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ECTHR CASE LAW FOR ANTI-SLAPP DEFENSE

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1. Introduction

This document is produced as part of the Central Curriculum of the Pioneering anti-SLAPP Training for Freedom of Expression Project (the PATFox Project), which seeks to train lawyers defending journalists and media organizations, NGOs and activists against companies and official bodies using lawfare to shut down legitimate criticism.

The Central curriculum, composed of this document and the training materials available on the project webpage, is intended to equip practising lawyers in Europe and prospective practitioners to better represent clients against Strategic Lawsuits Against Public Participation (SLAPP). It will enable lawyers to identify SLAPPs and to consider a number of legal strategies that might assist them both to pre-empt and respond to threats of litigation that are designed to intimidate or vex their clients, as opposed to claims intended to enforce a legitimate right.

In particular, this document is intended to provide an analysis of the case law of the European Court of Human Rights ("the Court") and summaries of pertinent decisions in order to provide practitioners with useful guidance on how to use these precedents to support their arguments against SLAPP lawsuits.

The reasoning of the Court is given without alteration, but the keywords are shown in bold and italics, to highlight the essential passages.

2. The relevance of ECtHR case law for national courts

All European States are party to the European Convention of Human Rights ("the Convention") and, therefore, responsible for implementing and enforcing the rights and freedoms guaranteed by the Convention within their jurisdiction[1]. From Article 1 it follows that, in ratifying the Convention, Contracting States undertake to ensure that their domestic legislation is compatible with it[2]. In *Ireland v. the United Kingdom*, the Court clarified that, unlike classic international treaties, the Convention: *"comprises more than mere reciprocal engagements between contracting States. It creates, over and above, a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble,* ***benefit from a "collective enforcement****."*[3]

Over the decades, the Court has become a cornerstone of Europe's efforts to protect human rights, democracy, and the rule of law, both by obliging national courts to interpret and apply national law in conformity with the Convention and expanding the scope of the rights protected by it. Although the judgments of the Court are only binding upon the state concerned, and other national courts could therefore feel free to ignore them, the decisions and reasoning of the Court may be persuasive in similar cases within other national jurisdictions.

The primary aim of the Convention system is, in fact, for the domestic courts to enforce the text of the Convention as developed by the Court's jurisprudence, with recourse to the Strasbourg Court itself only a last resort. In practice, this means that case law should serve as a relevant source of guidance for national courts which should adhere to the Court's jurisprudence from the very first hearing by interpreting their national laws in the

[1] ARTICLE 1 Obligation to respect Human Rights *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*".
[2] Paksas v. Lithuania [GC], Application No. 34932/04, Judgment of 6 January 2011, para. 119
[3] Ireland v. the United Kingdom, Application No. 5310/71, Judgment of 18 January 1978, para. 239

light of the Convention and the Court's case law or refusing to apply laws which are in conflict with them. In light of all of this, relying on the Court's case law to interpret national law and defend fundamental rights within the legal systems is a sound strategy in anti-SLAPP defense.

3. The court recognizes SLAPP

The first thing to consider when building up anti-SLAPP defence is how to frame the lawsuit as a SLAPP. The phenomenon of Strategic Lawsuit Against Public Participation was recognised by the Court, for the first time in the court's history, and highlighted as an impact on freedom of expression in a landmark decision related to a civil defamation suit brought by the Russian state against media company OOO Memo. In ***OOO Memo v Russia***, the Court explicitly referred to the Human Rights Comment by the Council of Europe Commissioner for Human Rights "Time to take action against SLAPPs" of 27 October 2020[4]:

> *""SLAPPs: lawsuits with an intimidating effect*
>
> *The Annual Report of the Council of Europe Platform to promote the protection of journalism and safety of journalists highlights groundless legal actions by powerful individuals or companies that seek to intimidate journalists into abandoning their investigations. In some cases, the threat of bringing such a suit, including through letters sent by powerful law firms, was enough to bring about the desired effect of halting journalistic investigation and reporting.*
>
> *This problem goes beyond the press.* ***Public watchdogs in general are affected.*** *Activists, NGOs, academics, human rights defenders, indeed all those who speak out in the public interest and hold the powerful to account might be targeted. SLAPPs are*

[4] Human Rights Comment by the Council of Europe Commissioner for Human Rights "Time to take action against SLAPPs: https://www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps

typically disguised as civil or criminal claims such as defamation or libel and have several common features. First, they are ***purely vexatious*** *in nature. The aim is not to win the case but to divert time and energy, as a tactic to* ***stifle legitimate criticism****. Litigants are usually more interested in the litigation process itself than the outcome of the case. The aim of distracting or intimidating is often achieved by rendering the* ***legal proceedings expensive*** *and* ***time-consuming****. Demands for damages are often exaggerated.*

Another common quality of a SLAPP is the power imbalance between the plaintiff and the defendant. Private companies or powerful people usually target individuals, alongside the organisations they belong to or work for, as an attempt to intimidate and silence critical voices, based purely on the financial strength of the complainant.

Member states therefore have a ***positive obligation*** *to secure the enjoyment of the rights enshrined in Article 10 of the Convention: not only must they refrain from any interference with the individual's freedom of expression, but they are also under a positive obligation to protect his or her right to freedom of expression from any infringement, including by private individuals. ..."* [5]

Furthermore, the Court recognised the threat posed by these proceedings [6]:

"...considering ***the growing awareness of the risks that court proceedings instituted with a view to limiting public participation*** *bring for democracy, as highlighted by the Council of Europe Commissioner for Human Rights (see paragraph 23 above), and in view of the power imbalance between the claimant and the defendant in the present case...."*

[5] OOO Memo v Russia, Application No. 2840/10, Judgment of 15 March 2022, para. 23
[6] OOO Memo v Russia, Application App. No. 2840/10, Judgment of 15 March 2022, para. 43

4. Freedom of expression as a pillar of democracy

Given the absence of anti-SLAPP legislation, lawyers defending SLAPP respondents can rely on strategies based on existing legal frameworks and principles to successfully defend their clients in court. The most commonly used legal defence is based on the exercise of the right of freedom of expression.

The right to freedom of expression is inextricably linked to the rights of freedom of assembly and of freedom of association protected under Article 11 of the Convention. Exercised together, the rights to freedom of assembly, association and of expression are a fundamental part of the checks and balances ensuring the successful functioning of democratic institutions. The guaranteed enjoyment of these rights is a pre-condition for the active participation of civil society in decision-making at all levels of government.

As protected by Article 10 of the Convention, the right to freedom of expression includes:

(a) freedom to hold opinions, which is a prior condition to the other freedoms;

(b) freedom to impart information and ideas, which include freedom to criticise the government;

(c) freedom to receive information and ideas, which includes the right to gather information and to seek information. [7]

Although Article 10 of the Convention does not confer a general **right of access to information**, over the years, the Court has shown a tendency to interpret freedom of information as a fully-fledged right encompassing recognition of a right to information[8], by

[7] ARTICLE 10 *"1: Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."*

[8] Társaság a Szabadságjogokért v. Hungary, Application No. 37374/05, Judgment of 14 April 2009, para 35.

applying the **evolutive approach** resorting to the principle- stated in *Tyrer v. the United Kingdom*-that the Convention is *"a **living instrument** which should be interpreted in the light of present-day conditions*"[9].

Furthermore, in the Grand Chamber's approach in *Magyar Helsinki Bizottság v. Hungary*, the Court noted that: *"there exists a broad consensus, in Europe (and beyond) on the need to recognise an individual right of access to State-held information in order to assist the public in forming an opinion on **matters of general interest**, and that therefore the ECtHR is not prevented from interpreting Article 10 § 1 of the Convention as including a right of access to information"[10].*

Consequently, the case-law of the Court places particular emphasis on the democratic relevance of freedom of expression. In its interpretation of Article 10 of the Convention, the Court has repeatedly held that: *"The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society. Freedom of expression constitutes **one of the essential foundations of [democratic] society**, one of the basic conditions for its progress and for each individual's self-fulfillment*[11]".

The *Handyside v. United Kingdom* opening paragraph highlights the two fundamental justifications for why freedom of expression is seen as essential: first, it is crucial to the operation of a democratic society; second, an individual can only reach self-fulfillment and reach their full potential by being able to freely express their thoughts, feelings, and ideas.

Furthermore, in recognising that freedom of expression is a necessary value in a democratic society, in the *Handyside case*, the Court has tried to confer a wide scope to the

[9] Tyrer v. the United Kingdom, Application No. 5856/7, Judgment of 25 April 1978, para 31.
[10] Magyar Helsinki Bizottság v. Hungary, [GC], Application No. 18030/11, Judgment of 8 November 2016, para 155
[11] Handyside v. United Kingdom, Application No. 5493/72, judgment of 7 December 1976, para. 49

concept, by proclaiming that: *"the freedom of expression is applicable, not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb: such are the demands of* ***pluralism, tolerance and broadmindedness****, without which there is no democratic society."*[12]

This principle is the bedrock of the Court's case-law on freedom of expression and the scope of that right.

5. The right to participate in public debate: public watchdogs

SLAPPs are legal actions targeting those who engage in public participation and act as public watchdogs over public and private powers.

