that is to be situated in the domain of **protection of personal data and the right to freedom of expression.**<sup>18</sup> As this judgment, which is often labelled as having established a “right to be forgotten”, will be more thoroughly analysed and discussed in another session, by other rapporteurs, only the very essence of this ruling of the CJEU is presented.<sup>19</sup>

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<sup>15</sup> See e.g. CJEU 1 December 2011, Case C-145/10, *Eva-Maria Painer*, in which the CJEU refers to the impact of Article 10 ECHR “having regard to the purpose of the press, in a democratic society governed by the rule of law, to inform the public, without restrictions other than those that are strictly necessary” and CJEU 18 July 2013, Case C-201/11 P, *UEFA v. Commission*, in which the CJEU stated in the case of major events that UEFA’s property rights under Article 17 of the EU Charter were indeed affected by Article 3a of Directive 85/552 and that in this case the obstacle to the right of property was justified by the objective of protecting the right to information and ensuring wide access by the public to television coverage of events of major importance.

<sup>16</sup> CJEU 24 November 2011, Case C-70/10, *Scarlet Extended NV v. Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM)*.

<sup>17</sup> CJEU 16 February 2012, Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*.

<sup>18</sup> On this issue see also the earlier case of the European Court of Justice: ECJ 16 December 2008, Case C-73/07, *Tietosuoja- ja valtuutus v. Satakunnan Markkinapörssi Oy, Satamedia Oy*.

<sup>19</sup> For an elaborate analysis, see the Guidelines on the implementation of the CJEU judgment in the Google Spain case by the Article 29 Data Protection Working Party, 26 November 2014,

Apart from the Google-Spain judgment, also another CJEU judgment on data protection and esp. date retention in the fight against terrorism, will be briefly referred to.

## **Overview of the case law of the CJEU 2014**

### **Cases related to data protection and freedom of expression and information**

#### **- CJEU 13 May 2014, Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, C-131/12 (Grand Chamber): request for removal of personal data in list of results of search engine**

The CJEU clarifies that the operator of a search engine must be regarded as the ‘controller’ in respect of processing personal data in the meaning of Article 2(d) of the Directive 95/46/EC of 24 October 1995. 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. A person (data subject) has a right that information in relation to him personally should, 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, (right to the respect for private life, and the right to the protection of personal data) 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.

In contrast with the general perception that has been created about this case, the judgment of the CJEU in the Google Spain case does not recognise nor mention a “right to be forgotten”, neither in general terms, nor in relation to the application of the Data Protection Directive 95/46/EC of 24 October 1995.

Although the CJEU recognises that there may be circumstances (“particular reasons”) in which exceptionally the remaining of the public accessibility of personal data can be justified “by the preponderant interest of the general public”, it is remarkable that the judgment omits to refer to the right to freedom of expression and the right to receive information as guaranteed by Article 10 ECHR

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[http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf). See also [http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29\\_press\\_material/20141126\\_wp29\\_press\\_release\\_ecj\\_de-listing.pdf](http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/20141126_wp29_press_release_ecj_de-listing.pdf) and <https://inform.wordpress.com/2014/11/28/google-spain-article-29-working-party-issues-guidelines-for-de-listing-decisions/>

and Article 11 EU Charter. In practice however, the impact of the de-listing on individuals' rights to freedom of expression and access to information will prove to be very limited, according to the Article 29 Data Protection Working Party, referring to the public's the right to information: "When assessing the relevant circumstances, European Data Protection Authorities (hereinafter: DPAs) will systematically take into account the interest of the public in having access to the information. If the interest of the public overrides the rights of the data subject, de-listing will not be appropriate. The judgment states that the right only affects the results obtained from searches made on the basis of a person's name and does not require deletion of the link from the indexes of the search engine altogether. That is, the original information will still be accessible using other search terms, or by direct access to the publisher's original source".<sup>20</sup>

#### **- CJEU 8 April 2014, Digital Rights Ireland Case C-293/12 (Grand Chamber) on data retention and the fight against organized crime and terrorism**

Another important CJEU judgment dealing with data protection is indeed to be mentioned, although finally in the case C-293/12 of Digital Rights Ireland Ltd regarding the EU Data Retention Directive, the CJEU considered that there was no need to examine the validity of the Data Retention Directive in the light of the right to freedom of expression and information under Article 11 of the EU-Charter and Article 10 ECHR.<sup>21</sup> Having regard to other considerations, the CJEU held that, by adopting Directive 2006/24, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality in the light of the right of privacy and protection of personal data under Articles 7, 8 and 52(1) of the EU-Charter. The CJEU decided most importantly: "As regards the necessity for the retention of data required by Directive 2006/24, it must be held that the fight against serious crime, in particular against organised crime and terrorism, is indeed of the utmost importance in order to ensure public security and its effectiveness may depend to a great extent on the use of modern investigation techniques. However, such an objective of general interest, however fundamental it may be, does not, in itself, justify a retention measure such as that established by Directive 2006/24 being considered to be necessary for the purpose of that fight". According to the CJEU the EU legislation in question must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards so that the persons whose data have been retained have sufficient guarantees to effectively protect their personal data against the risk of abuse and against any unlawful access and use of that data. The need for such safeguards is all the greater where, as laid down in Directive 2006/24, personal data are subjected to automatic processing and where there is a significant risk of unlawful access to those data. Because the Directive 2006/24 is considered being overbroad and is lacking substantive, procedural and other safeguards in the light of the right of privacy and data protection, it is considered not laying down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter. The CJEU holds therefore that Directive 2006/24 entails a

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<sup>20</sup> Article 29 Data Protection Working Party, Guidelines of 26 November 2014, [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf).

<sup>21</sup> CJEU 8 April 2014, Case C-293/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, Commissioner of the Garda Síochána, Ireland*, Requests for a preliminary ruling concerning the validity of Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary. Therefore the CJEU ruled that Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC is invalid.

### **Case related to the EU E-commerce Directive and the limited liability of intermediary service providers on the internet**

**- CJEU 11 September 2014, Sotiris Papasavvas v O Fileleftheros Dimosia Etairia Ltd, Takis Kounnafi, Giorgos Sertis, Case C-291: the limitations of civil liability for ISP's do not apply for a newspaper's online version**

The request for a preliminary ruling in this case 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 (E-commerce Directive). The questions focus mainly on the applicability of the limitations for liability of ISP's, as mere conduit, caching or hosting providers. In essence, ISP's (or: intermediary service providers), cannot be held liable for content they transmit or store on their network when the ISP has neither knowledge, nor control over the information which is transmitted or stored. The CJEU reiterates that "the exemptions from liability established in the E-commerce directive cover only cases in which the activity of the information society service provider is of a merely technical, automatic and passive nature, which implies that that service provider has neither knowledge of nor control over the information which is transmitted or stored". This means that online newspapers cannot invoke the limited liability that is applicable for ISP's, as the newspaper itself publishes its content online, being aware of this content.

The case relates to the proceedings between Mr Papasavvas, on the one hand, and O Fileleftheros Dimosia Etairia Ltd, Mr Kounnafi and Mr Sertis, on the other, concerning an action for damages brought by Mr Papasavvas as a result of harm suffered by him caused by acts considered to constitute defamation. Mr Papasavvas brought an action for damages before the Eparchiako Dikastirio Lefkosias in Cyprus against O Fileleftheros Dimosia Etairia Ltd, a newspaper company, and against Mr Kounnafi, Editor-in-Chief and journalist at O Fileleftheros, and Mr Sertis, journalist at that newspaper, for acts which, in his opinion, constitute defamation. Mr Papasavvas seeks damages for harm allegedly caused to him by articles published in the daily national newspaper O Fileleftheros, on 7 November 2010, which were published online on two websites (<http://www.philenews.com> and <http://www.phileftheros.com>). He requests also the national court to order a prohibitory injunction to prohibit the publication of the contested articles.

As the court in Cyprus considers that the resolution of the case pending before it depends in part on the interpretation of Directive 2000/31, it decided to refer a series of questions to the CJEU for a preliminary ruling.