Over the years, the Court has developed an extensive jurisprudence that is protective of robust public debate and appreciative of the valuable contributions that the media, journalists and other actors make to it. In *Dink v. Turkey*, the Court held that States have a positive obligation "*to create a* ***favourable environment*** *for participation in public debate by everyone"*[13]. Building on this important precedent, the Court recently emphasized the necessity for States to take significant actions to ensure what it has now for the first time dubbed "the spirit of an environment protective of journalism"[14].

Everyone means journalists, individuals, NGOs, academics, whistleblowers, citizen journalists, bloggers, users of social media, and so on. In other words, everyone should be able to participate freely and ***without fear*** in discussions and debates on matters of public interest. The object of fear has not been specified, as it does not have one single meaning

[12] *Ib.*
[13] Dink v. Turkey, Application No. 2668/07, Judgment of 14 September 2010, para 137.
[14] Khadija Ismayilova v. Azerbaijan, Application No 65286/13 and 57270/14, Judgment of 10 January 2019, para 165

and it could infer fear of civil or criminal legal proceedings, or even the threat of either, as in the case of SLAPP lawsuits.

In *Társaság a Szabadságjogokért v. Hungary*, the Court recognised the right of access to official documents, making it clear that, when public bodies hold information that is needed to *"create a forum for **public debate**"*, the refusal to provide documents in this matter to those who are requesting access, is a violation of the right to freedom of expression and information guaranteed under Article 10 of the Convention: *"the Court considers that it would be fatal for freedom of expression in the sphere of politics if public figures could **censor the press and public debate** in the name of their personality rights, alleging that their opinions on public matters are related to their person and therefore constitute private data which cannot be disclosed without consent. These considerations cannot justify, in the Court's view, the interference of which complaint is made in the present case…. The Court considers that obstacles created in order to hinder **access to information** of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role **as "public watchdogs"** and their ability to provide accurate and reliable information may be adversely affected."*[15]

These principles have been consolidated and further specified in a line of case-law, culminating in *Magyar Helsinki Bizottság v. Hungary,* in which the Court proclaimed that: *"The manner in which **public watchdogs** carry out their activities may have a significant impact on the **proper functioning of a democratic society**……. Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may result in those working in the media or related fields no longer being able to*

[15] Társaság a Szabadságjogokért v. Hungary, Application No. 37374/05, Judgment of 14 April 2009, para 37

*assume their **"watchdog" role** effectively, and their ability to provide accurate and reliable information may be adversely affected."*[16]

On numerous occasions, the Court has emphasized the multitude of forms through which the role of **public watchdog** can be exercised and, consequently, count on the highest standards of protection of freedom of expression. For instance, the Court referred to reporting on alleged misconduct or irregularities by public officials[17], reporting on the human rights situation and organising campaigns calling for improvement of the general situation,[18] and protests or informal gatherings against the government,[19] or against specific legislation[20].

5.1 Journalists and the media

The Court's case law has frequently reiterated that the **media** play a vital role as a "public watchdog" in a democracy[21]. In particular, media *"play a pre-eminent role in a State governed by the rule of law"*[22] since it "*affords the public one of the **best means** of discovering and forming an opinion of the ideas and attitudes of political leaders*"[23] and *"has an important role in encouraging debate on issues of general public interest"*[24].

Consequently, the Court accords special protection to the **press**, both as business entities – enterprises publishing, newspapers and periodicals – and as individuals, i.e. journalists, both professional[25] and non-professional[26]. The protection extends to:

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[16] Magyar Helsinki Bizottság v. Hungary [GC], Application No. 18030/11, Judgment of 8 November 2016, para 167
[17] Medžlis Islamske zajednice Brčko and others v Bosnia and Herzegovina, Application No. 17224/11, Judgment of 13 October 2015, para 86
[18] Rasul Jafarov v Azerbaijan, Application No 69981/14, Judgment of 17 March 2016, para 148
[19] Navalnyy v Russia, Application No 29580/12 Judgment of 15 November 2018, para 156
[20] Lashmankin and others v Russia, Application No 57819/09, Judgment of 7 February 2017
[21] Observer and Guardian v. UK, Application No. 13585/88, Judgment of 26 November 1991, para 59
[22] Castells v. Spain, Application No 11798/85, Judgment of 23 April 1992; Prager and Oberschlick v. Austria, Application No 15974/90, Judgment of 26 April 1995
[23] Lingens v. Austria, Application No 9815/82, Judgment of 8 July 1986
[24] Cumpana and Mazare v. Romania, Application No. 33348/96, Judgment of 17 December 2004, para 96
[25] Pedersen and Baadsgaard v. Denmark [GC], Application No 49017/99, Judgment of 17 December 2004, para71
[26] Falzon v. Malta, Application No 45791/13, Judgment of 2018, para 57

- research and inquiries carried out by journalists in **preparation for publication**[27]

  In *Youth Initiative for Human Rights v. Serbia*, the Court opined that: *"the gathering of information is an **essential preparatory step** in journalism and is an inherent, protected part of press freedom" and that "obstacles created in order to hinder access to information which is of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as "public watchdogs", and their ability to provide accurate and reliable information may be adversely affected"*[28].

  Furthermore, in *Fressoz & Roire v. France*[29] and subsequent case-law[30], the Court delivered that journalists should not be prosecuted or sanctioned because of **breach of confidentiality or the use of illegally obtained documents**, when the disclosure of confidential information is related to journalistic reporting on a **matter of public interest** and the journalist has furthermore acted in accordance with the standards of **journalistic ethics**.

- the protection of **journalistic sources**

  Journalistic sources enjoy a very high level of protection in terms of Article 10 of the Convention. According to the Court in *Goodwin v. UK*.: *"**protection of journalistic sources** is one of the basic conditions for press freedom, as is recognised and reflected in various international instruments*

[27] Guseva v. Bulgaria, Application No. 6987/07, Judgment of 17 February 2015, para 37.
[28] Youth Initiative for Human Rights v. Serbia, Application No. 48135/06, Judgement of 25 June 2013, para
[29] Fressoz and Roire v. France [GC], Application No. 29183/95, Judgment of 21 January 1999
[30] Dammann v. Switzerland, Application No 77551/01, Judgement of 25 April 2006; Dupuis and Others v. France, Application No 1914/02, Judgement of 7 June 2007; Radio Twist v. Slovakia, Application No 62202/00, Judgement of 19 December 2006; Pinto Coelho v. Portugal, Application No 28439/08, Judgement of 28 June 2011

including the Committee of Ministers Recommendation (..). Without such protection, sources may be deterred from assisting the press in informing the ***public on matters of public interest****. As a result, the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the* ***potentially chilling effect*** *an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest"*[31]

Not only does the press enjoy a right to freedom of expression, it also has a *"****duty to impart****, in a manner consistent with its obligations and responsibilities, information and ideas on all matters of public interest."*[32]

5.2 Civic society actors

In 2004, in *Vides Aizsardzı¯bas Klubs v. Latvia*, the Court for the first time extended this recognition of a **watchdog function** beyond the media to a civil society organisation by referring to its essential function in a democracy[33]. This interpretation has been confirmed in subsequent reasonings[34].

Furthermore, as previously indicated, in later cases the Court also recognised the **social watchdog** role of civil society when it comes to **access to information** over which the state has an informational monopoly[35]. In its case-law, the Court acknowledges that

[31] Goodwin v. UK [GC], Application No. 17488/90, Judgment of 27 March 1996
[32] Jersild v. Denmark, Application No. 15890/89, Judgment of 23 September 1994, para 31
[33] Vides Aizsardzības Klubs v Latvia, Application No. 57829/00, Judgment of 27 May 2004, para 42
[34] Animal Defenders International v. the United Kingdom [GC], Application No. 48876/08, Judgment of 22 April 2013, para 103; Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina [GC], 17224/11, Judgment of 13 October 2015, para 86; Cangi v. Turkey, Application nos. 48226/10 and 14027/11, Judgment of 1 March 2016, para 35
[35] Magyar Helsinki Bizottság v. Hungary [GC], Application No. 17224/118 November 2016, no. 18030/11 para 168

civil society is composed of a number of different entities. As suggested in the landmark case of *Gorzelik and others v Poland*: *"[i]t is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to* ***associations*** *in which they may integrate with each other and pursue common objectives collectively."* [36]

Associations include:

- political parties, which *"function as the lungs of a democratic society that represent 'a form association essential to the proper functioning of democracy"*[37]
- associations *"protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness"* [38]

In particular, the Court held that when an **NGO** draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press and may be characterised as a ***social watchdog***. Moreover, it has explicitly connected this function of the NGOs to the functioning of civil society, recognising that *"**civil society** makes an important contribution to the discussion of public affairs."*[39]

In *Társaság A Szabadságjogokért v Hungary,* the Court took the next step, confirming that not only are NGOs and the press comparable in social function, but their activities also:

[36] Gorzelik and others v Poland, Application No. 44158/98, Judgment of 20 December 2001, para 92
[37] Case of the United Communist Party of Turkey and others v Turkey, Application No. 133/1996/752/951, Judgment of 30 January 1998, para 25
[38] Gorzelik and others v Poland, Application No. 44158/98, Judgment of 20 December 2001 para 92
[39] Steel and Morris v the United Kingdom, Application No 68416/01, Judgment of 15 February 2005, para 89 and Magyar Helsinki Helsinki Bizottság v. Hungary [GC], Application No. 17224/118 November 2016, no. 18030/11 para; Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina [GC], 17224/11, Judgment of 13 October 2015, para 86.

*"**warrant similar Convention protection**, unlocking access to the Court's wide-ranging jurisprudence on the protections that States must afford to the media"*[40].

Recognising that NGOs play a significant role in verifying and corroborating the veracity of relevant information, in *Medžlis Islamske zajednice Brčko and others v Bosnia and Herzegovina*, the Court opined that[41]: *"in a comparable way to the press, an NGO performing a public watchdog role is likely to have greater impact when reporting on **irregularities of public officials**, and will often dispose of greater means of verifying and corroborating the veracity of criticism than would be the case of an individual reporting on what he or she has observed personally".*

Therefore, the Court recognised that the same considerations on the "**duties and responsibilities"** concerning the freedom of expression of journalists should apply to those NGOs assuming a social watchdog function[42].

Whereas associations and, in particular, NGOs are the key collective actors of civil society, they are not the only entities that are pertinent to the monitoring role of civil society. In *Steel and Morris v United Kingdom*, the Court declared that[43]*"in a democratic society even **small and informal campaign groups** […] must be able to carry on their activities effectively and that there exists a strong public interest in enabling such groups and individuals **outside the mainstream** to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment."*

Furthermore, the Court has reaffirmed the applicability of this principle to cases involving **individuals**, in particular human-rights defenders, NGO activists, civic

[40] Társaság A Szabadságjogokért v Hungary Application No. 37374/05, Judgment of 14 April 2009, para 27
[41] Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina [GC], 17224/11, Judgment of 13 October 2015, para 87
[42] Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina [GC], 17224/11, Judgment of 13 October 2015, para 45 and 87
[43] Steel and Morris v the United Kingdom, Application No 68416/01, Judgment of 15 February 2005, para 89.

movements leaders, as one of the actors constituting civil society[44] to whom the principles relating to the protection of journalists and media professionals should, therefore, be applied.

5.3 Whistleblowers

On various occasions[45], the Court has recognised the **indirect protection** of whistleblowers - individuals who report or disclose information on threats or harm to the public interest - can contribute to strengthening transparency and democratic accountability. This has been achieved through the recognition and application of the journalist's right to source protection, on the basis that the lack of protection is likely not only to have very negative repercussions on the relationships of the journalists with their sources, but could also have a serious and chilling effect on other journalists or other whistle-blowers who are State officials, and could discourage them from reporting any misconduct or controversial acts by public authorities.

Nevertheless, in the recent years, the Court has asserted whistleblowers' direct protection under Article 10 of the Convention. In particular, in its judgment in *Guja v. Moldova* the Grand Chamber clarified that: *"a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to* ***a strong public interest****."*[46]

[44] Rasul Jafarov v Azerbaijan, Application No 69981/14, Judgment of 17 March 2016); Mammadli v Azerbaijan, Application No 47145/14, Judgment of 19 April 2018; Rashad Hasanov and others v Azerbaijan, Application No 48653/13, 52464/13 and 65597/13, Judgment of 7 June 2018; Aliyev v Azerbaijan, Application No 68762/14 and 71200/14. Judgment of 20 September 2018; Natig Jafarov v Azerbaijan, Application No 64581/16, Judgment of 7 November 2019; Kavala v Turkey , Application No 28749/18., Judgment of 10 December 2019; Ibrahimov and Mammadov v Azerbaijan, Application No 63571/16, 74143/16 and 2883/17, Judgment of 13 February 2020; Khadija Ismayilova v Azerbaijan, Application No 30778/15, Judgment of 27 February 2020; Yunusova and Yunusov v Azerbaijan, Application No 68817/14, Judgment of 16 July 2020; Azizov and Novruzlu v Azerbaijan, Application No 65583/13 and 70106/13, Judgment of 18 February 2021.
[45] Goodwin v. UK, Application no. 17488/90, Judgment of 27 March 1996
[46] Guja v. Moldova [GC], Application No 14277/04, Judgment 12 February 2008

However, as stated in the recent Grand Chamber judgment in *Halet v. Luxembourg*[47], to date, the concept of "whistle-blower" has not been given an unequivocal legal definition. In this regard, the Court refers to the criteria defined in the Grand Chamber judgment in *Guja v. Moldova* and later reviewed by the subsequent case-law to assess whether and, if so, to what extent, an individual who discloses confidential information obtained in the context of an employment relationship could rely on the protection of Article 10 of the Convention. The criteria are:

- the channels used to make the disclosure;
- the authenticity of the disclosed information;
- good faith must be the basis of the motives for uncovering the information;
- a public interest in the disclosed information must be at issue;
- the detriment caused;
- the severity of the sanction which must be proportionate.

5.4 Other watchdogs

In the Grand Chamber decision in *Magyar Helsinki Bizottság v Hungary*, the Court clarified that the role of public watchdogs ("*chien de garde*") and the consequent protection applies to:

- *academic researchers*[48]. In the Court's view, academic freedom comprises the freedom to distribute knowledge and truth without restriction[49]. **Academic freedom** is not restricted to academic or scientific research, but also extends to academics' freedom to express freely their views and opinions, even if

[47] Halet v. Luxembourg [GC], Application No 21884/18, Judgment of 14 February 2023
[48] Başkaya and Okçuoğlu v. Turkey [GC], Application No 23536/94 and 24408/94, Judgment of 8 July 1999 para 61-67,;
[49] Sorguç v. Turkey, Application no. 17089/03, Judgment of 23 June 2009, para 35; Kula v. Turkey, Application no 20233/06, Judgment of 19 September 2018, para 38

controversial or unpopular, in the areas of their research, professional expertise and competence, including, as indicated in *Mustafa Erdoğan and Others v. Turkey*, the examination of the functioning of public institutions in a given political system and criticism thereof[50].

- *authors of literature on matters of public concern*[51];
- *bloggers and popular users of social media*. Given the role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information, on a couple of occasions, the Court has recognised the emergence of so-called **citizen journalists**[52].

This extension of watchdog status means for rights and duties attributed to not only speakers, but also to the public who benefits from access to information and the state in terms of its obligations towards these public watchdogs.

6. Matters of public interest

SLAPPs are aimed to suppress scrutiny on issues of public interest. Therefore, the notion of the public or general interest is at the core of the issue.

Although the Court has reiterated the importance of an open public debate on matters of public interest, the notion of the public interest is still a blurred concept. In the Court's view, such an interest can be established only in the light of the circumstances of the case.[53] However, as noted in *Satakunnan Markkinapörssi Oy and Satamedia Oy v.*

[50] Mustafa Erdoğan and Others v. Turkey, Application no. 346/04 and 39779/04, Judgment of 27 May 2014, para 40

[51] Chauvy and Others v. France, Application no. 64915/01, Judgment of 29 June 2004 para 68, and Lindon, Otchakovsky-Laurens and July v. France [GC], Application nos. 21279/02 and 36448/02, Judgment of 22 October 2007, para 48

[52] Magyar Helsinki Bizottság v. Hungary [GC], Application no. 18030/11, Judgment of 8 November 2016, para 168

[53] Von Hannover v. Germany [GC], Application no. 40660/08 and 60641/08, Judgment of 7 February, para 109; Leempoel & S.A. ED. Ciné Revue v. Belgium, Application no. 64772/01, Judgment of 9 November 2011, para 68; Standard Verlags GmbH v. Austria, Application no. 39378/15, Judgment of 7 December 2021, para 46

Finland,: *"**Public interest** ordinarily relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about."*[54].

Such interest has been recognised regarding political and economic matters;[55] the actions of the police;[56] crimes committed[57], the administration of justice[58]; public health; [59] history; [60] religion;[61] problems in local communities; [62] the functioning of an elementary school[63]; environmental pollution[64]; scientific discoveries[65]; strategy of a private company[66].

7. The doctrine of the chilling effect

SLAPP lawsuits can have a "chilling effect" on the exercise of freedom of expression. Although the term *chilling effect* has not been defined by the Court in any substantial way, the multiple references in the Court's recent case law to the danger of a chilling effect have made it an important concept that indicates that something vital is at stake. A chilling effect may arise, in the words of the Court, where, due to a **fear** of disproportionate sanctions or

[54] Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC]. Application no.. 931/13, Judgment of 27 June 2017 para 171
[55] Lingens v. Austria, Application No 9815/82, Judgment of 8 July 1986
[56] Thorgeir Thorgeirson v. Iceland, Application no. 25 June 1992, § 67.
[57] White v. Sweden, Application no. para 29; Egeland and Hanseid v. Norway, Application no. para 58; Leempoel & S.A. ED. Ciné Revue v. Belgium, Application no. 64772/01, Judgment of 9 November 2011, para 72; Eerikäinen and Others v. Finland, Application no. para 59
[58] Morice v. France [GC]. Application no. 29369/10, Judgment of 23 April 2015, para 128
[59] Bergens Tidende v. Norway, Application no. 26132/95, Judgment of 2 May 2000.
[60] Monnat v. Switzerland, Application no. 73604/01, Judgment of 31 January 2006
[61] Paturel v. France, Application no. 54968/00, Judgment of 22 December 2005
[62] Kurłowicz v. Poland, Application no. 41029/06, Judgment of 22 June 2010.
[63] Gałus v. Poland, Application no. 61673/10, Judgment of 15 November 2011
[64] Dubowska and Skup v. Poland, Application no. 33490/96, Judgment of 18 April 1997
[65] Sunday times v. UK, Application no. 13166/87, Judgment of 26 April 1987
[66] Goodwin v. UK, Application no. 17488/90, Judgment of 27 March 1996

a fear of prosecution under overbroad laws, a person engages in **self-censorship**, which weakens public debate[67].