In essence the CJEU clarifies that since a newspaper publishing company which posts an online version of a newspaper on its website has, in principle, knowledge about the information which it posts and exercises control over that information, it cannot be considered to be an 'intermediary

service provider' within the meaning of Articles 12 to 14 of Directive 2000/31, whether or not access to that website is free of charge. Therefore the limitations of civil liability specified in Articles 12 to 14 of Directive 2000/31 do not apply to the case of a newspaper publishing company which operates a website on which the online version of a newspaper is posted, that company being, moreover, remunerated by income generated by commercial advertisements posted on that website, since it has knowledge of the information posted and exercises control over that information, whether or not access to that website is free of charge.

The CJEU also decides that Articles 12 to 14 of the E-commerce Directive 2000/31 do not allow information society service providers to oppose the bringing of legal proceedings for civil liability against them and, consequently, the adoption of a prohibitory injunction by a national court. The limitations of liability provided for in those articles may be invoked by the provider in accordance with the provisions of national law transposing the Articles 12 to 14 of the Directive or, failing that, for the purpose of an interpretation of that law in conformity with the directive. Since the service providers at issue in the main proceedings do not appear capable of being considered to be intermediary service providers referred to by Articles 12 to 14 of Directive 2000/31, they cannot rely on this provisions.

#### **Cases related to IP, copyright law and freedom of expression and information**

**- CJEU 13 February 2014, Nils Svensson a.o. v. Retriever Sverige AB, C-466/12: “Clickable links” to works freely available on another website are no breach of copyright (*no new public, no communication to the public under Infosoc Directive 2001/29*).**

Article 3(1) of Directive 2001/29/EC 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. The objective pursued by Directive 2001/29 would inevitably be undermined if the concept of communication to the public were to be construed in different Member States as including a wider range of activities than those referred to in Article 3(1) of that directive. The CJEU observes that indeed an act of communication such as that made by a manager of a website by means of clickable link is aimed at all potential users of the site, that is to say, an indeterminate and fairly large number of recipients. But it does not lead to the works in question being communicated to a new public, as the public targeted by the initial communication already consisted of all potential visitors to the site concerned. Given that access to the works on that site was not subject to any restrictive measures, all Internet users could therefore have free access to them. It is obvious that by excluding “clickable links” as those at issue from copyright protection, the interpretation of the CJEU of what constitutes an act of communication to the public has, support guaranteeing the right to freedom of expression and information in the online environment. The CJEU however does not refer to Article 11 of the EU-Charter or Article 10 ECHR, and it argues 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”.

Notice that the CJEU’s judgment does not clarify what the status of a “clickable link” is in terms of copyright protection, from the moment that the initial communication that was first freely

accessible, has become subject after the “clickable link” was posted, to restrictive measures at the level of the initial communication on the internet.

**- CJEU 27 March 2014, UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH, C-314/12: ISP restricting access in order to protect copyright must ensure compliance with the fundamental right of internet users to freedom of information.**

The CJEU has clarified in this preliminary ruling that an ISP restricting access to protect copyright must ensure compliance with the fundamental right of internet users to freedom of information. Measures shall not affect internet users lawfully accessing information. National procedural rules must provide a possibility for internet users to assert their rights before the court once the implementing measures taken by an internet service provider are known. Failing that, the provider’s interference in the freedom of information of those users would be unjustified in the light of the objective pursued.

Article 8(3) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc Directive) provides for the possibility for right holders to apply for an injunction against intermediaries whose services are used by a third party to infringe one of their rights. It must be held that an internet service provider, which allows its customers to access protected subject-matter made available to the public on the internet by a third party is an intermediary whose services are used to infringe a copyright or related right within the meaning of Article 8(3) of Directive 2001/29. Directive 2001/29 requires that the measures which the Member States must take in order to conform to that directive are aimed not only at bringing to an end infringements of copyright and of related rights, but also at preventing them. The Court has already ruled that, where several fundamental rights are at issue, the Member States must, when transposing a directive, ensure that they rely on an interpretation of the directive which allows a fair balance to be struck between the applicable fundamental rights protected by the European Union legal order. Then, when implementing the measures transposing that directive, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with that directive but also ensure that they do not rely on an interpretation of it which would be in conflict with those fundamental rights or with the other general principles of EU law, such as the principle of proportionality. 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. When the addressee of an injunction 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. 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. It must be possible for national courts to check that that is the case. In the case of an injunction such as that at issue in the main proceedings, the Court notes that,

if the internet service provider adopts measures which enable it to achieve the required prohibition, the national courts will not be able to carry out such a review at the stage of the enforcement proceedings if there is no challenge in that regard. Accordingly, in order to prevent the fundamental rights recognised by EU law from precluding the adoption of an injunction such as that at issue in the main proceedings, the national procedural rules must provide a possibility for internet users to assert their rights before the court once the implementing measures taken by the internet service provider are known.

**- CJEU 10 April 2014, ACI Adam BV and Others v. Stichting de ThuisKopie, Stichting Onderhandeligen ThuisKopie vergoeding, C-435/12: reproduction for private use is allowed, but not if the copies are made from an unlawful source – for the calculation of the fair compensation to right holders, a copying levy system must make a distinction between reproduction from a lawful source and from an unlawful source**

This request for a preliminary ruling concerns the interpretation of Article 5(2)(b) and (5) 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 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. The request has been made in proceedings between, on the one hand, ACI Adam BV and a certain number of other undertakings ('ACI Adam and Others') and, on the other, Stichting de ThuisKopie ('ThuisKopie') and Stichting Onderhandeligen ThuisKopie vergoeding ('SONT') — two foundations responsible for, first, collecting and distributing the levy imposed on manufacturers and importers of media designed for the reproduction of literary, scientific or artistic works with a view to private use ('the private copying levy'), and, secondly, determining the amount of that levy — regarding the fact that SONT, in determining the amount of that levy, takes into account the harm resulting from copies made from an unlawful source.

In essence the CJEU made clear that the restrictions and limitation on copyright giving certain rights to users of works do not apply for reproductions for private use made from an unlawful source.

The CJEU states:

*“35 If the Member States had the option of adopting legislation which also allowed reproductions for private use to be made from an unlawful source, the result of that would clearly be detrimental to the proper functioning of the internal market.*

*36 Secondly, it is apparent from recital 22 in the preamble to Directive 2001/29, that the objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.*

*37 Consequently, national legislation which makes no distinction between private copies made from lawful sources and those made from counterfeited or pirated sources cannot be tolerated.*

*38 Furthermore, when it is applied, national legislation, such as that at issue in the main proceedings, which does not draw a distinction according to whether the source from which a reproduction for private use is made is lawful or unlawful, may infringe certain conditions laid down by Article 5(5) of Directive 2001/29.*

*39 First, to accept that such reproductions may be made from an unlawful source would encourage the circulation of counterfeited or pirated works, thus inevitably reducing the volume of sales of of*

*other lawful transactions relating to the protected works, with the result that a normal exploitation of those works would be adversely affected.*

*40 Secondly, the application of such national legislation may, having regard to the finding made in paragraph 31 of the present judgment, unreasonably prejudice copyright holders.*

*41 It is apparent from the foregoing considerations that Article 5(2)(b) of Directive 2001/29 must be interpreted as not covering the case of private copies made from an unlawful source”.*

The CJEU also decides that a copying levy system, such as that at issue in the main proceedings, which does not, as regards the calculation of the fair compensation payable to its recipients, distinguish the situation in which the source from which a reproduction for private use has been made is lawful from that in which that source is unlawful, does not respect the fair balance between the rights and interests of authors, who are the recipients of the fair compensation, on the one hand, and those of users of protected subject-matter, on the other. As a consequence this precludes national legislation, such as that at issue in the main proceedings, which does not distinguish the situation in which the source from which a reproduction for private use is made is lawful from that in which that source is unlawful.