The **fear** interferes with the right of the public and social watchdog to impart information and ideas and with the right of the public to receive information and ideas. The Court has repeatedly pointed out that the plurality of public debate is damaged when critical voices are silenced.

8. Interferences with the right to freedom of expression

Freedom of expression is not an absolute right. The main exceptions are set out in the second paragraph of Article 10 of the European Convention of Human Rights: *"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are **prescribed by law** and **are necessary in a democratic society**, in the interests of the national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.""*

Relying on the so-called "triple test", the Court substantially reduces the possibility of interferences with the right, which are only allowed where three cumulative conditions are fulfilled:

- be ***"prescribed by law",*** which includes foreseeability, precision and publicity or accessibility and which implies a minimum degree of protection against arbitrariness;

[67] Vajnai v. Hungary, Application no. 33639/06, Judgment of 8 July 2008, para 54

- have a ***"legitimate aim".*** Para. 2 of article 10 lists a series of possible limits to freedom of expression such as national security and territorial integrity; public safety and prevention of disorder and crime; protection of health and of morals; protection of reputation or rights of others; preventing the disclosure of confidential information and maintaining the authority and impartiality of the judiciary. In principle, the multiplicity of countervailing interests should have brought to an attentive balancing.
- be ***"necessary in a democratic society".*** This requires a very thorough, well-elaborated, consistent, independent and transparent analysis of all factual elements, legal principles and interests involved in order to decide finally whether an interference with the right to freedom of expression and information is to be considered "necessary in a democratic society".

  In the Court's interpretation, this strict criterion implies the existence of a **pressing social need** and a claim of **proportionality**[68], to be first assessed by the national authorities, which, even though have a certain margin of appreciation, are called upon to follow the Court's jurisprudence[69].

9. The protection of the right to reputation: balancing of the right to freedom of expression with the right to private life

The "legitimate aim" of protecting the "**reputation** and rights of others" is by far the "legitimate aim" most frequently used by national authorities to restrict freedom of

[68] Observer and Guardian v. the United Kingdom, Application no. , Judgment of 26 November 1991, para 59
[69] Lingens v. Austria, Application No 9815/82, Judgment of 8 July 1986; Janowski v. Poland, Application no. 25716/94, Judgment of 21 January 1999

expression. According to the Court case law, reputation is protected by Article 8 of the Convention[70] as part of the right to respect for private life[71]. Not surprisingly, those initiating SLAPPs often base their claims on criminal or civil defamation. By definition, a defamatory statement is a false or untrue statement of fact that harms the reputation or good name of a living person, and the purpose of defamation laws is to protect that reputation.

In *Axel Springer AG v. Germany* the Court point out that: *"The Court reiterates that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life [...]. In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain* ***level of seriousness*** *and in a manner causing prejudice to personal enjoyment of the right to respect for private life [...]. The Court has held, moreover, that Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence [...].*

When examining the necessity of an interference in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required 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, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8 [...]."*[72]

[70] ARTICLE 8 *"1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

[71] Axel Springer AG v. Germany [GC], Application no. 39954/08, Judgment of 7 February 2012; Chauvy and Others v. France, Application no. 64915/01 Judgment of 29 June 2004; Pfeifer v. Austria Application no. 12556/03, Judgment of 15 November 2007; Petrina v. Romania, Application no. 78060/01 Judgment of 14 October 2008; Polanco Torres and Movilla Polanco v. Spain, Application no. 34147/06Judgment of 21 September 2010

[72] Axel Springer AG v. Germany [GC], Application no. 39954/08, Judgment of 7 February 2012, para 83-84

Therefore, over the years, the Court has developed a voluminous and ever-growing case-law on freedom of expression and defamation. In particular, the Court usually relies on a well-run set of criteria in order to strike the balance between the two conflicting rights: freedom of expression and protection of private life[73]:

- the contribution to a debate of public or general interest;
- the degree of notoriety of the person affected;
- the prior conduct of the person concerned;
- the content, form and consequences of the publication;
- the way in which the information was obtained and its veracity;
- the gravity of the penalty imposed

9.1 The degree of notoriety of the person affected

The degree of notoriety influences the protection that may be afforded to a person since the "limits of acceptable criticism" are much wider as regards individuals with a public status than as regards private individuals. Consequently, suits by public figures seeking to protect their reputation should meet a higher threshold.

In other words, while these persons are entitled to the protection of their reputation even while operating in a professional role, the need for such protection must be evaluated against the benefits of open **public discourse**[74]. As stated in *Kapsis and Danikas v. Greece*, **public figures** are to be intended as *"persons who, through their acts or even their position, have entered the public arena*[75]*".* However, the actual extension of the category and when it borders with that of 'private individuals' is left to a case-by-case decision. It includes:

[73] Axel Springer AG v. Germany [GC], Application no. 39954/08, Judgment of 7 February 2012, para 90-95
[74] Von Hannover v. Germany, Application no. Judgment of no. 59320/00, 29 September 2004; Von Hannover v. Germany (no. 2) [GC], Application nos. 40660/08 and 60641/08, Judgment of no. 7 February 2012
[75] Kapsis and Danikas v. Greece, Application no. 52137/12, Judgment of 19 January 2017, para 35

- **Politicians**, particularly if information about a person's private life has an impact on his or her duties and public functions, i.e, a Prime Minister[76], a minister[77], a member of parliament[78], a mayor[79], a political adviser[80], the head of a political party[81]. As stated In *Lingens v. Austria*, a politician "*inevitably and knowingly lays himself open to close scrutiny of his every word and deed . . . and he must consequently display a greater degree of tolerance."*[82]

- **Government, public authorities and other institutions**, i.e. State bodies and civil servants acting in an official capacity[83]. Regarding public authorities, in the aforementioned case *OOO Memo v. Russia*, the Court delivered that the right to reputation of natural individuals and the reputational interests of legal entities that compete in the marketplace are fundamentally different from the interests of a body of the executive invested with State powers in upholding a good reputation.

  The first rely on their good name to draw consumers and make a profit, while the latter are intended to serve the public and are supported by taxpayers. Consequently, public authority's activities of any kind must be closely inspected by the legislative, judicial, and public opinion authorities in order to prevent abuse of power and corruption of public office in a democratic society. Furthermore, protecting executive bodies from criticism by

[76] Tuşalp v. Turkey, Application no. 32131/08 and 41617/08, Judgment of 21 May 2012, para 45; Axel Springer AG v. Germany [GC], Application no. 39954/08, Judgment of 7 February 2012, para 67; Dickinson v. Turkey, Application no. 25200/11, Judgment of 2 February 2021, para 55
[77] Turhan v. Turkey, Applications nos. 75805/16, Judgment of 04 April 2022, para 25
[78] Mladina d.d. Ljubljana v. Slovenia, Application no. 20981/10, Judgment of 17 April 2014; Monica Macovei v. Romania, Application no. 53028/14 Judgment of 28 July 2020
[79] Brasilier v. France, Application no. 71343/01, Judgment of 11 April 2006, para 41
[80] Morar v. Romania, Application no. 25217/06 Judgment of 7 July 2015
[81] Oberschlick v. Austria, Application no. 11662/85, Judgment of 23 May 1991
[82] Lingens v. Austria, Application No 9815/82, Judgment of 8 July 1986, para 103.
[83] Romanenko and Others v. Russia, Application no. 11751/03 Judgment of 8 October 2009 para 47; Toranzo Gomez v. Spain, Application no. Judgment of 20 November 2018 para 65; Frisk and Jensen v. Denmark, Application no. 19657/12 Judgment of 27 March 2012 para 56

providing them with protection of their "business reputation" could seriously restrict media freedom.[84]

- **Civil servants** acting in an official capacity[85].