The CJEU also reiterates that the provisions in the Directive 2001/20 that refer to the exceptions and limitations on copyright and related rights, derogate from a general principle established by that directive and therefore must be interpreted strictly. It follows that the different exceptions and limitations provided for in the case at issue (Article 5(2) of Directive 2001/29) must be interpreted strictly. It is obvious that together with the Article 5(5) of Directive 2001/29 that requires that the exceptions and limitations to the reproduction right are to be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder, this strict interpretation of the exceptions and limitations on copyright and related rights may obstruct the fair balance which must be reached between the rights and interests of authors, on the one hand, and those of users of works, on the other hand.

**- CJEU 3 September 2014, *Vandersteen v. Deckmyn*, C-201/13 (Grand Chamber): preliminary ruling in Belgian Parody Case (Spike and Suzy) – parody as a format of freedom of expression, delimiting the rights of copyright holders**

This case concerns the parody as a format of freedom of expression and the balancing enforcement of copyright conflicting with the right to freedom of expression. The CJEU introduces a broad concept of parody, that can limit copyright claims in cases of “transformative use” of copyright protected works. Still copyright holders can eventually oppose against a parody, if the parody contains a discriminatory message they do not want to be associated with.

A pending case in Belgium on parody contains many ingredients, including an interesting aspect with regard to the relation between copyright and freedom of expression. The case concerns a small calendar, less than 6 by 9 centimeters, distributed in January 2011 by the radical right-wing political party *Vlaams Belang*, representing one of the Spike and Suzy comic book’s main characters, Ambrose (Lambik), wearing a white tunic and throwing coins to people who are trying to pick them up. The calendar resembles the cover of an original Spike and Suzy album, “De Wilde Weldoener”, roughly to be translated as “The Compulsive Benefactor”. In the drawing at issue, the character of Ambrose is

replaced by the Mayor of the City of Ghent. The people picking up the coins are replaced by people wearing veils and people of colour. The President of the Court of First Instance in Brussels, on request of the copyright holders ordered an injunction and rejected the parody defense by the Vlaams Belang, in essence because of lack of originality and because the parody did not criticize the work of Willy Vandersteen, but targeted the policy by the Mayor of Ghent. The Court of Appeal in Brussels showed reluctance how to decide the case and asked for a preliminary ruling by the CJEU in order to give some guidance how to apply the parody exception in the framework of EU copyright law.

It is interesting to notice that the CJEU draws the attention on the conflicting rights at issue, considering that “the application, in a particular case, of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, must strike a fair balance between, on the one hand, the interests and rights of persons referred to in Articles 2 and 3 of that directive (*reproduction right and right of communication to the public*), and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k)”. This approach of balancing copyright with the right to freedom of expression can also be found in the recent case law of the European Court of Human Rights.<sup>22</sup>

The judgment of the CJEU of 3 September 2014 opts for a broad, even a very broad definition of what can consist a parody and hence extends the range and application of the parody exception. Indeed in some EU member states, and especially in Belgium, the parody concept was given a much narrower interpretation as compared to the new established European standard.<sup>23</sup>

The CJEU decides that “the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery”. These are actually the only two relevant and pertinent characteristics, as all other criteria or conditions formulated by the Brussels Court of Appeal in its request for a preliminary ruling are irrelevant, according to the CJEU. The CJEU is very decisive and clear : “The concept of ‘parody’ (..) , is not subject to the conditions that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; that it could reasonably be attributed to a person other than the author of the original work itself; that it should relate to the original work itself or mention the source of the parodied work”. This also implies that both the parody ‘on’ and the parody ‘with’ are covered by the EU parody exception: a parody does not need to criticize or be directly in contrast or in a dialogue with the original work, as it does not need “to relate to the original work itself”. The CJEU opts for a wide and flexible parody concept, emphasizing that the concept of parody must be broad enough to “enable the effectiveness” of that exception and to safeguard its purpose. The CJEU considers that it “is not disputed that parody is an

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<sup>22</sup> See also our blogs on the Ashby Donald and “The Pirate Bay” case: D. Voorhoof and I. Høedt-Rasmussen, “Copyright vs. Freedom of Expression”, <http://inform.wordpress.com/2013/01/26/case-law-court-of-human-rights-ashby-donald-v-france-copyright-versus-freedom-expression-dirk-voorhoof-and-inger-hoedt-rasmussen/#more-19417> and “Copyright vs. Freedom of Expression II (The Pirate Bay)”, <http://inform.wordpress.com/2013/03/22/case-law-court-of-human-rights-the-pirate-bay-v-sweden-copyright-versus-freedom-of-expression-ii-dirk-voorhoof-and-inger-hoedt-rasmussen/#more-20411>. For a more extensive and recent analysis, see D. Voorhoof, “Freedom of expression and the right to information: Implications for copyright”, in C. GEIGER (ed.), *Research Handbook on Human Rights and Intellectual Property* (Cheltenham-Northampton: Edward Elgar), 2015, 331-353.

<sup>23</sup> See also D. Mendis and M. Kretschmer, *The Treatment of Parodies under Copyright Law in Seven Jurisdictions* (Intellectual Property Office, 2013), at [www.ipo.gov.uk](http://www.ipo.gov.uk).

appropriate way to express an opinion”, and that the envisaged EU-harmonisation of copyright right and related rights in the information society, can only be reached in “observance of the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.”

Therefore it is necessary but sufficient that a parody “evokes” an existing work being noticeably different from it and that it constitutes an expression of “humour or mockery”. It means that the national judges in the EU-Member states can only apply these two criteria in determining whether or not the parody-exception as mentioned in Article 5(3)(k) of the Infosoc Directive 2001/29, and implemented in their national law, can be invoked. It is to be observed that the interpretation whether a parody expresses “humour or mockery” should be approached with due care, the courts or judges in this context becoming the jury of what humour or mockery is (and is not). For sure, there is no autonomous concept of EU law what humour or mockery is, while the “humour or mockery”-criteria are ultimately and decisively the criteria to determine whether a parody fits in the autonomous concept of parody in EU law. There at least fifty shades of humour and mockery...

Even if the Vlaams Blok calendar is to be considered as a parody, the CJEU clarifies that the right holders still have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with a discriminatory message. The result of this approach risks to compromise the “fair balance” between the rights of the copyright holders and the right to freedom of artistic or political expression by the users of the copyright protected work. The CJEU explicitly refers to the EU instruments that can eventually justify an interference in the right to freedom of expression on the basis of combatting discrimination (the Council Directive 2000/43/EC of 29 June 2000 and Article 21(1) of the Charter of Fundamental Rights of the European Union), but no longer refers in this regard to Article 11 of the EU Charter of Fundamental Rights or Article 10 ECHR.

By leaving wide open the possibility for right holders to oppose against a parody they dislike to be associated with, the approach of the CJEU also risks to compromise the aim and ratio of the parody exception. The essence of the parody exception is precisely to legitimise a transformative use of an original work without permission of the right holder, as in principle copyright holders are not to be expected to authorise spontaneously the transformative use of their original work. If copyright holders can oppose the making of transformative works they do not want to be associated with, not much will be left of the parody exception, albeit it a broad concept in the terms of a harmonised concept of EU law. In this specific case however there is the circumstance that the right holders do not want to be associated with what they consider a discriminatory message or “hate speech”.

It is now up to national courts, and if need be the European Court of Human Rights in a later stage, to clarify whether the application of a copyright claim clearly interfering with the right to freedom of expression an information, can be sufficiently justified as necessary in a democratic society. As the CJEU’s judgment is “only” a preliminary ruling, the final outcome of the case at hand is still uncertain. The circumstance that right holders have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with a discriminatory message, does not mean that this is a sufficiently pertinent argument in this case to put aside the parody exception and to interfere with the freedom of political expression of the parodist.

Yet, the judgment of the CJEU has undoubtedly clarified that the parody exception is to be applied as a very broad concept in European law. This also obliges the EU member states to interpret the

parody exception, in as far as it is provided in their national copyright legislation, accordingly. EU member states who have not integrated a parody exception yet in their copyright law will now be inclined to do so. As according to the CJEU a “fair balance” must be struck between the rights and interests of the right holders of an original work and the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k), it is hard to imagine how such a fair balance can be reached if the national law does not provide in a copyright exception for parody at all. This also confirms that the other optional restrictions or limitations on copyright law as listed in the Infosoc Directive 2001/29, that are directly or indirectly based on the right to freedom of expression and information, should be made mandatory.