- **Legal entities** such as companies. In *Steel and Morris v. United Kingdom*, to which we will return later, the Court equated such plaintiffs to politicians, insofar that: *"**large public companies** inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies."*[86] In *Timpul Info-Magazin and Anghel v. Moldova*, the Court opined that a smaller company should, in principle, *"enjoy a comparatively increased protection of its reputation"*, although if it *"decides to participate in transactions in which considerable public funds are involved, it voluntarily exposes itself to an increased scrutiny by public opinion."* [87]

- **Private individuals**, who have sought publicity or engaged in public debate. In this case, private individuals, can be expected to tolerate public scrutiny and criticism. However, the limits of permissible criticism are not as wide as for politicians. In *Kuliś v. Poland*, the Court opined that: *"limits of critical comment are wider if a public figure is involved, as he inevitably and knowingly exposes himself to public scrutiny and must therefore display a particularly high degree of tolerance"*[88] In *Fayed v. the United Kingdom*, the Court held that: *"the limits of acceptable criticism are wider with regard to **businessmen***

[84] OOO Memo v. Russia, Application No. 2840/10, Judgment of 15 March 2023
[85] Mamère v. France, Application no. 12697/03 Judgment of 7 November 2006, para 27
[86] Steel and Morris v the United Kingdom, Application No 68416/01, Judgment of 15 February 2005, para 41; Fayed v. the United Kingdom, no. 17101/90, Judgment of 21 September 1990, para 294
[87] Timpul Info-Magazin and Anghel v. Moldova, Application No. 42864/05, Judgment of 27 November 2007
[88] Kuliś v. Poland, Application no. 15601/02, Judgment of 18 March 2008, para 47

actively involved in the affairs of large public companies than with regard to private individuals*"..." "who fall into the former category of businessmen inevitably and knowingly lay themselves open to close scrutiny of their acts, not only by the press but also and above all by bodies representing the public interest"*[89]

9.2 Prior conduct of the person concerned

The life of a private person may become matter of public interest if the person has entered the public scene. Likewise, public figures who voluntarily disseminate aspects of their private life to the public may also provoke legitimate public scrutiny[90].

9.3 The content, form and consequences of the publication

The "expression" protected under Article 10 is not limited to words, written or spoken, but it extends to pictures,[91] images[92] as well as actions intended to express an idea or to present information. It means that Article 10 has to be interpreted from a perspective of a high level of protection of freedom of expression and information, even if expressed opinions or information are considered **harmful** to the State or some groups, enterprises, organisations, institutions or public figures.

Moreover, Article 10 protects not only the substance of the information and ideas but also the **form** in which they are expressed, since any restriction imposed on the means necessarily interferes with the right to receive and impart information[93]. With regard to the language, the Court has accepted severe and harsh criticism, as well as colourful

[89] Fayed v. the United Kingdom, Application no. 17101/90, Judgment of 21 September 1990, para 75
[90] Axel Springer AG v. Germany [GC]. Application no. 39954/08, Judgment of 7 February 2012, 92, 101.
[91] Müller and Others v. Switzerland, Application no. 10737/84, Judgment of 24 May 1988
[92] Chorherr v. Austria, Application no. J 13308/87, Judgment of 25 August 1993
[93] Oberschlick v. Austria, Application no. 15974/90, Judgment of 23 May 1991; Thoma v. Luxembourg, Application no. 38432/97, Judgment of 29 March 2001; Dichand and Others v. Austria, Application no. 29271/95, Judgment of 26 February 2002; Nikula v. Finland, Application no. 31611/96, Judgment of 21 March 2002

expressions, as the latter have the advantage of drawing attention to the issues under debate.

In order for Article 8 to come into play, the statement must refer to the person suing in defamation and the attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life[94].

9.4 The way in which information was obtained and its veracity

By reason of the "duties and responsibilities" inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to journalists and media organisations in relation to reporting on issues of general interest is subject to the provision that they are acting in accordance with the **ethics of journalism**[95] by

- respecting the **good faith** principle which requires proportionality between allegations provided by journalists and **factual basis**. The Court, therefore, takes into consideration the context and the broadcast medium.
- providing **accurate and reliable information[96].**

This implies that journalists and media organisations have to employ fair means to obtain information and ensure its veracity as far as possible. In order to assess whether the interference corresponds to a "pressing social need", the Court also distinguishes between:

– **factual statements**, whose existence can be demonstrated

[94] Bédat v. Switzerland [GC], Application no. 56925/08, Judgment of 29 March 2016, para 72; Axel Springer AG v. Germany [GC], Application no. 39954/08, Judgment of 7 February 2012, para 83; A. v. Norway, Application no. 23118/93, Judgment of 15 November para 64

[95] Fressoz and Roire v. France [GC], Application No. 29183/95, Judgment of 21 January 1999; Bladet Tromsø and Stensaas v. Norway [GC], Application no. 21980/93, Judgment of 20 May 1999

[96] Bladet Tromso and Stensaas v. Norway, Application no. 21980/93, Judgment of 20 May 1999, para 65.

- **value judgments**, which are not capable of being proven. The requirement to prove the truth of a value judgment is impossible to fulfill and infringes on freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention. Nonetheless, value judgments should be founded on a sufficient factual basis, as even a value judgment without any factual basis to support it may be excessive[97].

The need to provide a factual basis is less stringent where the facts are already known to the public.

A defamatory statement is a false or untrue statement of fact that harms the reputation or good name of a living person, who, therefore, is entitled only to a reputation based on truth. Consequently, truth (*exceptio veritatis*) is a defence to a defamation action in that if the facts are true and can be proven true to the satisfaction of a court, there is no basis for holding the speaker liable and freedom of expression prevails.

9.5 The gravity of the penalty imposed

In various occasions, the Court reiterated that the nature and severity of the **penalties** imposed are factors to be taken into account when assessing the **proportionality** of an interference with the freedom of expression guaranteed by Article 10[98].

The Court's case-law has repeatedly acknowledged that the chilling effect of the **criminal sanction** is particularly dangerous in cases of public interest debate since these measures have far-reaching consequences for those affected by them [99]. By their very nature, criminal measures have a "chilling effect" on public debate.

[97] Dichand and Others v. Austria, Application no 29271/95, Judgment of 26 February 2002, para 42 and 43
[98] Ceylan v. Turkey, (GC), Application no. 23556/94, Judgment of 8 July 1999 para 37; Skalka v. Poland, Application no. 43425/98, Judgment of 27 May 2003, para 41-42
[99] Lewandowska-Malec v. Poland, Application no. 39660/07, Judgment of 18 September 2012, para 70.

Indeed, in *Kaperzyski v. Poland,* it has even found that *"must exercise caution when the **measures** taken, or **sanctions** imposed by the national authorities are such as to dissuade the press from taking part in a discussion of matters of legitimate public concern (..). The chilling effect that the fear of criminal sanctions has on the exercise of journalistic freedom of expression is evident. . . . This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed on media professionals*"[100].

Likewise, in the Grand Chamber 's judgment of *Cumpn and Mazre v. Romania*, the Court delivered that, although sentencing is in principle a matter for the national courts, the imposition of a prison sentence for a press offence is incompatible with the right to freedom of expression as guaranteed by Article 10 of the Convention. The Court observed that: *"investigative journalists are liable to be inhibited from reporting on matters of general public interest – such as suspected irregularities in the award of public contracts to commercial entities – if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to **imprisonment** or to a **prohibition on the exercise of their profession**. **The chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression is evident**"*[101]

However, the chilling effect is not limited to criminal sanctions. For instance, in case of remedies for defamation, the high level of the award in conjunction with the lack of adequate safeguards against a disproportionate award violated the applicant's right to freedom of expression. In particular, in Independent *Newspapers (Ireland) Limited v. Ireland*, the Court held that: "*unpredictably **high damages in libel cases** are considered*

[100] Kaperzyski v. Poland, Application no. No. 43206/07, Judgment of 3 April 2012
[101] Cumpn and Mazre v. Romania [GC], Application no. 33348/96, Judgment of 17 December 2004

capable of having a chilling effect and they therefore require the most careful scrutiny and very strong justification."[102]

Therefore, as stated in *Tolstoy Miloslavsky v. the United Kingdom*, the Court held that under the Convention, an award of damages for defamation must **bear a reasonable relationship of proportionality** to the injury to reputation suffered. [103]

As regards injunctions or other provisions, in *Axel Springer AG v. Germany*, the Court stated: *"Lastly, as regards the severity of the sanction imposed, the Court notes that the only measure taken against the applicant company was a* ***civil-law injunction*** *prohibiting further publication of a passage from the article ... It nevertheless considers that the injunction could have had a chilling effect on the exercise of the applicant company's freedom of expression"*[104].

An order requiring source disclosure may have a chilling impact on the practice of free speech, as the Court has noted and emphasized in a number of decisions[105]. The same holds true for the seizure of journalists' confidential source material[106].

[102] Independent Newspapers (Ireland) Limited v. Ireland, Application No. 28199/15, Judgment of 15 June 2017
[103] Tolstoy Miloslavsky v. United Kingdom, Application No 18139/91, Judgment of 13 July 1995, para 49
[104] Axel Springer AG v. Germany [GC], Application no. 39954/08, Judgment of 7 February 2012, para. 76
[105] Goodwin v. UK, Application no. 17488/90, Judgment of 27 March 1996
[106] Sanoma Uitgevers B.V. v. the Netherlands [GC], Application no. 38224/03, Judgment of para 14 September 2010, para. 65 and 71

10. Right to protection of personal data

SLAPP filers may invoke also data protection laws, in particular the General Data Protection Regulation (GDPR)[107], which has harmonised data protection rules across the EU by establishing comprehensive regulatory requirements for the protection of personal data (i.e. collection, analysis, storage).