**- CJEU 11 September 2014, Technische Universität Darmstadt v. Eugen Ulmer KG, C-117/13: the right of libraries to digitise a work contained in its collection in order to make it available to users by dedicated terminals and the limitation of copyright by the publisher of this work.**

The request for a preliminary ruling was made in proceedings between the Technical University of Darmstadt (Technische Universität Darmstadt, ‘TU Darmstadt’) and Eugen Ulmer KG (‘Ulmer’), concerning TU Darmstadt’s making available to the public, by terminals installed within a library, of a book contained in its collection, the user rights to which are held by Ulmer.

In essence the CJEU had to clarify the scope of one of the (optional) restrictions in European Copyright Law, based on Article 5 (3) (n) of Directive 2001/29/EC, Copyright and related rights in the information society, permitting the use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections. The establishments at issue are publicly accessible libraries, educational establishments or museums, or archives, which are not for direct or indirect economic or commercial advantage.

The publisher, Ulmer, argues that the mere fact that the right holder offers to conclude a licensing agreement with a publicly accessible library is sufficient for ruling out the application of Article 5(3)(n) of Directive 2001/29, provided always that such offer is ‘appropriate’. The CJEU recalls that the limitation under Article 5(3)(n) of Directive 2001/29 aims to promote the public interest in promoting research and private study, through the dissemination of knowledge, which constitutes, moreover, the core mission of publicly accessible libraries. The CJEU takes the view that the interpretation favoured by Ulmer implies that the right holder could, by means of a unilateral and essentially discretionary action, deny the establishment concerned the right to benefit from that limitation and thereby prevent it from realising its core mission and promoting the public interest. It emphasises that the interpretation proposed by Ulmer is difficult to reconcile with the aim pursued by Article 5(3)(n) of Directive 2001/29, which is to maintain a fair balance between the rights and interests of right holders, on the one hand, and, on the other hand, users of protected works who wish to communicate them to the public for the purpose of research or private study undertaken by individual members of the public. Therefore, the concept of ‘purchase or licensing terms’ provided for in Article 5(3)(n) of Directive 2001/29 must be understood as requiring that the right holder and an establishment, such as a publicly accessible library, referred to in that provision must have concluded a licensing agreement in respect of the work in question that sets out the conditions in which that establishment may use that work.

The CJEU also clarifies the right of communication of works enjoyed by establishments such as publicly accessible libraries covered by Article 5(3)(n) of Directive 2001/29, within the limits of the conditions provided for by that provision, would risk being rendered largely meaningless, or indeed ineffective, if those establishments did not also have an ancillary right to digitise the works in question. It means that Article 5(3)(n) of Directive 2001/29, read in conjunction with Article 5(2)(c) of that directive, must be interpreted to mean that it does not preclude Member States from granting to publicly accessible libraries covered by those provisions the right to digitise the works contained in their collections, if such act of reproduction is necessary for the purpose of making those works available to users, by means of dedicated terminals, within those establishments.

The CJEU also rules that Article 5(3)(n) of Directive 2001/29 must be interpreted to mean that it does not extend to acts such as the printing out of works on paper or their storage on a USB stick, carried out by users from dedicated terminals installed in publicly accessible libraries covered by that provision. However, such acts may, if appropriate, be authorised under national legislation transposing the exceptions or limitations provided for in Article 5(2)(a) or (b) of that directive provided that, in each individual case, the conditions laid down by those provisions are met.

Also this CJEU-judgment is a good illustration of the application of Recital 31 of Directive 2001/39, which states that “a fair balance of rights and interests between the different categories of right holders, as well as between the different categories of right holders and users of protected subject-matter must be safeguarded”, as the CJEU clearly balanced the interest of the copyright holders on their works with the interest of the users of these work.

## **2. Regional influences – influences beyond the regions?**

*Cf. supra*

## **3. Cross-references to other jurisdictions/other international instruments?**

*Cf. supra*

## **4. Is the ECtHR (still) a progressive judicial actor as regards the right to freedom of expression and information?**

The overview of the Strasbourg Court’s case law showed that in many cases a violation of Article 10 ECHR has been found, hence the European Court imposing and requesting a higher level of protection of the right to freedom of expression and information than the level guaranteed at the domestic level of the defending states. It is obvious that in cases of access to public documents, whistleblowing, defamation of public persons and criminal convictions of journalist or publishers, the Article 10 case law of the Strasbourg Court secures a higher and more robust level of protection. Also the list of violations found in cases against Turkey and against Russia in 2014 illustrates the efforts that are to be made in both countries in order to effectively respect the ECHR as a legal binding instrument of human rights protection within their respective jurisdictions.

In some cases in which the Court did not conclude to the finding of a violation of Article 10 ECHR, pertinent and convincing reasons seemed to be available for the ECtHR in order to consider the impugned interferences as complying with Article 10 § 2 ECHR, and hence being necessary in a democratic society. A few judgments were more controversial or neglected to some extent the

interest of having the right to freedom of expression also secured in religious matters (*Fernández Martínez v. Spain* and *S.A.S. France*).

Yet, in a few judgments the Court found no violation of Article 10 ECHR, while the justification to consider the interferences with the right to freedom of expression and information at issue does not seem convincing, lacking consistency with the Court's earlier case law. Some of these judgments in the meantime have been referred to the Grand Chamber, such as *Morice v. France*, *Pentikäinen v. Finland* and *Delfi AS v. Estonia* (cf. *infra*).

Especially two judgments that became final, seem to neglect the importance of the right to freedom of expression in a democratic society.

**- ECtHR 16 January 2014, *Tierbefreier E.V. v. Germany*, Appl. No. 45192/09: injunction against use of footages secretly taken by journalist is no violation of Art. 10**

Tierbefreier e.V. is an association based in Germany which militates for animal rights. A court decision prevented the association from disseminating a film footage which was secretly taken by a journalist on the premises of a company performing experiments on animals for the pharmaceutical industry (C. company). The journalist used his footage to produce documentary films of different length, critically commenting the way laboratory animals were treated. His films or extracts of it were shown on different TV channels. Largely based on the journalist's footages, Tierbefreier produced a film of about 20 minutes, with the title "Poisoning for profit" and made it available on its website. The film contained the accusation that the legal regulations on the treatment of animals were disregarded by C. company and closed by the statement that medicines were not being made safer by poisoning monkeys. On request of C. company, relying on its personality rights, which encompassed the right not to be spied upon by use of hidden cameras, Tierbefreier was ordered by a court injunction to desist from publicly showing the film footage taken by the journalist on the C. company's premises or to make it otherwise available to third persons. According to the German courts Tierbefreier could not rely on its right to freedom of expression, as the manner in which it had presented the footages did not respect the rules of intellectual battle of ideas. Relying on Article 10 of the European Convention on Human Rights Tierbefreier lodged an appeal before the Strasbourg Court, complaining that the injunction had violated its right to freedom of expression. The association further relied on Article 14 (prohibition of discrimination) in conjunction with Article 10, complaining that it had been discriminated against in comparison with the journalist and other animal rights activists who had merely been prohibited from disseminating specific films, but had been allowed to continue the publication of the footage in other contexts.