The Court has repeatedly acknowledged that the right to protection of personal data falls under the protective scope of Article 8 of the Convention[108], which imposes *non facere* duties among Member States. Since *Leander v. Sweden*, the Court opined that both the storing and the release of personal information amount to an interference with the right to the private life of the data subject[109]. The subsequent case law is based on and complemented by the Council of Europe Convention 108[110].

The concept of private life extends to aspects relating to personal identity, such as a person's name, photo, or physical and moral integrity. According to the Court, and in line with what established is under Article 2 of Convention 108, the concept of personal data is defined as "any information relating to an identified or identifiable individual"[111] as well as

[107] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (2016)
[108] ARTICLE 8 *'1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*
[109] Leander v. Sweden, Application No. 9248/81, Judgment of 26 March 1987
[110] Council of Europe, 1981, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS No. 108, 28January 1981
[111] Amann v. Switzerland [GC], Application no. 27798/95, Judgment of 3 December 1997para 65; Haralambie v. Romania, Application no. 21737/03, Judgment of 27 October 2009, para 77

legal entities, in case they are directly affected by a measure which breaches their right to respect for their "correspondence" or "home"[112].

However, the right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, including the right to freedom of expression and information. Given the broad scope of personal data and personal data processing, journalistic activities may fall within the ambit of the GDPR. In particular, all those carrying out journalistic activities can be considered as data controllers as they decide the how and why of a data processing operation when they handle personal information. Consequently, they should obey GDPR rules and obligations.

However, with the aim to reconcile the potential tension between personal data protection and journalistic activities, art. 85 (2) of the GDPR establishes the so-called **"journalistic exemption",** which requires Member States to regulate the extent to which GDPR applies to journalists and others writing in the public interest[113]. This has led to a mosaic of regulatory approaches across the EU and instrumentalization of the GDPR for abusive purposes. In particular, some Member States have implemented very narrow exemption regimes or have not exempted journalistic activities from the application of the GDPR at all.

Even when a working journalistic exemption is implemented on the national level, the GDPR can be used for abusive purposes. In fact, GDPR grounds offer several advantages to the would-be SLAPP litigant:

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[112] Bernh Larsen Holding AS and Others v. Norway, Application no. 24117/08, Judgment of 14 Mrach 2013, para 106

[113] ARTICLE 85.2. *For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for exemptions or derogations from Chapter II (principles), Chapter III (rights of the data subject), Chapter IV (controller and processor), Chapter V (transfer of personal data to third countries or international organisations), Chapter VI (independent supervisory authorities), Chapter VII (cooperation and consistency) and Chapter IX (specific data processing situations) if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information.*

- data protection concerns the information itself, rendering its veracity irrelevant;
- GDPR violations may trigger significant preliminary injunctions and large fines

In these cases, it should be useful to recall the so-called *Bosphorus presumption,* a doctrine elaborated for the first time in the famous *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, a major contribution to the protection of fundamental rights in the multi-level-structure of the European legal order. In that judgment, the Court that "*a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question a consequence of domestic law was or of the necessity to comply with* ***international legal obligations*** (such as the EU, the GDPR in this case).

In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to ***protect fundamental rights****, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides (see M. & Co., cited above, p. 145, an approach with which the parties and the European Commission agreed). By "equivalent" the Court means "comparable"; any requirement that the organisation's protection be "identical" could run counter to the interest of international cooperation pursued (see paragraph 150 above). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection*.

If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention

rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the ***Convention's role as a "constitutional instrument of European public order" in the field of human rights****."*[114]

In other words, according to the Court, whenever EU law gives Member States choice over how exactly to execute EU law, Member States must utilize such discretion to apply EU law in accordance with the Convention and its obligations.

11. Right to a fair trail

The quintessential SLAPP litigation to end up before an international human rights court was the so-called "McLibel" case (*Steel and Morris v the United Kingdom*).

In *Steel and Morris v the United Kingdom*, the Court stated that the **lack of procedural fairness and equality** also gave rise to a violation of the right to freedom as guaranteed under Article 10 of the Convention, noting the "*general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible '****chilling' effect*** *on others."*[115]

In case of delaying tactics, the Court reminded that the **applicant** *"is required only to show diligence in carrying out the procedural steps relating to him, to refrain from using* ***delaying tactics*** *and to avail himself of the scope afforded by domestic law for shortening the proceedings."*[116] Moreover, according to the Court, this kind of conduct must be taken into consideration *"when determining whether or not the proceedings* ***lasted longer*** *than the reasonable time referred to in Article 6 par. 1".*[117]

[114] Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland, Application No 45036/98, Judgment of 30 June 2005, para 153-156
[115] Steel and Morris v the United Kingdom, Application No 68416/01, Judgment of 15 February 2005, para 41
[116] Unión Alimentaria Sanders S.A. v. Spain, Application No 11681/85, Judgment of 07 July 1989, para 35
[117] Eckle v. Germany, Application no. 8130/78, Judgment of 15 July 1982, para 82

12. Abuse of rights

SLAPP filers aim to protect their own illegitimate interests triggering a chilling effect. When showing abuse, the intent of the applicant must be shown, which is not to seek remedy in court, but to intimidate critical voices.

As a last resort, article 17 of the Convention, which prohibits the destruction of and excessive limitation on the rights and freedoms set forth in the Convention, can be invoke for dismissing SLAPP claims. The principle that abuse of rights must result in dismissal is reflected also in Article 35(3)(a) Convention[118].

As stated in *Kilin v. Russia*, in order to establish whether a particular conduct amounts to an abuse of rights, the Court scrutinises the aims which an applicant pursues when relying on the Convention and their compatibility with this instrument[119]. The abuse take place when an applicant seeks to deflect a Convention provision from its real purpose by taking advantage of the right it guarantees in order to justify, promote or perform acts that:

- are contrary to the text and spirit of the Convention[120]
- are incompatible with democracy and/or other fundamental values of the Convention[121]

[118] ARTICLE 35. 3 3. *"The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; .."*
[119] Kilin v. Russia, Application no. 10271/12, Judgment of 11 May 2021 para 72
[120] M'Bala M'Bala v. France, Application no. J Case number 25239/13, Judgment of 20 October 2015; Garaudy v. France, Application no. 65831/01 Judgment of 7 July 2003; Kasymakhunov and Saybatalov v. Russia, Application no. 26261/05 and 26377/06, Judgment of 14 june 2013; W.P. and Others v. Poland, Application no. 42264/98 Judgment of 2 September 2004; Witzsch v. Germany, Application no. 7485/03, Judgment of 13 December 2005; Pastörs v. Germany, Application no. 55225/14, 3 October 2019, Judgment of para 46
[121] Perinçek v. Switzerland [GC], Application no. 27510/08, Judgment of 15 October 2015, para 114; Pavel Ivanov v. Russia, Application no. 35222/04, Judgment of 20 February 2007; Norwood v. the United Kingdom, Application no. 23131/03, Judgment of 1 6 November 2004; Roj TV A/S v. Denmark, Application no. 24683/14, Judgment of 17 April 2018, para 48; Romanov v. Ukraine [Committee], Application no. 63782/11, Judgment of 16 July 2020, para 164; Ayoub and Others v. France, Application no. 77400/14, 34532/15 and 34550/15, Judgment of 8 October 2020, para 138

- infringe the rights and freedoms recognised therein[122]

Practically, if Article 6 of the convention has been abused because i.e. the procedure is only started to silence the opposing party, then Article 17 must apply also in relation to Article 6 ECHR.

[122] Lawless v. Ireland, Application no. 332/57 (A/3) Judgment of 332/57 (A/3), para 7; Varela Geis v. Spain, Application no. 61005/09, Judgment of 5 March 2013, para 40; Molnar v. Romania, Application no. 49352/14, Judgment of 1 February 2018

13. Selected case summaries

13.1 OOO Memo v Russia[123]

OOO Memo, an online media outlet, was sued in civil defamation proceedings by an executive authority, the Administration of the Volgograd Region, following the publication of an interview with a third party critical of the Administration's actions. The District Court found in favour of the Administration. OOO Memo was ordered to publish a retraction and part of the court judgment on the website. The District Court ruling was upheld on appeal.

Russia submitted that the impugned Article 10 interference had pursued the legitimate aim of "the protection of the reputation and rights of others".

The Court held that the scope of the "protection of the reputation ... of others" clause was not restricted to natural persons and there existed a legitimate interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good (see *Steel and Morris v. the United Kingdom*). However, those considerations were inapplicable to a body vested with executive powers and which did not engage as such in direct economic activities.

Previous Article 10 judgments against Russia stemming from defamation proceedings had focused on the assessment of proportionality of an interferenc. In the present case, however the parties had contested whether the interference complained of had pursued a legitimate aim within the meaning of Article 10 § 2., particularly in light of the growing awareness of the risks that court proceedings instituted with a view to limiting public participation (SLAPPs) brought for democracy and the clear power imbalance between the claimant and the defendant in the present case.

[123] OOO Memo v Russia, Application No. 2840/10, Judgment of 15 March

The Court considered that, by virtue of its role in a democratic society, the interests of a body of the executive vested with State powers in maintaining a good reputation essentially differed from both the right to reputation of natural persons and the reputational interests of legal entities, private or public, that competed in the marketplace. To prevent abuse of powers and corruption of public office in a democratic system, a public authority's activities of all kinds had to be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion.

That executive bodies be allowed to bring defamation proceedings against members of the media would place an excessive and disproportionate burden on the media and could have an inevitable chilling effect on the media in the performance of their task of purveyor of information and public watchdog.

It followed that civil defamation proceedings, brought in its own name, by a legal entity that exercised public power might not, as a general rule, be regarded to be in pursuance of the legitimate aim of the protection of the reputation of others under Article 10.2. That did not exclude that individual members of a public body, who could be "easily identifiable" in view of the limited number of its members and the nature of the allegations made against them, might be entitled to bring defamation proceedings in their own individual name[124].

13.2 Társaság a szabadságjogokért v. hungary

In March 2004 a Hungarian Member of Parliament and other individuals lodged a complaint for a review of the constitutionality of certain amendments to the Criminal Code concerning drug-related offences. Several months later the applicant association, an NGO

[124] Thoma v. Luxembourg, Application no. 38432/97, Judgment of 29 March 2001

active in the field of drug policy, requested that the Constitutional Court grant it access to the complaint pending before it.

Having consulted the MP, the Constitutional Court refused the request, explaining that complaints before it could be made available to outsiders only with the approval of the maker of the complaint. The applicant then brought an action against the Constitutional Court requesting to oblige the respondent to give it access to the file, in accordance with the relevant provisions of the Data Act.

The courts dismissed the applicant's action concluding that the data required was "personal" and could therefore not be accessed without the complainant's approval. The protection of such data could not, in the courts' view, be overridden by other lawful interests, including the accessibility of public information. Meanwhile, the Constitutional Court decided the constitutionality question and published in its decision a summary of the complaint in question.

In due course, the Strasbourg Court ruled that the applicant's right to receive information as an aspect of Article 10 rights had been violated. The applicant – an NGO – was acting as a "public watchdog" on an issue of clear public interest. The refusal to grant access to the complaint constituted an interference in the applicant's right to gather information, much as a media organisation might do. A constitutional complaint submitted by a member of parliament could not be regarded as private. The requested information was readily available and there was no unreasonable administrative burden in supplying it to the applicant.

13.3 Handyside v. United Kingdom[125]

Richard Handyside, the owner of publishing house Stage 1, faced legal proceedings after acquiring the British rights to The Little Red Schoolbook a book by Søren Hansen and Jesper Jensen. The book, published in Denmark in 1969 and translated in several countries,

[125] Handyside v. United Kingdom, Application No. 5493/72, judgment of 7 December 1976

contained a controversial 26-page chapter on sex. Handyside distributed review copies to numerous publications, which led to extensive press coverage and mixed reactions.

Following complaints, an investigation was launched which led to the temporary confiscation of over a thousand copies of the book under the Obscene Publications Act Handyside was charged with possession of obscene publications for profit, found guilty, fined and ordered to pay costs. The ruling was upheld on appeal. The European Court of Human Rights ruled on that the conviction of the publisher was an interference with the Article 10 right to freedom of expression, but that this interference was "prescribed by law" and aimed to protect morality. Having established this, the central question was whether this interference was "necessary in a democratic society".

The Court emphasized that there is no European consensus regarding the protection of public morality, particularly in the case of children, and that states should be given a margin of appreciation in assessing "necessity". Nevertheless, the court emphasized that the criterion of "necessity" is strict. In particular, any action in the area of freedom of expression must be proportionate to the legitimate aims. As the controversial book was aimed at children and young people and contained potentially harmful information, the court denied a violation of freedom of expression and pointed out that the authorities had limited themselves to what was absolutely necessary by not taking action against a revised edition, in which many of the passages criticised in the court proceedings were either amended or cut.

13.4 Dink v. Turkey[126]

Failure of authorities to protect freedom of expression of a journalist who had commented on identity of Turkish citizens of Armenian extraction: *violation*

[126] Dink v. Turkey, Application No. 2668/07, Judgment of 14 September 2010

The applicants were a journalist, and five of his close relatives. The first applicant, a Turkish national of Armenian extraction, was publication director and editor-in-chief of a Turkish-Armenian weekly newspaper. In 2003 and 2004 he wrote a series of articles in which he expressed his views on the identity of Turkish citizens of Armenian extraction.

He commented, among other things, that Armenians' obsession with having their status as victims of genocide recognised had become their *raison d'être*, that this need on their part was treated with indifference by Turkish people and that, as a result, the traumas suffered by Armenians remained a live issue. In his view, the Turkish component in Armenian identity was both poison and antidote. He also wrote that "the purified blood that will replace the blood poisoned by the 'Turk' can be found in the noble vein linking Armenians to Armenia". He wrote a further article in which he referred to the Armenian origins of Atatürk's adopted daughter.

Extreme nationalists reacted to the articles by staging demonstrations, writing threatening letters and lodging a criminal complaint. In 2005 a criminal court found the journalist guilty of denigrating Turkish identity and imposed a suspended prison sentence. In 2006 the Court of Cassation upheld the finding of guilt. In early 2007 the criminal court to which the case had been remitted discontinued the proceedings on account of the death of the journalist, who had been assassinated a few weeks earlier.

The Court found violations of Article 10 (freedom of expression), Article 2 (right to life) and Article 13 (right to an effective remedy). The Court of Cassation ruling, taken on its own or coupled with the lack of measures to protect the journalist against attacks by nationalist extremists, had amounted to interference with the exercise of his right to freedom of expression. Accordingly, the journalist had victim status in relation to Article 10 and the remaining applicants had a legitimate interest in obtaining a finding that his conviction had been in breach of the right to freedom of expression.

Analysis of the full series of articles showed clearly that what the journalist had described as "poison" had not been "Turkish blood", as held by the Court of Cassation, but the "perception of Turkish people" by Armenians and the obsessive nature of the Armenian diaspora's campaign to have Turkish people recognise the events of 1915 as genocide. A study of the way in which the notion of Turkishness had been interpreted by the Court of Cassation showed that the latter had indirectly penalised the journalist for criticising the State institutions' denial that those events amounted to genocide.

Article 10 did not permit restrictions on freedom of expression in the sphere of political debate and issues of public interest, and the limits of permissible criticism were wider with regard to the government than in relation to private individuals. Furthermore, the series of articles taken overall did not incite others to violence, resistance or revolt. The author had been writing in his capacity as a journalist and editor-in-chief of a Turkish-Armenian newspaper, commenting on issues concerning the Armenian minority in the context of his role as a player on the political scene. He had merely been conveying his ideas and opinions on an issue of public concern in a democratic society. In such societies, the debate surrounding historical events of a particularly serious nature should be able to take place freely, and it was an integral part of freedom of expression to seek historical truth. Finally, the impugned articles had not been gratuitously offensive or insulting, and they had not incited others to disrespect or hatred. The journalist's conviction for denigrating Turkishness had therefore not answered any pressing social need.

Finally, states had positive obligations in relation to freedom of expression: they must not just refrain from any interference but must sometimes take protective measures even in the sphere of the relations of individuals between themselves. They were also 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. In view of the authorities' failure to protect the journalist against the attack by members of an extreme nationalist group and his conviction in the absence of a pressing social need, the

respondent State had not complied with its positive obligations with regard to the journalist's freedom of expression.

13.5 Lingens v. Austria[127]

In 1975, an accusation was made during a television interview against the chairman of the Austrian Liberal Party, Friedrich Peter, that he had served in the SS during the Second World War. The outgoing Federal Chancellor Bruno Kreisky, who formed a coalition with the Liberal Party, publicly supported Peter. The journalist Lingens then published two critical articles in which he questioned Kreisky's support and accused him of indifference towards the victims of National Socialism. Kreisky filed two libel suits against Lingens, which led to a conviction for defamation. The Vienna Regional Court imposed a fine, which was later overturned in order to examine Kreisky's standing to sue. The court ultimately confirmed Kreisky's standing and Lingens' conviction. This led to Lingens' appeal to the European Court of Human Rights, where he argued that the conviction violated his right to freedom of expression in a democratic society.

Lingens argued that the sentence violated his freedom of expression and thus violated the basic principles of a democratic society. The Court examined whether the interference with freedom of expression was prescribed by law, pursued a legitimate aim and was necessary in a democratic society. It agreed that the conviction of Lingens was based on Austrian criminal law and had the legitimate aim of protecting the reputation or rights of others. However, the court ruled that the interference was not necessary and disproportionate to the legitimate aim pursued. There was therefore a violation of Article 10 of the Convention.

In its judgment, the Grand Chamber found that the conviction of Lingens for defamation constituted an interference with his right to freedom of expression. The Court examined whether this interference was "prescribed by law" and "necessary in a

[127] Lingens v. Austria, Application No 9815/82, Judgment of 8 July 1986

democratic society". Lingens argued that his criticism of the outgoing Chancellor was his duty as a political journalist. The ECtHR emphasized the importance of the press on political issues and the wider limits of acceptable criticism of politicians. Although the national courts found damage to the Chancellor's reputation, the Court weighed up political interests and the impact on freedom of the press. It ruled that the conviction was a violation of the right to freedom of expression as Lingens' statements were value judgments and political views were expressed in good faith. Also, the ECHR determined just satisfaction for Mr. Lingens in accordance with Article 50. This included repayment of the fine and costs, expenses for the defense, costs of the proceedings before the Convention bodies and travel and subsistence expenses. In total, Mr. Lingens was awarded 284,538.60 schillings.