The European Court endorses the assessment that the injunction interfered with Tierbefreier's right to freedom of expression. But as it was prescribed by law, pursued the legitimate aim of protecting the C. company's reputation and was considered "necessary in a democratic society", the Court found no violation of Article 10 of the Convention. The Court observed that the domestic courts carefully examined whether to grant the injunction in question would violate the applicant association's right to freedom of expression, fully acknowledging the impact of the right to freedom of expression in a debate on matters of public interest. The Court points out that there was no evidence however that the accusations made in the film "Poisoning for profit", according to which the C. company systematically flouted the law, were correct. Furthermore, Tierbefreier had

employed unfair means when militating against the C. company's activities and they could be expected to continue to do so if allowed to make further use of the footage. The Court also referred to the German courts findings that the further dissemination of the footage would seriously violate the C. company's rights, especially since the footage had been produced by a former employee of the C. company, who had abused his professional status in order secretly to produce film material within that company's private premises. The Court finally notes that the interference at issue did not concern any criminal sanctions, but a civil injunction preventing Tierbefeier from disseminating specified footage. It referred to the circumstance that Tierbefeier remained fully entitled to express its criticism on animal experiments in other, even one-sided ways. The Court considers that the German courts struck a fair balance between Tierbefeier's right to freedom of expression and the C. company's interests in protecting its reputation. Hence there hasn't been a violation of Article 10 of the Convention taken separately. As the German courts also gave relevant reasons for treating Tierbefeier differently from the other animal rights activists and the journalist with regard to the extent of the civil injunction, the European Court accordingly finds neither a violation of Article 14 in conjunction with Article 10 of the Convention.

**- ECtHR 29 April 2014, Salumäki v. Finland, Appl. No. 23605/09: innuendo of involvement in homicide case justifies criminal conviction**

Can a title of a newspaper article that could be interpreted as damaging the reputation of a public person justify a criminal conviction of the journalist who wrote the article, while the article itself is written in good faith and does not contain any factual errors or defamatory allegations? That is the question the European Court needed to answer in a recent case against Finland. The applicant in this case is Tiina Johanna Salumäki, a journalist working for the newspaper *Ilta-Sanomat*. Ms Salumäki published an article concerning the investigation into a homicide (of P.O.). The front page of the newspaper carried a headline asking whether the victim of the homicide had connections with K.U., a well-known Finnish businessman. A photograph of K.U. appeared on the same page. Next to the article was a separate column mentioning K.U.'s previous conviction for economic crimes. The Helsinki District Court convicted the journalist, Salumäki, and the newspaper's editor-in-chief at the time, H.S., of defaming K.U. as the title of their article insinuated that K.U. had been involved in the killing, even though it was made clear in the text of the article itself that the homicide suspect had no connections with K.U. Along with H.S., Salumäki was ordered to pay damages and costs to K.U. This judgment was subsequently upheld on appeal and the Supreme Court finally refused leave to appeal. Salumäki complained that her conviction had amounted to a violation of Article 10 (freedom of expression) of the European Convention on Human Rights. She argued that the information presented in the article was correct and that the title of the article only connected K.U. to the victim and did not insinuate that K.U. had connections with the perpetrator, neither that he was involved in the homicide.

The Court explains that it had to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, the freedom of expression protected by Article 10 and, on the other, the right to respect for private life, including the right of reputation, enshrined in Article 8. The Court applies the criteria developed by the Grand Chamber in *Axel Springer Verlag and Von Hannover (no. 2)* (Iris 2012/3-1) in order to find out whether the domestic authorities struck indeed a fair balance between the rights protected by Article 8 and 10 of the Convention. First the Court

emphasises that the criminal investigation into a homicide was clearly a matter of legitimate public interest, having regard in particular to the serious nature of the crime : “From the point of view of the general public’s right to receive information about matters of public interest, and thus from the standpoint of the press, there were justified grounds for reporting the matter to the public”. The Court also recognised that “the article was based on information given by the authorities and K.U.’s photograph had been taken at a public event”, while “the facts set out in the article in issue were not in dispute even before the domestic courts. There is no evidence, or indeed any allegation, of factual errors, misrepresentation or bad faith on the part of the applicant”. Nevertheless the decisive factor in this case was that according to the domestic courts, the title created a connection between K.U. and the homicide, implying that he was involved in it. Even though it was specifically stated in the text of the article that the homicide suspect had no connections with K.U., this information only appeared towards the end of the article. The Court is of the opinion that Salumäki must have considered it probable that her article contained a false insinuation and that this false insinuation was capable of causing suffering to K.U. The Court refers in this context also to the principle of presumption of innocence under Article 6 § 2 of the Convention and emphasises that this principle may be relevant also in Article 10 contexts in situations in which nothing is clearly stated but only insinuated. The Court therefore comes to the conclusion that what the journalist had written was defamatory, implying that K.U. was somehow responsible for P.O.’s murder. According to the Court, “it amounted to stating, by innuendo, a fact which was highly damaging to the reputation of K.U.” and at no time did Salumäki attempt to prove the truth of the insinuated fact, nor did she plead that the insinuation was a fair comment based on relevant facts. Having regard to all the foregoing factors, including the margin of appreciation afforded to the State in this area, the Court considers that the domestic courts struck a fair balance between the competing interests at stake. There has therefore been no violation of Article 10 of the Convention.

Other examples of judgments and a decision which seem not fully in line with the high threshold of protection of freedom of expression under Article 10 ECHR:

**- ECtHR 30 January 2014, De Lesquen du Plessis-Casso v. France (no. 2), Appl. No. 34400/10**

This case is about the defamation of a politician and the criminal conviction for posting a letter on the Internet criticizing the political opportunism of a mayor in France. In September 2006, in response to an invitation from E.P., mayor of Versailles and member of parliament, to a ceremony to pay tribute to the “harkis” (French army auxiliaries during the Algerian war), Mr Plessis-Casso, a town councillor of Versailles, sent him an open letter that was published on the Internet. On the basis of comments attributed to an “eminent figure of Versailles”, he accused E.P. of, among other things, having waited until the end of the war to request French nationality, in order to avoid military service in Algeria. The European Court, confirming the findings of the French courts, is of the opinion that this value judgment had no sufficient factual basis, while Plessis-Casso had neither seriously verified in advance the truthfulness of the allegation against E.P. The Court also takes into account the serious character of the allegation, that also touched upon the private life of E.P. and it referred to the well prepared and conscious attack by Plessis-Casso on the reputation of E.P. Also finding the conviction in the form of a fine (1500 euro) combined with an award of damages (2000 euro) proportionate, the Court concludes that there is no violation of Article 10 ECHR (dissenting opinion by Judge Power-Forde).

**- ECtHR 28 October 2014, Gough v. UK, Appl. No. 49327/11**

In this case of the so-called “naked rambler”, the applicant complained about his repeated arrest, prosecution, conviction and imprisonment for the offence of breach of the peace owing to his refusal to wear clothes. The Court agrees that the applicant’s public nudity can be seen as a form of expression which falls within the ambit of Article 10 of the Convention and that his arrest, prosecution, conviction and detention constituted repressive measures taken in reaction to that form of expression of his opinions by the applicant. There has therefore been an interference with his exercise of his right to freedom of expression. The Court however agrees with the national authorities’ findings that the applicant’s appearance naked in public places and public roads was sufficiently severe to cause alarm to ordinary people and serious disturbance to the community. The Court is of the view that it is not concerned with the respondent State’s response to an individual incident of public nudity but with its response to the applicant’s persistent public nudity and his wilful and contumacious refusal to obey the law over a number of years. According to the Court the applicant’s own responsibility for the convictions and the sentences imposed cannot be ignored. It emphasises that in exercising his right to freedom of expression, the applicant was in principle under a general duty to respect the country’s laws and to pursue his desire to bring about legislative or societal change in accordance with them. Also many other avenues for the expression of his opinion on nudity or for initiating a public debate on the subject were open to the applicant. The Court also states: “Without any demonstration of sensibility to the views of others and the behaviour that they might consider offensive, he insists upon his right to appear naked at all times and in all places, including in the courts, in the communal areas of prisons and on aeroplanes”. The Court admits that the applicant’s case is troubling, since his intransigence has led to his spending a substantial period of time in prison for what is – in itself – usually a relatively trivial offence. However, the applicant’s imprisonment is the consequence of his repeated violation of the criminal law in full knowledge of the consequences, through conduct which he knew full well not only goes against the standards of accepted public behaviour in any modern democratic society but also is liable to be alarming and morally and otherwise offensive to other, unwarned members of the public going about their ordinary business. Therefore the Court concludes unanimously : “Even though, cumulatively, the penalties imposed on the applicant undoubtedly did entail serious consequences for him, the Court cannot find in the circumstances of his case, having regard in particular to his own responsibility for his plight, that the public authorities in Scotland unjustifiably interfered with his exercise of freedom of expression. Accordingly, no violation of Article 10 of the Convention has been established”.