13.6 Ireland v. the United Kingdom[128]

In the context of the crisis in Northern Ireland, the Court ruled that the UK authorities' use of five techniques of interrogation in 1971 constituted a practice of inhuman and degrading treatment, in breach of Article 3, but not torture within the meaning of the Article.

On 4 June 2014 the Irish television network broadcast "The Torture Files" which discussed the original proceedings before the Commission and the Court and highlighted a number of documents which had recently become available from the United Kingdom archives.

On 4 December 2014, Ireland, the applicant Government, informed the Court that documents had come to their attention, which were not known by the Court at the time of the judgment and which might have had a decisive influence on whether or not the use of the five techniques amounted to torture. They accordingly requested revision of the judgment within the meaning of Rule 80 of the Rules of Court on two grounds: that a

[128] Ireland v. the United Kingdom, Application No. 5310/71, Judgment of 18 January 1978

psychiatric expert called by the UK had misled the court and that the UK had withheld important information about the five techniques.

Rule 80 of the Rules of Court, which provides for the possibility of revision of Court judgments is considered an exceptional procedure. In the present case, the Court had to examine whether a six month limit for this application had been complied with, whether the new facts "could not reasonably have been known" to the party requesting the revision, whether the facts would have been decisive in the original ruling, the scope of the revision requested and whether the applicant government's submission contained new facts.

The request for revision was of a complex nature: the circumstances transpired from a significant number of documents which, analysed together, led the applicant Government to the conclusion that there was a basis for seeking revision. The relevant documents were not readily available. The applicant Government would have had to carry out extensive research among a broad range of potentially relevant documents in the United Kingdom's national archives.

In sum, the applicant Government had not "acquired knowledge" of any new facts before June 2014. The Court also doubted whether the applicant Government could reasonably have "acquired knowledge" of the documents containing the facts relied on in their revision request before June 2014. Therefore, the request for revision had been submitted within the six-month time-limit.

Concerning the documents submitted in support of the first ground for revision, the Court doubted whether the documents contained sufficient prima facie evidence of the alleged new fact that the psychiatric expert had misled the Commission as to the serious and long-term effects of the five techniques. As to the second ground of revision, while a number of documents submitted in support demonstrated that the then Government of the United Kingdom wanted to avoid any detailed inquiry into the use of the five techniques, the relevant facts as such were not "unknown" to the Court at the time of the original

proceedings. In the original judgment, the Court had regretted the attitude of the respondent Government which had not always afforded it the assistance desirable.

In order for revision to be granted, it had to be shown that there was an error of fact and a causal link between the erroneously established fact and a conclusion which the Court had drawn. It had to be clear from the reasoning contained in the original judgment that the Court would not have come to a specific conclusion had it been aware of the true state of facts. In contrast, where doubts remained as to whether or not a new fact actually did have a decisive influence on the original judgment, legal certainty had to prevail and the final judgment had to stand.

Turning to the original judgment, the issue of possible long-term effects of the use of the five techniques had not been mentioned in the legal assessment. It was considered difficult to argue that the original judgment had attached any particular importance to the uncertainty as to their long-term effects, let alone considered this to be a decisive element for coming to another conclusion than the Commission. As followed from the reasoning of the original judgment, the difference between the notions of "torture" and "inhuman and degrading treatment" was a question of degree depending on the intensity of the suffering inflicted. Necessarily, the assessment of that difference in degree depended on a number of elements.

Without an indication in the original judgment that, had it been shown that the five techniques could have severe long-term psychiatric effects, that one element would have led the Court to the conclusion that the use of the five techniques had occasioned such "very serious and cruel suffering" that they had to be qualified as a practice of torture, the Court could not conclude that the alleged new facts might have had a decisive influence on the original judgment. The request for revision was dismissed.

13.7 Bosphorus hava yollari turizm ve ticaret anonim şirketi v Ireland[129]

Impounding of leased aircraft in pursuance of UN sanctions regime and EC Council Regulation. Protection of fundamental rights by EC law equivalent to that of the Convention system, unless the presumption to that effect was rebutted: *no violation.*

In May 1993 an aircraft leased by Bosphorus Airways, an airline charter company registered in Turkey, from Yugoslav Airlines ("JAT") was seized by the Irish authorities. It had been in Ireland for maintenance by TEAM Aer Lingus, a company owned by the Irish State, and was seized under EC Council Regulation 990/93 which had implemented the UN sanctions regime against the Federal Republic of Yugoslavia (Serbia and Montenegro).

The applicant's challenge to the retention of the aircraft was initially successful in the High Court, which held in 1994 that Regulation 990/93 was not applicable to the aircraft. However, on appeal, the Supreme Court referred a question under Article 177 of the EEC Treaty to the European Court of Justice (ECJ) on whether the aircraft was covered by Regulation 990/93. The ECJ found that it was and, in its judgment of 1996, the Supreme Court applied the decision of the ECJ and allowed the State's appeal. By that time, the applicant's lease on the aircraft had already expired. Since the sanctions regime against FRY (Serbia and Montenegro) had also been relaxed by that date, the Irish authorities returned the aircraft directly to JAT. The applicant consequently lost approximately three years of its four-year lease of the aircraft, which was the only one ever seized under the relevant EC and UN regulations.

Before the Court the applicant company complained that the manner in which Ireland had implemented the sanctions regime to impound its aircraft had been a

[129] Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland, Application No 45036/98, Judgment of 30 June 2005

discretionary decision capable of being reviewed under Article 1 of Protocol No. 1 which had been violated.

It was not disputed that the impoundment of the aircraft had been implemented by the Irish authorities on its territory following a decision by the Irish Minister for Transport. In such circumstances the matter fell within the "jurisdiction" of the Irish State within the meaning of Article 1 of the Convention. As to the legal basis for the impoundment the Court observed that EC Regulation 990/93 had been generally applicable and binding in its entirety, applying to all Member States none of which could lawfully depart from any of its provisions.

In addition, its direct applicability was not, and could not be, disputed. The Regulation had become part of Irish domestic law with effect from 28 April 1993, when it had been published in the Official Journal, prior to the date of the impoundment and without the need for implementing legislation. The impoundment powers had been entirely foreseeable and the Irish authorities had rightly considered themselves obliged to impound any departing aircraft to which they considered Article 8 of EC Regulation 990/93 applied. Their decision that it did so apply had later been confirmed by the ECJ.

The Court furthermore agreed with the Irish Government and the European Commission (intervening in the case) that the Supreme Court had no real discretion to exercise in the case, either before or after its preliminary reference to the ECJ. In conclusion, the impugned interference had not been the result of an exercise of discretion by the Irish authorities, either under EC or Irish law, but rather had amounted to compliance by the Irish State with its legal obligations flowing from EC law and, in particular, Article 8 of EC Regulation 990/93.

As to the justification of the impoundment the Court found that the protection of fundamental rights by EC law could have been considered to be, and to have been at the

relevant time, "equivalent" to that of the Convention system. Consequently, a presumption arose that Ireland had not departed from the requirements of the Convention when it had implemented legal obligations flowing from its membership of the EC. Such a presumption could be rebutted if, in a particular case, it was considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a constitutional instrument of European public order in the field of human rights.

The Court took note of the nature of the interference, of the general interest pursued by the impoundment and by the sanction's regime and of the ruling of the ECJ, a ruling with which the Supreme Court had been obliged to comply. It could not be said that the protection of Bosphorus Airways' Convention rights had been manifestly deficient. It followed that the presumption of Convention compliance had not been rebutted and that the impoundment of the aircraft did not give rise to a violation of Article 1 of Protocol No. 1.

13.8 Goodwin v. UK[130]

The applicant was a British journalist who received a telephone call from an anonymous source on 2 November 1989 who passed on to the journalist sensitive financial information about the company Tetra

Tetra sought an interim High Court injunction to prevent publication, which was granted. A few days later, on 14 November, the High Court granted an order for source disclosure under the Contempt of Court Act primarily on grounds of the threat of severe damage to their business and to livelihood of employees, which would arise from the disclosure of information. The applicant appealed to the Court of Appeal and the House of

[130] Goodwin v. UK [GC], Application No. 17488/90, Judgment of 27 March 1996

Lords on the basis that the public interest in disclosure outweighed any interest in confidentiality. Both appeals were dismissed. The journalist refused to disclose his source by the stated deadline and was fined £5000 for contempt of court.

The Grand Chamber in its judgment found that, because the publication of the confidential information was already prohibited by injunction, the order for disclosure of the source was not "necessary in a democratic society" as required by Article 10 ECHR. Accordingly, the order breached Article 10.

The company's legitimate reasons for wishing disclosure, namely to prevent further dissemination of the confidential information (other than by publication) and to take action against the source who was presumed to be an employee, were outweighed by the interest of a free press in a democratic society. If journalists are forced to reveal their sources the role of the press as public watchdog could be seriously undermined because of the chilling effect that such disclosure would have on the free flow of information.

14. References

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