**- ECtHR 11 March 2014, Yaman Akdeniz v. Turkey, Appl. no. 20877/10 (dec.)**

In this case the applicant complained about the blocking by the authorities of two websites, offering access to music. The websites (myspace.com and last.fm) were blocked because they offered access to music in an unlawful way, infringing the copyrights and related rights of right holders. The applicant complained that the enforcement of copyright was overbroad in this case, breaching his right to freedom to receive information as guaranteed under Article 10 ECHR. The Court reiterates the importance of having access to the Internet and the importance of the Internet to facilitate the communication of information. Nevertheless, the Court finds that the applicant cannot be considered as a victim of the blocking of the websites of which he claimed to be a regular visitor of user: “Toutefois, pour la Cour, le seul fait que le requérant – tout comme les autres utilisateurs en Turquie des sites en question – subit les effets indirects d’une mesure de blocage concernant deux sites consacrés à la diffusion de la musique ne saurait suffire pour qu’il se voie reconnaître la qualité

de « victime » au sens de l'article 34 de la Convention". The Court is also of the view that access to music does not facilitate the applicant to take part in public debate on matters of interest for society and that many others ways were open in order to have access to music in a legal way. Therefore the Court declared the application inadmissible, the applicant not having the quality of victim of an alleged human rights violation under Article 10 ECHR, in the sense of Article 34 and 35 §§ 3 and 4 of the Convention.

## 5. Most important issues on the agenda in 2015

### **The Grand Chamber is to deliver ten judgments with major impact on the right to freedom of expression in Europe**

The Grand Chamber is to deliver in 2015 a series of judgments with an important impact on the freedom of expression in Europe. In application of Article 43 of the Convention the panel deciding of request for referral to the Grand Chamber, in each of these cases was of the opinion that they raised serious questions affecting the interpretation or application of the Convention, or concern serious issues of general importance, in which the Grand Chamber of 17 judges is to deliver a final judgment. Out of the 24 cases referred to the Grand Chamber (situation on 10 March 2015), ten of them concern alleged violations of Article 10 of the Convention.

### **Three cases concern the earlier non-finding of a violation of Article 10**

1. In **Delfi AS v. Estonia** (ECtHR 10 October 2013, Appl. No. 64569/09) the Chamber judgment saw no sufficient reason to oppose against the liability of an online news platform that had published insulting and defamatory comments on its website by readers.<sup>24</sup>

In our review 2013 it has been reported that the First Section of the European Court of Human Rights found no violation in the case of *Delfi AS v. Estonia* (ECtHR 10 October 2013), which concerns the liability of an Internet news portal for offensive comments that were posted by readers below one of its online news articles. The Chamber's judgment however did not become final, as on 17 February 2014 the panel of five judges, in application of Article 43 of the Convention, decided to refer the case to the Grand Chamber of the European Court of Human Rights.

In its judgment of 10 October 2013 the European Court has found that one of Estonia's largest news portals on the Internet, Delfi, was not exempted from liability for grossly insulting remarks in its readers' online comments. The news portal was found liable for violating the personality rights of a plaintiff, although it had expeditiously removed the grossly offending comments posted on its website as soon as it had been informed of their insulting character. In particular, the domestic courts rejected the portal's argument that, under EU Directive 2000/31/EC on Electronic Commerce,

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<sup>24</sup> See also D. Voorhoof, "Qualification of news portal as publisher of users' comment may have far-reaching consequences for online freedom of expression- Delfi AS v. Estonia", *Strasbourg Observers Blog* 25 October 2013, <http://strasbourgobservers.com/2013/10/25/qualification-of-news-portal-as-publisher-of-users-comment-may-have-far-reaching-consequences-for-online-freedom-of-expression-delfi-as-v-estonia/> and on Inforrm's Blog 29 October 2013, <http://inforrm.wordpress.com/2013/10/29/treating-a-news-portal-as-publisher-of-users-comment-may-have-far-reaching-consequences-for-online-freedom-of-expression-dirk-voorhoof/>

its role as an Internet society service provider or storage host was merely technical, passive and neutral, finding that the portal exercised control over the publication of comments. The First Section of the European Court was unanimously of the opinion that the finding of liability by the Estonian courts was a justified and proportionate restriction on the portal's right to freedom of expression, in particular, because the comments were highly offensive, while the portal failed to prevent them from becoming public and allowed their authors to remain anonymous. Furthermore the award of damages (320 Euro) imposed by the Estonian courts was not excessive.

The panel of five judges has decided however, on requests of Delfi AS, that the case raises a serious question affecting the interpretation or application of the Convention, or concerns a serious issue of general importance, in which the Grand Chamber is now to deliver a final judgment. In its request for referral, Delfi argued that EU law, as well as other international reports and policy documents of the Council of Europe reflect the principle that in order to safeguard the right to freedom of expression and information on the internet, there should be no obligation for internet service providers to proactively monitor user generated content. Delfi was supported in its request for a referral to the Grand Chamber by a coalition of media-organisations, NGOs and civil society organisations advocating for freedom of expression on the internet. The hearing in the case before the 17 judges of the Grand Chamber took place on 9 July 2014. The final judgment by the Grand Chamber is expected before summer 2015.

2. In **Pentikäinen v. Finland** (ECtHR 4 February 2014, Appl. No. 11882/10) the European Court found that a Finnish press photographer's conviction of disobeying the police while covering a demonstration did not breach his freedom of expression either. In both cases the applicants are supported by professional organisations of journalists in their claims in order to persuade the Grand Chamber that the practices and convictions in the cases of Delfi AS and Pentikäinen are to be considered violations of Article 10.<sup>25</sup>

In a judgment of 4 February 2014 the European Court found that a Finnish press photographer's conviction of disobeying the police while covering a demonstration did not breach his freedom of expression. The applicant, Mr Pentikäinen, is a photographer and journalist for the weekly magazine *Suomen Kuvalehti*. He was sent by his employer to take photographs of a large demonstration in Helsinki. At a certain moment the police decided to interrupt the demonstration which had turned violent. It was announced over loudspeakers that the demonstration was stopped and that the crowd should leave the scene. After further escalation of violence, the police considered that the event had turned into a riot and decided to seal off the demonstration area. When leaving, the demonstrators were asked to show ID and their belongings were checked. However, a core group of around 20 people remained in the demonstration area, including Mr Pentikäinen, who assumed the order to leave the area only applied to the demonstrators and not on him, doing his work as a

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<sup>25</sup> See also D. Voorhoof, "Finnish journalist's arrest, detention, prosecution and conviction for disobeying a police order during a demonstration does not violate Article 10", *Strasbourg Observers Blog* 24 March 2014, <http://strasbourgobservers.com/2014/03/24/finnish-journalists-arrest-detention-prosecution-and-conviction-for-disobeying-a-police-order-during-a-demonstration-does-not-violate-article-10/> on Inform's Blog 26 March 2014, <http://inform.wordpress.com/2014/03/26/case-law-strasbourg-pentikainen-v-finland-arrest-detention-and-prosecution-of-press-photographer-on-a-demonstration-no-violation-of-article-10-dirk-voorhoof/>

journalist. He also tried to make clear to the police that he was a representative of the media, referring to his press badge. A short time later the police arrested the demonstrators, including Mr Pentikäinen. He was detained for more than 17 hours and short time later the public prosecutor brought charges against him. The Finnish courts found the journalist guilty of disobeying the police, but they did not impose any penalty on him, holding that his offence was excusable.

In Strasbourg Mr Pentikäinen complained that his rights under Article 10 (freedom of expression) had been violated by his arrest and conviction, as he had been prevented from doing his job as a journalist. The European Court recognised that Mr Pentikäinen as a newspaper photographer and journalist has been confronted with an interference in his right to freedom of expression. However, as the interference was prescribed by law, pursued several legitimate aims (the protection of public safety and the prevention of disorder and crime) and was to be considered necessary in a democratic society, there was no violation of his right under Article 10 of the Convention. The European Court especially referred to the fact that Mr Pentikäinen had not been prevented from taking photos of the demonstration and that no equipment or photos had been confiscated. There was no doubt that the demonstration had been a matter of legitimate public interest justifying that the media reported on it, and Mr Pentikäinen was not prevented to do so. His arrest was a consequence of his decision to ignore the police orders to leave the area, while there was also a separate secure area which had been reserved for the press. It was also doubtful whether Mr Pentikäinen had made it sufficiently clear to the police when being arrested that he was a journalist. Furthermore, although Mr Pentikäinen was found guilty of disobeying the police, no penalty had been imposed on him and no entry of his conviction had been made in his criminal record. The Court also considered that the fact that the applicant was a journalist did not give him a greater right to stay at the scene than the other people and that the conduct sanctioned by the criminal conviction was not his journalistic activity as such, but his refusal to comply with a police order at the very end of the demonstration, when the latter was judged by the police to have become a riot. The European Court concluded therefore, by five votes to two, that the Finnish courts had struck a fair balance between the competing interests at stake and accordingly came to the conclusion that there had been no violation of Article 10.

According to the separate dissenting opinion of two judges it has not been substantiated why it was necessary in a democratic society to equate a professional journalist, operating within recognised professional limits in covering the demonstration, with any of the people taking part in the demonstration and to impose drastic criminal restraints on him. The dissenting judges criticized sharply the imposition of restrictions on a journalist's freedom of expression through his arrest, detention, prosecution and conviction for a criminal offence simply because he had the courage to do his duty in furtherance of the public interest. According to the dissenting judges the case reveals a one-sided attitude on the part of the Finnish authorities, one likely to create a "chilling effect" on press freedom.

Pentikäinen requested for a referral to the Grand Chamber. His claim was supported by the Finnish Union of Journalists, the International Federation of Journalists and the European Federation of Journalists, arguing that the Court's finding risked to undermine press freedom and the rights of journalists covering issues of importance for society. On 2 June 2014 the panel decided to refer this case to the Grand Chamber. The hearing took place on 17 December 2014. The final judgment is expected in 2015.

3. The third case referred to the Grand Chamber in which the Chamber did not find a violation of Article 10 is **Morice v. France** (ECtHR 11 July 2013, Appl. No. 29369/10). The Grand Chamber's final judgment in the case *Morice v. France* will certainly have a significant impact on how lawyers can use their right to freedom of expression by bringing dysfunctions within the administration of justice under public attention. The hearing before the Grand Chamber was on 25 May 2014. In this case the Fifth Section of the ECtHR found that the conviction of a lawyer, Mr. Morice, for public defamation of a judge was not in breach with Article 10 ECHR. The conviction was based on an article in the daily newspaper *Le Monde*, stating that Mr. Morice, in his capacity as a lawyer, had "vigorously" challenged a judge before the Minister of Justice, accusing her of "conduct that was completely contrary to the principles of impartiality and loyalty". The Court considered that the national courts could have been satisfied that the comments made by Mr. Morice in *Le Monde* were serious and insulting to the judge in question, that they were capable of unnecessarily undermining public confidence in the judicial system and, lastly, that there were sufficient grounds to convict Mr. Morice of public defamation. It is worth noting that in her dissenting opinion, judge Yudkivska found that the majority of the Chamber didn't take sufficiently in account the possible *chilling effect* of the criminal conviction of Mr. Morice. She also emphasised the role of lawyers to criticise dysfunctions within the administration of justice and to inform the public of this. The judgment of the Grand Chamber, whatever the outcome, promises to have a manifest impact on the development of the lawyer's identity and his responsibilities towards society (ECtHR 11 July 2013, *Morice v. France*, not final, case referred to Grand Chamber on 9 December 2013, hearing 25 May 2014).

**Update:** on 23 April 2014 the Grand Chamber, unanimously, found a violation of Article 10 in this case. The Grand Chamber is of the opinion that Morice, in the newspaper *Le Monde* had expressed value judgments with a sufficient factual basis and that his remarks concerning a matter of public interest, had not exceeded the limits of the right to freedom of expression. The Court takes the view that the impugned remarks published in *Le Monde* concerned a high-profile case that created discussion about the functioning of the judiciary. As such a context of a debate on a matter of public interest calls for a high level of protection of freedom of expression, only a particularly narrow margin of appreciation is left to the domestic authorities, leading to a strict scrutiny by the European Court whether the interference at issue can be justified as being necessary in a democratic society. As regard the nature of the impugned remarks the Court is of the opinion that they were more value judgments than pure statements of fact, reflecting mainly an overall assessment of the conduct of the investigating judges in the course of the investigation. Furthermore the remarks had a sufficient factual basis and could not be regarded as misleading or as a gratuitous attack on the reputation or the integrity of the two investigative judges. The Grand Chamber considers that the respect for the authority of the judiciary cannot justify an unlimited restriction on the right to freedom of expression. Although the defence of a client by his lawyer must be conducted not in the media, but in the courts of competent jurisdiction, involving the use of any available remedies, the Grand Chamber accepts that there might be "very specific circumstances" justifying a lawyer making public statements in the media, such as in the case at issue. According to the Court, "*a lawyer should be able to draw the public's attention to potential shortcomings in the justice system; the judiciary may benefit from constructive criticism*".<sup>26</sup>

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<sup>26</sup> For a first analysis and comment, see I. Høedt-Rasmussen and D. Voorhoof, "A great victory for the whole legal profession", *Strasbourg Observers Blog* 6 May 2015,

In **seven other cases** it is to awaited whether the Grand Chamber will confirm the Chambers' earlier findings of **violations of Article 10**. In these cases indeed the Court's chamber did find violations of Article 10. It is striking that the Panel accepted some of these cases to be referred to the Grand Chamber. That seven cases in which the Chamber earlier found a violation are referred to the Grand Chamber also indicates that there is actually a level of uncertainty within the Strasbourg Court how finally to decide on these cases.

### **1. Perinçek v. Switzerland, Appl. No. 27510/08**

This case concerns the conviction of incitement to hatred because of denial of the Armenian genocide. In this case the Grand Chamber is challenged with the question whether memory laws 'as such' can justify criminal convictions for denial of genocide, or whether the conviction of Perinçek can be justified as it is to be considered as a form of hate speech, inciting to hatred and discrimination against the Armenian population.<sup>27</sup>

In *Perinçek v. Switzerland* the Second section of the Court ruled by five votes to two, that Switzerland violated the right to freedom of expression by convicting Doğu Perinçek, chairman of the Turkish Workers' Party, of publicly challenging the existence of the genocide against the Armenian people. The Swiss Courts found Perinçek guilty of racial discrimination within the meaning of Article 261bis of the Swiss Criminal Code. According to the Swiss Courts, the Armenian genocide, like the Jewish genocide, was a proven historical fact, recognised by the Swiss Parliament, while Perinçek's motives in denying this historical fact were of a racist tendency and did not contribute to the historical debate. The Second section of the European Court however clearly distinguished the discussions on the legal qualification of the atrocities perpetrated against the Armenian people in the first decades of the 20<sup>th</sup> century from those concerning the negation of the crimes of the Holocaust, committed by the Nazi-regime short before and during World War II. The Court took the view that Switzerland had failed to show how there was a social need in that country to punish an individual for racial discrimination on the basis of declarations challenging the legal characterisation as "genocide" of acts perpetrated on the territory of the former Ottoman Empire in 1915 and the following years. The Swiss Government requested for the referral to the Grand Chamber in order to reconsider the approach and reasoning of the majority of the Second section, finding that there has been a violation of Article 10. After the panel referred the case to the Grand Chamber on 2 June 2014, the hearing took place on the 28 January 2015.

### **2. Kudrevičius and Others v. Lithuania, Appl. No. 37553/05.**

This pending case concerns the conviction of five farmers for rioting, following a protest in which they had blockaded major roads during a dispute with the Government over the price of milk. In this case to, the Chamber found a violation of Art. 10 ECHR. The Panel's referral was on 14 April 2014, the hearing was planned on 26 November 2014, but has been cancelled.

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<http://strasbourgobservers.com/2015/05/06/a-great-victory-for-the-overall-profession-of-lawyers/#more-2848>

<sup>27</sup> See D. Voorhoof, "Criminal conviction for denying the existence of the Armenian "genocide" violates freedom of expression", *ECHR Blog* 7 January 2014, <http://echrblog.blogspot.nl/2014/01/perincek-judgment-on-genocide-denial.html>

### **3. A.B. v. Switzerland, Appl. No. 56925/08.**

In its Chamber judgment of 1 July 2014 the European Court of Human Rights held, by four votes to three, that there had been a violation of Article 10 of the Convention. It found in particular that the Swiss Government had not established how the disclosure of this type of confidential information could have had a negative influence on both the accused's right to be presumed innocent and the outcome of his trial. It further noted that the accused had a remedy under Swiss law by which he could have sought redress for the damage to his reputation, but that he had not used it, and that it was primarily for him to take action to ensure respect for his private life. On 17 November 2014 the case was referred to the Grand Chamber at the request of the Swiss Government. The Court will be holding a hearing in this case on 13 May 2015.

### **4. Baka v. Hungary , Appl. No. 20261/12.**

In its judgment of 27 May 2014 the ECtHR concluded, unanimously, that there had been a violation of Article 10 of the Convention. It found that Mr Baka's dismissal as a judge had been due to the criticism he had publicly expressed of government policy on judicial reform when he was President of the Supreme Court. The Chamber's judgment underlined that the fear of sanction, such as losing judicial office, could have a "chilling effect" on the exercise of freedom of expression and risked discouraging judges from making critical remarks about public institutions or policies. On 15 December 2014 the was referred to the Grand Chamber. The Court will be holding a hearing on 17 June 2015.

### **5. Couderc and Hachette Filipacchi Ass. v. France, Appl. No. 40454/07.**

In its Chamber judgment of 12 June 2014, the European Court of Human Rights held, by four votes to three, that there had been a violation of Article 10 of the Convention. The applicants are Anne-Marie Couderc, the publication director of the weekly magazine Paris-Match, and the company Hachette Filipacchi Associés, which publishes the magazine. In 2005 the English newspaper the Daily Mail published claims by Ms C. that Albert Grimaldi, the reigning Prince of Monaco, was the father of her son. The newspaper reproduced the main points of an article due to be published in Paris-Match. Prince Albert of Monaco, having learnt that an article was about to appear in Paris-Match, served notice on the applicants to refrain from publishing the article. The magazine went ahead and published the article, together with photographs showing the Prince with the child, which appeared simultaneously in the German weekly magazine Bunte. Prince Albert of Monaco brought proceedings against the applicants. The Court of Appeal awarded Prince Albert 50,000 euros (EUR) in damages and ordered details of the judgment to be printed in Paris-Match, finding that the article in Paris-Match had caused irreversible damage to the Prince, as the fact that he was the child's father, which had remained secret until publication of the article, had suddenly become public knowledge, against his wishes. The whole article and the accompanying pictures were considered to come within the most intimate sphere of the Prince's emotional and family life and were not apt to be the subject of any debate of general interest.

The ECtHR however found that the judgment against the applicants had made no distinction between information which formed part of a debate of general interest and that which merely reported details of the private life of the Prince of Monaco. Nor did the case simply concern

a dispute between the press and a public figure; the interests of Ms C. and the child in asserting his existence and having his identity recognised had also been at stake. In the Court's view, there was no reasonable relationship of proportionality between the restrictions imposed on the right to freedom of expression and the protection of the reputation and rights of others. On 13 October 2014 the case was referred to the Grand Chamber at the request of the French Government.<sup>28</sup>

6/7. On 16 February 2015 the Grand Chamber panel of five judges decided to refer two cases to the Grand Chamber of the European Court of Human Rights, related to Article 10 ECHR: **Karácsony and Others v. Hungary** (Appl. No. 42461/13) and **Szél and Others v. Hungary** (Appl. No. 44357/13). Both cases concern complaints by members of the Hungarian Parliament of two opposition parties about having been fined, for gravely disturbing Parliament's work, following their protests against two legislative proposals. In its Chamber judgments of 16 September 2014 the European Court of Human Rights held, unanimously (!), that there had been a violation of Article 10 of the Convention. The Court found that the sanctions had been disproportionate. In particular, they had been imposed by the Speaker of Parliament without compelling reasons, without a previous warning, and they had been adopted without a debate. The Court further found a violation of Article 13 in conjunction with Article 10, as the applicants did not have an effective remedy under Hungarian law in respect of their complaints.

## Coda

An issue which already had reached prominent attention,<sup>29</sup> has now, after the assassination of journalists and cartoonist of *Charlie Hebdo* on 7 January 2015, become predominantly on the agenda: the issue of the protection of journalism against violence and safety of journalists and other media actors.

A judgment, delivered in the very beginning of 2015, reflects the concerns of the ECtHR on this matter. The Court's judgment is a robust statement for the need to protect journalists against violence and it compels the authorities of states where journalists or media workers are the victims of violent action to take all necessary measures to stop impunity and to protect them and to bring the perpetrators to court.

### ECtHR 29 January 2015, *Uzeyir Jafarov v. Azerbaijan*, Appl. No. 54204/08

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<sup>28</sup> See also D. Voorhoof, "Can the right to freedom of expression justify the reporting about Monaco's reigning monarch's illegitimate child?", *Strasbourg Observers Blog* 15 April 2015, <http://strasbourgobservers.com/2015/04/15/can-the-right-to-freedom-of-expression-justify-the-reporting-about-monacos-reigning-monarchs-illegitimate-child/>

<sup>29</sup> See the UN Action Plan on the Safety of Journalists and the issue of impunity, <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/safety-of-journalists/un-plan-of-action/> and the COE, Committee of Ministers Declaration 2014 *on the protection of journalism and safety of journalists and other media actors*: <https://wcd.coe.int/ViewDoc.jsp?id=2188999&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>; <http://www.coe.int/en/web/portal/-/launch-of-the-internet-based-platform-to-protect-journalism-and-promote-safety-of-journalists> <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2642620&SecMode=1&DocId=2205486&Usage=2>

In a case related to a violent attack on a journalist, the European Court reiterates that States, under their positive obligations of the Convention, are required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear. Because of failures to carry out an effective investigation, the European Court finds that the criminal investigation of the journalist's claim of ill-treatment was ineffective and that accordingly there has been a violation of Article 3 (prohibition of torture, or inhuman or degrading treatment) of the Convention under its procedural limb.

In this case, again<sup>30</sup>, the European Court finds numerous shortcomings in the investigation carried out by the domestic authorities. The Court *inter alia* referred to the fact that the journalist's complaint was examined by the police office where the agent who had allegedly committed the offence was based. In the Court's view, an investigation by the police into an allegation of misconduct by its one of own officers could not be independent in these circumstances. The Court also noted that, despite explicit requests by the journalist, the domestic authorities failed to take all steps reasonably available to them to secure the evidence concerning the attack. The Court further considered that the public statement by the Minister of Internal Affairs showed that during the investigation the domestic authorities were more concerned with proving the lack of involvement of a State agent in the attack on the journalist than with discovering the truth about the circumstances of that attack. In particular, it does not appear that adequate steps were taken to investigate the possibility that the attack could have been linked to Uzeyir Jafarov's work as a journalist. On the contrary it appears that the responsible authorities had already discarded that possibility in the early stages of the investigation and with insufficient reason. These elements were sufficient to enable the Court to conclude that the investigation of the journalist's claim of ill-treatment was ineffective. There has accordingly been a violation of Article 3 of the Convention under its procedural limb.

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<sup>30</sup> See also ECtHR 16 March 2000, *Ozgür Gündem v. Turkey*, ECtHR 8 November 2005, *Gongadze v. Ukraine* and ECtHR 14 September 2010, *Dink v. Turkey*.